

# Forestry Fair Contract Code 2003

## INTRODUCTION:

In accordance with the provisions of the *Forestry (Fair Contract Codes) Act 2001* this Forestry Contract Code has been prepared by interested parties and their representatives.

Interested parties and their representatives commenced the preparation of this Forestry Contract Code on 28 June 2002. On 5 September 2002, the Minister for Economic Development, Energy and Resources issued, pursuant to section 8 of the *Forestry (Fair Contract Codes) Act 2001*, a formal invitation to prepare a Forestry Contract Code for all contracts for the provision of services within the forestry industry to the interested parties and their representatives.

The Standard Conditions contained in this Forestry Contract Code apply to all Forestry Contracts entered into for the following types of forestry operation:

- (a) planting trees for commercial timber production;**
- (b) managing trees that have been planted for commercial timber production, but limited to the following silviculture activities:**
  - **thinning**
  - **pruning**
  - **fertilising**
  - **pest and weed control**
  - **fire and weed management;**
- (c) harvesting trees for commercial timber production;**
- (d) transporting timber that has been harvested for commercial purposes;**
- (e) land clearing associated with a forestry operation specified elsewhere in this definition; and**
- (f) road construction and quarrying associated with a forestry operation specified elsewhere in this definition.**

# FORESTRY CONTRACT CODE STANDARD CONDITIONS

## Interpretation

In this Forestry Contract, unless the context precludes it:

- (a) the singular includes plural and the plural includes the singular;
- (b) a reference to a gender includes reference to each other gender;
- (c) a reference to a person includes a reference to a firm, corporation or other corporate body;
- (d) a reference to a statute, regulation or provision of a statute or regulation includes a reference to:
  - (i) that statutory provision as amended or re-enacted from time to time; and
  - (ii) a statute, regulation or provision enacted to replace that statutory provision;
- (e) a reference to writing includes a reference to printing, typing and each other method of producing words in visible form;
- (f) if a word or expression is given a particular meaning, then other parts of speech and grammatical forms of that word or expression have corresponding meanings;
- (g) headings are for convenience only and are to be ignored in construing it;
- (h) if a party consists of more than one person, then this Forestry Contract binds them jointly and each of them severally;
- (i) it binds, in addition to the parties, their respective legal personal representatives and successors;
- (j) the verb “include” (in all its parts, tenses and variants) is not used as, nor is it to be interpreted as, a word of limitation.

## Definitions

In this Forestry Contract, unless the context precludes it:

“Area” means the locality in which the Contract Services are to be performed;

“Contractor” means the party named as the Contractor in Item 1 of Schedule 1;

“Contract Services” means the services described in Item 2 of Schedule 1, to be performed by the Contractor under the terms of this Forestry Contract;

“Forestry Contract” means a contract that provides for one party to the contract to carry out, otherwise than as an employee, a forestry operation for another party to the contract or another person;

“Guarantor” means the party (if any) named in Item 1 of Schedule 1, as the Guarantor;

“Mediator” means a professional mediator appointed by agreement between the parties, or, failing agreement, by the President of the Law Society of Tasmania, or the President’s nominee at the written request of any party;

“Principal” means the party named as the Principal in Item 1 of Schedule 1;

“Nationally Based Competency Standards” means the standards of that description in the Forest and Forest Products Employment Skills Company’s Forest and Forest Products Industry Training Package from time to time;

“Rate” means the sum of money stated in, or determined under, Item 4 of Schedule 1, that the Principal must pay the Contractor for providing the Contract Services;

“Term” means the term of this Forestry Contract fixed under clause 3.1, and includes a renewed or extended term under clause 3.3.

## **GENERAL CONDITIONS FOR ALL FORESTRY CONTRACTS**

### **1 Identity of Parties**

Each person who signs this Forestry Contract on behalf of a party to it, warrants separately to each other party, that the party on whose behalf he or she has signed is a validly constituted, existing legal entity, whose name, address and Australian Business Number (if applicable) are correctly set out in Item 1 of Schedule 1.

