

MAJOR PLANT HIRE AGREEMENT

Rev 01 May 2013



MAJOR PLANT HIRE AGREEMENT – GENERAL TERMS & CONDITIONS

1. AGREEMENT

These General Terms & Conditions govern the rights and obligations of the Supplier and Watpac under the Agreement. Capitalised terms have the meanings given in this Agreement or these General Terms & Conditions, as applicable.

This Agreement contains the entire agreement between the parties and no regard shall be had to any prior dealings. Any terms and conditions that may have been attached or embodied in the Supplier's tender, offer or included in correspondence are deemed to have been withdrawn in favor of the terms and conditions stated in this Agreement.

Subject to the next sentence, if there is a conflict between these General Terms & Conditions and any other document or statement forming part of the Agreement, these General Terms & Conditions shall prevail. In the event that any of these General Terms & Conditions conflict with any Special Conditions, then such Special Conditions shall prevail to the extent of such conflict.

The acceptance by the Supplier of the Agreement or the supply of the Plant/Equipment shall be deemed to be acceptance of the terms of the Agreement and shall constitute a binding contract between the Supplier and Watpac.

Item 6 in the Agreement Details sets out the agreed responsibilities for specified obligations relating to the Plant/Equipment and any Operator and who is to be charged for the reasonable cost of performing those specified obligations. If a particular specified obligation in item 6 is not completed as the responsibility of Watpac it is deemed to be the responsibility of the Supplier.

In this Agreement:

"BUSINESS DAY" means a day that is not a Saturday, Sunday or public holiday in the State or Territory identified as the delivery address in the Agreement Details.

"DRY HIRE" means where the Supplier is not responsible for the provision of an Operator for the Plant/Equipment.

"HIRE RATES" means the rates specified in the Agreement Details.

"INCLUDING" and similar expressions are not words of limitation.

"OPERATOR RATE" is the rate to be applied where both the Plant/Equipment and Operator are on the site and the Operator is operating the Plant/Equipment as directed and to the satisfaction of Watpac and as otherwise provided in clause 19.

"PRINCIPAL" means the person that Watpac contracts with under a head contract in respect of the project.

"SAFETY LEGISLATION" means:

- any legislation covering work health and safety, mining safety, petroleum and gas safety, environment protection and dangerous goods

safety that is applicable to the location and circumstances of the supply and/or operation of the Plant/Equipment;

- regulations made under that legislation;
- any directions on safety or notices issued by any relevant authority or any code of practice or compliance code appropriate or relevant to the works undertaken by the Supplier,

as amended from time to time, including without limitation, as the case may be, the *Mining Act 1978 (WA)*, *Mines Safety and Inspection Act 1994 (WA)*, *Petroleum and Geothermal Energy Resources Act 1967 (WA)*, *Petroleum (Submerged Lands) Act 1982 (WA)*, *Petroleum Pipelines Act 1969 (WA)*, *Coal Mining Safety and Health Act 1999 (Qld)*, *Mining and Quarrying Safety and Health Act 1999 (Qld)*, *Petroleum and Gas (Production and Safety) Act 2004 (Qld)* and *Geothermal Energy Act 2010 (Qld)* as applicable.

"SAFETY REQUIREMENTS" means any direction, instruction, request or requirement relevant or necessary for compliance by Watpac or the Supplier with Safety Legislation, and including any such matter of which the Supplier has been informed by Watpac orally or in writing.

"SMU HOURS" are the engine hours based on the Service Meter Unit (SMU) for each piece of Plant/Equipment.

"STANDBY RATE" is the rate to apply when the Plant/Equipment is in full operating condition and available for operation, but Watpac does not require the use of the Plant/Equipment at that time.

"WET HIRE" means where the Supplier is responsible for the provision of an Operator for the Plant/Equipment.

"WORKING RATE" is the rate that is to be applied when the Plant/Equipment is fully operational and being operated as directed and to the satisfaction of Watpac.

2. ELECTRONIC TRANSACTIONS

The *Electronic Transactions (Victoria) Act 2000 (Vic)*, the *Electronic Transactions Act 2000 (SA)*, the *Electronic Transactions Act 2011 (WA)*, the *Electronic Transactions (Queensland) Act 2001 (QLD)* or the *Electronic Transactions (Northern Territory) Act 2000 (NT)* (as applicable to the State or Territory identified as the delivery address in the Agreement Details) applies to the Agreement. By accepting this Agreement, the Supplier has consented to the provision of these General Terms & Conditions by means of electronic communication via Watpac's website, <http://www.watpac.com.au>.

3. HEALTH AND SAFETY

3.1 The SUPPLIER must carry out its obligations under the Agreement safely and so as to protect persons and property. The Supplier shall ensure that in carrying out its obligations under the Agreement, the Supplier and its

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employees and subcontractors comply with the relevant Safety Legislation and Safety Requirements.

3.2 The SUPPLIER:

- must comply with all relevant Safety Legislation and Safety Requirements;
- warrants that it is familiar with and has the capability and resources to comply with all relevant Safety Legislation and Safety Requirements; and
- must perform all relevant functions and fulfil all relevant duties under all relevant Safety Legislation of an employer, supplier of plant or person conducting a business or undertaking or a role otherwise applicable under Safety Legislation to the role of the SUPPLIER under this Agreement.

