



Eastern Goldfields Regional Prison Redevelopment Project

Tender Number: BMW 213419/11

FM Side Deed

The State of Western Australia represented by the Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902 (WA)* and the Honourable Murray John Cowper MLA, Minister for Corrective Services (**State**)

Assure Partners (EGRP) 1 Pty Ltd ACN 160 900 149 as trustee of the Assure Partners (EGRP) Unit Trust 1 for and on behalf of the Assure Partners (EGRP) Partnership

Assure Partners (EGRP) 2 Pty Ltd ACN 161 471 316 as trustee of the Assure Partners (EGRP) Unit Trust 2 for and on behalf of the Assure Partners (EGRP) Partnership (together, **Project Co**)

Honeywell Limited ABN 74 000 646 882 (**FM Subcontractor**)

Honeywell International Inc (**FM Subcontractor Guarantor**)

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FM Side Deed made on

Parties

The State of Western Australia represented by the Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902 (WA)* and the Honourable Murray John Cowper MLA, Minister for Corrective Services (**State**)

Assure Partners (EGRP) 1 Pty Ltd ACN 160 900 149 as trustee of the Assure Partners (EGRP) Unit Trust 1 for and on behalf of the Assure Partners (EGRP) Partnership; and

Assure Partners (EGRP) 2 Pty Ltd ACN 161 471 316 as trustee of the Assure Partners (EGRP) Unit Trust 2 for and on behalf of the Assure Partners (EGRP) Partnership,

of Level 8, 136 Exhibition Street, Melbourne, VIC 3000 (together, **Project Co**)

Honeywell Limited (ABN 74 000 646 882) of Level 3, 2 Richardson Place, North Ryde, NSW 2113 (**FM Subcontractor**)

Honeywell International Inc of 101 Columbia Road, Morristown, NJ, U.S.A. (**FM Subcontractor Guarantor**)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. Project Co has, in accordance with the FM Subcontract, subcontracted its obligations to undertake the Services to the FM Subcontractor.
- C. The FM Subcontractor Guarantor has, in accordance with the FM Guarantee, guaranteed to Project Co the performance of the FM Subcontractor's obligations in accordance with the FM Subcontract.
- D. The parties have agreed that upon termination by the State of the Project Agreement, the State will have the option of exercising certain rights in relation to the FM Subcontract and the FM Guarantee on the terms stated in this document.

Operative provisions

1. Definitions and interpretation

1.1 General

- (a) Except as otherwise expressly provided in this document, expressions used in this document have the meanings given to them in or for the purposes of the Project Agreement.
- (b) The use of the word "remedy" or any form of that word in respect of a Default Event means that the Default Event must be remedied or its effects overcome.

1.2 Definitions

In this document:

Additional Obligor means a company which is wholly owned by the State.

Additional Obligor Step-in Notice means the notice given in accordance with Clause 5.1(a)(iv).

Additional Obligor Step-Out Date is the date determined in accordance with Clause 5.3(d).

Default Event means a breach or default by Project Co in accordance with the FM Subcontract, which alone or with the giving of notice or the passage of time (or both) would entitle the FM Subcontractor to terminate, rescind, accept repudiation of or suspend any or all of the FM Subcontractor's obligations under the FM Subcontract.

Default Event Notice means a notice given in accordance with Clause 4.2(a).

FM Subcontractor Associates has the meaning given to it in the FM Subcontract.

FM Project Documents has the meaning given in the FM Subcontract.

Material Adverse Effect means a material adverse effect on:

- (a) the ability of Project Co or the FM Subcontractor to perform and observe its obligations under any Project Document to which it is a party;
- (b) the rights of the State under any Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a Project Document; or
- (c) the performance of, or the cost of undertaking, the Facility Functions.

Novation Date means:

- (a) in connection with Clause 6.8, the later of the date of the Novation Notice and the date the FM Subcontractor consents or is deemed to have consented to the novation (or such date as is determined in accordance with Clause 11); and
- (b) otherwise, the date of the Novation Notice.

Novation Notice has the meaning given to it in Clause 6.1.

Project Agreement means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - Project Agreement" between the State and Project Co dated on or about the date of this document.

Receiver means a receiver or receiver and manager appointed by the State in accordance with the State Deed of Charge.

State Cure Notice means the notice given by the FM Subcontractor to the State in accordance with Clause 4.2(c).

Statement Beneficiary has the meaning given to it in Section 1.4(a) of Schedule 1.

Step-in Period means the period determined in accordance with Clause 5.1(c).

Subsidiaries has the meaning given to it in Clause 1.8(j)(i).

Substitute Party means the substitute party identified in the Novation Notice.

