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Terms and Conditions of Trade

Following are the Terms and Conditions of Trade (“Trading Terms”) for **NS EARTHMOVING PTY LTD (ACN 111 665 797)** and each related body corporate, any subsidiary or associated entity and as trustee of any trust from time to time (individually and together called “**NS EARTHMOVING**”).

- 1) **Payment:** The Customer must pay for all purchases within fourteen (14) days of the date on which the invoice is generated, or within any alternative credit period granted in writing by NS Earthmoving. Amounts payable by the Customer under these Credit Terms must be paid in full without deduction, retention or set-off of any kind and for any reason.
- 2) **Interest and Administration fee:** NS Earthmoving is entitled to charge the Customer:
 - a) interest on amounts not paid within the credit period specified by NS Earthmoving at a rate equivalent to 3% p.a. above the annual business overdraft interest rate of its principal banker, as determined and calculated by NS Earthmoving, in its discretion; and
 - b) if any account remains unpaid at the end of the second month after the invoice is generated, an immediate amount the greater of \$20.00 or 10.0% of the amount overdue for administration fees, which sum shall become immediately due and payable. The Customer acknowledges that this fee is a genuine pre-estimate by NS Earthmoving of the loss, costs and expenses which shall be incurred by reason of the Customer’s default in payment and the recovery thereof.
- 3) **GST:** Each amount payable by the Customer under these Trading Terms in respect of a Taxable Supply by NS Earthmoving is a GST exclusive amount and on receipt of a tax invoice the Customer must, in addition to that amount and at the same time, pay the GST payable in respect of that supply. “Taxable Supply” and “GST” have the meanings set out in the A New Tax System (Goods and Services) Act 1999 (Cth).
- 4) **Withdrawal or Variation of Credit:** NS Earthmoving may at any time, without the need to provide a reason, vary or withdraw any credit granted to the Customer. Where the Customer completes a further Application for a Commercial Trading Account, that Application will not be in derogation of but in addition to any previous general Trading Terms existing except as notified by NS Earthmoving (or any of its related entities, subsidiaries and assigns and as Trustee of any Trust) in writing.
- 5) **Charge over Customer’s Property:** As security for payment to NS Earthmoving of all moneys payable by the Customer and for the Customer’s obligations generally under these Trading Terms, the Customer charges in favour of NS Earthmoving the whole of the Customer’s undertaking, property and assets (including without limitation all of the Customer’s interests, both legal and beneficial, in freehold and leasehold land) both current and later acquired. The Customer irrevocably appoints each Officer as the Customer’s attorney to do all things necessary to create and register each such charge. Upon demand by NS Earthmoving, the Customer agrees to immediately execute a mortgage or other instrument in terms satisfactory to NS Earthmoving to further secure payment of the money payable by the Customer. If the Customer fails within a reasonable time of such demand to execute such mortgage or other instrument, then the Customer acknowledges that NS Earthmoving may execute such mortgage or other instrument as the Customer’s attorney pursuant to the appointment of NS Earthmoving as the Customer’s attorney set out in these Trading Terms.
- 6) **Suspension or Ceasing of Supply:**
 - a) NS Earthmoving may in NS Earthmoving’s complete discretion and without incurring any liability to the Customer, cease or suspend supply of Products and Services to the Customer or amend these Trading Terms.
 - b) without limiting clause 6(a), if an Event of Default occurs, NS Earthmoving may, without prejudice to NS Earthmoving’s other rights, call up moneys owed to NS Earthmoving by the Customer, retain all

moneys paid on account, or cease further deliveries and recover from the Customer all loss of profits and other costs arising from the Event of Default and/or take immediate possession of any Products and Services for which payment remains outstanding.

- 7) **Liability of NS Earthmoving:** NS Earthmoving will not be liable for any loss or damage whatsoever suffered by the Customer as a result of any act, omission or statement made by NS Earthmoving, its employees, contractors or agents.
- 8) **Certification:** A statement signed by an Officer certifying the amount of any moneys payable by the Customer, or identifying any Products and Services, as being “unpaid for” is, in the absence of manifest error, conclusive and binding on the Customer.
- 9) **Notification of Change of Details:** The Customer will provide written notice to NS Earthmoving of any change in the Customer’s structure or management, including any change of director, shareholder, partnership, trusteeship or address within 7 days of the change.
- 10) **Continuing Guarantee:** All guarantees under or related to these Trading Terms will be continuing guarantees and will terminate only with NS Earthmoving’s written agreement.
- 11) **Set-Off:** NS Earthmoving may at any time set-off amounts owed by NS Earthmoving to the Customer against amounts owed by the Customer to NS Earthmoving.
- 12) **Property:**
 - a) Where Products are to be supplied by way of sale, property in the Products shall not pass until the Customer has paid all money owing to NS Earthmoving in full. Risk in the Products passes to the Customer at the time of delivery.
 - b) The Customer holds the Products as fiduciary bailee and agent for NS Earthmoving and must keep the Products physically separate from all other goods of the Customer, and clearly identified as owned by NS Earthmoving until payment of all moneys owed by the Customer to NS Earthmoving. If an Event of Default occurs, then without prejudice to NS Earthmoving’s other rights, NS Earthmoving may, without notice to the Customer enter any premises occupied by the Customer or any other place where the Products may be and recover possession of the Products.
 - c) If the Customer sells any of the Products supplied while money is owed to NS Earthmoving, the Customer must keep the proceeds of the sale in a separate account and not mix them with any other funds.
 - d) If the Products are resold, or goods and/or services using the Products are manufactured and resold by the Customer, the Customer holds all of the book debts owed in respect of such sales and proceeds of such sales in trust for NS Earthmoving. Such part of the book debts and proceeds will be deemed to equal in dollar terms the amount owed by the Customer to NS Earthmoving at the time of the receipt of such book debts. The Customer must not assign or grant a security interest in respect of such book debts without NS Earthmoving’s prior written consent.
 - e) If the Customer uses the Products in some manufacturing process of its own or of some third party, then the Customer shall hold such part of the proceeds of such manufacturing process as relates to such Products in trust for NS Earthmoving. Such part shall be deemed to equal in dollar terms the amount owing by the Customer to NS Earthmoving and at the time of payment of such proceeds the Customer’s obligation to pay the amount owed for such Products will be discharged.
- 13) **Personal Property Securities Act (Cth) 2009 (“PPSA”):** The Customer grants to NS Earthmoving (under **clause 6(a)**) a “**Financing statement**”, “**financing change statement**”, “**security interest**”, “**purchase money security interest**”, “**attached**”, “**attachment**”, “**perfected**”, “**accession**”, “**commingled**” and all related terms have the meaning given to them by the PPSA.
 - a) In consideration of NS Earthmoving supplying the Services to the Customer at the request of the Customer, the Customer by signing these Trading Terms:
 - i) grants to NS Earthmoving a “Purchase Money Security Interest” (“**PMSI**”) in all Products supplied by NS Earthmoving to the Customer from time to time as security for payment of the purchase price of the Products;
 - ii) grants to NS Earthmoving a “Security Interest” (“**SI**”) in all of its present and after-acquired property and in all of its present and future rights in relation to any personal property (as defined in the PPSA) from time to time as security for payment of any amount owed by the Customer to NS Earthmoving and as security for the performance by the Customer of the obligations set out in these Credit Terms;