3.3 The SUPPLIER must (and must ensure that its contractors and all subcontractors engaged by it to perform works on its behalf) at all times identify and exercise all necessary precautions to ensure its employees, contractors, subcontractors and its employees, Watpac's employees and members of the public are not exposed to risks to their health or safety from the conduct of its undertaking.

3.4 Specific Obligations of SUPPLIER

Without derogating in any way from the SUPPLIER'S obligations under clause 3.2, the SUPPLIER will have the following specific obligations in relation to health and safety:

Risk Assessment: Without limiting the Supplier's obligations under this Hire Agreement, the Supplier must ensure that the risks to the health or safety of any persons arising from the use of the Plant/Equipment have been identified and relevant control measures have been put in place, so far as is reasonably practicable, in order to eliminate or minimise the risks associated with the use of the Plant/Equipment.

Consultation, co-operation and co-ordination: The Supplier must so far as is reasonably practicable consult, co-operate and co-ordinate activities with Watpac and other persons engaged in or associated with the provision of the safe use of Plant/Equipment, in order to:

- achieve effective co-ordination of activities to ensure optimal health and safety risk management; and
- enable Watpac and other relevant parties to comply with their respective obligations under all relevant Safety Legislation.

Provision and maintenance of Plant/Equipment: Without limiting the Supplier's obligation under clauses 9 and 14.

The Supplier must ensure that maintenance of all Plant/Equipment is undertaken to enable Watpac and other parties to use the Plant/Equipment in a manner that is safe and without any risk to health. The Supplier must ensure that all plant supplied is maintained in a condition that is safe and without risk to any person. Watpac may from time to time, request the Supplier to provide relevant documentation to evidence that:

- the Plant/Equipment have been maintained in accordance with the manufacturer's specification; and
- the Plant/Equipment (where required) has been registered in accordance with the relevant Safety Legislation.

Supplier's provision of information: The Supplier must (whether through its agents or contractors and subcontractors), so far as is reasonably practicable:

- provide current information on the requirements for the safe use of, and the risk to health and safety of all persons from, the use of the Plant/Equipment ;
- supply those persons using or exposed to such Plant/Equipment with adequate health and safety information concerning the Plant/Equipment ; and
- advise of any conditions for the safe and proper use and storage of the Plant/Equipment.

The Supplier must inform Watpac of all relevant information which becomes known to the Supplier (or its agents, contractors and subcontractors) concerning the safe use, supply, maintenance or storing of the Plant/Equipment.

The Supplier must also inform Watpac in relation to such Plant/Equipment as required by the Safety Legislation.

Without limiting Clauses 9 and 14, the Supplier must provide Watpac with access to all safety related information on request, including:

- relevant licenses, certifications, authorisations and approvals;
- work method statements in respect of the supply of Plant/Equipment;
- job safety analyses in respect of the supply of Plant/Equipment;
- plant risk assessments;
- induction and training records; and
- incident records and reports.

3.5 Indemnity

Without limiting its obligations elsewhere in this Agreement, the Supplier indemnifies and holds harmless Watpac from and against any cost, expense or liability incurred by the Supplier arising out of or as a result of non-

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compliance or breach by the Supplier or any of its contractors, subcontractors or other persons supplying any part of Plant/Equipment under the Agreement. This shall extend to any costs incurred by Watpac in taking steps to ensure compliance by it or the Supplier or its contractors or subcontractors with Safety Legislation, where such or equivalent steps should have been taken by the Supplier, its contractors or subcontractors in compliance with the Safety Legislation or Safety Requirements.

3.6 Termination for Health and Safety breach

Without limiting anything contained in Clauses 27 or 28, any breach by the Supplier of its obligations under this Clause 3 entitles Watpac at its option:

- to suspend the whole or part of the Agreement ("Suspension") by giving notice to the Supplier and in that event the Supplier is liable for any cost incurred by Watpac by reason of the Suspension (including the cost to Watpac of replacement Plant/Equipment in place of the Plant/Equipment which was provided or to be provided by the Supplier); or
- Subsequent to, or instead of the Suspension, to terminate the Agreement with immediate effect upon the giving of a written notice to the Supplier and in that event the Supplier shall indemnify Watpac for any loss or damage caused by the breach or the termination.

4. SITE

Watpac will give the Supplier sufficient, but non-exclusive, access to the site to carry out its obligations under this Agreement.

The Supplier must co-operate with Watpac, other contractors and other subcontractors of Watpac and their respective employees, consultants and agents in the execution of its obligations under this Agreement.

The Supplier must keep the site clean and tidy during the period of hire and regularly remove rubbish from the site.

Watpac may at any time and for any reason direct the removal from the site of any employee of the Supplier or its subcontractors or suppliers.