### **2 Engagement**

2.1 The Principal and the Contractor agree that the Contractor will carry out the Contract Services for the Principal on the terms of this Forestry Contract.

### **3 Term, renewal and extension of this Forestry Contract**

3.1 The Term starts on the Starting Date and finishes on the Finishing Date, set out in Item 2 of Schedule 1. Neither the Contractor nor the Principal is obliged to renew or extend the Term.

3.2 When at least 75% of the duration of the Term has expired, either the Contractor or the Principal may notify the other parties that the party giving the notice wishes to renew or extend the Term. Each party receiving the notice must respond within 7 days or before the Finishing Date, whichever is the sooner.

3.3 If the Principal and the Contractor intend to renew or extend the Term, then the parties must meet, conduct and complete all negotiations about a renewed or extended Term within 25% of the part of the Term remaining after the date of the notice under clause 3.2.

### **4 Relationship of Parties**

4.1 The Contractor is an independent contractor with the Principal to provide the Contract Services. That is the only contractual relationship between the Principal and the Contractor for the Contract Services.

4.2 No relationship in the nature of:

- employer/employee
- principal/agent
- joint venturers
- partners

exists between the Principal and the Contractor for the Contract Services.

### **5 The Contractor's responsibilities**

5.1 The Contractor is responsible:

- (a) for the conduct of all operations required to perform the Contract Services;

- (b) for the timing of the performance of the Contract Services consistently with any timing restrictions that the Principal has previously notified to the Contractor;
- (c) to engage, direct and pay each employee and subcontractor engaged by the Contractor to perform the Contract Services;
- (d) to provide all materials necessary to perform the Contractor's obligations under this Forestry Contract at the Contractor's own cost, including providing all fuel, plant and equipment and labour, unless the Principal and the Contractor agree otherwise in writing;
- (e) to ensure that all the Contractor's employees and subcontractors, either:
  - (i) are competent; and
  - (ii) have the necessary qualifications and accreditation to carry out the work necessary to perform the parts of the Contract Services for which they are employed or engaged to Nationally Based Competency Standards;or, until they meet those criteria, are currently involved in a documented training program overseen by a person who has the necessary qualifications and accreditation to Nationally Based Competency Standards;
- (f) to ensure that it, its employees and subcontractors comply with all relevant State and Commonwealth legislation, in particular the *Workplace Health and Safety Act (1995) Tas* and the *Forest Practices Act (1985) Tas*; and
- (g) to use all reasonable and proper precautions to prevent and suppress unplanned fires.

5.2 The Contractor must take out and keep in place throughout the Term:

- (a) public risk insurance:
  - (i) to cover liability for personal injury, death or property damage arising from the Contractor's obligations under this Forestry Contract;

- (ii) for at least Ten Million Dollars for any one claim, or series of claims, arising out of a single occurrence; and
  - (iii) extending to cover the Contractor's employees engaged in carrying out work or obligations under this Forestry Contract;
- (b) workers compensation insurance for all of the Contractor's employees, naming the Principal as a principal for the purposes of any liability that accrues to it under Section 29 of the *Workers' Rehabilitation and Compensation Act (1988) Tas*;
- (c) if the Contractor is a natural person, not covered by workers compensation insurance while providing the Contract Services, a personal sickness and accident policy that provides for income protection in the event of accident or injury to the Contractor; and
- (d) insurance for each vehicle used by the Contractor to carry out the Contracted Services, covering third party property damage for at least Ten Million Dollars.

5.3 The Contractor must ensure that each vehicle used by the Contractor to carry out the Contracted Services has a current certificate issued by the Motor Accident Insurance Board confirming cover for personal injury arising out of the use of the motor vehicle.

5.4 The Contractor must either:

- (a) ensure that each of its sub-contractors and their employees and agents are covered by insurance of the type described in clauses 5.2(a) and 5.2(b) and 5.3, as if those subcontractors were the Contractor; or
- (b) take out and keep in place throughout the Term, a policy of insurance that indemnifies the Contractor against liability that would attach to the Contractor if the Contractor's sub-contractors and their employees and agents are not covered by insurance of the type described in clauses 5.2(a) and 5.2(b) and 5.3, as if those subcontractors were the Contractor.