1.3 Interpretation

In this document unless the context otherwise requires:

- (a) **(references)**: references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), or a partnership;
- (b) **(includes)**: the words "including", "includes" and "include" will be read as if followed by the words "without limitation";
- (c) **(or)**: the meaning of "or" will be that of the inclusive "or", that is meaning one, some or all of a number of possibilities;

- (d) **(party)**: a reference to a "party" is to a party to this document;
- (e) **(other persons)**: a reference to any party or person includes each of their legal representatives, executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (f) **(Authority)**: a reference to any Authority, institute, association or body is:
 - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, a reference to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as applicable; and
 - (ii) if that Authority, institute, association or body ceases to exist, a reference to the organisation which serves substantially the same purposes or objectives as that Authority, institute, association or body;
- (g) **(this document)**: a reference to this document or to any other deed, agreement, document or instrument includes a reference to this document or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (h) **(Legislation)**: a reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for, that legislation, section or provision;
- (i) **(rights)**: a reference to a right includes any benefit, remedy, discretion, authority or power;
- (j) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (k) **(headings)**: headings are for convenience only and do not affect the interpretation of this document;
- (l) **(inclusive)**: a reference to this document includes all Schedules;
- (m) **(Clauses)**: a reference to:
 - (i) a Clause is a reference to a Clause of this document unless otherwise stated; and
 - (ii) a paragraph is a reference to a paragraph in the Clause in which the reference appears;
- (n) **(defined meaning)**: where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (o) **(\$)**: a reference to "\$" is to Australian currency;
- (p) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (q) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (r) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this document or any part;

- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (t) **(may)**: the term may, when used in the context of a power or right exercisable by the State, means that the State can exercise that right or power in its absolute and unfettered discretion and the State has no obligation to Project Co to do so;
- (u) **(remedy)**: the use of the word "remedy" or any form of it in this document means that the event to be remedied must be cured or its effect overcome;
- (v) **(no double costing)**: if this document requires calculation of an amount payable to a party there should be no double costing in calculating that amount; and
- (w) **(writing)**: references to a notice, request, Claim, consent, approval, record or report means that the notice, request, Claim, consent, approval, record or report must be in writing unless otherwise agreed by the parties or expressly stated in this document.

1.4 Related matters

- (a) **(Provisions limiting or excluding Liability)**: Any provision of this document which seeks either expressly or by implication to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.
- (b) **(Business Day)**: If the day on or by which any thing is to be done in accordance with this document is not a Business Day, that thing must be done on the next Business Day.
- (c) **(Consents)**: A consent or approval in accordance with this document from the State or the State Representative may be given or withheld, or may be given subject to such conditions (other than the payment of money), as the State or the State Representative (in its absolute discretion) considers fit, unless this document states otherwise.
- (d) **(Order of precedence)**: To the extent of any inconsistency, ambiguity or discrepancy between this document and the FM Subcontract, this document prevails to the extent of that inconsistency.

1.5 Continuance of rights

- (a) This document does not affect the Liabilities, rights, powers or remedies of a party in accordance with any other Project Document.
- (b) The failure by a party (other than Project Co) to comply with the provisions of this document does not affect the Liability of Project Co in accordance with any other Project Document.

1.6 State Project Documents

Each of the FM Subcontractor and FM Subcontractor Guarantor agrees that it has received a copy of the State Project Documents.

1.7 Commencement

The rights and obligations of the parties in accordance with this document commence on Financial Close.

1.8 Representations by FM Subcontractor

The FM Subcontractor represents and agrees that:

- (a) **(Project Documents)**: it has power to execute, deliver and perform its obligations in accordance with each Project Document to which it is a party and all necessary corporate action has been taken to authorise its execution, delivery and performance;
- (b) **(valid and legally binding)**: each Project Document to which it is a party is a legal, valid and binding obligation on it in accordance with its terms, subject only to a court's exercise of its discretion in relation to equitable remedies and to the applicable laws which affect creditor's rights generally;
- (c) **(legality)**: the execution, delivery and performance by it of its obligations in accordance with the Project Documents to which it is a party does not violate any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
- (d) **(status)**: it is a corporation limited by shares duly and validly incorporated and existing in accordance with the *Corporations Act 2001* (Cth);
- (e) **(litigation)**: no Claim against it is current or pending or (to its knowledge) is threatened, which will or is likely to have a material adverse effect upon the FM Subcontractor or the FM Subcontractor's ability to perform its obligations in accordance with the Project Documents to which it is a party;
- (f) **(liquidation)**: it is not in liquidation and no matter in relation to it or any of its subsidiaries is the subject of a direction in accordance with, or having effect as if it were a direction in accordance with, Section 14 of the *Australian Securities and Investments Commission Act 2001* (Cth), or the subject of any investigation in accordance with, or taken to be in accordance with, the *Australian Securities and Investments Commission Act 2001* (Cth);
- (g) **(no misrepresentation)**: all the information which it provided or will provide to the State is or will be true and correct in all material respects at the date of this document or of its later provision, and is not, by omission of information, or otherwise, misleading;
- (h) **(copies of documents)**: all copies or originals of documents or instruments provided to the State in connection with any Project Document to which it is a party are or will be, at the date of this document or of their later provision, true copies or originals (as applicable) of the documents or instruments which they purport or have been represented to be;
- (i) **(no trustee)**: it is not acting and will not act at any time as a trustee or an agent in respect of the Project;
- (j) **(accounts)**:
 - (i) its most recent consolidated and unconsolidated audited (if the requirement for auditing is applicable) accounts give a true and fair view of its and its subsidiaries' (as defined in the *Corporations Act 2001* (Cth)) **(Subsidiaries)** state of affairs as at the date to which they relate and the results of its and its Subsidiaries' operations for the accounting period ended on such date;
 - (ii) there has been no material change in its or its Subsidiaries' state of affairs since such date; and
 - (iii) such accounts have been prepared in accordance with the *Corporations Act 2001* (Cth) and accounting principles and practices generally