5. PERIOD OF HIRE

The Supplier agrees to hire the Plant/Equipment to Watpac on and from the Hire Start Date and Time stated on the Agreement until the date and time notified by Watpac. The Supplier will be notified by Watpac when the Plant/Equipment is no longer required whereupon the period of hire will be deemed terminated and the Plant/Equipment shall be promptly collected from the Delivery Address by the Supplier. Watpac will only be responsible to make payment at the agreed Hire Rates for that period of the hire up to the date of termination of the Agreement and in the case of a monthly or weekly hire only for the portion of

the month or week of hire occurring prior to the termination. The Estimated Hire Finish Date stated on the Agreement is an estimate only and is not guaranteed by Watpac.

6. DELIVERY & COLLECTION

On the Hire Start Date and Time, the Supplier shall deliver the Plant/Equipment to the delivery address stated on the Agreement ("**Delivery Address**") at a point stipulated by Watpac's representative. Transit to and from, loading and off-loading the Plant/Equipment at the Delivery Address shall be the responsibility of the Supplier. Delivery shall be deemed to have occurred when the Plant/Equipment has been delivered in accordance with this clause and is operational and Watpac's representative has accepted receipt of the Plant/Equipment.

On delivery, the Supplier and Watpac shall jointly inspect the Plant/Equipment and record the details of the inspection. Any approval of the Plant/Equipment by Watpac shall not relieve the Supplier of its obligations and liabilities under this Agreement.

At the end of the period of hire, Watpac will make the Plant/Equipment available to the Supplier at the Delivery Address. The Supplier and Watpac shall jointly inspect the Plant/Equipment and record the details of the inspection.

7. CONDITION OF PLANT/ EQUIPMENT

Notwithstanding Watpac's acceptance or right of inspection and notwithstanding any other terms of this Agreement, the Supplier shall ensure and warrants that upon delivery and throughout the period of hire, the Plant/Equipment:

- accords with the manufacturer's specification;
- is in good repair;
- is suitable and fit for the intended purpose and use;
- is suitably licensed for operation;
- is free from any encumbrances;
- is free from any defects in design, materials and workmanship;
- has been maintained in proper working order;
- fully complies with the Technical Requirements;
- complies with all legislative and regulatory requirements.

Watpac relies on this warranty by the Supplier in hiring the Plant/Equipment.

If the Plant/Equipment requires an operator to be positioned upon or in the machine, the Supplier shall ensure that it is fitted with appropriate safety devices including but not limited to seat belts, roll over protection structures (ROPS) and falling object protection structures (FOPS) as required by Watpac, all relevant legislation and the relevant Australian Standards.

The Supplier shall produce on demand by Watpac appropriate documentation to confirm that the Plant/Equipment has been inspected within the past 12 months by a competent person and is in a safe,

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serviceable condition, and complies with all relevant legislation and relevant Australian Standards.

8. REJECTION

Watpac may at any time whether before or after delivery reject any Plant/Equipment found to be inferior, defective, damaged or not in accordance with the Agreement or any supplied or referenced specifications and drawings ("**Technical Requirements**"). Without limiting the liability of the Supplier, Watpac may demand, in its discretion, a refund of payment made by Watpac to date in respect of the rejected Plant/Equipment within seven (7) days or a replacement of the Plant/Equipment within two (2) days, and the Supplier must comply with such demand. The Supplier is liable for all loss, expense and damages incurred by Watpac due to the rejection of the Plant/Equipment. This clause shall apply notwithstanding that the Plant/Equipment have been inspected or tested or that Watpac has paid for the Plant/Equipment.

9. PLANT OPERATOR

Where the Supplier is responsible for the supply of an operator for the Plant/Equipment ("**Operator**"), the Supplier shall ensure that, to the satisfaction of Watpac, at all times that the Operator:

- (a) remains an employee of the Supplier;
- (b) is experienced, competent and fit to operate the Plant/Equipment;
- (c) holds appropriate qualifications, licenses and certificates;
- (d) complies with all safety, environmental and industrial relations legislative and site-specific requirements, all relevant Australian Standards and Watpac's directions, including all prudent fatigue management practices and all requirements to:
 - (i) participate in and comply with site inductions;
 - (ii) use appropriate personal protective equipment (to be provided by the Supplier);
 - (iii) adopt and adhere to safe working procedures; and
 - (iv) inspect the Plant/Equipment prior to each shift; and
- (g) is paid by the Supplier in accordance with the Operator's employment contract and receives the proper working conditions applicable to the site and in accordance with all legislative requirements.

The Supplier acknowledges and agrees that in the event that the Supplier's Operator is unavailable at start of a shift for any reason, Watpac may assign its own operator to operate the relevant Plant/Equipment until the Supplier's Operator becomes available to recommence the services, and the Supplier shall not be entitled to payment for the Supplier's Operator in respect of the shifts for which the Supplier's Operator was unavailable.

Where either the Supplier or the Operator has terminated the Operator's employment, the Supplier shall immediately provide a replacement Operator.

10. COMPLIANCE

In performing its obligations under this Agreement, the Supplier agrees to comply with all laws and regulations applying to the Agreement, the Plant/Equipment and the project generally.

