



Watertight Contract Benefits

## SPASA Benefits Trust - SPASA BENEFIT TERMS

### Part 1: Definitions and Interpretations

In this document the following words have these meanings unless the contrary intention appears:

#### 1.1 Definitions

**"Act"** means the Domestic Building Contracts Act 2000 (Qld)

**"Application Form"** means a completed Watertight Contract Benefits Application Form, in a form approved by the *Trustee*, in respect of a *Contract* and signed by the *Contractor* and the *Customer*

**"Architect"** means a person registered as an architect under the Architects Act 1985 (Qld)

**"Benefits"** means the Benefits which the *Trustee* may, at its sole and absolute discretion; pay to or on behalf of a *Customer* in accordance with these *Benefits Terms*

**"Benefits Terms"** means the terms and conditions contained in this document

**"BSA"** means the Queensland Building Services Authority

**"Defective Works"** means defective building work (other than residential construction work causing subsidence) in the *Contracted Works* which may adversely affect the structural adequacy of a swimming pool or spa; or, adversely affect the structural performance or functional use of a swimming pool or spa, following *practical completion*

**"Certificate of Benefit"** means a confirming Certificate of Benefit issued by the *Trustee* in respect of a *Contract* upon receipt and acceptance by the *Trustee* of the *Application Form* and the *Contribution Fee*

**"Certificate of Practical Completion"** means a Certificate of Practical Completion & Handover signed and issued by the *Contractor* at the completion of a *Contract*

**"Construction Works"** means the whole of the construction works (including authorised variations) for the construction, installation or renovation of a swimming pool or spa on *land* comprising a private residence, and intended for a *Resident Owner's* residential, private or domestic use only

**"Contract"** means a written contract, in a form approved by the *Trustee*, entered into between and signed by a *Customer* and a *Contractor* and which complies with the requirements of the Domestic Building Contracts Act 2000 (Qld) for the performance by the *Contractor* of *Construction Works*

**"Contracted Works"** means the *Construction Works* to be performed under a *Contract* by a *Contractor* for a *Customer*

**"Contractor"** means a BSA licensed contractor who is a Member of *SPASA Queensland*, and who is referred to in the *Certificate of Benefit* and in the *Contract*

**"Contractor Default"** means: as a result of the declared death or the *Contractor* becoming bankrupt or entering into a composition, deed, scheme, or arrangement for the benefit of creditors; or, the *Contractor* (being a company) being placed into administration, receivership or liquidation and the appointed administrators, receivers or liquidators failing to complete the *Contracted Works* or the *Rectification Works*

- a) in the event of **non-completion** of the *Contracted Works* - the failure by the *Contractor* to complete the *Contracted Works* to the standard specified in the *Contract*; or
- b) in the event of **defective construction** of the *Contracted Works* - the failure by the *Contractor* to rectify any *defective building work* as determined by the *Trustee*, in its sole and absolute discretion, to be defective work, as assessed by the *Trustee* or an assessor approved or appointed by the *Trustee*

**"Contribution Fee"** means the amount paid to the *Trustee* upon the lodgement of an *Application Form* and prior to the issue by the *Trustee* of a *Certificate of Benefit*

**"Customer"** means the *Resident Owner* referred to in a *Contract*

**"Date for Practical Completion"** means the date upon which the *Contracted Works* are to reach *Practical Completion* as shown in the *Contract*

**"Date for Commencement"** means the date upon which the *Contracted Works* are to commence as shown in the *Contract*

**"Days"** means working days

**"Engineer"** means a person who is a registered professional engineer under the Professional Engineers Act 1988 (Qld)

**"Excess"** means the non-refundable amount of \$500 (or such other amount as determined by the *Trustee* from time to time) which shall be paid by the *Customer* to the *Trustee* upon lodgement of a claim for *Benefits* under these *Benefits Terms*

**"Fixed Price"** means the price under a *Contract* which is certain, except for the effect of provisional sums and prime cost items

**"GST"** means Goods and Services Tax

**"Handover Requirements"** means the preventative and maintenance requirements contained in the *Customer and Maintenance Book* provided by the *Contractor* to the *Customer*

**"Land"** means the land owned by the *Resident Owner* upon which the *Contracted Works* are to be performed comprising a private residence, and intended for the *Resident Owner's* residential, private or domestic use only

**"Limit of Benefits"** means the maximum amount of *Benefits* which the *Trustee* will be liable to pay to or on behalf of the *Customer* in accordance with these *Benefits Terms*

**"Practical Completion"** means when the *Trustee*, in its sole and absolute discretion, is of the opinion that the *Contracted Works* are complete except for minor defects and/or omissions which do not prevent the *Contracted Works* from being used for their intended purpose, which may include the issue of a signed *Certificate of Practical Completion* by the *Contractor*.

