



**Mr Excavator**  
0419 527 555

[www.mrexavator.com.au](http://www.mrexavator.com.au)  
mrexavator@bigpond.com



**Mr Excavator**  
ABN 26 913 485 321 – ACN 095 800 749  
PO Box 722 Reservoir VIC 3073  
Ph 0419 527 555 - Fax 86926231  
Email [mrexavator@bigpond.com](mailto:mrexavator@bigpond.com)  
Web [www.mrexavator.com.au](http://www.mrexavator.com.au)

## CREDIT ACCOUNT APPLICATION

**To Be Completed By Applicants** - Please complete all sections and read the Terms and Conditions of Trade overleaf or attached.

DATE: \_\_\_\_\_ REF No. \_\_\_\_\_

CUSTOMER'S TRADE NAME: \_\_\_\_\_

CUSTOMER'S FULL or LEGAL NAME: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Mobile: \_\_\_\_\_ Email: \_\_\_\_\_

Billing Address: \_\_\_\_\_ Physical Address: \_\_\_\_\_

\_\_\_\_\_ State: \_\_\_\_\_ Postcode: \_\_\_\_\_

### COMMERCIAL CUSTOMERS ONLY

ABN/ACN Number: \_\_\_\_\_

Requested Credit Limit: \_\_\_\_\_ Date Established: \_\_\_\_\_

Contact 1: \_\_\_\_\_ Contact 2: \_\_\_\_\_

Position: \_\_\_\_\_ Position: \_\_\_\_\_

Phone: \_\_\_\_\_ Phone: \_\_\_\_\_

### DETAILS OF OWNER (If Sole Trader) PARTNERS (If Partnership) OR DIRECTORS (If Company) OR TRUSTEE (If a Trust)

Full Name: \_\_\_\_\_ Full Name: \_\_\_\_\_

Home Address: \_\_\_\_\_ Home Address: \_\_\_\_\_

\_\_\_\_\_ State: \_\_\_\_\_ Postcode: \_\_\_\_\_

ID: \_\_\_\_\_ Date of Birth: \_\_\_\_\_ ID: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(Driver's Licence, Passport, etc.) (Driver's Licence, Passport, etc.)

Home Phone: \_\_\_\_\_ Home Phone: \_\_\_\_\_

### TRADE REFERENCES

Business Name 1: \_\_\_\_\_ Address or A/C No: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Business Name 2: \_\_\_\_\_ Address or A/C No: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Business Name 3: \_\_\_\_\_ Address or A/C No: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

I certify that the above information is true and correct and that I am authorised to make this application for credit. I have read and understand the TERMS AND CONDITIONS OF TRADE (overleaf or attached) of Mr Excavator which form part of, and are intended to be read in conjunction with this Credit Account Application and agree to be bound by these conditions. I authorise the use of my personal information as detailed in the Privacy Act clause therein. ***I agree that if I am a director/shareholder (owning at least 15% of the shares) of the Customer I shall be personally liable for the performance of the Customer's obligations under this contract.***

**SIGNED (CUSTOMER):** \_\_\_\_\_ **SIGNED (MR EXCAVATOR):** \_\_\_\_\_

Name: \_\_\_\_\_ Name: \_\_\_\_\_

Position: \_\_\_\_\_ Position: \_\_\_\_\_

### WITNESS TO CUSTOMER'S SIGNATURE:

**Signed:** \_\_\_\_\_ Name: \_\_\_\_\_ Date: \_\_\_\_\_

**Personal/Directors Guarantee and Indemnity**

IN CONSIDERATION of La Caffe Pty Ltd ATF La Caffe Unit Trust T/A Mr Excavator and its successors and assigns ("Mr Excavator") at the request of the Guarantor (as is now acknowledged) supplying and continuing to supply materials and/or works to

ABN 26 913 485 321 – ACN 095 800 749

PO Box 722Reservoir VIC 3073

[Insert Company Name In Box Provided]