accepted in Australia consistently applied, except to the extent of departures from such principles and practices disclosed in such accounts;

- (k) **(no default):**
 - (i) it is not in default in accordance with any Project Document to which it is a party; and
 - (ii) nothing has occurred which would, with the giving of notice or lapse of time, constitute an event of default, cancellation, prepayment event (pursuant to a bona fide right to exercise prepayment) or similar event (whatever called) in accordance with any such Project Document, and which would have a Material Adverse Effect;
- (l) **(no undisclosed agreement):** there are no documents or agreements in existence at the date of this document and there will not be any documents or agreements in the future which have not been or will not be disclosed to the State which are material in the context of the Project Documents to which it is a party or, to the best of its knowledge and belief, the Project or which have the effect of varying any such Project Document and, in respect of such Project Documents to which the State is not a party, performance of which would have a Material Adverse Effect;
- (m) **(no immunity):** neither it nor any of its assets enjoys any immunity from set off, suit or execution; and
- (n) **(own investigations):** in entering into the Project Documents to which it is a party it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State.

1.9 Inconsistency

The provisions of the Finance Side Deed shall prevail to the extent of any inconsistency between the Finance Side Deed and this document.

2. Delegation

2.1 Parties' representatives

The parties may exercise their rights or perform their obligations in accordance with this document through their representatives appointed in accordance with the Project Agreement or the FM Subcontract (as applicable).

2.2 Further State delegations

- (a) The State may at any time delegate the exercise of any of its power or authority in accordance with this document to a person other than the State Representative and may terminate or vary that delegation. The State is responsible for the acts and omissions of any person exercising a power or authority in accordance with any delegation under this Clause 2.2(a).
- (b) In respect of any delegation in accordance with paragraph (a), the State will promptly notify Project Co and the FM Subcontractor of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and of any termination or variation to that delegation. For the avoidance of doubt, Project Co and the FM Subcontractor are entitled to rely upon such notice until the State provides notice of revocation of that delegation.
- (c) Any direction given by a State delegate in accordance with its delegation in accordance with this Clause 2.2 will be deemed to be a direction of the State.

3. Acknowledgements, consents and undertakings

3.1 Consent to State Deed of Charge

- (a) The FM Subcontractor and the FM Subcontractor Guarantor:
- (i) **(grant of security)**: consent to the grant of a fixed and floating charge in the form of the State Deed of Charge in favour of the State over all assets and undertakings of Project Co including Project Co's right, title and interest in the FM Subcontract and the FM Guarantee or to the assignment of Project Co's right title and interest in the FM Subcontract and the FM Guarantee to the State by way of security;
 - (ii) **(acknowledgement of rights)**: acknowledge, subject to the Finance Side Deed, the rights created in accordance with the State Deed of Charge including the appointment by Project Co of the State as attorney of Project Co to do, perform and exercise all things, acts and rights in accordance with the FM Subcontract on behalf of and for the account of Project Co;
 - (iii) **(no liabilities)**: agree that nothing in the State Deed of Charge will cause the State to assume any Liabilities in accordance with the FM Subcontract or the FM Guarantee except as a result of or act or omission of the State in exercising rights or performing or failing to perform obligations in accordance with the FM Subcontract as contemplated by this document;
 - (iv) **(no Default Event)**: acknowledge and agree that the:
 - A. State Deed of Charge does not; and
 - B. the exercise by the State of its rights in accordance with any of the State Deed of Charge will not,constitute a Default Event; and
 - (v) **(notice of any other assignment)**: confirm that, with the exception of the securities created in accordance with the Finance Documents or as otherwise notified to the State, the FM Subcontractor has not received notice of any other assignment or charge by Project Co of any right, title, interest in or benefit of Project Co in accordance with the FM Subcontract.
- (b) The FM Subcontractor Guarantor agrees that the grant of the State Deed of Charge does not, and the exercise by the State of its rights in accordance with the State Deed of Charge will not, give rise to any rights by the FM Subcontractor Guarantor to revoke or terminate the FM Guarantee.