**"Rectification Works"** means building works that are necessary to rectify, replace or reinstate any *Defective Works* in the *Contracted Works* as determined by the *Trustee*, in its sole and absolute discretion

**"Regulations"** means Regulations made under the Domestic Building Contracts Act 2000 (Qld), or the Queensland Building Services Authority Act 1991 (Qld), or any regulation made by any appropriate authority

**"Resident Owner"** means a *resident owner* as defined in Schedule 2 of the Domestic Building Contracts Act 2000 (Qld)

**"SPASA" or "SPASA Queensland"** means the incorporated association known as the Swimming Pool & Spa Association of Queensland Inc

**"SPASA Benefits Trust"** means the discretionary mutual fund style scheme established under a Trust Deed dated 31 December 2001 (as varied from time to time)

**"Trustee"** means the trustee (from time to time) of the *SPASA Benefits Trust*, which *Trustee* is currently *SPASA Queensland*

## 1.2 Interpretations

- a) Unless the contrary intention appears, wherever terms defined by any Act or *Regulations* appear in these *Benefits Terms*, those terms shall as far as is reasonably practicable have the same meaning in these *Benefits Terms* as they have in that Act or *Regulations*, and, where there exists any discrepancy between the terms, provisions or requirements contained in these *Benefits Terms* and any other terms, provisions or requirements contained in the *Contract* then (subject to the sole and absolute discretion of the *Trustee*) the terms, provisions and specifications contained in the *Contract* shall prevail.
- b) Headings and italics (denoting defined terms and expressions) are for convenience only and are not to be used in interpreting these *Benefits Terms*.

## Part 2: *Benefits*

2.1 **General** - The *Trustee*, at its sole and absolute discretion (and subject to the terms and conditions of the *Contract*, the *SPASA Benefits Trust* and these *Benefits Terms*), will pay *Benefits* to or on behalf of the *Customer* in an amount not exceeding the *Limit of Benefits* arising from *Contractor Default* in respect of a *Contract*.

2.2 **Conditions** - Subject to the terms and conditions of the *Contract*, the *SPASA Benefits Trust*, and these *Benefits Terms*, the *Trustee* will not be liable to pay *Benefits* to or on behalf of the *Customer* unless the *Application Form* and the *Contribution Fee* is received (and a confirming *Certificate of Benefit* issued) by the *Trustee* prior to the *Date for Commencement* as shown in the *Contract*; and

- a) the *Customer* named in the *Contract* is the person/s who suffers financial loss (excluding consequential loss) directly resulting from *Contractor Default*, and, the contracting parties, the site and the construction specifications are as set out in the *Contract*;
- b) the *Contract* is in writing and is in a form approved by the *Trustee*, and the *Contracted Works* have all necessary statutory and local authority approvals,
- c) the *Contracted Works* consist of *Construction Work*, and the *Customer* complies with the terms and conditions of these *Benefits Terms*

2.3 **Non-transfer of *Benefits*** - The right, if any, to claim or receive *Benefits* in accordance with these *Benefits Terms* is for the benefit of the *Customer* only and is not to be assigned, transferred or otherwise disposed of, and is not in any way enforceable by, any other person/s.

## Part 3: *Non-completion of the Contracted Works*

3.1 **Payment for Non-Completion of the *Contracted Works*** - The *Trustee*, at its sole and absolute discretion (and subject to the terms and conditions of the *Contract*, the *SPASA Benefits Trust* and the terms of these *Benefits Terms*), will pay *Benefits* under this Part to or on behalf of the *Customer* arising from *Contractor Default* (in the nature of the non-completion of the *Contracted Works*) in respect of a *Contract*.

