Hygrade Water Australia Limited Partnership - Terms of Trade (“Terms”)

1 Application of Terms

1.1 These Terms, together with our quotation (if any), govern our supply of Goods and Services to you, including supplies on a cash basis.

1.2 If you wish to negotiate these Terms with us then you should respond to this document, marking up these Terms and drawing those changes to our attention and obtain our agreement in writing.

1.3 It is not our practice to otherwise review terms and conditions on documents that you issue to us.

1.4 Unless we otherwise agree in writing, we do not accept, and will not be bound by, any terms or conditions included in, attached to, or referenced in, any other document you give to us like a purchase order.

2 Quotations

2.1 Each quotation that we issue:

(a) is an estimate only;

(b) is not an offer or obligation to supply any Goods or to perform any Services;

(c) is exclusive of:

(i) GST, customs duty, and any similar tax or impost;

(ii) relevant Approvals; and

(iii) deposit terms;

(d) does not include the costs of delivering Goods;

(e) remains valid for acceptance for a period of thirty (30) days from the date of quotation, unless withdrawn or varied by us at any time before a contract for supply is formed; and

(f) contains a price on the basis that all Services are performed, and all Goods delivered, during our usual business hours,

unless the quotation states otherwise.

2.2 Quotations provided orally are subject to written confirmation.

2.3 A quotation may include additional terms or conditions, which will supplement these Terms.

2.4 Should you wish to have Services performed or Goods delivered outside our usual business hours please let us know as additional charges may apply.

3 Formation of contract

3.1 We are not obliged to supply any Goods or provide Services until after a contract for supply is formed.

3.2 A contract for supply is formed, and you have accepted these Terms, when:

(a) you have placed an Order with us; and

(b) we have received any deposit we have required from you in respect of the Order before progressing it; and

either we have:

(c) accepted your Order in writing; or

(d) supplied you with any Goods or performed any Services following receipt of your Order.

3.3 If you revoke an Order:

(a) prior to the formation of a contract for supply then:

(i) we will refund you any deposit you have paid in respect of that Order; and

(ii) you will not be required to pay any fee for the cancellation of the Order; or alternatively

(b) after the formation of a contract for supply then unless we are in breach of the contract for supply:

(i) you must pay all our reasonable costs associated with fulfilment of your Order; and

(ii) we may apply any deposit you have paid towards those costs.

4 Price

4.1 The price payable for the Goods or Services will be:

(a) the price agreed in writing; or alternatively

(b) the price by our prevailing price list or rates as when you place your Order.

5 Price variations

5.1 This clause 5 applies where a contract for supply has formed pursuant to clause 3.2.

5.2 Unless otherwise agreed, where you request or direct that any Goods or Services be supplied that are not strictly in accordance with your Order, then such Goods or Services shall constitute a price variation and clause 5.3 will apply.

5.3 You acknowledge and agree that your requested variations under clause 5.2 shall be, at our reasonable discretion, invoiced at the rate(s) specified in the original quotation, as specifically quoted, or in accordance with our current prevailing rates or price list (as amended from time to time).

5.4 Subject to clause 5.5, we reserve the right to vary the price or rates specified in the Order if:

(a) there is any movement in the cost of supplying the Goods or Services specified in the Order (including, without limitation, any actual increase in the costs to manufacturing, procuring, or transporting the Goods, foreign exchange fluctuation, currency regulation of duties, or significant increases in the cost of labour, materials);

(b) additional Goods or Services are required due to the discovery of hidden or unforeseen problems (including, without limitation, issues, faults or problems identified upon further inspection) which have been discovered following the commencement of the Services;

(c) the Goods or Services specified in the Order are varied from the Goods or Services specified in the quotation;

(d) you request:

(i) the Goods or Services be rendered outside our usual business hours; or

(ii) that we delay provision of the Goods or Services for sixty (60) days or more; or

(e) as otherwise provided for in these terms and conditions.

5.5 Where we vary the price or rates payable for the Goods or Services pursuant to clause 5.4, we will notify you of the new price or rates. Thereafter you may reject the new price or rates within seven (7) days and terminate the contract for supply without further cost, or any penalty to you, otherwise you agree that the new price or rates will apply to the contract. For clarity, any termination of the contract for supply under this clause will be without prejudice to any Goods or Services supplied prior to termination.