3.2 Acknowledgement of State's rights

- (a) **(State's rights)**: The FM Subcontractor acknowledges the State's rights in accordance with Clause 8.3 (Occupational health, safety and rehabilitation), Clause 8.5 (State's right to enter, inspect and test), Clause 30 (Intervening Events), Clause 32 (Handover), Clause 39 (Insurance), Clause 43 (Step-in by the State), Clause 44 (Termination), Clause 46 (Assignment and ownership) and Clause 50.1 (Confidential Information) of the Project Agreement.
- (b) **(Facilitation of rights)**: The FM Subcontractor must exercise its rights in accordance with the FM Subcontract in a way which facilitates the effective exercise by the State of the rights referred to in paragraph (a) and will on reasonable notice permit the State to have access to, and take copies of, the records, reports,

documents and other papers to which the State is entitled to have in connection with the State's rights referred to in paragraph (a).

- (c) **(Continued performance):** Subject to Clause 5, if a Step-in Event has occurred and the State is exercising a right of step-in in accordance with Clause 43 (Step-in by the State) of the Project Agreement, the State may require the suspension or the continuation of performance by the FM Subcontractor of its obligations in accordance with the FM Subcontract. The FM Subcontractor must comply with all reasonable directions of the State in connection with the performance or non-performance of the FM Subcontract by the FM Subcontractor.
- (d) **(State not liable):** Subject to Clause 5, any direction given by the State in accordance with paragraph (c) by the State will not be construed as an assumption by the State of any obligations of the FM Subcontractor in accordance with the FM Subcontract.
- (e) **(Probity Investigations):** Without limiting the previous paragraphs, the FM Subcontractor acknowledges and agrees that:
 - (i) in accordance with Clause 47.8 (Consents required for Probity Investigations) of the Project Agreement, the State may require Project Co to conduct Probity Investigations of a Consortium Entity or a Related Person;
 - (ii) it will consent to the undertaking of a Probity Investigation in respect of it or procure the consent of a Related Person to a Probity Investigation;
 - (iii) it will not appoint and will ensure that no other person appoints a person to the position of a Related Person following a Probity Investigation unless the prior consent of the State is obtained; and
 - (iv) it will remove any person from the position of a Related Person if following the results of a Probity Investigation, the State considers that it is not appropriate for that person to continue to be a Related Person.

3.3 Undertakings of the FM Subcontractor

The FM Subcontractor undertakes to the State that it must:

- (a) **(notification of Default Event):** notify the State of any Default Event promptly after it gives notice of that Default Event to Project Co in accordance with Clause 42.1 of the FM Subcontract;
- (b) **(documents in relation to Default Event):** give the State a copy of all documents issued by the FM Subcontractor to Project Co in relation to a Default Event promptly after giving such documents to Project Co;
- (c) **(no amendment without consent):** not, unless the consent of the State has first been obtained:
 - (i) make or permit any amendment or replacement of or addition to;
 - (ii) subject to Clauses 4.2 and 4.4 terminate, surrender, rescind, suspend or accept repudiation of;
 - (iii) permit the novation, assignment or substitution of any party's rights, obligations or interest in; or
 - (iv) allow any express waiver of its material rights and obligations in accordance with,

the FM Subcontract, provided that the State will not withhold its consent to an amendment which corresponds to an amendment to which it has consented in accordance with the Project Agreement;

- (d) **(deed of accession)**: not novate, assign or substitute any of its rights, obligations or interest in the FM Subcontract without first procuring that the proposed novatee, assignee or substitute executes a deed in favour of the State (in form and substance approved by the State) in accordance with which the novatee, assignee or substitute agrees to accept and be bound by this document as if it were the FM Subcontractor;
- (e) **(attend meetings and inspections)**: when reasonably requested by the State:
 - (i) attend meetings with the State;
 - (ii) provide the State with:
 - A. full access to the Operating Phase Site, the Facility and any other place where any Services are being carried out or materials are being prepared or stored on such terms and conditions in connection with occupational health and safety as the FM Subcontractor considers reasonably necessary; and
 - B. any information, records or documents that the State reasonably requires in connection with undertaking the Services or compliance with the FM Subcontract; and
 - (iii) to the extent provided in the Project Agreement, permit the State or any nominee of the State to attend all tests and inspections to be carried out in connection with the Services in accordance with the FM Subcontract; and
- (f) **(access to records)**: subject to reasonable confidentiality requirements (such requirements not to be inconsistent with clause 9.1(e)), permit the State to inspect all documents of whatever nature prepared or kept by the FM Subcontractor in relation to the Project.

