

## STANDARD TERMS AND CONDITIONS

These Standard Terms and Conditions, together with any Proposal (defined in clause 1), set out the agreement (this '**Agreement**') under the terms of which SMT Drainage and Excavations Pty Ltd ABN 14 138 566 177 (SMT Drainage and Excavations) provides Services (defined in clause 2) to you or the company which you represent (the **Client**).

### 1. PROPOSAL, THIS AGREEMENT

- (a) These Standard Terms and Conditions will apply to all the Client's dealings with SMT Drainage and Excavations, including being incorporated in all agreements, quotations or orders under which SMT Drainage and Excavations is to provide services to the Client (each a **Proposal**) together with any additional terms included in such Proposal (provided such additional terms are recorded in writing).
- (b) The Client will be taken to have accepted this Agreement if the Client accepts a Proposal, or if the Client orders, accepts or pays for any services provided by SMT Drainage and Excavations after receiving or becoming aware of this Agreement or these Standard Terms and Conditions.
- (c) In the event of any inconsistency between these Standard Terms and Conditions and any Proposal, the clauses of these Standard Terms and Conditions will prevail to the extent of such inconsistency, except that any "Special Conditions" (being terms described as such in a Proposal) will prevail over these Standard Terms and Conditions to the extent of any inconsistency.

### 2. HEAD CONTRACT

- (a) The parties acknowledge that this Agreement may be subject to the terms and conditions of a head contract for the Services (**Head Contract**).
- (b) SMT Drainage and Excavations and the Client are, if applicable, bound by the terms and conditions of any Head Contract (including, but not limited to, the term and renewal term, fees, scope, payment due dates, variations, defects liability period or liquidated damages as set out in a Head Contract.)
- (c) In the event of any inconsistency between this Agreement and a Head Contract, the terms and conditions of the Head Contract will prevail to the extent of such inconsistency.

### 3. SERVICES

#### 3.1. SERVICES

- (a) In consideration for the payment of the fees set out in the Proposal (**Fees**), SMT Drainage and Excavations will provide the Client with the goods and/or services set out in a Proposal (**Services**) or as otherwise agreed with the Client, at the site set out in the Proposal (**Site**) or as otherwise agreed with the Client.
- (b) Unless otherwise agreed, SMT Drainage and Excavations may, in its discretion:
  - (i) not commence work on any Services until the Client has paid any Fees or deposit payable in respect of such Services; and
  - (ii) withhold delivery of Services until the Client has paid an invoice in respect of such Services.
- (c) Any dates set out in the Proposal are indicative only and are provided as a guide for when the Service will be performed. SMT Drainage and Excavations may, due to various reasons beyond its control, make reasonable adjustments to these dates and the Client will have no claim against SMT Drainage and Excavations in respect of such adjustments.
- (d) The Proposal (which includes any quotation under which SMT Drainage and Excavations is to provide the Services) is valid for 6 months and is merely an invitation to treat, and is not binding on SMT Drainage and Excavations until SMT Drainage and Excavations has accepted it. The Proposal is subject to changes in price including, without limitation, parts, price fluctuations and other fees/costs that may have been unforeseeable in the initial Proposal.
- (e) The Proposal becomes binding on SMT Drainage and Excavations upon written acceptance by SMT Drainage and Excavations or at the time SMT Drainage and

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Excavations commences supply of the Services, whichever comes first. SMT Drainage and Excavations may, in its discretion, accept or reject in whole or part any Proposal.

- (f) Once the Proposal is accepted by SMT Drainage and Excavations, the Client will be committed to purchase the Services and cannot cancel or revoke the Proposal except to the extent as expressly permitted by this Agreement.
- (g) The Client acknowledges and agrees that the supply of Services under an accepted Proposal remains subject to availability and if, for any reason SMT Drainage and Excavations is unable to commence the Services, SMT Drainage and Excavations reserves the right to cancel the order (in which case SMT Drainage and Excavations will refund all amounts paid for the Proposal). This is the Client's only remedy in these circumstances and SMT Drainage and Excavations will not be liable to pay any other amount to the Client

### 3.2. EXCLUDED SERVICES

- (a) The Services do not include any activities that are not expressly stated as a Service in the Proposal (**Excluded Services**). Excluded Services include:
  - (i) soil compaction;
  - (ii) the removal, excavation, hammering or blasting of rock;
  - (iii) the removal of any structures (such as retaining walls, fences or site amenities), building materials, spoil, concrete overpour, septic tanks (and/or emptying of waste from septic tanks), vegetation, rubbish or friable asbestos from the Site;
  - (iv) power to any equipment required to perform the Services (such as sump pumps);
  - (v) weather proofing, temporary propping, hoarding, silt control, and/or scaffolding; or
  - (vi) the provision of air monitoring.
- (b) If any Excluded Services are required by the Client, SMT Drainage and Excavations may, in its sole discretion and in whole or in part, agree to such additional work and charge the Client an additional fee for these services. This will constitute a change to the Services in accordance with clause 7.