- iii) agrees that any Products or proceeds of sale of the Products coming into existence after the date of these Trading Terms will come into existence subject to the PMSI and SI granted herein and these Trading Terms without the need for any further action or agreement by any party;
 - iv) acknowledges that the Customer has received valuable consideration from NS Earthmoving and agrees that it is sufficient;
 - v) agrees that the PMSI and SI has attached to all Products supplied now or in the future by NS Earthmoving to the Customer and that the attachment of the PMSI has in no way been deferred or postponed.
- b) NS Earthmoving reserves the right to register a financing statement in the Personal Properties Securities Register to perfect the PMSI and/or SI created under these Trading Terms.
 - c) The costs of registering a financing statement or a financing change statement can be charged to the Customer by NS Earthmoving at NS Earthmoving's complete discretion, and may, where applicable, be charged to the customer's credit account with NS Earthmoving.
 - d) The Customer must promptly, on request by NS Earthmoving, execute all documents and do anything else reasonably required by NS Earthmoving to ensure that the PMSI and SI created under these Trading Terms constitutes a perfected security interest.
 - e) The Customer must not agree to allow any person to register a financing statement over any of the Products in which NS Earthmoving has any PMSI and/or SI without the prior written consent of NS Earthmoving and will immediately notify NS Earthmoving if the Customer becomes aware of any person or entity taking steps to register a financing statement in relation to any such Products.
 - f) The Customer must not allow the Products to become accessions or commingled with other goods unless NS Earthmoving has first perfected any PMSI or SI that NS Earthmoving has in relation to the Products.
 - g) If NS Earthmoving perfects any PMSI and/or SI that NS Earthmoving has in relation to the Products, the Customer must not do anything that results in NS Earthmoving having less than the security or priority granted by the PPSA that NS Earthmoving assumed at the time of perfection, subject only to the rights of a mortgagee pursuant to a registered mortgage.
 - h) The Customer irrevocably grants to NS Earthmoving the right to enter upon the Customer's property or premises, without notice, and without being in any way liable to the Customer or to any third party, if NS Earthmoving has cause to exercise any of NS Earthmoving's rights under Chapter 4 of the PPSA, and the Customer will indemnify NS Earthmoving for any claims made by any third party as a result of such exercise.
 - i) **The Customer acknowledges and agrees that: -**
 - i) Nothing in sections 125, 132(3)(d), 142 and 143 of the PPSA will apply to these Trading Terms;
 - ii) The Security Agreement created by these Terms of Sale may only be reinstated on the terms considered appropriate by NS Earthmoving at its complete discretion.
 - j) The Customer acknowledges and agrees that to the full extent permitted by law and mentioned below, the following provisions of the PPSA will not apply to the enforcement of any PMSI and SI created under these Trading Terms, and the Customer waives it's right to: -
 - i) not have goods damaged or be inconvenienced any more than necessarily incidental if NS Earthmoving removes an accession under s.92 PPSA;
 - ii) to receive notice of any intention to remove an accession under s.95(1)(a);
 - iii) to apply to the Court for an order postponing the removal of the "accession" or to determine the amount payable to NS Earthmoving for the retention of the accession under s.97 PPSA
 - iv) to receive notice of a decision to enforce the security interest in personal property in the same way as an interest in land which secures the same obligation under s.118(1)(b)(i) PPSA;
 - v) to receive notice of the enforcement of liquid assets under s.121(4) PPSA
 - vi) to receive notice of any proposal to dispose of collateral under s.130(1)(a) PPSA;
 - vii) to receive a Statement of Account if no disposal under s.132(4) PPSA;
 - viii) to receive notice of any proposal to retain collateral under s.135(1)(a) PPSA; and
 - ix) to receive notice of a verification statement in relation to any registration event (including registration of a financing statement or a financing change statement) relating to the PMSI and SI created under these Trading Terms under s.157 PPSA.

14) **Effect of Other Terms:** These Trading Terms are supplemented by the Trading Terms on NS Earthmoving's website at www.nsearthmoving.com.au and are in no way affected or amended by any

other express or implied terms. No terms of the Customer apply to any agreement between the Customer and NS Earthmoving.

