

1. Definitions

- 1.1 “Excel” shall mean Excel Earthworks PTY LTD, its successors and assigns or any person acting on behalf of and with the authority of Excel EarthworksPTY LTD.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by Excel to the Client.
- 1.3 “Guarantor” means that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Works” shall mean all Works performed by Excel for the Client, including and advice or recommendations (and includes any incidental supply of goods), and as described on the invoices, quotation, work authorisation or any other forms as provided by Excel to the Client.
- 1.5 “Price” shall mean the Price payable for the Works as agreed between Excel and the Client in accordance with clause 4 of this contract.

2. The Commonwealth Trade Practices Act 1974 (“TPA”) and Fair Trading Acts (“FTA”)

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

3. Acceptance

- 3.1 Any instructions received by Excel from the Client for the performance of Works and/or the Client’s acceptance of Works performed by Excel shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of Excel.
- 3.4 The Client shall give Excel not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client’s name and/or any other change in the Client’s details (including but not limited to, changes in the Client’s address, facsimile number, or business practice). The Client shall be liable for any loss incurred by Excel as a result of the Client’s failure to comply with this clause.
- 3.5 Works are performed by Excel only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client’s order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

4. Price and Payment

- 4.1 At Excel’s sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by Excel to the Client in respect of Works performed; or
 - (b) Excel’s Price at the date of performance of the Works, according to Excel’s current pricelist; or
 - (c) Excel’s quoted Price (subject to clause 4.2) which shall be binding upon Excel provided that the Client shall accept Excel’s quotation in writing within thirty (30) days.
- 4.2 Excel reserves the right to change the Price in the event of a variation to Excel’s quotation. Any variation from the plan of scheduled Works or specifications (including, but not limited to, any variation as a result of additional work required due to hidden or unidentifiable difficulties such as hard rock barriers below the surface or inclement weather) will be charged for on the basis of Excel’s quotation and will be shown as variations on the invoice.
- 4.3 Excel may submit detailed progress payment claims in accordance with the specified payment schedule. Such payment claims may include the reasonable value of authorised variations.
- 4.4 At Excel’s sole discretion:
 - (a) payment shall be due on completion of the Works; or
 - (b) payment for approved Clients shall be due thirty (30) days following the end of the month in which a statement is posted to the Client’s address or address for notices.
- 4.5 Time for payment for the Works shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and Excel.
- 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 4.8 Receipt by Excel of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then Excel’s rights in respect of this agreement shall continue.
- 4.9 No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, Excel reserves the right to treat retentions as placing the Client’s account into default.

5. Performance of the Works

- 5.1 Subject to clause 5.2 it is Excel’s responsibility to ensure that the Works start as soon as it is reasonably possible.
- 5.2 The Works commencement date will be put back and the completion date extended to whatever time is reasonable in the event that Excel claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond Excel’s control including but not limited to any failure by the Client to:
 - (a) make a selection; or

- (b) have the site ready for the Works; or
- (c) notify Excel that the site is ready.

- 5.3 The failure of Excel to perform the Works shall not entitle either party to treat this contract as repudiated.
- 5.4 Excel shall not be liable for any loss or damage whatsoever due to failure by Excel to perform the Works (or any part of them) promptly or at all, where due to circumstances beyond the control of Excel.

6. Damages

- 6.1 The Client shall ensure that Excel has clear and free access to the site at all times to enable them to undertake the Works. Excel shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of Excel.

7. Underground Locations

- 7.1 Prior to Excel commencing the Works the Client must advise Excel of the precise location of all underground services on the site and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 7.2 Whilst Excel will take all care to avoid damage to any underground services the Client agrees to indemnify Excel in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 7.1.

8. Compliance with Laws

- 8.1 The Client and Excel shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works.
- 8.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 8.3 The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

9. Errors and Omissions

- 9.1 The Client shall inspect the Works on completion and shall within twenty-four (24) hours of completion (time being of the essence) notify Excel of any alleged defect, error or omission, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford Excel an opportunity to inspect the Works within a reasonable time following such notification if the Client believes the Works are defective in any way. If the Client shall fail to comply with these provisions the Works shall be presumed to be free from any defect or damage. For defective Works, which Excel has agreed in writing that the Client is entitled to reject, Excel's liability is limited to either (at Excel's discretion) replacing the Works or rectifying the Works except where the Client has acquired Works as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Works, or rectification of the Works, or replacement of the Works.