6 Delivery and risk

6.1 Unless otherwise agreed, you must reimburse us for all reasonable charges and costs associated with transport, shipping, demurrage, freight, cartage, and other delivery costs.

6.2 We will use reasonable endeavours to deliver the Goods at the time and place agreed for delivery. You will make arrangements necessary to take delivery of the Goods.

6.3 You acknowledge and agree that, unless the contract for supply expressly states otherwise:

(a) time in respect of delivery is not of the essence; and

(b) any timeframe or date for delivery is an estimate only and is not a contractual commitment.

6.4 Risk of loss, damage, or deterioration to the Goods passes to you, and delivery is deemed to occur, at the time:

(a) you or any third party on your behalf collect the Goods from us;

(b) we or our nominated carrier deliver the Goods to the delivery location stated in your Order (or to such other location as agreed in writing); or

(c) your nominated carrier takes possession of the Goods.

6.5 It is your responsibility to provide suitable, practical, and safe means of access and egress to the place agreed for delivery. If the site is deemed unsuitable or unsafe (at the delivery driver’s sole discretion), then the delivery driver may:

(a) refuse to deliver the Goods and return the Goods to the point of despatch (in which case an additional delivery fee will apply to any subsequent delivery attempt); or

(b) deliver the Goods to the location nearest to the agreed place for delivery where delivery can be safely effected.

6.6 You agree to sign our delivery docket or consignment note or that of our nominated carrier as confirmation that you have received the Goods, and if appropriate, certify that you have received the Goods in apparent good order and condition in the quantity or volume you have ordered.

6.7 If you authorise us to deliver the Goods to an unattended location or to leave them outside the agreed place for delivery, we may deliver the Goods as requested at your risk.

6.8 If delivery or collection of the Goods is deferred:

(a) at your request; or

(b) due to you being unable or unwilling to accept delivery of the Goods (other than as a result of the Goods delivered not being in accordance with the contract for supply),

in circumstances where:

(c) we are ready to deliver the Goods and a delivery date has not been agreed; or

(d) the Goods are due to be delivered or collected on an agreed delivery date,

then you will pay to us:

(e) reasonable daily storage charges (which will continue to accrue until such time as the Goods are delivered or collected); and

(f) any costs associated with us or our nominated carrier attempting to re-deliver the Goods (where we or our nominated carrier has previously attempted to deliver the Goods).

6.9 You acknowledge and agree that we may deliver the Goods in one or more lots and may invoice you for pro rata progress in respect thereof.

7 Provision of Services

7.1 Subject to any applicable laws or unless otherwise agreed in writing, we will determine (in our absolute and reasonable discretion) the method, delivery, and performance of the provision of Services.

7.2 You must, prior to us commencing the Services:

(a) obtain, at your expense, all relevant Approvals;

(b) provide us with such information and documentation that we reasonably require to perform the Services; and

(c) inform us of any special requirements pertaining to the Services.

7.3 You acknowledge and agree that unless the contract expressly states otherwise:

(a) time in respect of completion of the Services is not of the essence; and

(b) while we will take reasonable endeavours to complete the Services by the estimated date for completion, any timeframe or date for completion is an estimate only and is not a contractual commitment.

7.4 If the commencement or the completion of the Services is delayed due to any event beyond our reasonable control, such as:

(a) Goods unavailability; or

(b) your failure to select the Goods or Services,

then you agree we may extend the time for commencement or completion of the Services (as the case may be) by a period of time equal to the delay.

8 Payment terms

8.1 Unless you have a Credit Facility with us which is not in default:

(a) deposits we have requested must be paid before we commence providing Goods and Services;

(b) you must pay for all Goods before they are despatched (in cash or cleared funds); and

(c) you must pay for all Services on a progressive hourly basis as performed and within seven (7) days from the date you were invoiced or charged.

8.2 Payment may be made by cash, cheque, electronic funds transfer, Visa, or Mastercard credit cards. We reserve the right to change the payment methods that we accept at any time.