3.2 **Termination of *Contract*** - The *Trustee*, at its sole and absolute discretion, will only be liable to pay *Benefits* under this Part when the *Contract* is for a *Fixed Price* and the *Customer* has properly terminated the *Contract*.

In these *Benefits Terms*, "properly" means lawfully under the *Contract* and upon the occurrence of *Contractor Default* and where there is no unresolved dispute between the *Customer* and the *Contractor* concerning any such termination.

3.3 **Amount of *Benefits* payable - where the *Contracted Works* have not commenced** - Subject to Parts 5, 6, and 7 of these *Benefits Terms*, where the *Contractor* has not commenced the *Contracted Works*, the amount of any *Benefits* payable by the *Trustee* under this Part will not exceed the amount of the *Limit of Benefits* and is limited to the lesser of the amount of any unrefunded deposit paid by or on behalf of the *Customer* to the *Contractor* pursuant to the *Contract*; or

- a) if the *Fixed Price* is equal to or more than \$20,000 – 5% of the *Fixed Price* or the deposit paid, whichever is the lesser; or
- b) if the *Fixed Price* is less than \$20,000 – 10% of the *Fixed Price* or the deposit paid, whichever is the lesser.

3.4 **Amount of *Benefits* payable - where the *Contracted Works* have commenced** - Subject to Parts 5, 6 and 7 of these *Benefits Terms*, where the *Contractor* has commenced the *Contracted Works*, the amount of any *Benefits* payable by the *Trustee* under this Part will not exceed the amount of the *Limit of Benefits* and is limited to the amount which the *Trustee*, in its sole and absolute discretion, assesses to be the reasonable cost of completing the *Contracted Works* less any remaining liability of the *Customer* to pay under the *Contract*.

3.5 **When *Contracted Works* commenced** - For the purposes of this Part, *Contracted Works* are commenced when excavation or site preparation for the *Contracted Works* is physically commenced; or in the case of *Contract Works* where no excavation is required, when a change to the existing structure is physically commenced.

3.6 **Limits on *Benefits*** - Where the *Trustee*, in its sole and absolute discretion, is of the opinion that the value of the *Contracted Works* to be performed exceeds the *Fixed Price* to be paid then the *Trustee* may reduce the amount of any *Benefits* payable under these *Benefits Terms* by the amount of that excess.

Where the *Trustee*, in its sole and absolute discretion, is of the opinion that the *Customer* paid to or on behalf of the *Contractor* any moneys for the *Contracted Works* before they become due, then the *Trustee* may reduce the amount of any *Benefits* payable under these *Benefits Terms* by the amount of that prepayment (such amount to be assessed by the *Trustee* in its sole and absolute discretion).

3.7 **Expiry of Cover** - The *Trustee* is not liable to pay *Benefits* under this Part where the *Customer* has not properly terminated the *Contract*, or the date 12 months from the *Date of the Signing of the Contract* (whichever is the earlier).

3.8 **Time Limit for Making a Claim** - The *Customer* is NOT ENTITLED to payment of any *Benefits* under this Part unless a written claim is made by the *Customer* under and in accordance with these *Benefits Terms* within 90 Days of the *Customer* first becoming aware of the *Contractor Default* relied upon by the *Customer* for properly terminating the *Contract*.

3.9 **No Liability in Certain Circumstances** - The *Trustee* is not liable to pay *Benefits* under this Part where there is an unresolved dispute between the *Customer* and the *Contractor* concerning any termination of the *Contract*, or the non-completion of the *Contracted Works*, or any other matter arising under the *Contract*; or, where the *Customer* has exercised its right to withdraw from the *Contract* during any "cooling off period" provided for therein; or, where the *Customer* is not a *Resident Owner*.

## Part 4: *Defective Construction of the completed Contracted Works, following Practical Completion*

4.1 **Payment for Defective Construction of the *Contracted Works*** - The *Trustee*, at its sole and absolute discretion (and subject to the terms and conditions of the *Contract*, the *SPASA Benefits Trust* and the terms of these *Benefits Terms*), will pay *Benefits* under this Part to or on behalf of the *Customer* arising from *Contractor Default* (in the nature of the defective construction of the *Contracted Works*) in respect of a completed *Contract*.