- 15) **Expenses:** The Customer must pay to NS Earthmoving any costs, charges and expenses (including all stamp duty and legal fees and costs and debt recovery expenses on a full indemnity basis as a liquidated debt) incurred by NS Earthmoving in connection with the entry into these Trading Terms, the exercise or attempted exercise of any power, right or remedy under these Trading Terms and/or the failure of the Customer to comply with these Trading Terms.
- 16) **Service of Notices and Documents:** All notices or documents required to be given to NS Earthmoving for the purposes of the PPSA must be given in accordance with the PPSA. Any notices or documents required to be given by NS Earthmoving to the Customer for the purposes of the PPSA or for any other purposes will be effectively 'given', 'served' and 'delivered' if sent by NS Earthmoving to the Customer by pre-paid ordinary post to any one of the following addresses: -
 - a) the last address for the Customer known to NS Earthmoving;
 - b) if the Customer is a Company, the registered office or principal place of business; or
 - c) if the Customer trades under a registered business name, any address contained on a current business extract for that business name.
- 17) **Transactions:** The Customer will be liable for all transactions and expenses involving the Customer's credit account including any fraudulent use of the account by the Customer or any person authorised by the Customer to use the account or the Customer's employees, agents or contractors. The Customer will also be liable for any fraudulent use of the Customer's credit account which is directly or indirectly caused or contributed to by the Customer's negligence.
- 18) **Application of Moneys Received:** If NS Earthmoving receives or recovers money in respect of a debt of the Customer, NS Earthmoving may use the money to pay off whichever debt or part of a debt NS Earthmoving chooses and is not compelled to apply the money as directed by the Customer or any other person.
- 19) **Indemnity:** The Customer will indemnify NS Earthmoving in relation to any direct or indirect loss, liability or damage suffered by NS Earthmoving or any other person as a result of the Customer's negligence or breach of these Trading Terms.
- 20) **Trusts:** These Trading Terms bind the Customer both personally and as trustee of any trusts of which the Customer is trustee.
- 21) **Joint and Several:** If the Customer consists of more than one person, the obligations of each person are joint and several.
- 22) **Severance:** Each clause, subclause and part of these Trading Terms is separate and independent. If any clause or subclause or part is found to be invalid or ineffective, the other clauses or subclauses or parts will not be adversely affected.
- 23) **Waiver:** Any waiver by NS Earthmoving must be in writing signed by NS Earthmoving. In the event that NS Earthmoving elects not to exercise any of NS Earthmoving's rights arising in connection with these Trading Terms, NS Earthmoving's election will not constitute a waiver of any rights relating to any other breach of these Trading Terms.
- 24) **Amendments:** These Trading Terms may only be amended with NS Earthmoving's express written agreement.
- 25) **Assignment:** The Customer may not assign any agreement under these Trading Terms without NS Earthmoving's prior written consent.
- 26) **Engagement:** Any instructions received by NS Earthmoving from the Customer for the Works and/or the Customer's acceptance of Equipment supplied on hire by NS Earthmoving and/or Products or Services supplied by NS Earthmoving shall constitute acceptance of these Trading Terms ("**Engagement**"). Where more than one Customer has entered into this agreement, they shall be jointly and severally liable under these Trading Terms. Upon Engagement, these Trading Terms are irrevocable and can only be amended with the written consent of NS Earthmoving. The Customer shall not make any claim of Work performed after the Customer has signed the Job Docket(s) provided by NS Earthmoving to the Customer. A signature on the Job Docket(s) indicates that the Work has been completed to the Customer's satisfaction.
- 27) **Supply of Equipment:** Equipment is supplied by NS Earthmoving based only on these Trading Terms to the exclusion of anything to the contrary in the terms of the Customer's order, notwithstanding that any such order is placed on terms that purport to override these Trading Terms. Subject to these Trading

Terms, NS Earthmoving shall supply all consumables necessary for the operation of the Equipment, the Equipment itself, and (in the event of wet hire) the operator(s) for the Equipment. NS Earthmoving is responsible for the repair and maintenance of the Equipment, and the Customer is not authorised to order or carry out any repair on the Equipment without the prior written consent of NS Earthmoving.

28) **Special Conditions:** NS Earthmoving's Special Conditions as annexed to any Quotation from NS Earthmoving from time to time, shall form part of and are intended to be read in conjunction with these Trading Terms.

29) **Price:**

- a) Unless otherwise confirmed in writing, the Price shall be in accordance with NS Earthmoving's current price list, as amended from time to time.
- b) In the alternative to 29(a) above, at NS Earthmoving's sole discretion, the Price shall be either:
 - i) As indicated on invoices provided by NS Earthmoving to the Customer in respect of Equipment supplied on hire; or
 - ii) As indicated on the Job Docket(s) provided by NS Earthmoving to the Customer from time to time; or
 - iii) NS Earthmoving's quoted price (subject to these Trading Terms) which shall be binding on NS Earthmoving provided that the Customer accepts the said quote in writing within thirty (30) days of issue;
- c) NS Earthmoving reserves the right to change the Price in the event of any variation to NS Earthmoving's quotation;
- d) In the event of Wet Hire, charges will be tracked using the NS Earthmoving Job Docket Book which is to be filled out by NS Earthmoving's operator;
- e) At NS Earthmoving's sole discretion, a bond may be required which shall be refunded upon the return of the Equipment in a condition acceptable to NS Earthmoving;
- f) At NS Earthmoving's sole discretion, a deposit may be required, which amount will be non-refundable.
- g) Any variation from the Works in the Quotation including (but not limited to) any variation and extension of completion date as a result of additional works required due to hidden, unidentifiable and/or unforeseen difficulties (such as concealed asbestos materials, concealed waste, concealed stumps and roots, hard rock barriers below the surface, soft ground conditions below the surface, water table encountering, iron reinforcing rods in concrete, thickness of concrete or asbestos under slabs) will be made in writing and charged for on the basis of NS Earthmoving's quotation, and will be shown as variations on the invoice. Payment for all variations must be made in accordance with the ordinary terms of payment set out in these Trading Terms.
- h) Any variation from the Works in the Quotation including (but not limited to) any variation and extension of completion date as a result of additional works required due to the unsuitability of the onsite material (such as rocks in soil are too large to meet Australian Compaction Standards, soil contains organic matter, soil is too wet and un-compactable or trafficable) and/or the unsuitability of onsite machinery (such as a larger excavator required to excavate rock or crusher required to crush rock or larger compaction equipment to break up material to a size that meets Australian Compaction Standards) that cause a furtherance to NS Earthmoving in time or materials will entitle NS Earthmoving to an equitable adjustment in the contract price and/or an extension of the completion date.
- i) Any additional cost or delay including (but not limited to) inclement weather, industry-wide industrial conditions, delays caused by the customer or agents of the customer, variations, changes in law, directions by a public authority and delays by a public authority will result in a claim for the extension of the completion date and/or variation.
- j) NS Earthmoving may submit invoices for Works from time to time at NS Earthmoving's absolute discretion. The value of the Works shall include the reasonable value of authorized variations and the value of materials delivered to the site but not yet installed;
- k) NS Earthmoving reserves the right to charge the Customer any costs incurred by NS Earthmoving including, but not limited to consumables, dumping fees or other costs associated with the supply of Works and/or Equipment without set off or deduction for any reason.
- l) Any quotation issued by NS Earthmoving allows for all salvageable building materials, contents, articles and/or objects to become the property of NS Earthmoving. In the event of the removal of

such items by any person without NS Earthmoving's prior written consent, NS Earthmoving may, at its absolute discretion, terminate the Works and/or provide an amended Price for the works to the Customer prior to Works commencing or continuing.