8.3 We may charge a payment surcharge for applicable payment transactions equal to our reasonable cost of acceptance.

8.4 You agree to pay GST on all taxable supplies upon us issuing you a tax invoice relating to the taxable supply.

8.5 You agree to pay sums due to us free of any set off or counterclaim and without deduction or withholding.

9 Claims

9.1 You must, within seven (7) business days from the date of delivery:

(a) inspect the Goods for shortfall, incorrect supply, and for any obvious or apparent defects that a reasonable person upon inspection would identify;

(b) give us reasonable notice in writing, with particulars, of any Claim that the Goods delivered are not in accordance with the contract for supply (including any Claim for shortfall, incorrect supply, defects, or obvious or apparent damage to the Goods);

(c) reasonably preserve Goods the subject of your Claim in the state in which they were delivered pending our inspection or review of the Claim; and

(d) at our reasonable request:

(i) provide us with photographic evidence (to our satisfaction) of any alleged damage to the Goods; and

(ii) permit us access to your premises (or any premises that you own or occupy) to inspect the Goods.

9.2 You must notify us in writing of any Claim for non-delivery within seven (7) days of the date of the invoice which relates to the Goods the subject of your Claim.

9.3 If the contract for supply is not a Consumer Contract nor a Small Business Contract and you fail to notify us in accordance with clauses 9.1 or 9.2, then, to the extent permitted by law, the Goods are deemed to have been delivered in good condition and in accordance with the contract for supply.

9.4 If the contract for supply is a Consumer Contract or Small Business Contract and you fail to notify us in accordance with clauses 9.1 or 9.2, then, to the extent permitted by law, you waive your right to reject the Goods. For the avoidance of doubt, 'reject goods' and 'rejection of goods' has the same meaning given to these terms as in relevant sales of goods legislation.

10 Returns

10.1 We will accept the return of any Goods if:

(a) the Goods supplied do not conform with the contract for supply;

(b) the Goods are defective; or

(c) we are required by law to accept the return of the Goods.

10.2 At our discretion, we may accept the return of Goods if you change your mind if:

(a) you agree to (except for Goods we have incorrectly supplied or we agree are defective):

(i) pay a handling and administration charge of up to 25% of the purchase price of the returned Goods; and

(ii) reimburse us for all other reasonable costs we incur in connection with the return of those Goods;

(b) the Goods are in substantially the same condition to the condition in which they were delivered; and

(c) the Goods were not custom-made, or specifically produced or procured at your request.

10.3 You indemnify and release us from any damage that occurs to any Goods in return transit. You should ensure that any returned Goods are insured against such damage.

11 Retention of title

11.1 Until such time as you have made payment in full (in cash or cleared funds) for any Goods we have supplied:

(a) title in the Goods does not pass to you and we retain the legal and equitable title in the Goods;

(b) you will hold the Goods as fiduciary and bailee for us and agree to store the Goods in such a manner as to enable them to be readily identifiable as our property;

(c) you undertake to not mix the Goods with similar goods;

(d) unless and until we notify you to the contrary, you will be entitled to sell the Goods in the ordinary course of your business (provided any such sale is at arm's length and on market terms) and will sell the Goods as our agent and bailee; and

(e) you undertake to hold any proceeds derived from the sale of the Goods on trust for us absolutely.

11.2 While title in the Goods remains with us, you permit us to enter upon any premises you occupy (or any premises any receiver, receiver and manager, administrator, liquidator, or trustee in bankruptcy of yours occupies) as your invitee to inspect the Goods and, when you are in default of payment of any invoice, to repossess any Goods in your possession, custody, or control.

11.3 Where we exercise our right of entry pursuant to clause 11.2, you agree that us doing so will not give rise to any Claim for trespass or similar action against us or our officers, employees, and agents.

11.4 Where we have retaken Goods into our possession, we have the right to sell or deal with those Goods, and, if necessary, sell any Goods bearing your name or trade mark, and you hereby grant us an irrevocable licence to do all things necessary to sell those Goods.

11.5 For the removal of doubt, our interest under this clause 11 constitutes a purchase money security interest for the purposes of the PPS Act.