5.5 The Contractor must give the Principal, a certificate of currency, or other satisfactory evidence, of all insurance that the Contractor is required to take out and a certified copy of each policy. The Contractor irrevocably authorises the Principal and its representatives to make such enquiries as it considers necessary, to determine the nature and extent of the Contractor's insurances.

5.6 The Principal's directions and policies in place at the Starting Date are set out in Schedule 2. The Contractor acknowledges that the Principal retains the right to add to, vary, amend or revoke its directions and policies at any time and the Contractor agrees to comply with those directions and policies if the directions and policies are fair and reasonable and are not inconsistent with the terms of this Forestry Contract. The Principal agrees to consult with the Contractor when changing these directions and policies.

## **6 The Principal's obligations**

The Principal must:

- (a) provide the Contractor with valid and authorised Forest Practices Plans for the Area, before the Contractor starts work. The Principal must make every reasonable effort to consult with the Contractor, when the Principal develops the Forest Practices Plans involving the Contract Services;
- (b) use all reasonable endeavours to provide the Contractor with authorised access to the Area when carrying out the Contracted Services.

## **7 Payment for Contract Services**

7.1 The Principal will pay the Contractor the Rate specified in Item 4 of Schedule 1, being the only payment due to the Contractor for the Contracted Services.

7.2 The Contractor and the Guarantor, together and separately, indemnify the Principal against any claim made against the Principal by an employee or subcontractor of the Contractor in respect of any income tax, workers

compensation, annual leave, redundancy payment or long service leave entitlement.

## **8 Dispute and grievance resolution**

- 8.1 A party may notify all other parties when they consider there is a dispute or grievance under this Forestry Contract. Within 14 days after notice of a dispute or grievance, the parties must meet and make every effort to resolve the matter within a further 30 days.
- 8.2 If the dispute or grievance is not resolved within the period allowed in clause 8.1, then any party may notify the other parties, in writing, that they intend to refer the dispute or grievance for mediation by a Mediator.
- 8.3 A notice under clause 8.1 or clause 8.2 must be in writing and include reasonable particulars of the subject matter of the dispute or the cause of the grievance.
- 8.4 A party may be represented by another person at a mediation.
- 8.5 The Principal and the Contractor are jointly responsible for the Mediator's fees and out of pocket expenses.
- 8.6 A Mediator is entitled to inform himself or herself about matters relevant to mediation of a dispute or grievance as he or she considers most appropriate in the circumstances.
- 8.7 A Mediator's determination about a dispute or grievance is not binding on a party unless that party agrees to be bound.
- 8.8 If a dispute or grievance is not resolved by mediation, only then may a party refer the dispute or grievance to arbitration under the *Commercial Arbitration Act 1986 Tas*, or commence formal legal proceedings.

8.9 The parties must continue to perform their respective obligations under this Forestry Contract pending resolution of a dispute or grievance.

## **9 Assignment**

9.1 Either the Principal or the Contractor may assign their rights and obligations under this Forestry Contract if:

- (a) the intending assignor gives written notice of that intention to all other parties; and
- (b) another party does not object in writing within 30 days.

9.2 An objection to assignment must be on reasonable grounds relating to the ability of the proposed assignee to carry out the terms of this Forestry Contract.

9.3 The Principal may object to an assignment proposed by the Contractor if, within 21 days after receiving the notice under clause 9.1(a):

- (a) the Guarantor has not consented in writing to the proposed assignment; and
- (b) no new guarantor, acceptable to the Principal, has entered into a guarantee in the form of clause 14.1, of the proposed assignee's obligations under this Forestry Contract.

Such an objection will be taken to have been made on reasonable grounds.

9.4 A dispute about assignment is to be dealt with under clause 8.

## **10 Periodic Rate review**

10.1 The parties must meet to review the Rate:

- (a) on the date in Item 5 of Schedule 1 in each year during the Term; and
- (b) as requested by any party at any other time during the Term.