- m) Time for payment for the Products and/or Services shall be of the essence and will be stated on the invoice, or any other order forms supplied by NS Earthmoving. If no time is stated then payment shall be on delivery of the Products and/or Services or, at NS Earthmoving's sole discretion:
 - i) for approved clients, payment within fourteen (14) days from the date in which the invoice is generated; or as agreed in writing by NS Earthmoving.
 - ii) Otherwise, payment is due on completion of works;
 - iii) payment will be made by cash on delivery, or by cheque, or by bank cheque, or by credit card (subject to these Trading Terms), or by direct credit, or by any other method as agreed to between the Customer and NS Earthmoving.
 - iv) the Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by NS Earthmoving.

30) Hire Period:

- a) For Dry Hire Equipment the hire period shall be either on a daily or hourly rate (as determined by NS Earthmoving) for the entire period whilst the Equipment is in the Customer's possession unless otherwise agreed in writing in NS Earthmoving's Special Conditions attached to the Quotation.
- b) Hire charges shall commence from the time the Equipment is floated/dropped to the Customer's nominated site, and will continue until the return of the Equipment to NS Earthmoving's premises, and/or until the expiry of the Minimum Hire Period, whichever last occurs.
- c) In the event of Wet Hire of the Equipment, the hire period shall be tracked using the NS Earthmoving Docket Book.
- d) No allowance whatsoever will be made for time during which the Equipment is not in use for any reason unless NS Earthmoving confirms special prior arrangements in writing.
- e) In the event of Equipment breakdown, provided the Client notifies NS Earthmoving immediately, NS Earthmoving may, at its discretion, waive hire fees during the time the Equipment is not working, unless the condition is due to negligence or misuse on the part of or attributable to the Customer.

31) Title:

- a) The Equipment is and will at all times remain the absolute property of NS Earthmoving.
- b) Nothing in the Engagement entitles the Customer to retain or hold Equipment, or creates any proprietary interest in Equipment in favour of the Customer.
- c) The Customer irrevocably grants to NS Earthmoving and/or any Agent or Subcontractor the right to enter upon the Customer's property or premises, without notice, and without being in any way liable to the Customer or to any third party, to retrieve or recover possession of the Equipment at any time.
- d) The Customer is not authorised to pledge NS Earthmoving's credit for repairs to the Equipment or to create a lien over the Equipment in respect of any repairs or for any reason whatsoever.

32) Delivery of Equipment and/or Services:

- a) At NS Earthmoving's sole discretion, delivery of the Equipment shall take place when:
 - i) The Customer takes possession of the Equipment from NS Earthmoving's premises; or
 - ii) The Customer takes possession of the Equipment at the Customer's address or premises;
- b) At NS Earthmoving's sole discretion, the costs of delivery of Equipment are in addition to the Price of the Works;
- c) A minimum of twenty-four (24) hour's notice must be given for standby. In the event of any standby, NS Earthmoving may, at its absolute discretion, charge fees in respect of the standby in an amount to be determined by NS Earthmoving which is not more than the equivalent to the hire charges which NS Earthmoving could have received but for the standby;
- d) NS Earthmoving reserves the right to amend the delivery date and the completion date due to circumstances beyond its control (including, but not limited to) breakdowns, inclement weather, staffing issues or any other like matters;
- e) The Customer shall make all arrangements necessary to take delivery of the Equipment whenever the Equipment is tendered for delivery. In the event that the Customer is not able to take delivery of

the Equipment as arranged, NS Earthmoving will be entitled to charge a reasonable fee for redelivery;

- f) Delivery of the Equipment to a third party nominated by the Customer is deemed to be delivery to the Customer for the purpose of these Trading Terms;
- g) The Customer shall be responsible for free access by NS Earthmoving to the site on which the Equipment is located and/or Products and/or Services are to be provided. If there are any delays due to free access not being available, then the Customer shall be responsible and shall reimburse NS Earthmoving for all lost hire fees associated with the equipment not being available. The Customer shall also be responsible for all other expenses and costs incurred by NS Earthmoving due to delays in access to the Equipment and/or provision of the Products and/or Services;
- h) Any failure or delay in delivering the Equipment shall not entitle either party to treat the Engagement as repudiated;
- i) NS Earthmoving shall not be liable for any loss or damage whatsoever resulting from or related to a failure or delay by NS Earthmoving to deliver the Equipment and/or Products and/or Services (or any of them) promptly, or at all, where due to circumstances beyond the control of NS Earthmoving.

33) **Duration of Works:** During the period in which the Works are to be completed, the Customer shall:

- a) immediately notify NS Earthmoving should any competent authority require the suspension or cessation of the work;
- b) immediately notify NS Earthmoving should it become aware of any fact, matter or thing that might reasonably endanger the performance of the work;
- c) allow NS Earthmoving and/or any Agent or Subcontractor to store the Equipment at the Premises;
- d) take all reasonable precautions to keep all persons, including the Customer, its employees, agents and invitees, away from the Equipment while the Equipment is stored, and at a safe distance from the Equipment while it is in operation. Without limitation to this, the Customer shall take all reasonable precautions to prevent bodily injury or damage to property and to comply with all statutory obligations and by-laws and regulations imposed by any public authority for the safety of persons and property in relation to the Works;
- e) comply with all reasonable safety requests of NS Earthmoving, and shall not at any time (and will ensure that no person having access to the Premises does not), operate, occupy or attempt to operate or occupy the Equipment.