4. Right to remedy before termination of FM Subcontract

4.1 The State's right to remedy

- (a) The FM Subcontractor must give the State:
 - (i) Default Event Notices; and
 - (ii) State Cure Notices,as required by Clause 4.2.
- (b) On receiving a State Cure Notice, and subject to the Finance Side Deed, the State may take steps to:
 - (i) remedy, or procure the remedy of, the Default Event; or
 - (ii) if the Default Event is not capable of remedy, commence and continue to perform the obligations of Project Co in accordance with the FM Subcontract.

4.2 FM Subcontractor's right to terminate

Subject to clause 4.3, the FM Subcontractor may only terminate, rescind, accept the repudiation of or suspend the performance of any or all of its obligations in accordance with the FM Subcontract if:

- (a) the FM Subcontractor has given a notice to the State that complies with the requirements of Schedule 1 (FM Subcontractor Statements) (**Default Event Notice**);
- (b) any remedy period available to the Financiers in accordance with the FM Consent Deed for the Default Event has expired without a remedy being achieved; and
- (c) the FM Subcontractor has given a notice (**State Cure Notice**) to the State confirming that, either:
 - (i) the requirements of paragraph (b) are satisfied; or
 - (ii) the Financiers do not have any right to remedy the Default Event in accordance with the FM Consent Deed; and
- (d) where:
 - (i) the Default Event is capable of remedy:
 - A. the Default Event is not remedied within 20 Business Days of the date on which the State receives the State Cure Notice; or
 - B. but is not capable of remedy within 20 Business Days, the State (or an Additional Obligor or Receiver) has not commenced remedying the Default Event within 20 Business Days of the date on which the State receives the State Cure Notice or has not continued to diligently pursue that remedy;
 - (ii) the Default Event is not reasonably capable of remedy in any time period and the Default Event Notice contains a claim for reasonable compensation – Project Co or the State has not provided that compensation:
 - A. within 20 Business Days of the date on which the State receives the State Cure Notice; or
 - B. if the amount of compensation has been referred to dispute in accordance with Clause 11, within 20 Business Days of the dispute being resolved;
 - (iii) the Default Event is not reasonably capable of remedy in any time period and the Default Event Notice does not contain a claim for reasonable compensation – the State (or an Additional Obligor or Receiver) does not commence and continue to perform Project Co's obligations in accordance with the FM Subcontract within 20 Business Days of the date on which the State receives the State Cure Notice; or
 - (iv) the State notifies the FM Subcontractor that it elects not to remedy the Default Event.

4.3 Early suspension of the Services

- (a) If:

- (i) the FM Subcontractor, but for the operation of Clause 4.2, would have a right to suspend the Services in accordance with the FM Subcontract; and
- (ii) the FM Subcontractor has issued a State Cure Notice in connection with the Default Event,

and either:

- (iii) the State has not undertaken to pay to the FM Subcontractor the amounts stated in the Default Event Notice that gave rise to the FM Subcontractor's right to suspend within 10 Business Days of receipt of the State Cure Notice, or if the State refers the amounts in the Default Event Notice to Dispute, within 10 Business Days of the dispute being resolved;
- (iv) the State has undertaken to pay the FM Subcontractor such amounts for a stated period and that period has expired without being extended by the State on terms reasonably acceptable to the FM Subcontractor; or
- (v) the Default Event has not otherwise been remedied,

then the FM Subcontractor may suspend the performance of the Services.

- (b) The FM Subcontractor agrees that payment by the State of the amounts referred to in paragraph (a)(iii) and (iv) will, as between the State and the FM Subcontractor, fully discharge the State's liability to pay such amounts.

4.4 FM Subcontractor's right to terminate or suspend without cause

If no Default Event is subsisting, the FM Subcontractor may not suspend the performance of the Services in accordance with the FM Subcontract unless:

- (a) Project Co validly suspends its corresponding obligations in connection with the Services in accordance with the Project Agreement; or
- (b) the State has provided its prior written consent.

5. Step-in by the State

5.1 Step-in Right

- (a) Upon receipt of a State Cure Notice or if the State is entitled to exercise any of the rights referred to in Clause 3.2(a), the State may:
 - (i) appoint a Receiver over Project Co, any or all of its assets (including the FM Subcontract), or any or all of the shares or units in Project Co;
 - (ii) itself enter into possession of any or all of the assets or any or all of the shares or units in Project Co;
 - (iii) take such other action as it is permitted by Law to undertake in accordance with the terms of the Project Documents; or
 - (iv) by notice to the FM Subcontractor (**Additional Obligor Step-in Notice**), procure that an Additional Obligor assumes jointly and severally with Project Co all of Project Co's rights and obligations in accordance with the FM Subcontract.
- (b) Any action taken by the State in accordance with paragraph (a) is an exercise of a "**Step-in Right**" for the purposes of this document.