12 Security interest

12.1 You must reimburse us for any costs we incur in registering our interests on the Personal Property Securities Register (including registration fees).

12.2 Unless you have obtained our prior written and fully informed consent, you undertake not to:

(a) register a financing change statement in respect of a security interest in our favour; or

(b) create, or purport to create, any security interest in the Goods (or any proceeds derived from the sale of such Goods), nor register, nor permit to be registered, a financing statement or financing change statement in relation to the Goods in favour of any third party.

12.3 You:

(a) waive your right to receive a copy of any verification statement in accordance with section 157 of the PPS Act; and

(b) agree that, to the extent permitted by the PPS Act:

(i) sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 132, 134, 135, 142, and 143 of the PPS Act do not apply and are hereby contracted out of; and

(ii) you waive your right to receive notices under sections 95, 118, 121(4), 127, 130, 132(3)(d), and 132(4) of the PPS Act.

12.4 We need not disclose information of the kind detailed in section 275(1) of the PPS Act, unless required by law.

12.5 Where we have rights in addition to those under Part 4 of the PPS Act, those rights continue to apply.

13 Particular purpose

If you require any Goods for a particular purpose, you must advise us of that purpose prior to placing your Order and must obtain a written assurance from us that the Goods will meet your requirements. If you do not advise us of your requirements and we do not expressly warrant in writing that the Goods will be fit for your particular purpose, then you agree that you did not rely upon our skill or judgment in relation to the suitability of the Goods for that purpose.

14 Customer Material

14.1 You warrant and represent to us that all Customer Material:

(a) is accurate and correct; and

(b) will not infringe the Intellectual Property Rights of any third-party.

14.2 You grant us a non-exclusive, non-transferrable, royalty free, perpetual, worldwide licence to use all Customer Material for:

(a) the purposes of supplying the Goods or performing the Services; and

(b) (where such Customer Material is not confidential in nature) marketing and advertising.

15 Intellectual Property Rights

15.1 All right, title, and interest in the Intellectual Property Rights in and to all Working Documents, and all Goods (including Goods that we have designed, drawn, or developed) sold or supplied by us are, and will at all times, remain our property.

15.2 All improvements, derivatives and modifications to the Intellectual Property Rights contemplated by clause 15.1 (the **Improvements**) vest in us immediately on creation. To the extent necessary to give effect to this clause 15, you assign to us all right, title, and interest in the Improvements.

15.3 You acknowledge and agree that:

(a) you have no rights to use our Intellectual Property Rights under these Terms, except as expressly set out herein, unless otherwise agreed in writing; and

(b) you must not modify, copy, clone, or reverse engineer any of our Goods (nor procure or permit any person within your reasonable control to do any of these things).

16 Default

16.1 Clauses 16.2 to 16.4 apply if you fail to pay sums to us when they fall due.

16.2 We may charge you interest on the outstanding debt (including any judgment debt) at the rate of 10% per annum.

16.3 We may suspend or cease the supply of any further Goods or Services to you.

16.4 We may require pre-payment in full for any Goods or Services which have not yet been supplied.

17 Indemnity

17.1 If you default in the performance or observance of your obligations under any contract of which these Terms form part, then:

(a) we will take steps to mitigate our loss and act reasonably in relation to any default by you; and

(b) we will give you notice requesting payment for loss and damage occasioned in respect of those events and requesting that you remedy any breach within a reasonable time; and

(c) if that demand is not met then you indemnify us in respect of loss, damage, costs (including collection costs, bank dishonour fees, and legal costs on an indemnity basis) that we have suffered arising therefrom.

17.2 Your liability to indemnify us will be reduced proportionally to the extent that any fraud, negligence, or wilful misconduct by us or a breach of our obligations under contract has contributed to the Claim, loss, damage, or cost which is the subject of the indemnity.

17.3 Your liability to indemnify us is a continuing obligation separate and independent from your other obligations and survives the termination or performance of any contract of which these Terms form part.

18 Limitation of liability

18.1 No party is liable to the other party for any Consequential Loss, including under clause 17, however caused arising out of or in connection with any contract for supply of which these Terms form part.