("the Customer")

Ph 0419 527 555 - Fax 86926231

**I/WE (also referred to as the "Guarantor/s") UNCONDITIONALLY AND IRREVOCABLY:**

1. **GUARANTEE** the due and punctual payment to Mr Excavator of all monies which are now owing to Mr Excavator by the Customer and all further sums of money from time to time owing to Mr Excavator by the Customer in respect of materials and works supplied or to be supplied by Mr Excavator to the Customer or any other liability of the Customer to Mr Excavator, and the due observance and performance by the Customer of all its obligations contained or implied in any contract with Mr Excavator, including but not limited to the Terms & Conditions of Trade signed by the Customer and annexed to this Guarantee and Indemnity. If for any reason the Customer does not pay any amount owing to Mr Excavator the Guarantor will immediately on demand pay the relevant amount to Mr Excavator. In consideration of Mr Excavator agreeing to supply the Materials to the Customer, the Guarantor charges all of its right, title and interest (joint or several) in any land, realty or other assets capable of being charged, owned by the Guarantor now or in the future, to secure the performance by the Guarantor of its obligations under these terms and conditions (including, but not limited to, the payment of any money) and the Guarantor acknowledges that this personal guarantee and indemnity constitutes a security agreement for the purposes of the Personal Property Securities Act 2009 ("PPSA") and unequivocally consents to Mr Excavator registering any interest so charged. The Guarantor irrevocably appoints Mr Excavator and each director of Mr Excavator as the Guarantor's true and lawful attorney/s to perform all necessary acts to give effect to this clause including, but not limited to, signing any document on the Guarantor's behalf which Mr Excavator may reasonably require to:
  - (a) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
  - (b) register any other document required to be registered by the PPSA or any other law; or
  - (c) correct a defect in a statement referred to in clause 1(a) or 1(b).
2. **HOLD HARMLESS AND INDEMNIFY** Mr Excavator on demand as a separate obligation against any liability (including but not limited to damages, costs, losses and legal fees calculated on a solicitor and own client basis) incurred by, or assessed against, Mr Excavator in connection with:
  - (a) the supply of materials and/or works to the Customer; or
  - (b) the recovery of moneys owing to Mr Excavator by the Customer including the enforcement of this Guarantee and Indemnity, and including but not limited to Mr Excavator's nominees costs of collection and legal costs; or
  - (c) moneys paid by Mr Excavator with the Customer's consent in settlement of a dispute that arises or results from a dispute between, Mr Excavator, the Customer, and a third party or any combination thereof, over the supply of materials and/or works by Mr Excavator to the Customer.

**I/WE FURTHER ACKNOWLEDGE AND AGREE THAT**

3. **I/We have received, read and understood Mr Excavator's Terms and Conditions prior to entering into this Guarantee and Indemnity and agree to be bound by those Terms and Conditions.**
4. This Guarantee and Indemnity shall constitute an unconditional and continuing Guarantee and Indemnity and accordingly shall be irrevocable and remain in full force and effect until the whole of moneys owing to Mr Excavator by the Customer and all obligations herein have been fully paid satisfied and performed.
5. No granting of credit, extension of further credit, or granting of time and no waiver, indulgence or neglect to sue on Mr Excavator's part (whether in respect of the Customer or any one or more of any other Guarantor(s) or otherwise) and no failure by any named Guarantor to properly execute this Guarantee and Indemnity shall impair or limit the liability under this Guarantee and Indemnity of any Guarantor. Without affecting the Customer's obligations to Mr Excavator, each Guarantor shall be a principal debtor and liable to Mr Excavator accordingly.
6. If any payment received or recovered by Mr Excavator is avoided by law such payment shall be deemed not to have discharged the liability of the Guarantor, and the Guarantor and Mr Excavator shall each be restored to the position in which they would have been had no such payment been made.
7. The term "Guarantor" whenever used in this Guarantee and Indemnity shall, if there is more than one person named as Guarantor, mean and refer to each of them individually and all of them together unless the context otherwise requires, and the obligations and agreements on the part of the Guarantor contained in this Guarantee and Indemnity shall bind them jointly and severally.
8. **I/We have been advised to obtain independent legal advice before executing this Guarantee and Indemnity. I/we understand that I/we am/are liable for all amounts owing (both now and in the future) by the Customer to Mr Excavator.**
9. I/we irrevocably authorise Mr Excavator to obtain from any person or company any information which Mr Excavator may require for credit reference purposes. I/We further irrevocably authorise Mr Excavator to provide to any third party, in response to credit references and enquiries about me/us or by way of information exchange with credit reference agencies, details of this Guarantee and Indemnity and any subsequent dealings that I/we may have with Mr Excavator as a result of this Guarantee and Indemnity being actioned by Mr Excavator.
10. The above information is to be used by Mr Excavator for all purposes in connection with Mr Excavator considering this Guarantee and Indemnity and the subsequent enforcement of the same.