- (c) The "**Step-in Period**" is the period commencing on the date on which the FM Subcontractor receives notice of the exercise of any Step-in Right and ending on the earlier of:
- (i) the Additional Obligor Step-Out Date;
 - (ii) the date on which the FM Subcontractor terminates the FM Subcontract;
 - (iii) the date of any novation in accordance with Clause 6;
 - (iv) the date which the State has notified the FM Subcontractor that the State will cease to exercise its Step-in Rights; and
 - (v) any other date on which the State ceases to continue to exercise its Step-in Rights.
- (d) The FM Subcontractor agrees that the exercise by the State of a Step-in Right will not of itself contravene, or constitute a Default Event in accordance with the FM Subcontract or entitle the FM Subcontractor to exercise any right (including termination) in accordance with it.

5.2 Step-in by the State

- (a) Subject to the Finance Side Deed, the State may at any time after the State has given a notice to the FM Subcontractor in accordance with Clause 5.1(a), exercise all or any of Project Co's rights and perform all or any of Project Co's obligations in accordance with the FM Subcontract, as if it were Project Co and to the exclusion of Project Co.
- (b) Project Co and the FM Subcontractor agree that, subject to Clause 5.3(b), the State will have no Liability, nor will Project Co or the FM Subcontractor be entitled to make, continue or enforce any Claim against the State in connection with the FM Subcontract or this document by reason only of the State exercising a Step-in Right other than, and then only to the extent of, Liability for fraudulent, unlawful or negligent acts or omissions or wilful misconduct of the State.

5.3 Step-in by an Additional Obligor

If an Additional Obligor is appointed in accordance with Clause 5.1(a)(iv):

- (a) (**Assumption Date**): the Additional Obligor will become a party to the FM Subcontract on the date on which the Additional Obligor Step-in Notice is given to the FM Subcontractor or such later date as the FM Subcontractor and the State may agree (**Assumption Date**);
- (b) (**Rights and obligations of Additional Obligor**): during the Step-in Period:
- (i) the Additional Obligor will be jointly and severally:
 - A. entitled with Project Co to exercise the rights, powers and discretions of Project Co in accordance with the FM Subcontract (excluding any accrued rights of Project Co for any damage, loss, cost, charge, expense, outgoing or payment to the extent that the rights arose prior to the Assumption Date) (**Project Co's Rights**); and
 - B. liable with Project Co for the performance or non-performance of all Project Co's obligations in accordance with the FM Subcontract arising on or after the Assumption Date except as released in accordance with paragraph (e);

- (ii) as between Project Co, the FM Subcontractor and the Additional Obligor, only the Additional Obligor is authorised to deal with the FM Subcontractor and to exercise Project Co's Rights;
 - (iii) Project Co agrees that it will be legally bound by all the acts and omissions of the Additional Obligor;
 - (iv) the Additional Obligor will be bound by any earlier decision, directions, approvals or consents given or made prior to the Assumption Date;
 - (v) Clause 13 will apply to the FM Subcontractor and the Additional Obligor as if the address, facsimile number and email address of the Additional Obligor were set out in Clause 13 in addition to those of Project Co; and
 - (vi) the FM Subcontractor will owe its obligations in accordance with the FM Subcontract to Project Co and the Additional Obligor jointly but the performance by the FM Subcontractor in favour of either Project Co or the Additional Obligor will be a good discharge of the obligations in accordance with the FM Subcontract.
- (c) **(No Liability)**: the Additional Obligor will have no Liability for remedying any Default Event arising prior to the Assumption Date;
- (d) **(Additional Obligor Step-Out Date)**: the Additional Obligor may at any time give the FM Subcontractor not less than 30 days notice terminating the Additional Obligor's obligations in accordance with the FM Subcontract (without affecting the continuation of Project Co's obligations or liabilities towards the FM Subcontractor in accordance with the FM Subcontract). Such notice must specify the date on which it takes effect (**Additional Obligor Step-Out Date**), which must be:
- (i) the date 30 days after the date of the notice; or
 - (ii) if a Novation Notice has been given in accordance with Clause 6.1, the Novation Date; and
- (e) **(Release)**: on and from the Additional Obligor Step-Out Date, between the FM Subcontractor and the Additional Obligor, each of the Additional Obligor and the FM Subcontractor will be released from all obligations in accordance with the FM Subcontract (except for those obligations which have arisen during the Step-in Period including in respect of additional liabilities incurred by the FM Subcontractor during the Step-in Period), whether or not a Claim has been made in respect of those obligations or they have not fallen due to be performed or have not been performed).