18.2 While we will take reasonable endeavours to meet any estimated delivery date or estimated time for Goods and Services, you acknowledge and agree that we are not liable for any delay associated with meeting those estimated timeframes.

18.3 If the contract for supply is not a Consumer Contract or a Small Business Contract then, to the extent permitted by law, our liability is limited to:

(a) (in the case of a supply of Goods):

(i) us repairing or replacing the Goods; or

(ii) us paying you the cost of having the Goods repaired or replaced; or

(b) (in the case of a supply of Services):

(i) us supplying the Services again; or

(ii) us paying you the cost of having equivalent Services supplied.

19 Termination

A party may, with immediate effect, terminate any contract for supply of which these Terms form part by notice in writing, if the other party:

(a) commits a material or persistent breach of these Terms and does not remedy that breach (if capable of remedy) within seven (7) days of the receipt of a notice (or such longer time as specified in the notice) identifying the breach and requiring its remedy; or

(b) has failed to pay sums due to the party within seven (7) days; or

(c) has indicated that it is, or may become, insolvent; or

(d) ceases to carry on business; or

(e) comprises an entity which is the subject of the appointment of receivers or managers; or

(f) comprises a natural person who:

(i) has committed an act of bankruptcy; or

(ii) has been made bankrupt;

(g) comprises a corporation which:

(i) enters into voluntary administration;

(ii) is subject to a deed of company arrangement; or

(iii) is subject to the appointment of liquidators or provisional liquidators.

20 Agent capacity

If you act as an agent for another party or parties (whether disclosed to us or not), you warrant and represent to us that:

(a) you hold a current and proper authority to engage us on behalf your principal(s);

(b) any Goods or Services you request we supply are within the

authority and financial limits authorised by your principal(s);

(c) you hold sufficient funds to ensure payment of all amounts due and owing to us under the contract;

(d) at our request, you will provide the name(s), address(es), and contact details of your principal(s); and

(e) if you fail to pay sums to us when they fall due as a result of a dispute between you and your principal(s) regarding your authority, or if you fail to hold sufficient funds in accordance with clause 20(c), then you agree to indemnify us for the amount due and owing.

21 Trustees

21.1 If you are the trustee of a trust (whether disclosed to us or not), you warrant to us that:

(a) you enter into the contract for supply in both your capacity as trustee and in your personal capacity;

(b) you have the right to be reasonably indemnified out of trust assets;

(c) you have the power under the trust deed to enter into the contract for supply; and

(d) you will not retire as trustee of the trust nor appoint any new or additional trustee without first notifying us in writing and having the new or additional trustee sign an agreement on terms substantially the same as those governing your Credit Facility (where applicable).

21.2 You must give us a true and complete copy of the trust deed upon request.

22 Variation

22.1 We may amend these Terms in the future by notifying you in writing. The amended Terms will thereafter apply to each Order you place unless you earlier give us written notice in advance of placing a further Order.

22.2 The parties may agree to amend any contract of which these Terms form part by agreement in writing.

23 Assignment

23.1 Subject to clause 23.2, a party may only assign its rights or obligations under the contract for supply with the written consent of the other party, with such consent not unreasonably withheld.

23.2 We may assign or transfer our rights and obligations under the contract for supply but only where we are transferring our business as a going concern to a third party, without your consent.

24 Conflicts and Inconsistencies

If there is any conflict or inconsistency between any of the documents which together govern the relationship between the parties, it is agreed the order of precedence will be (highest to lowest):

(a) any additional terms or conditions contained in our quotation applicable to the supply of Goods or Services;

(b) any terms governing your Credit Facility; and

(c) these Terms.

25 Severance

If any part or term of our agreement with you (including any Credit Facility) is illegal, invalid, or unenforceable, it will be read down so far as necessary to give it a valid and enforceable operation or, if that is not possible, it will be severed from the contract and the remaining provisions will not be affected, prejudiced, or impaired by such severance.

26 Governing law and jurisdiction

26.1 Our relationship is governed by and must be construed according to the law applying in the State of Queensland.

26.2 The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the State of Queensland with respect to any proceedings that may be brought at any time relating to our relationship.

27 Definitions

In these Terms, unless the context otherwise requires, the following definitions apply.