11. INFRINGEMENT

The Supplier warrants that the Plant/Equipment and the hire or use of it will not infringe any patent or any other intellectual property right, and the Supplier covenants that it will defend at its own cost and expense every action which may be brought against Watpac for any alleged infringement of any patent or breach of any other intellectual property right by reason of the use of such Plant/Equipment and the Supplier agrees to pay all costs, damages, fines and profits recoverable in any such action.

12. SUPPLIER'S RESPONSIBILITY FOR PLANT/EQUIPMENT

The Plant/Equipment shall at all times remain the property of the Supplier. Watpac is responsible for maintenance, repair or replacement of parts of the Plant/Equipment only to the extent expressly specified in the Agreement Details, item 6 as the responsibility of Watpac. In all other respects, the Supplier is responsible for all maintenance, repair and replacement of parts of the Plant/Equipment including routine maintenance, all oiling, greasing and other care and maintenance of the Plant/Equipment, repairs, required to ensure its satisfactory performance or for any other purpose. Watpac accepts no responsibility for loss or damage to the Plant/Equipment, except to the extent it actually recovers under insurance policy it has effected under clause 15.

13. DAMAGE TO PERSON OR PROPERTY

The Supplier shall indemnify and keep indemnified Watpac against all loss or damage including claims made on Watpac by third parties and including all physical loss or damage to property, including the works under any head contract with the Principal, and all loss or damage resulting from death or personal injury arising out of or resulting from the operation of the Plant/Equipment or from any other act, error, omission or neglect of the Supplier. The Supplier shall promptly make good the loss of damage at its own expense.

14. PUBLIC LIABILITY INSURANCE

The Supplier shall effect public liability insurance in the joint names of Watpac and the Supplier to cover them for their respective rights and interests against liability to third parties for loss or damage to property (including any indirect or consequential loss) and death of or injury to any person.

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15. REGISTRATION & INSURANCE OF PLANT/EQUIPMENT

The Supplier shall ensure that, at all times during the period of hire, the Plant/Equipment is registered and insured as may be required by law.

The Supplier acknowledges that Watpac has effected insurance to cover loss or damage to any Dry Hire Plant/Equipment having a market value of less than \$2.5 million. The Supplier shall effect comprehensive insurance cover (on terms and with an insurer acceptable to Watpac) for loss or damage to any Plant/Equipment that is on Wet Hire.

The Supplier shall:

- (a) provide Watpac with a written notice identifying Plant/Equipment with a market value over \$10,000 including separately identifying any Plant/Equipment with a market value of \$2.5 million or greater and advising the market value of any such items of Plant/Equipment, a minimum of 24 hours before the Hire start date and time, and
- (b) Indemnify Watpac against any loss or damage resulting from any failure by the Supplier to provide the information in (a) in a timely manner so that Watpac may provide notifications to its insurers including in respect of any Plant/Equipment which has a market value of \$2.5m or more and so Watpac may effect the insurance, or instruct the Supplier in writing to effect insurance of the Plant/Equipment which has a market value of \$2.5m or more.

16. INSURANCE OF EMPLOYEES

The Supplier must maintain insurance during the period of hire against liability for death or injury to persons employed by the Supplier including liability by statute and at common law. The Supplier shall ensure that all of its subcontractors are similarly insured.

17. PROOF OF INSURANCE

Before commencing the hire and whenever requested by Watpac, the Supplier shall produce evidence that it has satisfied all of its insurance obligations under this Agreement. Unless agreed otherwise, such evidence shall be in the form of an original certificate of currency from the relevant insurance company or the Supplier's insurance broker stating the name of the insurance company, the name of the insured party or parties, the policy number, the expiry date and the amount of cover for each policy of insurance the amount of any excess and a copy of the policy wording. Effecting or failing to effect insurance does not limit the Supplier's other liabilities under this Agreement or otherwise.

18. CHANGES

Watpac has the right at any time to make changes to the Agreement, including the quantities or type of the Plant/Equipment or the period of hire. If Watpac issues an amended Agreement with changes to the quantity or type of the Plant/Equipment ordered or the period of hire, the Supplier must promptly notify Watpac whether it can reasonably comply with the

changes. The parties shall then agree a reasonable variation to the Hire Rates, Mobilisation Costs and Demobilisation Costs in respect of the changes to the Agreement, but in no case shall the Hire Rates for particular Plant/Equipment be increased above the Hire Rates set out in the Agreement Details for such Plant/Equipment. No cause of action for breach of contract or other right of action shall arise or be instituted by the Supplier as a result of Watpac changing the Agreement and the only remedy for the Supplier will be the right to payment in accordance with this Agreement for that part of the order that has been completed and claim an adjustment under this clause. Any claim by the Supplier for adjustment under this clause must be made within two (2) weeks from the date of issue of the revised Agreement.

19. HIRE RATES AND COSTS

Subject to clause 18, the Hire Rates for the Plant/Equipment shall be as stated in the Agreement Details and such rates shall not be subject to price escalation.

The **Working Rate** specified in the Agreement Details shall apply at such times as the Plant/Equipment is fully operational as required by this Agreement and the Plant/Equipment is being operated as directed and to the satisfaction of Watpac.