34) **Risk:**

- a) All risk for the Equipment passes to the Customer on Delivery of Equipment.
- b) The Customer accepts full responsibility for the safekeeping of the Equipment and indemnifies NS Earthmoving for all loss, theft, or damage to the Equipment howsoever caused and without limiting the generality of the foregoing, whether or not such loss, theft or damage is attributable to any negligence, failure or omission of the client.
- c) If the Equipment is lost, stolen, damaged or destroyed whilst in the possession of the Customer, (including, for the avoidance of doubt its servants, agents, employees or invitees), including through failure to comply with these Trading Terms, the Customer shall make good that loss or damage at its expense immediately upon demand by NS Earthmoving;
- d) The Customer accepts full responsibility for and shall keep NS Earthmoving indemnified against all liability in respect of all actions, proceedings, claims, damages, costs and expenses in respect of any injury to persons or damage to property arising out of the use of the Equipment or breakdown of the Equipment during the hire period however arising and whether or not arising from any negligence, failure or omission of the Customer or any other persons.
- e) The Customer agrees and acknowledges that it shall be solely responsible to remove from the site of the Works any materials, equipment or other items that it wishes to retain for its own purposes, or that it wishes to ensure are not damaged during the course of the Works. The Customer agrees and acknowledges that any materials that have not been removed from the site at the time that NS Earthmoving and/or its Agent or Subcontractor is given access to the site shall become the property of NS Earthmoving (including, but not limited to, any salvageable building(s) articles, objects or materials or other items found inside walls, under slabs, on the site (etc). All such materials may be retained and/or disposed of by any method chosen at the sole discretion of NS Earthmoving.

35) **Suspension by NS Earthmoving and/or Agent or Subcontractor:** NS Earthmoving and/or NS Earthmoving's Agent or Subcontractor in its discretion may suspend performance of the Works at any

time if in its reasonable opinion the conditions at the Premises are such that it would be unsafe to any person or detrimental to the Equipment for the operation of the Equipment. In the event of Suspension NS Earthmoving may, at its absolute discretion, and without incurring any liability to the Customer, cease or suspend supply of Works, Products and Services to the Customer or amend these Trading Terms and/or the Quotation setting out the Works.

36) Termination of Engagement:

- a) NS Earthmoving may, in its absolute discretion, terminate the Engagement at any time with immediate effect if the performance or completion of the Works would breach any law, regulation or directive of any competent authority by which NS Earthmoving and/or its Agent or Subcontractor is bound, or if the Customer:
 - i) hinders or impedes the performance of the Works;
 - ii) fails to comply with an essential Term of these Trading Terms;
 - iii) commits an Event of Default
- b) NS Earthmoving shall have exclusive right to determine the distance the Equipment may reasonably be driven and the suitability of the Equipment for the Work required and to terminate the Engagement at any time during the hire if such distance is deemed excessive or the Equipment is deemed unsuitable by NS Earthmoving for the Work.
- c) If the Engagement is terminated for any reason: the Customer must immediately pay any outstanding Price for Works completed. In the event that the Customer terminates the agreement, the date upon which the Customer advises of the termination shall in all cases be treated as a Full Day's Hire.

37) Warranties: Other than as set out in these Trading Terms (with the exception of the consumer guarantees provided by the ACL) all conditions, warranties and obligations, whether implied or imposed by statute or otherwise, in respect of the provision of any services provided by the Contractor are excluded. No warranty is provided by NS Earthmoving in respect of the condition of the Equipment or its fitness for any particular purpose. The Customer shall indemnify and hold harmless NS Earthmoving in respect of all claims arising out of the use of the Equipment.

38) Liability for Works:

- a) Subject to any liability under the ACL which cannot be excluded, NS Earthmoving does not accept Liability for any personal injury, death, direct loss, indirect loss, Consequential Loss or damage, however caused which the Customer may directly or indirectly suffer in connection with the hire of the Equipment.
- b) For the avoidance of doubt, under no circumstances shall NS Earthmoving's liability exceed the Price.
- c) If liability under the ACL cannot be excluded but can be limited in the case of services supplied by the Subcontractor that are NOT acquired for personal, domestic or household use or consumption, any personal injury, death, direct loss, indirect loss, Consequential Loss or other damage, however caused which the Customer may incur or suffer in connection with the services is limited to (at the election of NS Earthmoving) one or more of the following:
 - i) provision of the services again; or
 - ii) payment of the cost of having the services provided again.

39) Force Majeure: The Subcontractor shall not be obliged to complete or continue the performance of the Works where and to the extent that such performance is prevented or interrupted or delayed by reason of any requirement of any governmental authority or any war, public disorder, civil commotion or disturbance, acts of enemies, strike, lockout, fire, act of terror, act of God, accident or any other cause beyond the control of the Subcontractor ("**Force Majeure Event**"). Where the Subcontractor fails or is delayed in the performance of the Works by a Force Majeure Event, other than any cause of action that cannot be excluded under the ACL or otherwise at law the Customer shall have no cause of action against the Subcontractor or NS Earthmoving for a breach of any Term or otherwise. If the Subcontractor is unable to complete the Works as a consequence of a Force Majeure Event, either NS Earthmoving or the Subcontractor may, subject to their obligations under the ACL (if any) and otherwise at law, terminate the Engagement.

40) Ongoing indemnity: Each indemnity of the Customer given herein is a liability of the Customer separate and independent of any other liability the Customer under these Terms, and survives and continues after performance of the Works and in the event of termination of the Engagement, that termination.