27.1 **Approval** means any authorisation, assessment, accreditation, determination, registration, clearance, permit, licence, consent, certificate, or other approval obtained or required or applying in connection with any contract of which these Terms form part.

27.2 **Australian Consumer Law** means Schedule 2 to the *Competition and Consumer Act 2010* (Cth), as amended.

27.3 **Claim** includes a claim, notice, demand, action, proceeding, litigation, investigation, judgment, or award howsoever arising, whether present, unascertained, immediate, future, or contingent, whether based in contract, tort, pursuant to statute or otherwise and whether involving a third party or a party to a contract for supply.

27.4 **Consequential Loss** includes any:

(a) consequential loss;

(b) loss of anticipated or actual profits or revenue;

(c) loss of production or use;

(d) financial or holding costs;

(e) loss or failure to realise any anticipated savings;

(f) loss or denial of business or commercial opportunity;

(g) loss of or damage to goodwill, business reputation, future reputation, or publicity;

(h) loss or corruption of data;

(i) downtime costs or wasted overheads; or

(j) special, punitive, or exemplary damages.

27.5 **Consumer Contract** has the meaning given to this term in section 23(3) of the Australian Consumer Law.

27.6 **Credit Facility** means an account we have opened for you on which we may, from time to time, extend you with additional time to pay for our Goods and Services and associated charges.

27.7 **Customer**, **you** means the person or other entity who has placed an Order with us for the supply of Goods or Services (or the person on whose behalf an Order is placed).

27.8 **Customer Material** means all information and documentation provided to us by you (or on your behalf) in the course of us supplying the Goods or Services.

27.9 **Goods** means all goods supplied by us, as described on our quotation, invoice, or any other form issued by us.

27.10 **Intellectual Property Rights** means all industrial and intellectual property rights throughout the world, whether present or future, and whether protectable by statue, at common law or in equity, including rights in relation to copyright, trade secrets, know how, trade marks (whether registered or unregistered or whether in word or logo/device form), designs, patents and patentable inventions, including the right to apply for registration of any such rights.

27.11 **Order** means a written or oral order placed by you requesting that we provide Goods or Services.

27.12 **Personnel** means officers, employees, and agents engaged by each party (but does not include the other party) and, in the case of the Supplier, includes its subcontractors (and any employee of those subcontractors).

27.13 **PPS Act** means the *Personal Property Securities Act 2009* (Cth), as amended.

27.14 **Services** means all services performed by us, as described on our quotation, invoice, or any other form issued by us.

27.15 **Site** means the location where the Services are to be performed (and where applicable includes our premises).

27.16 **Small Business Contract** has the meaning given to this term in section 23(4) of the Australian Consumer Law.

27.17 **Supplier**, **we**, **us** means Hygrade Water Australia Limited Partnership ABN 13 713 124 364 and its related bodies corporate (as that term is defined in the Corporations Act 2001 (Cth)) including Hygrade Water Pty Limited ACN 124 052 213.

27.18 **Working Documents** means all plans, designs, specifications, and schedules created by us in the course of or in relation to any contract in which Intellectual Property Rights may subsist and all drafts, variations, alterations, and adaptations of such plans, designs, specifications, and schedules (whether currently existing or created in the future).

28 Interpretation

In these Terms, unless the context otherwise requires:

28.1 A time is a reference to the time zone of Brisbane, Australia unless otherwise specified.

28.2 $, dollar, or AUD is a reference to the lawful currency of Australia.

28.3 A party includes a reference to that person's executors, administrators, successors, substitutes (including a person who becomes a party by novation), assigns, and in the case of a trustee, includes any substituted or additional trustee.

28.4 A right includes a benefit, remedy, authority, discretion, or power.

28.5 The singular includes the plural and vice versa, and a gender includes other genders.

28.6 “In writing” or “written” means any expression of information in words, numbers, or other symbols, which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

28.7 If a word or phrase is given a defined meaning, its other grammatical forms have a corresponding meaning.

28.8 Words such as “includes”, “including”, and “for example” are not words of limitation and are to be construed as though followed by the words “without limitation”.

28.9 A term of an agreement in favour of two or more persons is for the benefit of them jointly and each of them separately.