5.4 Indemnity

Project Co indemnifies the State (including any Additional Obligor) and the State Associates against any Claim or Liability (including any Liability to a third party) the State or any State Associate suffers or incurs in connection with taking any action in accordance with Clause 5.2 or 5.3, except to the extent that such Claim or Liability is a consequence of any of the events set out in clause 4.6 (Indemnities) of the Project Agreement.

6. Novation of rights and obligations

6.1 Option

- (a) The State may require a novation of the FM Subcontract upon the termination of the Project Agreement, by giving a notice (**Novation Notice**) to the FM Subcontractor and the FM Subcontractor Guarantor. The Novation Notice must specify the person to whom the State intends to novate the FM Subcontract whether this be the State or another person (**Substitute Party**).

- (b) If the State issues a Novation Notice then the FM Subcontractor must comply with this Clause 6 and until the Novation Date the FM Subcontractor must continue to perform its obligations in accordance with the FM Subcontract.
- (c) The FM Subcontractor agrees that the giving of a Novation Notice by the State will not of itself contravene, or constitute a Default Event in accordance with the FM Subcontract or entitle the FM Subcontractor to exercise any right (including termination) in accordance with it.

6.2 Novation

If the State issues a Novation Notice to the FM Subcontractor, the parties agree to novate the FM Subcontract to the Substitute Party identified in the Novation Notice and must enter into a novation agreement in a form and substance reasonably satisfactory to the State, the FM Subcontractor and the Substitute Party.

6.3 Novation of obligations

From the Novation Date, a Substitute Party must perform:

- (a) any obligation of Project Co to pay money to the FM Subcontractor that arose before the Novation Date and which:
 - (i) is due and payable in accordance with the terms of the FM Subcontract and has not been paid by Project Co; and
 - (ii) is not the subject of a Dispute (within the meaning of Clause 45.1 of the FM Subcontract) in accordance with the FM Subcontract; and
- (b) the obligations of Project Co in accordance with the FM Subcontract which arise or relate to events occurring on or after the Novation Date (including to pay amounts that become due and payable on or after the Novation Date in relation to work or Services performed before the Novation Date).

6.4 Novation of rights

- (a) Subject to paragraph (b), the Substitute Party is entitled to all rights to which Project Co was entitled in accordance with the FM Subcontract including all rights which arose prior to the Novation Date.
- (b) Project Co is entitled to rights which accrued prior to the Novation Date in connection with any Liability in accordance with the FM Subcontract which is the subject of a dispute.

6.5 Continuing obligations

- (a) The FM Subcontractor must perform its obligations in accordance with the FM Subcontract in favour of the Substitute Party, including obligations which were incurred or which relate to events occurring before the Novation Date or which arise or relate to events occurring on or after the Novation Date.
- (b) The FM Subcontractor will continue to be bound by the FM Subcontract as if the Substitute Party was an original party to the agreement in place of Project Co.
- (c) If the FM Subcontractor has exercised its right to suspend in accordance with Clause 4.4, the FM Subcontractor must recommence performance of the Services from the Novation Date or the date on which the cause of the suspension is remedied (which ever is the earlier).
- (d) The FM Subcontractor:

- (i) will have the benefit of any extensions of time granted to the FM Subcontractor prior to the Novation Date; and
- (ii) is not entitled to exercise any right of set off or counterclaim against the Substitute Party if, and to the extent that, such right arose prior to the Novation Date.

6.6 Release

- (a) The FM Subcontractor releases Project Co from all of its obligations in accordance with the FM Subcontract and all Liabilities that it may have against Project Co in connection with the FM Subcontract other than those obligations or Liabilities which arose or relate to events occurring before the Novation Date and which are not obligations or Liabilities which are assumed by the Substitute Party.
- (b) Project Co releases the FM Subcontractor from all its obligations in accordance with the FM Subcontract and all Liabilities that it may have against the FM Subcontractor in connection with the FM Subcontract other than those obligations or Liabilities which arose or relate to events occurring before the Novation Date and which are not obligations or Liabilities which are assumed by the Substitute Party.

6.7 Amendments to FM Subcontract

The FM Subcontractor and the Substitute Party will promptly negotiate in good faith, any amendments to the FM Subcontract which are necessary to reflect the termination of the Project Agreement.