## 4. CLIENT OBLIGATIONS

### 4.1. PROVIDE INFORMATION AND LIAISON

- (a) The Client must provide SMT Drainage and Excavations with all documentation, information and assistance reasonably required for SMT Drainage and Excavations to perform the Services. This includes, prior to the commencement of Services:
  - (i) identifying and advising SMT Drainage and Excavations of all services above and below ground at the Site, including water, sewerage, drainage, power and telephone services (**Utility Services**);
  - (ii) providing SMT Drainage and Excavations with any plans (such as site and drainage plans), specifications and particulars detailing any obstructions, including concealed easements and assets, pipes and wiring (**Obstructions**); and
  - (iii) providing SMT Drainage and Excavations with 'dial before you dig' or other similar reports.
- (b) SMT Drainage and Excavations may require the inspection of the Site prior to performing the Services if the Client is unable to provide the documentation, information and assistance required by the SMT Drainage and Excavations, or for any other reason. The Client must fully co-operate with SMT Drainage and Excavations in respect of such inspections, including by providing safe and reasonable access to the Site in accordance with clause 4.2 and 4.3.
- (c) The Client must ensure that any survey pegs identifying the Site boundaries have been accurately installed prior to the commencement of Services.
- (d) The Client agrees to liaise with SMT Drainage and Excavations as it reasonably requests for the purpose of enabling SMT Drainage and Excavations to provide the Services.

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#### 4.2. PROVIDE ACCESS AND AUTHORITY

- (a) The Client must allow SMT Drainage and Excavations safe, unrestricted and reasonable access to the Site, or required areas of the Site, during the project period or on the fixing date or set out in the Proposal (**Project Period/Fixing Date**) or as otherwise agreed with the Client, to allow SMT Drainage and Excavations to provide the Services. This includes:
  - (i) ensuring the Site is suitable for all weather and any equipment required to perform the Services;
  - (ii) ensuring the Site is safe, unimpeded, and continuous;
  - (iii) ensuring the Site is firm, stable and safe with no height restriction for any equipment required to perform the Services;
  - (iv) controlling the management of traffic at the Site;
  - (v) ensuring compliance with all council regulations for the performance of the Services at the site; and
  - (vi) where there are weak soil profiles or deep excavations at the Site, ensuring that the Client has provided for soil stabilisation, such as retaining walls or soldier piers.
- (b) The Client must obtain any authority or approval (including from the council, landlord, any neighbours involved, strata or building management approval) so that SMT Drainage and Excavations can carry out the Services. The Client is responsible for informing neighbours of the Services and for any issues or disputes that arise.
- (c) The Client must conduct or facilitate any inductions, training or supervision or other requirements of the Site including anything referred to in Special Conditions of the Proposal, so that SMT Drainage and Excavations has safe and reasonable access to carry out the Services.
- (d) The Client must ensure a supply of water and/or electricity (at no cost) to enable SMT Drainage and Excavations to carry out the Services.
- (e) Where SMT Drainage and Excavations is unable to gain safe, unrestricted and reasonable access to the Site due to the Client's non-compliance with this clause, omission, fault or otherwise, SMT Drainage and Excavations reserves the right to charge a call out fee of \$400 (plus GST) and charge any additional expenses including travel and lost income to the Client as set out in clause 7. SMT Drainage and Excavations may suspend the provision of the Services until the relevant issue has been resolved to its satisfaction.

#### 4.3. SAFETY AND COMPLIANCE WITH WORKPLACE LAWS

- (a) The Client warrants that the Site are safe for SMT Drainage and Excavations to enter and perform the Services including, where applicable, complying with any relevant occupational health and safety legislation and requirements.
- (b) The Client acknowledges and agrees that it is their responsibility to ensure they have adequately assessed any risk before SMT Drainage and Excavations has commenced the Services. The Client must provide sign off that they have conducted a risk assessment and provided a safe work method or have signed off on SMT Drainage and Excavations safe work method if applicable.
- (c) If applicable, the Client must:
  - (i) ensure that the Site is managed in accordance with, and complies with, all applicable workplace relations, workplace health and safety laws and regulations;
  - (ii) control and supervise all aspects of the Services, and ensure that such work is only undertaken without risks to the safety, health and welfare of any persons and in compliance with any relevant work health and safety laws and regulations and any policy or procedure established by the Client or issued by SMT Drainage and Excavations;
  - (iii) immediately advise SMT Drainage and Excavations of any hazard or safety incident arising out of, or affecting the performance of the Services and provide SMT Drainage and Excavations with any assistance, as requested, in relation to the incident including any rectification plan or schedule or information; and

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- (iv) have adequate insurance coverage to cover SMT Drainage and Excavations and any breach of this Agreement, including safety provisions.

## 5. DISCLAIMERS

### 5.1. GENERAL DISCLAIMERS

The Client acknowledges and agrees that:

- (a) While SMT Drainage and Excavations will perform the Services to the best of its ability and in accordance with industry standards, safety procedures and procedures, due to the nature of the Services there can be unforeseen and inherent risks and challenges posed by the performance of the Services, some of which are beyond the control of SMT Drainage and Excavations;
- (b) While SMT Drainage and Excavations will endeavour to not damage the Site any Utility Services SMT Drainage and Excavations is aware of, SMT Drainage and Excavations makes no promise or guarantee and is not responsible for any loss or damage to the Site or the Utility Services arising out of or relating to SMT Drainage and Excavations' access to the Site and/or performance of the Services;
- (c) While SMT Drainage and Excavations will endeavour to maintain the stability and structural integrity of any nearby structures (which are not removed prior to the commencement of the Services), SMT Drainage and Excavations makes no promise or guarantee and is not responsible for any loss or damage to, or adverse effect to the stability and structural integrity of, these nearby structures arising out of or relating to SMT Drainage and Excavations' access to the Site and/or performance of the Services;
- (d) SMT Drainage and Excavations is not responsible for any neighbourly issues and conflicts and accepts no liability caused or contributed to by the performance of the Services;

### 5.2. SPECIFIC DISCLAIMERS

To the extent that the Services include drainage, stormwater or plumbing services, the Client acknowledges and agrees that:

- (a) The presence of plant or tree root growth and/or other blockages may indicate damaged pipe work. Where SMT Drainage and Excavations is requested to merely clear such blockages, SMT Drainage and Excavations can offer no guarantee against reoccurrence or further damage. In the event of collapse during the pipe clearing process, SMT Drainage and Excavations will immediately advise the Client and provide an estimate for the full repair of the damaged pipe work;
- (b) Where any plumbing notices are required to be lodged for the Services with the relevant authority, SMT Drainage and Excavations will lodge these notices subject to the Client paying all amounts by the due date specified in the Proposal;
- (c) Connections to existing plumbing are sometimes difficult due to the state of deterioration of existing pipes and/or the existing pipe's location, and SMT Drainage and Excavations is not responsible for any loss or damage arising out of or relating to the state of existing pipes and/or the existing pipe's location;
- (d) Aged and deteriorated plumbing fixtures, piping, and appurtenances may no longer be serviceable, and SMT Drainage and Excavations is not responsible for any loss or damage arising out of relating to aged or deteriorating plumbing or otherwise resulting from conventional repair efforts; or
- (e) They have read, acknowledged and agreed to the disclaimers in this clause (**Disclaimers**) and will not hold SMT Drainage and Excavations liable for any loss or damage arising out of or relating to any of the aforementioned issues in these Disclaimers.

## 6. PAYMENT

### 6.1. FEES

The Client must pay to SMT Drainage and Excavations fees in the amounts and at the times set out in the Proposal or as otherwise agreed in writing.

## 6.2. ADDITIONAL FEES

SMT Drainage and Excavations may charge the Client additional fees for carrying out the Services under certain circumstances, including where:

- (a) There is an increase in any of SMT Drainage and Excavations' standard rates;
- (b) There is any change to the nature of the Services to be undertaken, including if SMT Drainage and Excavations is required to provide an Excluded Service in accordance with clause 3.2;
- (c) SMT Drainage and Excavations' suppliers vary the costs of the materials that they supply to SMT Drainage and Excavations;
- (d) SMT Drainage and Excavations is required to attend to premises for an emergency call out;
- (e) The Client has failed to provide insufficient or inaccurate documentation, information or specifications to SMT Drainage and Excavations in accordance with clause 4.1;
- (f) The Client has failed to provide safe, unrestricted and reasonable access to the Site in accordance with clause 4.2 and 4.3;
- (g) Goods or Services are damaged or destroyed through no fault of SMT Drainage and Excavations; or
- (h) There are interruptions or delays in the provision of the Services caused or contributed to by:
  - (i) Force Majeure events in accordance with clause 16;
  - (ii) the Client's breach of this Agreement;
  - (iii) inclement weather;
  - (iv) abnormal site conditions, including excessive grass, wet soil profile, or contaminated fill
  - (v) other tradespeople or third parties working or operating at the Site impeding or preventing the provision of Services; or
  - (vi) the Site being deemed unsafe to carry out the Services (in SMT Drainage Excavations' reasonable opinion).

## 6.3. INVOICES

Unless otherwise agreed in the Proposal:

- (a) if SMT Drainage and Excavations issues an invoice to the Client, payment must be made by the time(s) specified in such invoice; and
- (b) in all other circumstances, the Client must pay for all Services within 7 days of receiving an invoice for amounts payable.

## 6.4. PAYMENT METHOD

The Client must pay Fees using the fee payment method specified in the Proposal or any other method nominated by SMT Drainage and Excavations.

## 6.5. EXPENSES

Unless otherwise agreed in writing:

- (a) the Client will bear all travel, accommodation, office stationery, computer storage, media and related expenses reasonably incurred by SMT Drainage and Excavations in connection with a Proposal; and
- (b) any third party costs incurred by SMT Drainage and Excavations in the course of performing the Services may be billed to the Client, unless specifically otherwise provided for in the Proposal.

## 6.6. GST

Unless otherwise indicated, amounts stated in a Proposal do not include GST. In relation to any GST payable for a taxable supply by SMT Drainage and Excavations, the Client must pay the GST subject to SMT Drainage and Excavations providing a tax invoice.

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6.7. **CARD SURCHARGES**

SMT Drainage and Excavations reserves the right to charge credit card surcharges in the event payments are made using a credit, debit or charge card (including Visa, MasterCard or American Express).

6.8. **FAILURE TO PAY**

If payment is not made in accordance with this clause 6, SMT Drainage and Excavations at its entire discretion may:

- (a) require the Client to pay SMT Drainage and Excavations interest on all outstanding monies from 14 days after the due date until the date of payment at the rate of 15% per annum, accruing daily, subject to change from time to time by written notice to the Client at the absolute discretion of SMT Drainage and Excavations;
- (b) demand payment and all money due under this Agreement to SMT Drainage and Excavations shall immediately become due and payable;
- (c) demand payment of SMT Drainage and Excavations' legal and other recovery costs on a solicitor/own client indemnity basis;
- (d) refuse to perform any further Services to/for the Client until all outstanding monies, including any accrued interest, is paid in full; or
- (e) terminate this Agreement whereupon the Client must pay for any amount payable in accordance with clause 17.3.

7. **CHANGES**

- (a) The Client must pay additional service fees for changes to Services requested by the Client which are outside the scope set out in the relevant Proposal (**Changes**) including:
- (b) Unless otherwise agreed in writing, SMT Drainage and Excavations may at its discretion extend or modify any delivery schedule or deadlines for the Services as may be reasonably required by such Changes.