**4.2 Amount of Benefits payable** - Subject to clauses 4.2 c) and 4.2 d) and Parts 5, 6 and 7 of these *Benefits Terms*, the amount of any *Benefits* payable by the *Trustee* under this Part will not exceed the amount of the *Limit of Benefits* and is limited to the amount which the *Trustee*, in its sole and absolute discretion, assesses to be the appropriate proportion of the reasonable cost to perform any *Rectification Works* required, less the remaining liability of the *Customer* to pay under the *Contract*.

For the purpose of determining the remaining liability of the *Customer* under the *Contract*, the *Trustee* may credit the *Customer* with an amount for which the *Contractor* has, for valuable consideration, waived payment and an amount for which the *Contractor* is liable to the *Customer* in respect of the *Contract* for the *Contracted Works*.

Where the *Trustee*, in its sole and absolute discretion, is of the opinion that the undertaking of *Rectification Works* is unnecessary or unreasonable, the payment of *Benefits* will be limited to the loss in value, if any, in the *Contracted Works*, produced by the departure from the plans or specifications or by the defective workmanship or materials.

For the purpose of determining the appropriate proportion of any *Benefits* payable in accordance with clause 4.2 a), such appropriate proportion shall be calculated as follows:

- a) where any *Defective Works* first became evident less than one year after the *Date of Practical Completion* – the full amount of such *Benefits*;
- b) where any *Defective Works* first became evident more than one year but less than two years after the *Date of Practical Completion* – five-sixths of such *Benefits*;
- c) where any *Defective Works* first became evident more than two years but less than three years after the *Date of Practical Completion* – four-sixths of such *Benefits*;
- d) where any *Defective Works* first became evident more than three years but less than four years after the *Date of Practical Completion* – three-sixths of such *Benefits*;
- e) where any *Defective Works* first became evident more than four years but less than five years after the *Date of Practical Completion* – two-sixths of such *Benefits*;
- f) where any *Defective Works* first became evident more than five years but less than six years after the *Date of Practical Completion* – one-sixth of such *Benefits*.

**4.3 Limits on Benefits** - The liability of the *Trustee* to pay any *Benefits* under this Part will not arise in circumstances where there is no *Contractor Default*, or

- a) where the *Contractor* has a continuing obligation to, and can complete the *Contracted Work*, or, in circumstances where *Rectification Works* are directed by the *BSA*, the *Contractor* has a continuing obligation to, and can complete the *Rectification Work*
- b) in circumstances where the *Customer* has not maintained the *Contracted Works* in accordance with the *Handover Requirements*;
- c) where the *Trustee*, in its sole and absolute direction, is of the opinion that the *Customer* has unreasonably refused access to the *Trustee* or its appointed agent, contractor or representative to inspect the *Contracted Works* and/or to perform or assess the *Rectification Works*.

**4.4 Expiry of Cover** - The *Trustee* is not liable to pay any *Benefits* under this Part where any *Defective Works* first became evident more than six years after the *Date of Practical Completion*.

**4.5 Time Limit for Making a Claim** - The *Customer* is NOT ENTITLED to payment of any *Benefits* under this Part unless a written claim is made by the *Customer* under and in accordance with these *Benefits Terms* within 90 Days of the *Customer* first becoming aware of the *Contractor Default* relied upon by the *Customer*.

## Part 5: **Limit of Benefits**

**5.1 Maximum Amount of Benefits payable** - The *Trustee* will not be liable to pay to or on behalf of the *Customer* any amount of *Benefits* in excess of the maximum amount of *Benefits* payable in accordance with these *Benefits Terms*.

- a) Subject to the terms and conditions of these *Benefits Terms*, the *Trustee* may (at its sole and absolute discretion) in addition to any *Benefits* payable in accordance with Part 3 or Part 4, pay any reasonable fees, costs or expenses including but not restricted to legal, accounting, engineering, architect or other specialist fees, costs or expenses incurred by the *Customer* (with the *Trustee's* prior written consent) in any attempt to reduce the amount of *Benefits* otherwise payable by the *Trustee* or in recovering amounts paid to or from the *Contractor* or any other person.
- b) Subject to the terms and conditions of these *Benefits Terms*, the maximum amount of *Benefits payable* by the *Trustee* to or on behalf of the *Customer* in respect of any *Contract* is an amount calculated by the *Trustee* in accordance with Part 3 or Part 4 and clause 5.1(b) (as applicable) or \$300,000.00 in the aggregate (whichever is the lesser).