**GUARANTOR-1**

SIGNED: \_\_\_\_\_

FULL NAME: \_\_\_\_\_

HOME ADDRESS: \_\_\_\_\_

DATE OF BIRTH: \_\_\_\_\_

**GUARANTOR-2**

SIGNED: \_\_\_\_\_

FULL NAME: \_\_\_\_\_

HOME ADDRESS: \_\_\_\_\_

DATE OF BIRTH: \_\_\_\_\_

Note: 1. If the Customer is a sole trader or partnership the Guarantor(s) should be some other suitable person(s).

2. If the Customer is a club or incorporated society the Guarantor(s) should be the president and secretary or other committee member

## **Mr Excavator – Terms Of Trade**

### **1. Definitions**

- 1.1 “Mr Excavator” means La Caffe Pty Ltd ATF La Caffe Unit Trust T/A Mr Excavator, its successors and assigns or any person acting on behalf of and with the authority of La Caffe Pty Ltd ATF La Caffe Unit Trust T/A Mr Excavator.
- 1.2 “Customer” means the person/s ordering the Works/Equipment as specified in any invoice, document or order, and if there is more than one Customer is a reference to each Customer jointly and severally.
- 1.3 “Works” means all Works or Materials supplied by Mr Excavator to the Customer at the Customer’s request from time to time (where the context so permits the terms ‘Works’ or ‘Materials’ shall be interchangeable for the other).
- 1.4 “Equipment” means all Equipment including any accessories supplied on hire by Mr Excavator to the Customer (and where the context so permits shall include any supply of Works). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation form provided by Mr Excavator to the Customer.
- 1.5 “Price” means the Price payable for the Works and/or Equipment hire as agreed between Mr Excavator and the Customer in accordance with clause 4 below.

### **2. Acceptance**

- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works/Equipment.
- 2.2 These terms and conditions may only be amended with Mr Excavator’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and Mr Excavator.

### **3. Change in Control**

- 3.1 The Customer shall give Mr Excavator not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer’s details (including but not limited to, changes in the Customer’s name, address, contact phone or fax number/s, or business practice). The Customer shall be liable for any loss incurred by Mr Excavator as a result of the Customer’s failure to comply with this clause.