8. **ACCREDITATIONS**

Unless otherwise agreed in writing:

- (a) all displays or publications of any deliverables provided to the Client as part of the Services (**Deliverables**) must, if requested by SMT Drainage and Excavations, bear an accreditation and/or a copyright notice including SMT Drainage and Excavations' name in the form, size and location as directed by SMT Drainage and Excavations; and
- (b) SMT Drainage and Excavations retains the right to describe the Services and reproduce, publish and display the Deliverables in SMT Drainage and Excavations' portfolios and websites for the purposes of recognition or professional advancement, and to be credited with authorship of the Services and Deliverables in connection with such uses.

9. **THIRD PARTY GOODS AND SERVICES**

- (a) Any Service that requires SMT Drainage and Excavations to acquire goods and services supplied by a third party on behalf of the Client may be subject to the terms & conditions of that third party (**Third Party Terms**), including 'no refund' policies.
- (b) The Client agrees to any Third Party Terms applicable to any goods and services supplied by a third party that the Client or SMT Drainage and Excavations acquires as part of the Services and SMT Drainage and Excavations will not be liable for any loss or damage suffered by the Client in connection with such Third Party Terms.

10. **CONFIDENTIALITY**

- (a) Except as contemplated by this Agreement, each party must not, and must not permit any of its officers, employees, agents, contractors or related companies to, use or disclose to any person any Confidential Information disclosed to it by the other party without its prior written consent.



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- (b) This clause 10 does not apply to:
- (i) information which is generally available to the public (other than as a result of a breach of this Agreement or another obligation of confidence);
  - (ii) information required to be disclosed by any law; or
  - (iii) information disclosed by SMT Drainage and Excavations to its subcontractors, employees or agents for the purposes of performing the Services or its obligations under this Agreement.
- (c) For the purposes of this Agreement, "**Confidential Information**" means information of or provided by a party to the other party under or in connection with this Agreement that is by its nature confidential information, is designated by the party as confidential, or the other party knows or ought to know is confidential, but does not include information which is or becomes, without a breach of confidentiality, public knowledge.

## 11. INTELLECTUAL PROPERTY

### 11.1. CLIENT CONTENT

- (a) The Client grants to SMT Drainage and Excavations (and its subcontractors, employees and agents) a non-exclusive, royalty free, non-transferable, worldwide and irrevocable licence to use the Client Content to the extent reasonably required to perform any part of the Services.
- (b) The Client:
- (i) warrants that SMT Drainage and Excavations' use of Client Content as contemplated by this Agreement will not infringe any third-party Intellectual Property Rights; and
  - (ii) will indemnify SMT Drainage and Excavations from and against all losses, claims, expenses, damages and liabilities (including any taxes, fees or costs) which arise out of such infringement or a claim of such an infringement.

### 11.2. DEVELOPED IP

All Developed IP will be solely and exclusively owned by SMT Drainage and Excavations.

### 11.3. SMT DRAINAGE AND EXCAVATIONS IP

- (a) SMT Drainage and Excavations grants to the Client a non-exclusive, royalty free, non-transferable and revocable licence to use SMT Drainage and Excavations IP and any Developed IP to the extent required for the Client to use, enjoy the benefit of or exploit the Services and/or the Deliverables.
- (b) Unless otherwise agreed in writing by SMT Drainage and Excavations or in this clause 11.3, the Client will not acquire Intellectual Property Rights in any SMT Drainage and Excavations IP under this Agreement or as part of receiving the Services.

### 11.4. DEFINITIONS

For the purposes of this clause 11:

- (a) "**Client Content**" means any Material supplied by the Client to SMT Drainage and Excavations under or in connection with this Agreement, including any Intellectual Property Rights attaching to that Material.
- (b) "**Developed IP**" means the Deliverables and any other Material produced by SMT Drainage and Excavations in the course of providing the Services, either alone or in conjunction with the Client or others, and any Intellectual Property Rights attaching to that Material or the Deliverables.
- (c) "**Intellectual Property Rights**" means any and all present and future intellectual and industrial property rights throughout the world, including copyright, trade marks, designs, patents or other proprietary rights, Confidential Information and the right to have information kept confidential, or any rights to registration of such rights whether created before or after the start date set out in a Proposal, whether registered or unregistered.
- (d) "**SMT Drainage and Excavations IP**" means all Material owned or licensed by SMT Drainage and Excavations that is not Developed IP and any Intellectual Property Rights attaching to that Material.

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- (e) **"Material"** means tangible and intangible information, documents, reports, drawings, designs, software (including source and object code), inventions, concepts, data and other materials in any media whatsoever.