**5.2 Taxes** - Any *Benefits* paid by the *Trustee* under these *Benefits Terms* are inclusive of all relevant taxes.

**5.3 Insurance Policies** - If any financial or other loss suffered by the *Customer* is covered by any other benefit or policies of insurance ("relevant policies"), then the amount of any *Benefits* payable by the *Trustee* under these *Benefits Terms* is limited to the amount in excess of the amount payable under any relevant policies.

- a) If the *Customer* elects not to claim or pursue payment or indemnity under any relevant Insurance policies, then the amount of any *Benefits* payable by the *Trustee* under these *Benefits Terms* is limited to the amount in excess of the amount that would have been payable under any relevant Insurance policies.
- b) The *Customer* shall, upon making a claim under these *Benefits Terms*, notify the *Trustee* in writing of any insurance or insurances already or proposed to be effected covering, whether in whole or in part, the *Land* or the liability hereby covered or any financial or other loss resulting from *Contractor Default*.

**5.4 Effect of Release of Contractor** - Where the *Contractor* or other person has been released from any liability in relation to the *Contracted Works*, then the *Trustee* is thereby also released from any liability under these *Benefits Terms*, and, where the *Contractor* or other person has been indemnified by the *Customer* in relation to the *Contracted Works*, then the *Customer* thereby releases the *Trustee* from any liability under these *Benefits Terms* to the extent of that indemnity.

## Part 6: **General Exclusions**

**6.1 Completion or Rectification without Approval** - The *Trustee* may in its sole and absolute discretion refuse to pay any *Benefits* under these *Benefits Terms* where the *Contracted Works* have been commenced, completed or rectified or *Rectification Works* have been commenced or completed (as applicable) by a person or entity other than the *Contractor* without the prior written approval of the *Trustee*.

**6.2 Alterations, Additions and Renovations** - Where the *Contracted Works* comprise or consist of renovation, alteration, extension or repair to any existing structure, the *Customer* is not entitled to payment of any *Benefits* under these *Benefits Terms* in respect of any financial

loss or any defect which occurs in relation to that existing structure.

**6.3 Other Exclusions** - The *Trustee* will not pay the *Excess* in respect of any claim under these *Benefits Terms*, and the *Customer* is not entitled to payment of any *Benefits* in respect of any financial or other loss in any way caused by, or arising from, or contributed to by any act, omission or inaction other than by or from *Contractor Default Defects* caused as a result of the *Customer* not maintaining the *Contracted Works* in accordance with the *Handover Requirements*, any defective design in the *Contracted Works* or the *Rectification Works* where the *Customer* is the person who contracted with an *Engineer, Architect* or other design drafter for the design of part or all of the *Contracted Works* or the *Rectification Works* or in any other case (unless the design was prepared by or on behalf of the *Contractor* by an *Engineer* or *Architect*), the gradual deterioration of the *Contracted Works* caused or contributed to by normal fair wear and tear, normal use or site conditions, the destruction of, or damage to, property or material used (or proposed to be used) in the *Contracted Works* or the *Rectification Works*, the lack of maintenance or neglect by the *Customer*, the failure of any person to undertake reasonable maintenance, inspections and treatments or to carry out reasonable recommendations given by the *Contractor* or the *Trustee* are also **excluded**, together with the effects of earthquake, erosion, flood, storm or tempest, landslip, tidal wave, change of watercourse, failure of artificial devices, pressure waves caused by aerial devices or aircraft, subsidence or settlement, fire, theft, malicious damage, or accidental damage.

**6.4 Customer as an Associate of the Contractor** - Where the *Customer* is a subcontractor, an associate, a trustee, a shareholder, or the spouse/child (de facto or otherwise) of the *Contractor* and/or the *Customer* has performed or caused performance of any part of the *Contracted Works* or the *Rectification Works*, then the *Customer* is not entitled to claim or receive payment of any *Benefits* under these *Benefits Terms*.