### **4. Price and Payment**

- 4.1 At Mr Excavator’s sole discretion the Price shall be either:
  - (a) as indicated on invoices provided by Mr Excavator to the Customer in respect of Works performed or Materials/Equipment supplied; or
  - (b) Mr Excavator’s Price at the date of delivery of the Works/Equipment according to Mr Excavator’s current pricelist; or
  - (c) Mr Excavator’s quoted Price (subject to clause 4.2) which shall be binding upon Mr Excavator provided that the Customer shall accept Mr Excavator’s quotation in writing within thirty (30) days.
- 4.2 Mr Excavator reserves the right to change the Price:
  - (a) if a variation to the Works/Equipment which are to be supplied is requested; or
  - (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
  - (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, hard rock barriers below the surface, iron reinforcing rods in concrete, poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations including discovery of asbestos etc) which are only discovered on commencement of the Works; or
  - (d) in the event of increases to Mr Excavator in the cost of labour and materials or any variation as a result of fluctuations in currency exchange rates or increases to Mr Excavator in the cost of taxes, which are beyond Mr Excavator’s control.
- 4.3 At Mr Excavator’s sole discretion a non-refundable deposit may be required.
- 4.4 Time for payment for the Works/Equipment being of the essence, the Price will be payable by the Customer on the date/s determined by Mr Excavator, which may be:
  - (a) before delivery of the Materials/Equipment; or
  - (b) before completion of the Works; or
  - (c) by way of progress payments in accordance with Mr Excavator’s specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed; or
  - (d) thirty (30) days following the date specified on the invoice which is posted to the Customer’s address or address for notices;
  - (e) the date specified on any invoice or other form as being the date for payment; or
  - (f) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Customer by Mr Excavator.

4.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card excluding AMEX (plus a surcharge of up to three (3%) percent of the Price), or by any other method as agreed to between the Customer and Mr Excavator.

4.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Customer must pay to Mr Excavator an amount equal to any GST Mr Excavator must pay for any supply of Works/Equipment by Mr Excavator under this or any other agreement. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

## **5. Delivery**

5.1 Subject to clause 5.2 it is Mr Excavator'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/or the completion date extended by whatever time is reasonable in the event that Mr Excavator claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond Mr Excavator's control, including but not limited to any failure by the Customer to:

- (a) make a selection; or
- (b) have the site ready for the Works; or
- (c) notify Mr Excavator that the site is ready.

5.3 Delivery Materials/Equipment is taken to occur at the time that:

- (a) the Customer or the Customer's nominated carrier takes possession of the Materials/Equipment at Mr Excavator's address; or
- (b) Mr Excavator (or Mr Excavator's nominated carrier) delivers the Materials/Equipment to the Customer's nominated address even if the Customer is not present at the address.

5.4 At Mr Excavator's sole discretion, the cost of delivery is included in the Price.

5.5 The Customer must take delivery by receipt or collection of the Materials/Equipment whenever either is tendered for delivery. In the event that the Customer is unable to take delivery of the Materials/Equipment as arranged then Mr Excavator shall be entitled to charge a reasonable fee for redelivery and/or storage of the Materials/Equipment.

5.6 Any time or date given by Mr Excavator to the Customer is an estimate only. Mr Excavator shall not be liable for any loss or damage whatsoever due to failure by Mr Excavator to deliver the Works/Equipment (or any part of them) promptly or at all, where due to circumstances beyond the reasonable control of Mr Excavator.

## **6. Risk**

6.1 If Mr Excavator retains ownership of the Materials under clause 12 then;

- (a) where Mr Excavator is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery;
- (b) where Mr Excavator is to both supply and install Materials then Mr Excavator shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Customer.

6.2 Notwithstanding the provisions of clause 6.1 if the Customer specifically requests Mr Excavator to leave Materials outside Mr Excavator's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Customer and it shall be the Customer's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Customer's expense.

## **7. Access**

7.1 The Customer shall ensure that Mr Excavator has clear and free access to the work site at all times to enable them to undertake the Works. Mr Excavator 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 Mr Excavator.

7.2 It is the responsibility of the Customer to ensure that access is suitable to accept the weight of laden trucks. The Customer agrees to indemnify Mr Excavator against all costs incurred by Mr Excavator in recovering such vehicles in the event they become bogged or otherwise immovable.

## **8. Underground Locations**

8.1 Prior to Mr Excavator commencing any work the Customer must advise Mr Excavator of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Customer 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.