41) Dry Hire Insurance:

- a) The Customer will insure, or self insure, NS Earthmoving's interest in the Equipment 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 arising out 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. The Customer must provide NS Earthmoving with copies of insurance covering Third Party Liability, Plant Equipment and Motor Vehicle Liability prior to delivery of the Equipment.
 - b) In the event that the Customer is unable to provide insurance cover, then NS Earthmoving may provide cover for theft, fire and accidental damage only at a cost of eight and a half percent (8.5%) of the Price. The greater of ten thousand dollars (\$10,000) or one point seven percent (1.7%) of the replacement value of the Equipment will be charged as an excess per claim if the Customer is to be covered by NS Earthmoving's insurance policy, which amount will be payable by the Customer on demand. The Customer will also be responsible to pay NS Earthmoving for lost hire revenue whilst repairs are carried out and until the Equipment is returned to NS Earthmoving in the same rentable condition as when it was delivered.
- 42) **Defects:** The Customer shall inspect the Equipment and/or Products and/or Services on delivery and shall within four (4) hours notify NS Earthmoving of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford NS Earthmoving an opportunity to inspect the Equipment within a reasonable time following delivery if the Customer believes the Equipment and/or Products and or Services are defective in any way. If the Customer fails to comply with these Trading Terms, the Equipment and/or Products and/or Services are deemed to be free from any defect or damage. For defective Equipment and/or Products and/or Services, which NS Earthmoving has agreed in writing that the Customer is entitled to reject, NS Earthmoving's liability is limited to either repairing or replacing the Equipment and/or Product and/or Services, except where the Customer is a consumer within the meaning of the *Competition and Consumer Act 2010* (Cth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion, either a refund of the hire price of the Equipment and/or Products and/or Services, the repair or the replacement of the Equipment and/or products and/or services.
- 43) **Access:**
- a) Prior to the commencement of the Works, the Customer:
 - i) shall permit NS Earthmoving and/or any agent or subcontractor to attend at the site to determine the condition and suitability of the site and/or the Equipment for the performance of the Works;
 - ii) must obtain the necessary permits and/or plans for the completion of the Works and pay any fee(s) payable to any local government or other authority required for the performance of the Works;
 - iii) must clearly mark the location of and identify all services above and below ground at the site including, but not limited to any electrical services, gas services, drains, pipes, sewers, mains, pumps, irrigation, telephone and/or data cables and/or any other services which may be on site.
 - b) Whilst NS Earthmoving will take all care to avoid damage to any services on the site, the Customer agrees to indemnify NS Earthmoving 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 in accordance with these Trading Terms.
- 44) **Customer's Responsibilities:** Unless otherwise agreed in NS Earthmoving's Special Conditions attached to the Quotation, the Customer shall:
- a) be responsible for the Minimum Hire Period for Equipment;
 - b) accept charges for travel time and/or delivery of equipment from depot to site back to depot as assessed by NS Earthmoving according to length of time required, inclination of route and distance to be travelled. Generally (but not limited to) for smaller Equipment one (1) hour minimum is charged for travel and/or delivery per day or occasion. For large equipment that requires float the Customer agrees to pay float charges for transport delivery from NS Earthmoving's depot to site and away from site back to NS Earthmoving's depot. The Customer agrees to pay for Operator travel time of half (0.5) hour minimum per day to site for Equipment that requires float at the Equipment hourly rate;
 - c) accept charges for time taken to refuel Equipment on site;

- d) be responsible for unloading and reloading the Equipment at the Premises, and NS Earthmoving and/or its agent and/or subcontractor shall be deemed to be under the Customer's direct control and responsibility;
 - e) accept charges for tolls incurred in carrying out the Works;
 - f) accept costs involved should the Equipment, as a result of instructions given to the operator become bogged. Costs referred to being lost hire and hire of whatever Equipment is necessary to recover the Equipment from the bog;
 - g) be responsible for providing and maintaining an exclusion zone for the safe operation of the Equipment;
 - h) be responsible for all safety fencing/barricades, site fencing, signage to comply with Workplace Health and Safety requirements;
 - i) be responsible for the control of dust suppression;
 - j) Notify NS Earthmoving immediately by telephone of the full circumstances of any mechanical breakdown, failure or accident. The Customer is not absolved from the requirements to safeguard the Equipment by giving such notification;
 - k) Satisfy themselves at commencement that the Equipment is suitable for its purposes;
 - l) Operate the Equipment safely, strictly in accordance with the law, only for its intended use, and in accordance with the manufacturer's instructions whether supplied by NS Earthmoving or posted on the Equipment;
 - m) Ensure that all persons operating the Equipment are suitably instructed in its safe and proper use and where necessary, that they hold a current Certificate of Competency and/or are fully licensed to operate the Equipment and shall provide evidence of the same to NS Earthmoving upon request. NS Earthmoving shall have the right to reject an operator nominated by the Customer provided the grounds for such rejection are reasonable in the view of the Customer, in which event the Customer will replace the nominated operator;
 - n) Comply with all occupational health and safety laws relating to the equipment and its operation;
 - o) Conduct a thorough hazard and risk assessment of the Premises before using the Equipment and/or requesting the works;
 - p) Keep the Equipment in their own possession and control and shall not assign the benefit of the third contract nor be entitled to any lien over the Equipment;
 - q) Not alter or make any additions to the Equipment including, without limitation, altering, making 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;
 - r) Employ the Equipment solely for the purposes for which it is hired and shall not permit the Equipment or any part thereof to be used by any other party for any other work;
 - s) Not exceed the recommended or legal load and/or any rated capacity limits of the Equipment;
 - t) Not use or carry any illegal, prohibited or dangerous substances in or on the Equipment;
 - u) Maintain the daily inspection book provided by NS Earthmoving and present it to NS Earthmoving on request;
 - v) Not fix any of the Equipment in such a manner as to make it legally a fixture forming part of any freehold;
 - w) Ensure the required Equipment servicing is completed in accordance with NS Earthmoving's instructions. The servicing shall be at the Customer's expense and shall include:
 - i) Greasing, oiling and lubrication, including all adjustments of bolts, nuts, hoses etc; and
 - ii) Replacement of filters, hoses etc to be provided by OEM or NS Earthmoving at cost to the Customer and fitted by the Customer; and
 - iii) Daily and weekly service as specified in NS Earthmoving's Maintenance Schedule; and
 - iv) Cleaning of equipment on completion of the hire;
 - x) On termination of the hire, deliver the Equipment complete with all parts and accessories, clean and in good order as delivered, fair wear and tear accepted, to NS Earthmoving.
- 45) **Customer's Obligations:** Unless stated otherwise in NS Earthmoving's Special Conditions attached to the Quotation, immediately on request by NS Earthmoving, the Customer must pay:
- a) The new list price of any Equipment or part thereof that is for whatever reason destroyed, written off or not returned to NS Earthmoving;
 - b) All costs incurred in cleaning the Equipment;