The **Standby Rate** specified in the Agreement Details shall apply during such times as the Plant/Equipment is in full operating condition as required by this Agreement and the Plant/Equipment is available for use on Watpac's works but Watpac does not require the use of the Plant/Equipment at that time.

The Standby Rate is only payable in such circumstances up to a maximum of the minimum hours per day, week or month as specified in the Agreement Details.

The Standby Rate shall not apply on public holidays, rostered days off, Christmas/New Year shut down and at times that Watpac cannot proceed with its works for reasons beyond its reasonable control.

The **Operator Rate** is included in the Working Rate in respect of Wet Hire so that in respect of Wet Hire, no additional amount is payable over the Wet Hire, Working Rate for the Operator but if in respect of a Wet Hire the Operator is not operating the Plant/Equipment as directed and to the satisfaction of Watpac the Wet Hire, Operating Rate will be reduced by the Operator Rate.

The **Mobilisation Cost** specified in the Agreement Details is a lump sum payable by Watpac in respect of the initial delivery of the Plant/Equipment and unloading at the Delivery Address.

The **Demobilisation Cost** specified in the Agreement Details is a lump sum payable by Watpac in respect of the final removal of the Plant/Equipment from the Delivery Address including the removal of all rubbish and other things belonging to the Supplier.

The Supplier agrees that the Hire Rates, Mobilisation Cost and Demobilisation Cost together include an allowance for the cost of complying with its obligations under this Agreement including:

- (a) the cost of delivery to, and collection from, the Delivery Address;

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- (b) unloading, erecting or assembling and maintaining the Plant/Equipment (as applicable); and
- (c) all amounts due in respect of insurance, duties, taxes and packing costs and any other costs and expenses associated with manufacturing, delivering and/or supplying the Plant/Equipment.

20. AVAILABILITY

The Supplier shall ensure that the Plant/Equipment is in full operating condition as required by this Agreement and available for use on Watpac's works for the minimum hours per day, week and/or month as specified in the Agreement Details.

If the item of Plant/Equipment has not been available for at least 90% of the minimum hours per day, week and/or month (as applicable) over any one month period, Watpac has the right to:

- (a) request the item of Plant/Equipment to be replaced by the Supplier, in which case the Supplier must do so promptly at no extra charge to Watpac; and
- (b) pay worked SMU hours only regardless of any stated minimum hours; and/or
- (c) exercise any rights under clause 27.

21. TIMES TO BE AGREED

The authorised representatives of the Supplier and Watpac shall meet as stated below to agree in writing the times for which the Working Rate, Standby Rate and Operator Rate shall apply. Such meetings shall be at the end of each day's work for hourly and daily hired Plant/Equipment and at the end of each week's work for weekly or monthly hired Plant/Equipment.

If the Supplier's representative fails to meet with Watpac's representative at the times stated above, Watpac's representative shall determine the times for which the Working Rate, Standby Rate and Operator Rate shall apply for the relevant period of hire and Watpac's representative's determination shall be final and binding.

22. PROGRESS CLAIMS & PAYMENT

Each month on or before the time for submission of claims stated in the Agreement, the Supplier shall submit to Watpac one payment claim in a form acceptable to Watpac setting out details of:

- (a) the amount for the hire of the Plant/Equipment at the Hire Rates stated in the Agreement for the times agreed or determined pursuant to clause 21 for the period of hire since the previous payment claim, or since the Hire Start Date and Time in the case of the first payment claim, adjusted for any additions or deductions under this Agreement;
- (b) in the case of the first payment claim only, the Mobilisation Cost;
- (c) in the case of the final payment claim only, the Demobilisation Cost; and

- (d) any other amounts which are payable by Watpac to the Supplier under the Agreement.

Where the delivery address for the Plant/Equipment is in Western Australia, within [10] business days of receiving the Supplier's payment claim, Watpac will issue to the Supplier a payment schedule setting out the amount payable to the Supplier including details of any adjustments to the amount set out in the Supplier's payment claim to take into account Watpac's determination of the value of hire completed, the value of hire included in previous progress payments and any other additions or deductions.

Subject to clause 24, Watpac shall pay the Supplier the amount set out in the payment schedule issued to the Supplier by the later of:

- (e) the date for payment stated in the Agreement; and
- (f) the date when the Supplier has submitted a payment claim in accordance with this clause and effected the insurances required by clause 14 to 16 and provided evidence of this to Watpac in accordance with clause 17,

but, if the State or Territory identified as the delivery address in the Agreement Details is Western Australia or Northern Territory, no later than fifty (50) days from the date of a valid payment claim.

Unless agreed otherwise, payment shall be made by electronic funds transfer to the Supplier's account.

23. ADJUDICATION

- (a) If the Supplier applies for adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic), the parties agree that the Authorised Nominating Authority for the purposes of that Act in respect of such an adjudication application is one of the following bodies:

- (i) Building Adjudication Victoria Inc;
- (ii) LEADR; or
- (iii) Rialto Adjudications Pty Ltd.