10.2 The parties must record the outcome of the review of the Rate, including any agreed adjustment to the Rate.

## **11 Periodic performance review**

- 11.1 If the Term is 18 months or longer, the parties must meet, at least annually, during the Term to discuss:
- (a) the quality of the Contractor's performance of the Contract Services;
  - (b) the quality of the Principal's performance of its obligations under this Forestry Contract; and
  - (c) the Term.
- 11.2 A party may attend a performance review with, and be represented by, any person of their choice.
- 11.3 The Principal must take minutes of each meeting held under this clause and deliver a draft copy to the other parties within 7 days after the meeting. The parties present at a meeting must use their best endeavours to agree upon a true record of the meeting, within 21 days after the meeting.

## **12. Supervening Events**

- 12.1 In this clause, unless the context precludes it:
- (a) "supervening event" means an event on which the affected party seeks to rely, to obtain one of the remedies under this clause.
  - (b) "affected party" means the party that is affected by a supervening event.
  - (c) "non-affected party" means each party that is not the affected party, in relation to a particular supervening event.
- 12.2 If a supervening event frustrates the affected party's ability to perform its obligations under this Forestry Contract, then the affected party may seek:
- (a) to terminate this Forestry Contract under this clause; or
  - (b) to delay the affected party's performance of its obligations under this Forestry Contract; or
  - (c) to extend the time for the affected party to complete particular obligations under this Forestry Contract; or
  - (d) to extend the Term of this Forestry Contract.

12.3 If the affected party seeks one of the remedies in clause 12.2 (other than a termination of this Forestry Contract), then that remedy applies only for a delay or an extension for the period that the supervening event, or the consequences of the supervening event, actually caused.

12.4 If the affected party seeks to obtain the benefit of this clause 12 to excuse their non-performance, then:

(a) the affected party must:

- (i) promptly give notice to the other parties of the occurrence and circumstances of the supervening event;
- (ii) promptly take all reasonable steps to mitigate the effects of, and remedy the consequences of, the supervening event; and
- (iii) resume performance of its obligations, in full, under this Forestry Contract as soon as reasonably practicable, unless a termination of this Forestry Contract is sought.

If the affected party does not do all of those things, they will not be entitled to the remedy sought.

(b) the event alleged as a supervening event by the affected party on which that party relies as a reason for non-performance, must:

- (i) have been beyond the affected party's control;
- (ii) not have been the result of the affected party's fault or negligence; and
- (iii) not be a matter on which the affected party has given a warranty to the non-affected party.

12.5 The initial burden of proof lies with the affected party.

(a) As part of the burden of proof, the affected party has a duty to show:

- (i) that all of the conditions in sub-clause 12.4 are satisfied;
- (ii) that the supervening event operated in a manner that prevented the affected party from performing its obligations under this Forestry Contract;
- (iii) that the supervening event in fact prevented the affected party from fulfilling its obligations under this Forestry Contract;

- (iv) that the supervening event was the cause, and the only relevant cause, of the affected party's inability to perform its obligations under this Forestry Contract;
  - (v) that if it had not been for the supervening event, the affected party was ready, willing and able to perform its obligations under this Forestry Contract, without the benefit of the remedy sought;
  - (vi) that the affected party has the resources available to meet its obligations under this Forestry Contract, and would do so but for the supervening event;
  - (vii) that the supervening event was not induced by the affected party;
  - (viii) what action has been taken to perform its obligations under this Forestry Contract, regardless of the occurrence of the supervening event.
- (b) If the affected party has discharged the burden of proof under sub-clause 12.5(a), then the non-affected party bears the burden of proof to show that the affected party would not have performed its obligations under this Forestry Contract in any event.
- (c) The affected party cannot rely on the benefit of this clause if the supervening event is:
- (i) a pre-existing cause, or state of affairs, known to the affected party; or
  - (ii) intentionally or negligently caused by the affected party; or
  - (iii) reasonably foreseeable by the affected party in the context of the warranties as to competence, capacity, expertise and otherwise given by the affected party, and not expressly disclosed to the non-affected party before the date of this Forestry Contract; or
  - (iv) an act of a third party making performance impossible, if that act of a third party was reasonably foreseeable by the affected party, and not expressly disclosed to the non-affected party before the date of this Forestry Contract; or

(v) a lack of funds, or an inability to use available funds.