10. Warranty

- 10.1 Subject to the conditions of warranty set out in clause 10.2, Excel warrants that if any defect in any workmanship of Excel becomes apparent and is reported to Excel within twelve (12) months of the date of completion (time being of the essence) then Excel will either (at Excel's sole discretion) replace or remedy the workmanship.
- 10.2 The conditions applicable to the warranty given by clause 10.1 are:
- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Client to properly maintain the Works; or
 - (ii) failure on the part of the Client to follow any instructions or guidelines provided by Excel; or
 - (iii) any use of the Works otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Works after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - (v) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and Excel shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without Excel's consent.
 - (c) in respect of all claims Excel shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.

11. Default and Consequences of Default

- 11.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Excel's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 11.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by Excel.
- 11.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify Excel from and against all costs and disbursements incurred by Excel in pursuing the debt including legal costs on a solicitor and own client basis and Excel's collection agency costs.

- 11.4 Without prejudice to any other remedies Excel may have, if at any time the Client is in breach of any obligation (including those relating to payment) Excel may suspend or terminate the performance of Works for the Client and any of its other obligations under the terms and conditions. Excel will not be liable to the Client for any loss or damage the Client suffers because Excel has exercised its rights under this clause.
- 11.5 If any account remains overdue after thirty (30) days then an amount of the greater of ten dollars (\$10.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 11.6 Without prejudice to Excel's other remedies at law Excel shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Excel shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to Excel becomes overdue, or in Excel's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

12. Security and Charge

- 12.1 Despite anything to the contrary contained herein or any other rights which Excel may have howsoever:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to Excel or Excel's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that Excel (or Excel's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should Excel elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify Excel from and against all Excel's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint Excel or Excel's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 12.1.

13. Cancellation

- 13.1 Excel may cancel any contract to which these terms and conditions apply or cancel the Works at any time before the Works are completed by giving written notice to the Client. On giving such notice Excel shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to Excel for Works already performed. Excel shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 13.2 In the event that the Client cancels the Works, then the Client shall be liable for any loss incurred by Excel (including, but not limited to, any amounts owing by the Client to Excel for Works already performed and any loss of profits) up to the time of cancellation.

14. Privacy Act 1988

- 14.1 The Client and/or the Guarantor/s (herein referred to as the Client) agree for Excel to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by Excel.
- 14.2 The Client agrees that Excel may exchange information about the Client with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by the Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the creditworthiness of the Client.
- The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 14.3 The Client consents to Excel being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 14.4 The Client agrees that personal credit information provided may be used and retained by Excel for the following purposes (and for other purposes as shall be agreed between the Client and Excel or required by law from time to time):
- (a) the performance of Works; and/or
 - (b) the marketing of Works by Excel, its agents or distributors; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the performance of Works; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Works.

- 14.5 Excel may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client;
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 14.6 The information given to the credit reporting agency may include:
- (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number;
 - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
 - (c) advice that Excel is a current credit provider to the Client;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - (f) information that, in the opinion of Excel, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - (h) that credit provided to the Client by Excel has been paid or otherwise discharged.

15. Building and Construction Industry Security of Payments Act 1999

- 15.1 At Excel's sole discretion, if there are any disputes or claims for unpaid Works then the provisions of the Building and Construction Industry Security of Payments Act 1999 may apply.
- 15.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.

16. General

- 16.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales and are subject to the jurisdiction of the courts of Moss Vale.
- 16.3 Excel shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Excel of these terms and conditions.
- 16.4 In the event of any breach of this contract by Excel the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price.
- 16.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Excel nor to withhold payment of any invoice because part of that invoice is in dispute.
- 16.6 Excel may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 16.7 The Client agrees that Excel may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Excel notifies the Client of such change.
- 16.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 16.9 The failure by Excel to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Excel's right to subsequently enforce that provision.