## 12. WARRANTIES

- (a) **(Limited Drainage and Stormwater Warranty)** SMT Drainage and Excavations' new drainage and stormwater installations come with a 2 year warranty on goods and a 7 year warranty on labour and materials.
- (b) **(Manufacturer's Warranty)** Manufacturers of goods may also provide a warranty which will be provided to the Client with the goods. Please read and review this document for any warranty claims.
- (c) **(Services not included)** SMT Drainage and Excavations' Services and labour will not be included as part of any Manufacturer's Warranty. The Client may be charged for additional labour fees for installation relating to warranty claims from the manufacturer. If so, SMT Drainage and Excavations will inform the Client of these charges and they will be charged at SMT Drainage and Excavations' usual service labour rate.
- (d) **(No warranty for lack of maintenance)** Warranty claims will only be accepted if the Services are faulty and the Client complies with the provisions of this clause 12 and will not be provided where the Services are faulty due to the Client's fault such as lack of maintenance (including the Client's failure to follow any maintenance procedures in any documentation, manuals or schedules provided).
- (e) **(Faulty products/installation)** If the Client believe the Services are faulty, the Client must contact SMT Drainage and Excavations using the contact details provided in the Proposal, with a full description of the fault (including images if possible). If SMT Drainage and Excavations determines, in its absolute discretion:
- (i) that the Client's Services may be faulty, SMT Drainage and Excavations will conduct a further inspection before deeming a product or installation fault. If SMT Drainage and Excavations determines that the relevant Services are faulty and covered by this warranty, SMT Drainage and Excavations' liability will, at its option, be limited to a refund of the full amount paid, an exchange or conducting the installation Services again. All refunds will be credited back to the Client's original method of payment unless the Client requests otherwise and SMT Drainage and Excavations approve this request;
  - (ii) that the relevant Services are not faulty, or are faulty due to lack of maintenance, fair wear and tear, misuse, failure to use in accordance with the manufacturer's instructions, failure to take reasonable care, or for any other reason beyond the control of SMT Drainage and Excavations, SMT Drainage and Excavations will refuse the Client's warranty claim and charge the Client for its Services at SMT Drainage and Excavations' applicable service labour rate;
  - (iii) If the Client fails to comply with the provisions of this clause 12 in respect of the faulty Services, SMT Drainage and Excavations may, in its absolute discretion, issue only a partial refund or no refund in respect of such Services, provided that nothing in this clause 12 is intended to limit the operation of any manufacturers' warranties which the Client may be entitled to or any of the Client's rights which cannot be excluded under applicable law.
- (f) **(Change of mind return)** SMT Drainage and Excavations does not accept returns for change of mind.
- (g) **(Error in the specifications)** SMT Drainage and Excavations does not accept returns for any error or miscommunication in any specifications set out in the Proposal. It is the Client's responsibility to ensure such details are correct.
- (h) To the maximum extent permitted by applicable law, all express or implied representations and warranties (whether relating to fitness for purpose or performance, or otherwise) not expressly stated in this Agreement or a Proposal are excluded.
- (i) Where any law (including the *Competition and Consumer Act 2010* (Cth)) implies a condition, warranty or guarantee which may not lawfully be excluded, then, to the maximum extent permitted by applicable law, SMT Drainage and Excavations' liability for breach of that non-excludable condition, warranty or guarantee will, at SMT Drainage and Excavations' option, be limited to:



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- (i) in the case of goods, their replacement or the supply of equivalent goods or their repair; and
  - (ii) in the case of services, the supply of the services again, or the payment of the cost of having them supplied again.

### 13. LIMITATION OF LIABILITY

To the maximum extent permitted by law, SMT Drainage and Excavations' liability for all claims in aggregate (whether those claims be for breach of contract, negligence or otherwise, and whether those claims are for economic loss, or for personal injury or other damage) arising under or in connection with this Agreement:

- (a) is totally excluded, to the extent it concerns liability for indirect, special and consequential damages, and damages (whether direct or indirect) reflecting loss of revenue, loss of profits and loss of goodwill (except to the extent this liability cannot be excluded under the *Competition and Consumer Act 2010* (Cth)); and
- (b) is limited, insofar as concerns other liability, to the total money paid to SMT Drainage and Excavations under this Agreement as at the date the event giving rise to the relevant liability occurred (or, where there are multiple events, the date of the first such event).
- (c) Nothing in this agreement is intended to limit the operation of the *Competition and Consumer Act 2010* (Cth).

### 14. INDEMNITY

The Client indemnifies SMT Drainage and Excavations from and against all losses, claims, expenses, damages and liabilities (including any taxes, fees or costs) which arise out of or relate to:

- (a) any breach of this Agreement by the Client;
- (b) any negligent, fraudulent or criminal act or omission of the Client or its personnel;
- (c) any components or materials supplied by the Client or its personnel;
- (d) any services carried out by third parties;
- (e) any defect or damage where such defect or damage is caused by or arises as a result of, or directly or indirectly in connection with, the Client (or the Client fails to take reasonable steps to prevent them from becoming defective), any other person (such as the Client's other contractors, staff and agents), fair wear and tear, or any accident or circumstance outside the reasonable control of SMT Drainage and Excavations;
- (f) any damage to the Site or Utility Services;
- (g) any damage to, or adverse effect to the stability and structural integrity of, nearby structures;
- (h) any neighbourly issues and conflicts;
- (i) any damage to the state of existing pipes and/or the existing pipe's location; or
- (j) any damage to aged or deteriorating plumbing.

### 15. SUBCONTRACTING

SMT Drainage and Excavations may subcontract any aspect of providing the Services and the Client hereby consents to such subcontracting.

### 16. FORCE MAJEURE

SMT Drainage and Excavations will not be liable to the Client for any failure in the fulfilment of any of its obligations under this Agreement to the extent that the failure is due to any delay, interruption, loss or damage occasioned by a Force Majeure Event. If SMT Drainage and Excavations cannot carry out any of its obligations by reason of a Force Majeure Event it must give prompt notice to the Client, following which it will be relieved of its obligations under this Agreement, to the extent that those obligations are affected by the Event of Force Majeure, and the Client must pay for any Services completed by SMT Drainage and Excavations at the prevailing rate notwithstanding the

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failure. Force Majeure Event means any cause beyond the control of SMT Drainage and Excavations, and include any:

- (a) act of God, lightning strike, meteor strike, earthquake, storm, flood, drought, landslide, explosion or fire and includes any of these acts such as extreme weather events, tress falling down and wildfires that affect the performance of the SMT Drainage and Excavations Services;
- (b) strikes or other industrial action outside of the control of SMT Drainage and Excavations; and
- (c) war, terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic.