- 12.6 Neither party is required to settle any strikes, lockouts or other industrial disputes or disturbances on terms that are contrary to its interests. The decision as to whether the terms are contrary to the interests of the affected party rests with the affected party.
- 12.7 If this Forestry Contract is terminated under this clause, then the affected party must give at least fifteen (15) Days notice to the non-affected party.
- 12.8 If this Forestry Contract is terminated under this clause, then the Principal must pay for Contract Services completed before the effective date of termination but is not liable to make any other payments.

### **13 Termination**

- 13.1 Either the Principal or the Contractor may, by written notice to the other, terminate this Forestry Contract immediately and without giving prior notice if there is a serious or persistent breach by the other of them, of this Forestry Contract.
- 13.2 Despite clause 13.1, upon breach of this Forestry Contract by the Principal or the Contractor, the other of them may, at its option, give notice to all other parties, that if the breach is not rectified within 14 days from the date of service of the notice, the party giving the notice will be entitled to terminate this Forestry Contract immediately. If the breach is not rectified within that time period, the party giving the notice may terminate this Forestry Contract by written notice to all other parties.
- 13.3 The Principal may terminate this Forestry Contract immediately by giving written notice to the other parties, if any of the following events happen:
- (a) there is a change in the direct or indirect beneficial ownership or control of the Contractor without the Principal's prior written consent;
  - (b) the Contractor disposes of all or part of any assets, operations or business that are required to provide the Contract Services without the

Principal's prior written consent and other than in the ordinary course of business;

- (c) the Contractor ceases to carry on business;
- (d) the Contractor ceases to be able to pay its debts as they become due;
- (e) a mortgagee takes a step to take possession or dispose of all or part of the Contractor's assets, operations or business;
- (f) the Contractor takes a step to enter into an arrangement with its creditors;
- (g) a step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, an administrator or other like person of all or part of the Contractor's assets, operations or business; or
- (h) if the Contractor is a partnership, a step is taken to dissolve or otherwise change the partners in that partnership, without the Principal's prior written consent.

13.4 The Principal must not unreasonably withhold, or delay giving its consent under clauses 13.3 (a), (b) or (h);

## **14 Guarantee**

14.1 In return for the Principal granting this Forestry Contract to the Contractor at the Guarantor's request, the Guarantor guarantees and indemnifies the Principal on the following terms:

- (a) the Guarantor guarantees to the Principal that the Contractor will punctually observe and perform its obligations under this Forestry Contract so far as is reasonably practical;
- (b) the Guarantor indemnifies the Principal against any loss the Principal suffers because:
  - (i) the Contractor does not perform the guaranteed obligations; or
  - (ii) the Principal cannot enforce this Forestry Contract against the Contractor, because the Contractor:
    - A. has not validly executed this Forestry Contract;
    - B. is subject to a legal disability or limitation;

- C. has acted without power; or
  - D. is insolvent;
- (c) the Guarantor agrees that:
- (i) the guarantee is a continuing guarantee; and
  - (ii) the indemnity is a continuing indemnity,
- and both remain in full force and effect during this Forestry Contract or while the Contractor fails to comply with this Forestry Contract;
- (d) the Guarantor's liability under the guarantee or indemnity will not be discharged or reduced just because:
- (i) the Principal, without first advising the Guarantor in writing or getting their consent:
    - A. grants time, or any other indulgence, to the Contractor or to any one or more persons constituting the Guarantor;
    - B. compounds, compromises or enters an arrangement with the Contractor or any one or more persons constituting Guarantor; or
    - C. releases the Contractor or any one or more persons constituting Guarantor,in relation to this Forestry Contract, the guarantee or the indemnity or any security held by the Principal in relation to this Forestry Contract, the guarantee or the indemnity;
  - (ii) the Principal, without first advising the Guarantor in writing or getting their consent:
    - A. agrees to vary this Forestry Contract or this guarantee;
    - B. waives any breach by the Contractor of its obligations under this Forestry Contract; or
    - C. fails to enforce this Forestry Contract against the Contractor;
  - (iii) this Forestry Contract is disclaimed because the Contractor is insolvent;
  - (iv) any security that the Principal holds in relation to this Forestry Contract, the guarantee or the indemnity is void or defective;