- (b) In these clauses 25(b) and 25(c), "**Security of Payment Law**" means the *Construction Contracts Act 2004* (WA), *Building and Construction Industry Payments Act 2004* (Qld), *Construction Contracts (Security of Payments) Act 2004* (NT) or the *Building and Construction Industry Security of Payment Act 2009* (SA) (as applies in the State or Territory identified as the delivery address in the Agreement Details) and "**Appointor**" means (in Western Australia and Northern Territory) the prescribed appointor and (in Queensland and South Australia) the authorised nominating authority (each as defined in the Security of Payment Law as applies in the State or Territory identified as the delivery address in the Agreement Details).

- (c) The parties agree that for the purposes of any adjudication under the Security of Payment Law in relation to the Agreement or the work to be done pursuant to the Agreement, the Appointor shall be the Institute of Arbitrators and Mediators Australia.

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24. DEDUCTIONS AND SET-OFF

Watpac may deduct from moneys otherwise due to the Supplier any debt or other moneys due from the Supplier to Watpac and any claim to money which Watpac reasonably believes it has against the Supplier whether for damages or otherwise, whether under the Agreement or otherwise at law relating to the Plant/Equipment.

Without limiting Watpac's rights under the paragraph above and clauses 27 and 28, if the Supplier fails to:

- (a) promptly and properly make good any damage or loss for which the Supplier is responsible;
- (b) supply items to be supplied to the Supplier;
- (c) remove rubbish or other items belonging to the Supplier;
- (d) properly maintain and/or repair the Plant/Equipment: and/or
- (e) comply with other requirements of this Agreement,

Watpac may, at its sole discretion and without obligation, rectify such failure at the Supplier's risk and expense and deduct such expense from monies due to the Supplier.

25. GST

Unless this Agreement provides otherwise, and subject to this clause, any consideration that may be provided for under the Agreement is exclusive of goods and services tax ("**GST**") pursuant to the *A New Tax System (Good and Services Tax) Act 1999* (Cth). If a party makes a taxable supply in connection with this Agreement for a consideration which represents its value, then the recipient of the taxable supply must also pay, at the same time and in the same manner as the value is otherwise payable, the amount of any GST payable in respect of the taxable supply subject to the provision to the recipient of a valid tax invoice.

26. SUSPENSION UNDER HEAD CONTRACT

Where the works are suspended under any head contract in respect of the Project between Watpac and the Principal, Watpac may immediately suspend the hire of the Plant/Equipment and the services of the Operator (if applicable) under this Agreement.

If the suspension under the head contract is not a result of any default or action by the Supplier or any of its employees, agents or subcontractors and is not as a result of weather conditions, Watpac will:

- (a) subject to the conditions set out in clause 19, pay the Supplier the Standby Rates for the Plant/Equipment for the minimum hours set out in the Agreement for the period of the suspension; and
- (b) reimburse the Supplier for the additional reasonable costs it incurred, as a direct consequence of the suspension.

The Supplier acknowledges and agrees that the remedy set out in this clause is its sole and exclusive remedy in respect of a suspension of this Agreement flowing from to a suspension under the head contract.

27. DEFAULT OF THE SUPPLIER

The Supplier is in default of this Agreement if:

- (a) an Insolvency Event occurs in respect of the Supplier;
- (b) the Supplier fails to deliver the Plant/Equipment to the Delivery Address by the Hire Start Date and Time and in accordance with this Agreement;
- (c) the Supplier fails to replace defective Plant/Equipment in accordance with this Agreement;
- (d) without reasonable cause, wholly or substantially suspends performance of its obligations under this Agreement;
- (e) the Supplier fails to comply with a notice from Watpac and by such failure Watpac's works or the time for completion under any head contract with the Principal is materially affected; or
- (f) the Supplier fails to perform or observe any other obligation contained in this Agreement to be performed by the Supplier.

If Watpac considers that the Supplier is in default of this Agreement, Watpac may in its absolute discretion by written notice to the Supplier:

- (g) suspend any payment due to the Supplier until the default has been remedied;
- (h) cancel the order for the Plant/Equipment in part; or
- (i) terminate the Agreement.

Watpac's notice shall specify the default and state the right it is exercising under this clause 27.

If Watpac cancels the order for the Plant/Equipment in part under this clause 27, then Watpac may hire similar Plant/Equipment from an alternative supplier and the Supplier must indemnify Watpac for any additional cost it may incur in doing so.

If Watpac terminates the Agreement under this clause 27, then Watpac may also recover from the Supplier all monies paid for undelivered Plant/Equipment and/or hire similar Plant/Equipment from an alternative Supplier and the Supplier must indemnify Watpac for any additional cost it may incur in doing so.