8.2 Whilst Mr Excavator will take all care to avoid damage to any underground services the Customer agrees to indemnify Mr Excavator 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 8.1.

## **9. Customer's Responsibilities**

9.1 The Customer acknowledges that in the event asbestos or any other toxic substances are discovered at the worksite that it is their responsibility to ensure the safe removal of the same. The Customer further agrees to indemnify Mr Excavator against any costs incurred by Mr Excavator as a consequence of such discovery. Under no circumstances will Mr Excavator handle removal of asbestos product.

## **10. Insurance**

10.1 Mr Excavator shall have public liability insurance of at least \$5m. It is the Customers responsibility to ensure that they are similarly insured.

## **11. Compliance with Laws**

11.1 The Customer and Mr Excavator 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.

11.2 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Works.

11.3 The Customer 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.

## **12. Title to Materials**

12.1 Mr Excavator and the Customer agree that ownership of the Materials shall not pass until:

- (a) the Customer has paid Mr Excavator all amounts owing to Mr Excavator; and
- (b) the Customer has met all of its other obligations to Mr Excavator.

12.2 Receipt by Mr Excavator 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.

12.3 It is further agreed that:

- (a) until ownership of the Materials passes to the Customer in accordance with clause 12.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to Mr Excavator on request.
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for Mr Excavator and must pay to Mr Excavator the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed.
- (c) the production of these terms and conditions by Mr Excavator shall be sufficient evidence of Mr Excavator's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with Mr Excavator to make further enquiries.
- (d) the Customer must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for Mr Excavator and must pay or deliver the proceeds to Mr Excavator on demand.
- (e) the Customer should not convert or process the Materials or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of Mr Excavator and must sell, dispose of or return the resulting product to Mr Excavator as it so directs.
- (f) unless the Materials have become fixtures the Customer irrevocably authorises Mr Excavator to enter any premises where Mr Excavator believes the Materials are kept and recover possession of the Materials.
- (g) Mr Excavator may recover possession of any Materials in transit whether or not delivery has occurred.
- (h) the Customer shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of Mr Excavator.
- (i) Mr Excavator may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

## **13. Personal Property Securities Act 2009 ("PPSA")**

13.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.

13.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials/Equipment that have previously been supplied and that will be supplied in the future by Mr Excavator to the Customer.

13.3 The Customer undertakes to:

- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Mr Excavator may reasonably require to:
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
    - (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 13.3(a)(i) or 13.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, Mr Excavator for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Materials/Equipment charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of Mr Excavator;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials/Equipment in favour of a third party without the prior written consent of Mr Excavator; and
  - (e) immediately advise Mr Excavator of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 13.4 Mr Excavator and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 13.5 The Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 13.6 The Customer waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 13.7 Unless otherwise agreed to in writing by Mr Excavator, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Customer shall unconditionally ratify any actions taken by Mr Excavator under clauses 13.3 to 13.5.
- 13.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

#### **14. Security and Charge**

- 14.1 In consideration of Mr Excavator agreeing to supply the Works/Equipment, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 14.2 The Customer indemnifies Mr Excavator from and against all Mr Excavator's costs and disbursements including legal costs on a solicitor and own Customer basis incurred in exercising Mr Excavator's rights under this clause.
- 14.3 The Customer irrevocably appoints Mr Excavator and each director of Mr Excavator as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the Customer's behalf.

#### **15. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**

- 15.1 The Customer must inspect all Materials/Equipment on delivery (or the Works on completion) and must within seven (7) days of delivery notify Mr Excavator in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Materials/Works/Equipment as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow Mr Excavator to inspect the Materials/Equipment or to review the Works provided.
- 15.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 15.3 Mr Excavator acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 15.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Mr Excavator makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works/Equipment. Mr Excavator's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 15.5 If the Customer is a consumer within the meaning of the CCA, Mr Excavator's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If Mr Excavator is required to replace any Materials under this clause or the CCA, but is unable to do so, Mr Excavator may refund any money the Customer has paid for the Materials.
- 15.7 If Mr Excavator is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then Mr Excavator may refund any money the Customer has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Customer which were not defective.
- 15.8 If the Customer is not a consumer within the meaning of the CCA, Mr Excavator's liability for any defect or damage in the Materials is:

- (a) limited to the value of any express warranty or warranty card provided to the Customer by Mr Excavator at Mr Excavator's sole discretion;
  - (b) limited to any warranty to which Mr Excavator is entitled, if Mr Excavator did not manufacture the Materials;
  - (c) otherwise negated absolutely.
- 15.9 Subject to this clause 15, returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause 15.1; and
  - (b) Mr Excavator has agreed that the Materials are defective; and
  - (c) the Materials are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
  - (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 15.10 Notwithstanding clauses 15.1 to 15.9 but subject to the CCA, Mr Excavator shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Customer failing to properly maintain or store any Materials;
  - (b) the Customer using the Materials for any purpose other than that for which they were designed;
  - (c) the Customer continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) interference with the Works by the Customer or any third party without Mr Excavator's prior approval;
  - (e) the Customer failing to follow any instructions or guidelines provided by Mr Excavator;
  - (f) fair wear and tear, any accident, or act of God.
- 15.11 In the case of second hand Materials, unless the Customer is a consumer under the CCA, the Customer acknowledges that it has had full opportunity to inspect the second hand Materials prior to delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by Mr Excavator as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Customer acknowledges and agrees that Mr Excavator has agreed to provide the Customer with the second hand Materials and calculated the Price of the second hand Materials in reliance of this clause 15.11.
- 15.12 Mr Excavator may in its absolute discretion accept non-defective Materials for return in which case Mr Excavator may require the Customer to pay handling fees of up to twenty percent (20%) of the value of the returned Materials plus any freight costs.
- 15.13 Notwithstanding anything contained in this clause if Mr Excavator is required by a law to accept a return then Mr Excavator will only accept a return on the conditions imposed by that law.

## **16. Intellectual Property**

- 16.1 Where Mr Excavator has designed, drawn, written plans or a schedule of Works, or created any Materials/Equipment for the Customer, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in Mr Excavator, and shall only be used by the Customer at Mr Excavator's discretion.
- 16.2 The Customer warrants that all designs, specifications or instructions given to Mr Excavator will not cause Mr Excavator to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify Mr Excavator against any action taken by a third party against Mr Excavator in respect of any such infringement.
- 16.3 The Customer agrees that Mr Excavator may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or Materials/Equipment which Mr Excavator has created for the Customer.

## **17. Default and Consequences of Default**

- 17.1 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 Mr Excavator's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 17.2 If the Customer owes Mr Excavator any money the Customer shall indemnify Mr Excavator from and against all costs and disbursements incurred by Mr Excavator in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own Customer basis, Mr Excavator's contract default fees, and bank dishonour fees).
- 17.3 Without prejudice to any other remedies Mr Excavator may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions Mr Excavator may suspend or terminate the supply of Works/Equipment to the Customer. Mr Excavator will not be liable to the Customer for any loss or damage the Customer suffers because Mr Excavator has exercised its rights under this clause.
- 17.4 Without prejudice to Mr Excavator's other remedies at law Mr Excavator shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to Mr Excavator shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to Mr Excavator becomes overdue, or in Mr Excavator's opinion the Customer will be unable to make a payment when it falls due;
  - (b) the Customer becomes insolvent or bankrupt, 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 Customer or any asset of the Customer.