- (e) each person who signs this Forestry Contract as a Guarantor is bound by this guarantee and indemnity even though another Guarantor:
  - (i) does not sign; or
  - (ii) is not bound by this guarantee and indemnity for any reason;
- (f) the Guarantor must pay all amounts due to the Principal under this guarantee and indemnity without:
  - (i) any deduction; or
  - (ii) any set-off;
- (g) if the Principal receives a payment that reduces the Contractor's liability to the Principal from any source, the Principal may apply it to any amount that the Contractor owes to the Principal, as the Principal chooses;
- (h) the Guarantor must not claim the benefit or require the transfer of any security, guarantee or indemnity held by the Principal until the Guarantor discharges all their liability to the Principal;
- (i) if the Contractor is insolvent:
  - (i) the Principal may:
    - A. prove in the insolvency for any money that the Guarantor has paid to the Principal under this guarantee; and
    - B. credit to a suspense account and apply any dividends it receives from the insolvency as it chooses until the Contractor's liability to the Principal has been paid in full; and
  - (ii) the Guarantor must not prove in the Contractor's insolvency unless the Principal first agrees in writing;
- (j) each Guarantor acknowledges that:
  - (i) they have read this Forestry Contract and the guarantee and indemnity;
  - (ii) in deciding to sign this Forestry Contract as guarantor, they did not rely on any promise, statement or information made or given by or on behalf of the Principal except those set out in this Forestry Contract;

- (iii) they had an opportunity to get independent legal and financial advice before signing this Forestry Contract as guarantor; and
- (iv) they are responsible to find out about this Forestry Contract, the financial position of the Contractor and any other Guarantor and any other matter affecting their decision to sign this Forestry Contract as guarantor.

14.2 Despite anything to the contrary in clause 14.1, if, without obtaining each Guarantor's prior written consent, the Principal agrees to the Contractor assigning the Contractor's rights and obligations under this Forestry Contract, then each Guarantor is released from all future obligations under this Forestry Contract from the date that the assignment takes effect. None of the Guarantor's obligations under clause 14.1, in respect of the period before an assignment takes effect, are released under this clause 14.2.

**15 No legal effect**

Any part of this Forestry Contract that is not in writing in the English language, has no legal effect.

## SCHEDULE 1

### Item 1 (cl. 1)

The parties to this Forestry Contract are:

- 1** \_\_\_\_\_, (ABN \_\_\_\_\_) of \_\_\_\_\_  
 (“the **Principal**”);
- 2** \_\_\_\_\_, (ABN \_\_\_\_\_) of \_\_\_\_\_  
 (“the **Contractor**”); and
- 3** \_\_\_\_\_, (ABN \_\_\_\_\_) of \_\_\_\_\_  
 (“the **Guarantor**”).

### Item 2 (cl. 2)

The Contract Services are:

### Item 3 (cl. 3)

The Starting Date of this Forestry Contract is: \_\_\_\_\_ 20...

The Finishing Date of this Forestry Contract is: \_\_\_\_\_ 20...

### Item 4 (Definitions)

The Rate:

### Item 5 (cl. 10.1(a))

The date for the annual Rate Review is: \_\_\_\_\_ in each year of the Term

## SCHEDULE 2

(Principal’s directions and policies – clause 5.6)

This Forestry Contract Code was approved by the Minister for Economic Development, Energy and Resources on:

Hon. Paul Lennon                      Date: 12 May 2003  
Deputy Premier  
Minister for Economic Development, Energy and Resources

This Forestry Contract Code was approved by both Houses of Parliament on:

House of Assembly                      Date: 10 June 2003

Legislative Council                      Date: 10 June 2003

This Forestry Contract Code came into effect on: 1 July 2003.