## **17. TERMINATION**

### **17.1. TERMINATION BY SMT Drainage and Excavations**

SMT Drainage and Excavations may terminate this Agreement in whole or in part immediately by written notice to the Client if:

- (a) the Client is in breach of any term of this Agreement;
- (b) the Client becomes subject to any form of insolvency or bankruptcy administration; or
- (c) in SMT Drainage and Excavations' reasonable opinion, it is unable to complete the Services due to conditions beyond its control.

### **17.2. TERMINATION BY THE CLIENT**

The Client may terminate this Agreement in whole or in part by written notice to SMT Drainage and Excavations if:

- (a) SMT Drainage and Excavations has committed a material breach of this Agreement and has failed to remedy the breach within 30 days after receiving written notice from the Client; or
- (b) SMT Drainage and Excavations consents to such termination, subject to the Client's fulfillment of any pre-conditions to such consent (for example, payment of a pro-rata portion of the agreed fees).

### **17.3. EFFECT OF TERMINATION**

Upon termination of this Agreement, the Client must promptly pay (at SMT Drainage and Excavations' request):

- (a) any payments required by SMT Drainage and Excavations to third party suppliers or service providers to discontinue their work;
- (b) SMT Drainage and Excavations' standard fees in relation to work already performed; and/or
- (c) an equitable amount by way of profit margin on the preceding items,

and the Supplier may retain any deposit or other sum paid by the Client as liquidated damages.

### **17.4. SURVIVAL**

Any clause that by its nature would reasonably be expected to be performed after the termination or expiry of this Agreement will survive and be enforceable after such termination or expiry.

## **18. GUARANTEE**

- (a) In consideration of SMT Drainage and Excavations agreeing to be bound by this Agreement, the Guarantor named in the Proposal (**Guarantor**), and where there is more than one Guarantor the Guarantors jointly and severally, as a principal obligor and not merely as surety, irrevocably and unconditionally guarantees to SMT Drainage and Excavations (and indemnifies SMT Drainage and Excavations in respect of) the due and punctual performance of all the obligations of the Client under or arising out of the Agreement including (without limitation):

- (i) the prompt payment of all amounts payable by the Client under the Agreement;
- (ii) the prompt performance of all other obligations of the Client under this Agreement;

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- (iii) the prompt payment of all amounts for which the Client may become liable in respect of any breach of this Agreement.
  - (b) The Guarantor agrees that the Guarantor's obligations under this guarantee and indemnity shall be unconditional irrespective of:
    - (i) the validity, regularity and enforceability of any provision of this Agreement;
    - (ii) the absence of any action by SMT Drainage and Excavations or the Client to enforce this Agreement;
    - (iii) the waiver or consent of SMT Drainage and Excavations in respect of any provision of this Agreement;
    - (iv) the recovery of any judgment against the Client;
    - (v) any action to enforce judgment against the Client;
    - (vi) any variation of the terms of this Agreement;
    - (vii) any time or indulgence granted to the Client by SMT Drainage and Excavations;
    - (viii) the winding up or dissolution of the Client;
    - (ix) any change in the status, function, control or ownership of the Client;
    - (x) any consolidation, merger, conveyance or transfer by the Client;
    - (xi) any other dealing, transaction or arrangement between SMT Drainage and Excavations and the Client; or
    - (xii) any other circumstances which might otherwise constitute a legal or equitable discharge of or defence to a surety.
  - (c) This guarantee and indemnity shall be a continuing guarantee and indemnity which shall not be discharged except by complete performance of all the obligations of the Client under or arising out of this Agreement.
  - (d) SMT Drainage and Excavations may require the Guarantor to make a payment or perform any other obligation of the Client under or arising out of this Agreement:
    - (i) without first asking the Client to do so; and
    - (ii) irrespective of whether the payment or other obligation would be enforceable against the Client.
  - (e) The Guarantor agrees to pay and indemnify SMT Drainage and Excavations against all transfer duty (if any) in respect of this guarantee and indemnity.

## **19. OWNERSHIP, RISK AND ASSIGNMENT**

- (a) Notwithstanding anything to the contrary express or implied in this Agreement, the parties agree that SMT Drainage and Excavations retains full title to any goods and title will not at any time pass to the Client until the purchase price for the goods and all other amounts owing in respect of the goods are paid to SMT Drainage and Excavations notwithstanding:
  - (i) the delivery or collection of the goods to/by the Client (as the case may be);
  - (ii) installation in or attachment of the goods to the Client's property; and/or
  - (iii) the possession and use of the goods by the Client.
- (b) Even if SMT Drainage and Excavations retains ownership of the goods, all risk for the goods passes to the Client on delivery of the goods to the Client or the nominee of the Client.
- (c) If any of the goods are damaged or destroyed following delivery but prior to ownership passing to the Client, SMT Drainage and Excavations is entitled to:
  - (i) receive payment for the goods; and
  - (ii) receive all insurance proceeds payable for the goods. The production of this Agreement by SMT Drainage and Excavations is sufficient evidence of SMT Drainage and Excavations' rights to receive the insurance proceeds without the need for any person dealing with SMT Drainage and Excavations to make further enquiries.