In this clause, "**Insolvency Event**" includes the following events—

- (j) the Supplier informs Watpac or creditors generally that it is insolvent or is financially unable to proceed with the Agreement;
- (k) execution is levied against the Supplier by a creditor which is not satisfied, set aside or withdrawn within 14 days of its issue;
- (l) an order for payment is made or judgment entered against the Supplier which is not satisfied within 14 days;
- (m) the Supplier suspends payment of its debts;
- (n) where the Supplier is an individual person or a partnership and the Supplier:
 - (i) commits an act of bankruptcy, files or has filed against it a petition in bankruptcy or is made bankrupt;

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- (ii) makes a proposal for a scheme of arrangement or a composition; or
 - (iii) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition or has a sequestration order made, under Part X of the *Bankruptcy Act 1966* (Cth); or
- (o) where the Supplier is a corporation and:
- (i) notice is given of a meeting of creditors with a view to the Supplier entering a deed of company arrangement, entering a scheme of arrangement or composition with creditors or placing the Supplier under official management;
 - (ii) the Supplier enters a deed of company arrangement or scheme of arrangement or composition with creditors;
 - (iii) a controller (as defined in section 9 of the *Corporations Act 2001*) is appointed of any of the property of the Supplier or any steps are taken for the appointment of a controller (but not where the steps taken are reversed or abandoned within 14 days);
 - (iv) an application is made to a court for the winding up of the Supplier and not stayed within 14 days; or
 - (v) a winding up order is made in respect of the Supplier.

28. TERMINATION FOR CONVENIENCE

Watpac may at any time for its sole convenience, terminate the Agreement by written notice to the Supplier. If Watpac so terminates the Agreement, Watpac may hire similar Plant/Equipment from an alternative supplier.

No later than twenty eight (28) days after receiving Watpac's written notice of termination under this clause, the Supplier may submit a payment claim setting out details of:

- (a) any amount which would have been payable to the Supplier for the hire of the Plant/Equipment up to and including the date of termination as if the Agreement had not been terminated, calculated at the Hire Rates stated in the Agreement for the times agreed or determined pursuant to clause 21; and
- (b) all reasonable costs of demobilising from the site, all Plant/Equipment and other items used in the performance of the Supplier's obligations, limited to the amount of the Demobilisation Cost.

If Watpac terminates the Agreement under this clause 28 and the Supplier has submitted a payment claim in accordance with this clause, Watpac shall pay the Supplier Watpac's determination of the amounts referred to in paragraphs (a) and (b) above and any other additions or deductions.

The Supplier's entitlement to payment under this clause 28 will be the Supplier's sole and full entitlement to compensation arising out of or in connection with Watpac's exercise of its rights under this clause. Following Watpac's exercise of its rights under this clause, the Supplier releases Watpac from any claim by it for any cost, expense, loss or damage on any basis whatsoever including under the Agreement, in tort (including negligence), under any statute, or a quantum meruit, under quasi contract, for unjust enrichment, for frustration or under any other principle of law, to the maximum extent permitted by law. If Watpac terminates the Agreement under this clause 28, the Supplier must take all steps necessary to mitigate the expense, cost or loss incurred as a result of the termination.

29. ASSIGNMENT & SUBCONTRACTING

The Supplier shall not assign the whole or any part of the Agreement nor any payment, right or interest thereunder nor subcontract the performance of its obligations under the Agreement or any part thereof, without the prior written approval of Watpac. Approval to subcontract shall not release the Supplier from any liability or obligation under this Agreement.

30. RELEASE

Upon completion of the hire and payment of the final payment to the Supplier, the Supplier hereby fully releases and discharges Watpac and its employees and agents from and against all claims, demands and causes of action and proceeding of every kind and nature which the Supplier may or might have had or might assert to have.

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31. PERSONAL PROPERTY SECURITY ACT

A term defined in the Personal Property Securities Act 2009 (Cth) ("PPSA") and any regulations made under the PPSA (together, the "PPS Law") has the same meaning when used in this clause 31.

The Hirer acknowledges that the Supplier wishes to take all reasonable steps which are prudent for the Supplier's business under or in relation to the PPSA. The Hirer must take reasonable steps to assist the Supplier to register, perfect and protect any security interest in the Supplier's favour in connection with this Hire Agreement, except to the extent it is reasonable not to do so, taking into account the costs and risks involved.

Subject to any other clause of this Hire Agreement which expressly permits the disclosure of such information, the parties agree that neither of them will disclose any information of the kind mentioned in section 275(1) of the PPSA. This paragraph survives the termination of this Hire Agreement.

To the extent that Chapter 4 of the PPSA would otherwise apply to enforcement by the Hirer of any security interest in collateral, the parties agree that the following provisions of the PPSA are excluded:

- (a) to the extent section 115(1) of the PPSA allows them to be excluded: sections 132(4) and 135 of the PPSA; and
- (b) to the extent section 115(7) of the PPSA allows them to be excluded: sections 129(2) and (3), 134(2) and 135.

32. NOTIFICATION OF CLAIMS

To the extent permitted by law, Watpac will not be liable upon any claim of any kind whatsoever by the Supplier arising out of or in connection with this Agreement, or pursuant to any principle of law or basis of law including but not limited to common law, equity and statute unless the Supplier has given Watpac notice in writing:

- (a) where this Agreement specifies a time period for giving a notice, before the expiry of that period including all particulars required to be included in the notice in accordance with the relevant provision; or
- (b) in all other cases, within five (5) days after the first occurrence of the events or circumstances on which the claim is based that it intends to make a claim and within five (5) days after that notice provides Watpac with detailed particulars concerning the events or circumstances on which the claim will be based and how they have affected the Supplier.