- c) All costs of repairing any damage caused by the ordinary use of the Equipment up to an amount equal to 10% of the new list price of the Equipment;
 - d) The cost of repairing any damage to the Equipment caused by the negligence of the Customer or the Customer's agent;
 - e) The cost of repairing any damage to the Equipment caused by vandalism, or (in NS Earthmoving's reasonable opinion) in any way whatsoever other than by the ordinary use of the Equipment by the Customer;
 - f) The cost of fuels and consumables provided by NS Earthmoving and used by the Customer. The Customer shall be responsible for the provision of transportation, storage and safe keeping of all fuels, oils and greases provided for use in the Equipment;
 - g) NS Earthmoving for replacement of damaged tires/tracks or any tires/tracks with other than normal wear and tear at the end of the hire period; and
 - h) The cost of repairing or replacement including labour of any Ground Engaging Tools (GET) required during or at the end of the hire period that is deemed by NS Earthmoving to be more than fair wear and tear. GET includes (but not limited to) items such as cutting edges, bucket teeth, wear plates, ripper boots/shin guards, auger teeth, auger pilots, auger flights, hammer moils/chisels, hammer bushes, scraper flights, header teeth/picks and compactor feet.
- 46) **Wet Hire:** In the event of Wet Hire of the Equipment the operator of the Equipment remains an employee of NS Earthmoving and operates the Equipment in accordance with the Customer's instructions. As such, NS Earthmoving will not be liable for any actions of the operator in following the Customer's instructions.
- 47) **Demolition:** Unless expressly stated otherwise in a quotation issued by NS Earthmoving:
- a) NS Earthmoving will only demolish footings to a depth of one metre (1 m).
 - b) The Quotation does not include:
 - i) any footings that were in the ground from a prior building, not connected to the building currently being demolished but below the building or any footing on the site/block away from the building being demolished;
 - ii) additional earthworks, levelling and/or compactions in preparation for new building works not expressly specified in the quotation;
 - iii) the removal of any hazardous materials;
 - iv) weather proofing, temporary propping, hoarding, silt control, and/or scaffolding;
 - v) the removal of septic tanks and/or emptying of waste from septic tanks and
 - vi) the removal of vegetation, retaining walls and/or fences;
 - vii) the provision of air monitoring;
 - viii) the removal of non-friable asbestos unless specifically stated as "non-friable asbestos" or "asbestos" removal in the quotation; and
 - ix) the removal of friable asbestos (including Low Density Board) unless specifically stated as "friable asbestos" removal in the quotation.
- 48) **Loss of Equipment:** If the Equipment is lost, damaged or destroyed due to any fault of the Customer, its servants, agents, employees or invitees, including through failure to comply with these Trading Terms, the Customer shall make good that loss or damage at its expense immediately upon demand by NS Earthmoving.
- 49) **Cancellation:**
- a) NS Earthmoving may cancel these Trading Terms or cancel delivery of Equipment at any time before the Equipment is delivered by giving written notice. On giving such notice, NS Earthmoving shall repay to the Customer any sums paid in respect of the Price. NS Earthmoving shall not be liable for any loss or damage whatsoever arising from or in connection with such cancellation.
 - b) The Customer may cancel hire of the Equipment and/or Works and/or supply of material by providing no less than two (2) hours written notice of their intention to cancel. In the event that the Customer cancels delivery of the Equipment and/or material without providing adequate notice or after dispatch of the Equipment and/or material or after the delivery of the Equipment and/or material, the Customer shall be liable for any loss incurred by NS Earthmoving (including but not limited to any loss of profits) as a result of the cancellation.
 - c) It is the responsibility of the Customer to cancel the hire of the Equipment and/or Works and/or supply of material due to wet weather. In the event that the Customer fails or refuses to advise of

any wet weather event which may delay, suspend or cancel the Works and/or the hire of Equipment not less than two (2) hours in advance directly to the office of NS Earthmoving, the Minimum Hire Period will apply, and NS Earthmoving may cancel, suspend or delay the hire of Equipment and/or the Works at its sole discretion.

- 50) **Replacement of Subcontractor:** NS Earthmoving may replace any Subcontractor at any time where NS Earthmoving reasonably believes the Subcontractor is unable for any reason to complete the Work. If NS Earthmoving replaces the Subcontractor, the Customer will sign all paperwork as reasonably required by NS Earthmoving with respect to completion of the Work by that replacement.
- 51) **Additional Charges:** The customer agrees and acknowledges that:
- a) The Customer is responsible for and agrees to pay for any float charges;
 - b) Charges in respect of NS Earthmoving Personnel are subject to additional charges for loadings, penalties and allowances as applicable to NS Earthmoving Personnel pursuant to their terms of engagement including night shifts, weekend rates, overtime, meals, standby and public holidays. Charges quoted in the Agreement are exclusive of GST, government duties, taxes and charges.
 - c) Where the Equipment supplied by NS Earthmoving is used by the Customer for more than 8 hours on any given day, NS Earthmoving reserves the right to impose additional hire charges as reasonable compensation;
 - d) A penalty rate of 15% will apply for all Works performed after 8 hours between 6am and 6pm (AEST) for the first 2 hours and a penalty rate of 30% will apply thereafter;
 - e) A penalty rate of 15% will apply for all Works performed on a Saturday for the first 2 hours between 6am and 6pm (AEST) and a penalty rate of 30% will apply thereafter;
 - f) A penalty rate of 30% will apply for all Works performed between the hours of 6pm and 6am (AEST), and/or on any Sunday or Public Holiday;
 - g) Any disbursements incurred in the performance of the disposal fees and/or other outlays will be the responsibility of the Customer and may be charged to the Customer in addition to the price of the Works at NS Earthmoving's sole discretion;
 - h) In the event that attachments are required, but not ordered with the Equipment or are unable to be carried with the Equipment, a minimum delivery fee of \$150 plus GST will apply to each supply of attachments;
 - i) Attachments on Equipment such as (but not limited to) Rippers, Rock Grabs, Augers, Rock Breakers, Broom and Compaction Wheels) will incur a further minimum charge of \$20 per hour plus GST with a Minimum Hire Period of two (2) hours;
 - j) The hire of Rock Augers may incur additional charges for wear and tear and/or replacement costs;
 - k) Fill that is to be removed from site as "Clean Fill" must be free from contaminants and/or be suitable as compactable fill for Level 1 supervision, otherwise the Customer will incur additional charges. Contaminants may include (but not limited to) concrete, bricks, asbestos, acid sulfate soils, tyres, builders rubbish, grass and vegetation.
 - l) Disposal fees or materials supplied using NS Earthmoving accounts will incur a surcharge.
- 52) **Review of Trading Terms:** NS Earthmoving reserves the right to review these Trading Terms at any time. If, following any such review, there is to be any change to these Trading Terms, that change will take effect from the date on which NS Earthmoving notifies the Customer of such Change. Except where the client supplies further Equipment to the Customer, and the Customer shall be under no obligation to accept such changes. The Trading Terms as amended from time to time will be posted on NS Earthmoving's website at: www.nsearthmoving.com.au
- 53) **Definitions & Interpretation:** In these Trading Terms unless the context requires otherwise:
- a) **"ACL"** means the Australian Consumer Law as contained in the *Competition and Consumer Act 2010 (Cth)* as amended from time to time.
 - b) **"Consequential Loss"** means without limitation: damage to any third party's property; loss of profits; loss of revenue; lost production; loss of business; loss of the benefit of any contract or other agreement or arrangement; damage to reputation; and legal costs.
 - c) **"Credit-related information"** includes "credit information", "credit reporting information", "credit eligibility information" and/or "regulated information" (as the context permits) within the meaning of those terms in the Privacy Act.
 - d) **"Credit Terms"** means the General Credit Terms attached to any Application for Commercial Trading Account.