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- (d) The Client acknowledges and agrees that:
- (i) it will not agree, attempt, offer or purport to sell, assign, sub-let, lend, pledge, mortgage, let, hire or otherwise part or attempt to part with personal possession of or otherwise deal with the goods without the express written consent of SMT Drainage and Excavations;
  - (ii) it will, if requested by SMT Drainage and Excavations, return the goods to SMT Drainage and Excavations following non-fulfilment of any obligation of the Client (including payment of monies) without limiting any other right SMT Drainage and Excavations may have;
  - (iii) it will deliver up the goods to SMT Drainage and Excavations upon demand by SMT Drainage and Excavations and give SMT Drainage and Excavations or its agents or authorised representatives the right to enter any premises occupied by the Client and any premises where it believes any goods may be stored (without liability for trespass or any resulting damage) and to use the name of the Client and to act on its behalf, if necessary, to recover possession of the goods and agrees to indemnify SMT Drainage and Excavations and its agents and/or authorised representatives from any damage, injury and/or loss arising from such recovery or attempted recovery of the goods from the Client's possession or control;
  - (iv) it holds the proceeds, book debts and accounts receivable arising from selling or hiring of the goods on trust for and as agent for SMT Drainage and Excavations immediately when they are receivable or are received; and
  - (v) SMT Drainage and Excavations may recover as a debt due and immediately payable by the Client all amounts owing by the Client to SMT Drainage and Excavations in any respect even though title to the goods has not passed to the Client.

## 20. PERSONAL PROPERTY SECURITIES

### 20.1. APPLICATION

Until such time as goods are paid for in full in cleared funds, this clause shall apply to the supply of goods by SMT Drainage and Excavations (**Goods**).

### 20.2. PERSONAL PROPERTY SECURITIES

- (a) The Client acknowledges and agrees that notwithstanding any other provision of this Agreement:
- (i) the PPSA applies to any supply of Goods by SMT Drainage and Excavations to the Client;
  - (ii) by agreeing to and/or accepting or adopting this Agreement the Client grants to SMT Drainage and Excavations:
    - A. a purchase money security interest in the Goods (on the basis that the Goods are sold on retention of title terms); and
    - B. a security interest over all present and after-acquired property of the Client ("**Client's Property**" for the purposes of this clause 20),to secure SMT Drainage and Excavations' interest in the Goods and all moneys owing or payable by the Client under this Agreement and any other moneys payable by the Client to SMT Drainage and Excavations from time to time on any account whatsoever.
  - (iii) if a purchase money security interest is not able to be claimed by SMT Drainage and Excavations in respect of the Goods for any reason, SMT Drainage and Excavations will have a security interest in the Goods;
  - (iv) the Client agrees that SMT Drainage and Excavations' security interest in Goods and the Client's property covered by this Agreement may be registered on the PPS Register and the Client agrees to do all things necessary and required by SMT Drainage and Excavations to effect registration of SMT Drainage and Excavations' security interest on the PPS Register in order to give SMT Drainage and Excavations' security interest the best priority possible

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- and anything else SMT Drainage and Excavations requests the Client to do in connection with the PPSA without delay;
- (v) the Client warrants that all information provided by the Client to SMT Drainage and Excavations, including but not limited to the Client's details, including the entity, name, ACN or ABN and address set out in the Quote is correct in all respects and must not change its name, address or other details set out in the Quote without providing SMT Drainage and Excavations with at least 20 business days prior written notice;
  - (vi) the Client unconditionally and irrevocably appoints SMT Drainage and Excavations as its attorney to do any of acts and matters set out in this clause 20 in the event that the Client fails, delays or declines to execute such documents or do such acts;
  - (vii) the Client agrees that it will not grant a security interest or other encumbrance in the Goods whether under the PPSA or any other law to a third party unless it has obtained the prior written consent of SMT Drainage and Excavations, which SMT Drainage and Excavations may refuse to provide or grant in its absolute and unfettered discretion. SMT Drainage and Excavations may request and the Client must provide any information that SMT Drainage and Excavations requires, acting reasonably, in order to fully consider whether to grant its consent;
  - (viii) SMT Drainage and Excavations' security interest in the Goods, and the Client's Property extends to any proceeds in all present and after acquired property including, without limitation, book debts and accounts receivable arising from the selling or hiring of the Goods, and/or the Client's Property by the Client;
  - (ix) it has received value as at the date of first delivery of the Goods and has not agreed to postpone the time for attachment of the security interest (as defined in the PPSA) granted to SMT Drainage and Excavations under this Agreement;
  - (x) the Goods are located in Australia at the date of the supply of the Goods and the Client warrants that the Goods will remain located in Australia for the duration of the Agreement;
  - (xi) neither SMT Drainage and Excavations nor the Client will disclose any information to any interested person unless required to do so under the PPSA;
  - (xii) the Client waives its right under the PPSA:
    - A. to receive a copy of any verification statement, financing change statement, or any notice that SMT Drainage and Excavations intends to sell the Goods and/or the Client's Property or to retain the Goods and/or the Client's Property on enforcement of the security interest granted to SMT Drainage and Excavations under this Agreement or any other notice under the PPSA unless the notice is required to be given by the PPSA and cannot be contracted out of;
    - B. to object to a proposal by SMT Drainage and Excavations to dispose of or purchase or retain the Goods and/or the Client's Property in satisfaction of any obligation owed by the Client to SMT Drainage and Excavations;
    - C. to receive a statement of account following the sale of the Goods and/or the Client's Property; or
    - D. to redeem the Goods and/or the Client's Property;
  - (xiii) will not give (or allow any person to give) to SMT Drainage and Excavations a written demand requiring SMT Drainage and Excavations to register a financing change statement under the PPSA or enter into (or allow any other person to enter into) the PPS Register a financing change statement under the PPSA; and
  - (xiv) a default under any other security agreement under which it has granted a security interest to any other party in respect of the Goods is deemed to be a breach of this Agreement.
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- (b) The parties agree that SMT Drainage and Excavations is not required to respond to a request made under Section 275 of the PPSA and that neither party will disclose information of the kind set out in Section 275(1) of the PPSA.