## Part 7: Claims

**7.1 Procedure for Claims** - The *Customer* must give the *Trustee* written notice of any circumstance likely to amount to *Contractor Default* or give rise to a claim under these *Benefits Terms* including, but not limited to, the death or insolvency of the *Contractor* – as soon as practicable after becoming aware of such circumstance, then:

- a) make a written claim under and in accordance with these *Benefits Terms* (in the form approved by the *Trustee*) within 90 Days of the *Customer* first becoming aware of the *Contractor Default* relied upon by the *Customer*, and, pay to the *Trustee*, at the time of making the written claim, the non-refundable *Excess* as nominated by the *Trustee*
- b) take all reasonable precautions and practical steps to mitigate any loss in relation to any claim under these *Benefits Terms*
- c) take all necessary steps to preserve (and must not without the *Trustee's* prior written consent release, agree not to sue, waive or prejudice) any of the *Customer's* rights against the *Contractor* and must not enter into any arrangement, or compromise, or do any act to prejudice the *Trustee's* subrogation rights or remedies arising under these *Benefits Terms*;
- d) provide in writing such additional information as the *Trustee* may from time to time request from the *Customer*.

**7.2 Admission of Claims** - Before admitting a claim under these *Benefits Terms*, the *Trustee* will determine and satisfy itself that there exists *Contractor Default*.

**7.3 Duty of Good Faith** - The *Customer* has a duty to the *Trustee* to act in utmost good faith in respect of any claim or other matter arising under or in relation to a *Contract* and these *Benefits Terms*.

- a) This duty includes, but is not limited to, a duty by the *Customer* to disclose to the *Trustee* in a timely manner each and every matter the *Customer* knows, or could reasonably be expected to know, which may be relevant to a determination by the *Trustee* to pay any *Benefits* under these *Benefits Terms*.
- b) The *Customer* must assist and co-operate with the *Trustee*, and provide in a timely manner all such information, documents, records and signed statements as the *Trustee* may from time to time require, in respect of any claim or other matter arising under or in relation to these *Benefits Terms*.
- c) If the *Customer* fails in the duty of utmost good faith, or if the *Customer* provides false or incorrect information to the *Trustee*, then the *Customer* shall upon demand by the *Trustee* pay to the *Trustee* any amount paid by the *Trustee* to any person as *Benefits* under these *Benefits Terms*.

**7.4 Subrogation** - The *Trustee* is subrogated to the rights of the *Customer* to the extent of any *Benefits* which the *Trustee* has paid, or undertaken to pay to any person, under these *Benefits Terms*.

## Part 8: Payments

Where the *Trustee* admits a claim under these *Benefits Terms*, the *Trustee* may at its sole and absolute discretion do any of the following:

- a) arrange for, and pay *Benefits* in respect of, the completion of the *Contracted Works* or *Rectification Works* by an appropriately BSA licensed contractor (whether or not a SPASA member) appointed by the *Trustee*; or
- b) pay *Benefits* (in an amount to be determined by the *Trustee*) to the *Customer*; or
- c) pay such part of the *Benefits* payable in respect of the completion of the *Contracted Works* or *Rectification Works* to an appropriately BSA licensed contractor (whether or not a SPASA member) and any balance to the *Customer*; or
- d) pay *Benefits* (in an amount to be determined by the *Trustee*) to an appropriately BSA licensed contractor (whether or not a SPASA member) engaged by the *Customer* with the prior written approval of the *Trustee* to complete the *Contracted Works* or *Rectification Works*.

## Part 9: Decisions Not Reviewable

All decisions made by the *Trustee* in respect of the *SPASA Benefits Trust* and these *Benefits Terms*, including decisions concerning or relating to the scope and costs of any work to be performed to complete *Contracted Works* and/or *Rectification Works*; or, whether to allow or disallow a claim under the *SPASA Benefits Trust* and these *Benefits Terms* wholly or in part; or, any claim entitlement, assessment or procedure under the *SPASA Benefits Trust* and these *Benefits Terms*; or, any other matter in respect of the *SPASA Benefits Trust* and these *Benefits Terms* are made at the sole and absolute discretion of the *Trustee*, and are not reviewable.

Published by the Trustee



Swimming Pool & Spa Association of Queensland Inc.

ABN: 13 935 751 789

PO Box 2123, Fortitude Valley Q 4006

Phone: (07) 3252 6777 Fax: (07) 3252 6700

January 1<sup>st</sup>, 2011