- e) **“Customer”** means the customer whose details appear in the Application for a Commercial Trading Account and the Customer’s subsidiaries, holding companies and other related entities.
- f) **“Dry Hire”** means hire of Equipment without an operator supplied by NS Earthmoving.
- g) **“Engagement”** any instructions received by NS Earthmoving from the Customer for the Works and/or the Customer’s acceptance of Equipment supplied on hire by NS Earthmoving and/or Products or Services supplied by NS Earthmoving shall constitute acceptance of these Trading Terms.
- h) **“Equipment”** means any equipment or other tools, materials, resources or other items necessary to carry out the Works, including but not limited to earthmoving equipment and other heavy equipment, whether supplied by NS Earthmoving, a Subcontractor or any other person.
- i) **“Event of Default”** - Means any of the following events:
 - i) The Customer fails to pay for any Products and Services and/or the Customer breaches these Trading Terms;
 - ii) The Customer ceases or threatens to cease carrying on business;
 - iii) If the Customer is a company: an order is made or a resolution is effectively passed for winding up of the Customer, or the Customer resolves to appoint a receiver or provisional liquidator or an administrator, or a receiver or provisional liquidator or an administrator is appointed, or the Customer goes into liquidation or makes an assignment or an arrangement or composition with the Customer’s creditor, or the Customer stops payment or is deemed unable to pay the Customer’s debts within the meaning of the Corporations Act 2001 (Cth); if the Customer is a natural person: an order is made for the Customer’s bankruptcy, or the Customer dies or becomes mentally or physically incapable of managing his or her affairs, or an order is applied for or made to place the assets and affairs of the Customer under administration
- j) **“Full Day’s Hire”** means 8 machine hours or one day’s hire.
- k) **“General Price List”** means the document headed “General Price List” setting out the hourly price of Equipment per hour and applicable GST, as amended from time to time and available upon request
- l) **“Job Docket”** means each and any job docket and/or tax invoice issued by NS Earthmoving with respect of the Work from time to time.
- m) **“Minimum Hire Period”** means the minimum hire period described on the invoices, quotation, authority to hire or any other form provided by NS Earthmoving to the Customer
- n) **“Officer”** means each director, secretary, credit manager and authorised representative of NS Earthmoving.
- o) **“NS EARTHMOVING”** means NS Earthmoving Pty Ltd and any related body corporate, any subsidiary or associated trustee and as trustee of any trust from time to time, and any of its successors and assigns or any person acting on behalf of and with the authority of NS Earthmoving Pty Ltd including any Agent or Subcontractor thereof.

- p) **“Premises”** means the site or location at which the Work is to be provided, as set out in the Job Docket.
- q) **“Privacy Act”** means the *Privacy Act 1988 (Cth)* as amended from time to time
- r) **“Products”** includes all Products and Services supplied by NS Earthmoving to the Customer including, but not limited to the Works, and the value attached to or the proceeds related to the provision of any Services, including, but not limited to products and services supplied by NS Earthmoving’s Subcontractors and/or agents, and the works described in any Job Docket provided by or on behalf of NS Earthmoving to the Customer.
- s) **“Services”** includes all Services supplied by NS Earthmoving to the Customer including, but not limited to the Works, Wet Hire, Dry Hire, earthmoving and/or heavy machinery services, or services associated therewith
- t) **“Subcontractor”** means each and any subcontractor engaged by NS Earthmoving for the completion of the Work at the discretion of NS Earthmoving from time to time
- u) **“Trading Terms”** means all the provisions of the Application for Commercial Trading Account (including the General Credit Terms) **plus** NS Earthmoving’s Terms and Conditions of Trade (as they appear herein) and/or any other conditions or facility agreement or member agreement as may be amended by NS Earthmoving from time to time
- v) **“Wet Hire”** means hire of the Equipment with an operator supplied by NS Earthmoving

w) **“Works”** means all earthmoving and heavy machinery services provided by NS Earthmoving to the Customer (and/or at the request of the Customer) including (but not limited to) the provision of Products and/or Services, the hire of Equipment, whether wet or dry hire including (but not limited to) the works undertaken in accordance with that hire, services provided in association with the hire and/or any items listed on the quotation and/or invoice and/or Job Docket arising out of or in connection to any supply of any kind by NS Earthmoving to the Customer and/or at the request of the Customer.

54) Interpretation:

- a) In these Trading Terms, unless the context requires otherwise, all references to a party include the party’s successors and permitted assigns.
- b) No provision of these Trading Terms will be construed adversely against a party solely because the party was responsible for drafting the provision.