33. JURISDICTION

The law of the State or Territory identified as the delivery address in the Agreement Details governs the Agreement.

34. NON-WAIVER

Any failure of Watpac to insist upon strict performance of any of the terms of the Agreement shall not be deemed a waiver of any subsequent default of them.

The shipping or receiving of any article under the Agreement shall not be deemed a waiver of any rights for any prior failure by the Supplier to comply with any of the conditions of the Agreement.

35. BUILDING CODE

Alternative 1 – Agreements up to \$25,000

The Building Code 2013 ("the Building Code") applies to this Project. By entering into the Agreement, the Supplier will be taken to have read and to agree to comply with the Building Code. Copies of the Building Code are available at <http://deewr.gov.au/building-code-2013>.

Alternative 2 – Agreements over \$25,000

- (a) The Supplier must comply with the *Building Code 2013* ("the Building Code"). Copies of the Building Code are available at <http://deewr.gov.au/building-code-2013>.
- (b) Compliance with the Building Code shall not relieve the Supplier from responsibility to perform the Agreement, or from liability for any defect in the works arising from compliance with the Building Code.
- (c) Where a change in the Agreement is proposed and that change would affect compliance with the Building Code, the Supplier shall submit a report to Watpac and the Commonwealth specifying the extent to which the Supplier's compliance with the Building Code will be affected.
- (d) The Supplier must maintain adequate records of compliance with the Building Code by the Supplier, its subcontractors, its consultants and its Related Entities (as defined in the Building Code).
- (e) While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Supplier may give preference to subcontractors and consultants that have a demonstrated commitment to:
 - (i) adding and/or retaining trainees and apprentices;
 - (ii) increasing the participation of women in all aspects of the industry; or
 - (iii) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
- (f) The Supplier must not appoint a subcontractor or consultant in relation to the project where:
 - (i) the appointment would breach a sanction imposed by the Minister; or
 - (ii) the subcontractor or consultant has had an adverse Court or Tribunal decision (not including decisions under appeal) for a breach of workplace relations law, work health and safety law, or workers' compensation law and the subcontractor or consultant has not fully complied, or is not fully complying, with the order.(g) The Supplier agrees to require that it and its subcontractors or

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consultants and its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate (each a **"Commonwealth Representative"**), with access to:

- (i) inspect any work, material, machinery, appliance, article or facility;
- (ii) inspect and copy any record relevant to the project and works the subject of this Agreement; and
- (iii) interview any person,

as is necessary to demonstrate its compliance with the Building Code.

- (h) Additionally, the Supplier agrees that the Supplier and its Related Entities will agree to a request from a Commonwealth Representative to produce a specified document within a specified period, in person, by fax or by post.
- (i) The Supplier must ensure that all subcontracts impose obligations on its subcontractors equivalent to the obligations imposed on the Supplier under this clause 35.

36. PROPORTIONATE LIABILITY

- (a) In this clause 36, **"Apportionment Legislation"** means:
 - (i) the *Proportionate Liability Act 2005* (NT);
 - (ii) Chapter 2, Part 2 of the *Civil Liability Act 2003* (Qld);
 - (iii) Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and section 72 of the *Development Act 1993* (SA);
 - (iv) Part IVAA of the *Wrongs Act 1958* (Vic); and
 - (iv) Part 1F of the *Civil Liability Act 2002* (WA)
- (b) The parties agree that to the extent permitted by law, the operation of the Apportionment Legislation is excluded in relation to all and any rights, obligations and liabilities arising out of or in connection with this Agreement or the work under this Agreement whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or on the basis of quantum meruit, quasi contract or of any other principle of law or equity.
- (c) The Supplier further agrees to include the following terms in each subcontract it enters

into in relation to any part of the work under this Agreement:

- (i) to the extent permitted by law, the operation of the Apportionment Legislation shall be excluded in relation to all rights, obligations and liabilities arising out of or in connection with each subcontract or the work of the subcontractor whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or on the basis of quantum meruit, quasi contract or of any other principle of law or equity; and
 - (ii) the subcontractor warrants in favour of Watpac that the subcontractor will not seek to rely upon any of the provisions of the Apportionment Legislation in any proceedings taken by Watpac against the Supplier or the subcontractor arising out of or in connection with the work of the subcontractor required to be executed by it under the subcontract.
- (d) To the extent permitted by law, the Supplier indemnifies Watpac against the difference (if any) between:
 - (i) the amount of any loss, damage, cost and expense suffered or incurred by Watpac for which, but for the Apportionment Legislation, Watpac would otherwise have been entitled to recover from the Supplier; and
 - (ii) the liability to Watpac of the Supplier as determined by any court under the Apportionment Legislation.

37. SEVERABILITY

- (a) If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.
- (b) If any provision in this Agreement is unenforceable, illegal or void in one jurisdiction but not in another jurisdiction or makes this Agreement or any part of it unenforceable, illegal or void in one jurisdiction but not in another jurisdiction, then that provision is severed only in respect of the operation of this Agreement in the jurisdiction where it is unenforceable, illegal or void unless this would change the underlying principal commercial purposes of the Agreement.

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