#### 20.3. FURTHER SUPPLIES

The parties acknowledge and agree that any supply of Goods of any kind by SMT Drainage and Excavations to the Client which is not specifically set out in the Quote but for which SMT Drainage and Excavations has or later issues a Tax Invoice or any other documentation to the Client is deemed to form part of the Agreement and is subject to the terms of the Agreement.

#### 20.4. ENFORCEMENT

- (a) The enforcement provisions contained in this Agreement are in addition to any rights available to SMT Drainage and Excavations under the PPSA and apply to the maximum extent permitted by law.
- (b) Without limitation to clause 20.4(a) and any other provision of this Agreement section 125, 129(2), 142 and 143 of the PPSA are contracted out of.

#### 20.5. POWER OF ATTORNEY

The Client irrevocably nominates, constitutes and appoints SMT Drainage and Excavations and/or its officers and/or its nominees severally to be the true and lawful attorneys of the Client on behalf of and in the name of the Client to do all things necessary and sign all such documents as may be necessary to deal with the Goods in accordance with the enforcement provisions of this Agreement, the PPSA or otherwise, if the Client is in default of this Agreement.

#### 20.6. INTERPRETATION

A term used in this clause 20 is taken to have the meaning defined under the PPSA.

### 21. DISPUTE RESOLUTION

- (a) A party claiming that a dispute has arisen under or in connection with this agreement must not commence court proceedings arising from or relating to the dispute, other than a claim for urgent interlocutory relief, unless that party has complied with the requirements of this clause.
- (b) A party that requires resolution of a dispute which arises under or in connection with this agreement must give the other party or parties to the dispute written notice containing reasonable details of the dispute and requiring its resolution under this clause.
- (c) Once the dispute notice has been given, each party to the dispute must then use its best efforts to resolve the dispute in good faith. If the dispute is not resolved within a period of 14 days (or such other period as agreed by the parties in writing) after the date of the notice, any party to the dispute may take legal proceedings to resolve the dispute.

### 22. NOTICES

- (a) A notice or other communication to a party under this agreement must be:
  - (i) in writing and in English; and
  - (ii) delivered via email to the other party, to the email address specified in this agreement, or if no email address is specified in this agreement, then the email address most regularly used by the parties to correspond regarding the subject matter of this agreement as at the date of this agreement (**Email Address**). The parties may update their Email Address by notice to the other party.
- (b) Unless the party sending the notice knows or reasonably ought to suspect that an email was not delivered to the other party's Email Address, notice will be taken to be given:
  - (i) 24 hours after the email was sent; or
  - (ii) when replied to by the other party,whichever is earlier.

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## 23. GENERAL

### 23.1. GOVERNING LAW AND JURISDICTION

This Agreement is governed by the law applying in South Australia. Each party irrevocably submits to the exclusive jurisdiction of the courts of South Australia and courts of appeal from them in respect of any proceedings arising out of or in connection with this Agreement. Each party irrevocably waives any objection to the venue of any legal process on the basis that the process has been brought in an inconvenient forum.

### 23.2. RELATIONSHIP

- (a) Nothing contained in this Agreement creates an agency, partnership, joint venture or employment relationship between SMT Drainage and Excavations and the Client or any of their respective employees, agents or contractors.
- (b) Neither party nor any person acting on its behalf may hold itself out as being entitled to contract or accept payment in the name of or on account of the other party.

### 23.3. AMENDMENTS

This Agreement may only be amended by a document signed by each party.

### 23.4. WAIVER

No party to this Agreement may rely on the words or conduct of any other party as a waiver of any right unless the waiver is in writing and signed by the party granting the waiver.

### 23.5. SEVERANCE

Any term of this Agreement which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity and enforceability of the remainder of this Agreement is not limited or otherwise affected.

### 23.6. JOINT AND SEVERAL LIABILITY

An obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally.

### 23.7. ASSIGNMENT

A party cannot assign, novate or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the other party.

### 23.8. COUNTERPARTS

This Agreement may be executed in any number of counterparts. Each counterpart constitutes an original of this Agreement and all together constitute one Agreement.

### 23.9. COSTS

Except as otherwise provided in this Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.

### 23.10. ENTIRE AGREEMENT

This Agreement embodies the entire Agreement between the parties and supersedes any prior negotiation, conduct, arrangement, understanding or Agreement, express or implied, in relation to the subject matter of this Agreement.

### 23.11. INTERPRETATION

- (a) **(singular and plural)** words in the singular includes the plural (and vice versa);
- (b) **(currency)** a reference to \$; or "dollar" is to Australian currency;
- (c) **(gender)** words indicating a gender includes the corresponding words of any other gender;
- (d) **(defined terms)** if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (e) **(person)** a reference to "person" or "you" includes an individual, the estate of an individual, a corporation, an authority, an association, consortium or joint venture (whether incorporated or unincorporated), a partnership, a trust and any other entity;

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- (f) **(party)** a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes any substituted or additional trustee;
  - (g) **(this agreement)** a reference to a party, clause, paragraph, schedule, exhibit, attachment or annexure is a reference to a party, clause, paragraph, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;
  - (h) **(document)** a reference to a document (including this Agreement) is to that document as varied, novated, ratified or replaced from time to time;
  - (i) **(headings)** headings and words in bold type are for convenience only and do not affect interpretation;
  - (j) **(includes)** the word "includes" and similar words in any form is not a word of limitation; and
  - (k) **(adverse interpretation)** no provision of this Agreement will be interpreted adversely to a party because that party was responsible for the preparation of this Agreement or that provision.