## **18. Cancellation**

- 18.1 Mr Excavator may cancel any contract to which these terms and conditions apply or cancel delivery of Works/Equipment at any time before the Works are commenced (or the Materials/Equipment are due to be delivered) by giving written notice to the Customer. On giving such notice Mr Excavator shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to Mr Excavator for Works already performed or Materials/Equipment already provided. Mr Excavator shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.2 In the event that the Customer cancels the delivery of Works/Equipment the Customer shall be liable for any and all loss incurred (whether direct or indirect) by Mr Excavator as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 18.3 Cancellation of orders for Materials/Equipment made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

## **19. Privacy Act 1988**

- 19.1 The Customer agrees for Mr Excavator to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by Mr Excavator.
- 19.2 The Customer agrees that Mr Excavator may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by the Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Customer.
- The Customer understands that the information exchanged can include anything about the Customer's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 19.3 The Customer consents to Mr Excavator being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 19.4 The Customer agrees that personal credit information provided may be used and retained by Mr Excavator for the following purposes (and for other purposes as shall be agreed between the Customer and Mr Excavator or required by law from time to time):
- (a) the provision of Works/Equipment; and/or
  - (b) the marketing of Works/Equipment by Mr Excavator, its agents or distributors; and/or
  - (c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Works/Equipment; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
  - (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Works/Equipment.
- 19.5 Mr Excavator may give information about the Customer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Customer;
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 19.6 The information given to the credit reporting agency may include:
- (a) personal particulars (the Customer's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
  - (b) details concerning the Customer's application for credit or commercial credit and the amount requested;
  - (c) advice that Mr Excavator is a current credit provider to the Customer;
  - (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 Customer'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 Mr Excavator, the Customer has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Customer's credit obligations);
  - (g) advice that cheques drawn by the Customer for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (h) that credit provided to the Customer by Mr Excavator has been paid or otherwise discharged.

## **20. Unpaid Seller's Rights**

- 20.1 Where the Customer has left any item with Mr Excavator for repair, modification, exchange or for Mr Excavator to perform any other service in relation to the item and Mr Excavator has not received or been tendered the



whole of any moneys owing to it by the Customer, Mr Excavator shall have, until all moneys owing to Mr Excavator are paid:

- (a) a lien on the item; and
- (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.

20.2 The lien of Mr Excavator shall continue despite the commencement of proceedings, or judgment for any moneys owing to Mr Excavator having been obtained against the Customer.

## **21. Equipment Hire**

21.1 Equipment shall at all times remain the property of Mr Excavator and is returnable on demand by Mr Excavator. In the event that Equipment is not returned to Mr Excavator in the condition in which it was delivered Mr Excavator retains the right to charge the Customer the full cost of repairing the Equipment. In the event that Equipment is not returned at all Mr Excavator shall have right to charge the Customer the full cost of replacing the Equipment.

21.2 The Customer shall;

- (a) keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to a lien over the Equipment.
- (b) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.
- (c) keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by Mr Excavator to the Customer.

21.3 The Customer accepts full responsibility for the safekeeping of the Equipment and the Customer agrees to insure, or self insure, Mr Excavator's interest in the Equipment and agrees to indemnify Mr Excavator against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Customer will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.

## **22. Building and Construction Industry Security of Payment Act 2002**

22.1 At Mr Excavator's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.

22.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.

## **23. General**

23.1 The failure by Mr Excavator to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Mr Excavator's right to subsequently enforce that provision. 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.

23.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria in which Mr Excavator has its principal place of business, and are subject to the jurisdiction of the Melbourne Courts in that state.

23.3 Subject to clause 15 Mr Excavator shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by Mr Excavator of these terms and conditions (alternatively Mr Excavator's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works/Equipment on hire).

23.4 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by Mr Excavator nor to withhold payment of any invoice because part of that invoice is in dispute.

23.5 Mr Excavator may license or sub-contract all or any part of its rights and obligations without the Customer's consent.

23.6 The Customer agrees that Mr Excavator may amend these terms and conditions at any time. If Mr Excavator makes a change to these terms and conditions, then that change will take effect from the date on which Mr Excavator notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for Mr Excavator to provide any Works/Equipment to the Customer.

23.7 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.

23.8 The Customer warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.