6.8 Novation to a Substitute Party other than the State

- (a) **(Information to be provided by the State):** If the State gives a Novation Notice to Project Co that states that Project Co must novate the FM Subcontract to a party other than the State, the State must provide the following details in connection with that party:
 - (i) the name, place of incorporation and identity of the shareholder(s);
 - (ii) if available, its most recent published audited accounts; and
 - (iii) sufficient particulars of the finance available to the Substitute Party to enable the FM Subcontractor to decide whether to grant its consent to the Substitute Party.
- (b) **(Consent by FM Subcontractor):** A novation to a Substitute Party other than the State in accordance with this Clause 6.8 will only be effective if the FM Subcontractor consents to the novation (such consent not to be unreasonably withheld or delayed) or is deemed to have consent in accordance with paragraph (d).
- (c) **(Further information):** The State must (as soon as practicable) supply the FM Subcontractor with such additional information to that provided in accordance with paragraph (a) as the FM Subcontractor reasonably requires to enable it to decide whether to grant consent in accordance with paragraph (b), and the FM Subcontractor must consider such information expeditiously.
- (d) **(Deemed consent):** The FM Subcontractor's consent to the novation will be deemed to be given if the FM Subcontractor has not notified the State whether it consents to the novation within 15 Business Days of receipt of the Novation Notice and all information required under clause 6.8(a).
- (e) **(Unreasonably withholding consent):** The FM Subcontractor is not entitled to refuse consent to the novation unless:

- (i) the grounds for refusal are reasonable and are based on:
 - A. the proposed documentation for the Substitute Party to assume the rights and obligations of Project Co in accordance with the FM Subcontract not being effective to substitute the Substitute Party for Project Co;
 - B. the Substitute Party not having the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co in accordance with the FM Subcontract including any necessary authorisations and consents;
 - C. the technical competence or financial standing of the Substitute Party being insufficient for it to meet the obligations of Project Co in accordance with the FM Subcontract; or
 - D. the FM Subcontractor being placed in breach of any Laws by the proposed novation and assignment; and
 - (ii) it has notified the State of such reasons.
- (f) **(If FM Subcontractor withholds consent):** If the FM Subcontractor withholds its consent to the novation in accordance with this Clause, this will not prejudice the ability of the State to give one or more subsequent Novation Notices containing changed particulars relating to the same Substitute Party or particulars relating to another Substitute Party.

6.9 FM Guarantee

- (a) If the State gives a Novation Notice then, subject to Clause 6.8, from the Novation Date:
 - (i) the FM Subcontractor Guarantor must enter into a new deed of guarantee (**New FM Guarantee**) on the same terms as the FM Guarantee, in respect of the Project except that:
 - A. Project Co will not be a party to the New FM Guarantee; and
 - B. the Substitute Party will be named as beneficiary to the New FM Guarantee in substitution for Project Co; and
 - (ii) the FM Subcontractor Guarantor will guarantee for the benefit of the Substitute Party all of the obligations of the FM Subcontractor in accordance with the New FM Guarantee.
- (b) If the Novation Notice referred to in paragraph (a) requires the novation of the FM Guarantee to a Substitute Party other than the State, then the FM Subcontractor and the FM Subcontractor Guarantor must enter into a side deed with the State and the Substitute Party (which is not the State) on substantially the same terms as this document.

7. Amendments to FM Subcontract and FM Guarantee

The FM Subcontractor and the FM Subcontractor Guarantor each agree with the State that it will not rescind (unless permitted in accordance with this document), grant or accept any waiver or discharge of the FM Subcontract or the FM Guarantee (as applicable), or agree to or permit any variation, waiver or amendment to the terms of the FM Subcontract or the FM Guarantee (as applicable) without the prior consent of the State.

8. Restriction on dealings

The FM Subcontractor agrees with the State that it will not assign, novate or otherwise deal with its interest in the FM Subcontract without the prior written consent of the State, except that it may, in the ordinary course of business, charge or encumber its interest in the FM Subcontract without State consent. In either circumstances, the FM Subcontractor must not allow the dealing to take place without procuring that any transferee, assignee, mortgagee, novatee, chargee or other encumbrancee enters into a deed in which it agrees to be bound by the terms of this document.

9. Confidentiality

9.1 Confidential Information

- (a) **(Confidentiality obligations):** Subject to paragraphs (b) and (c) the FM Subcontractor, the FM Subcontractor Guarantor and FM Subcontractor's Associates, must keep confidential the State Project Documents, all Records and all Disclosed Information (**Confidential Information**).
- (b) **(Permitted disclosure):** The FM Subcontractor and the FM Subcontractor Guarantor are not obliged to keep confidential any information:
 - (i) which is in the public domain through no default of any party; or
 - (ii) the disclosure of which is:
 - A. required by Law, including in accordance with the *Freedom of Information Act 1992 (WA)*;
 - B. required by a relevant stock exchange;
 - C. consented to by the State; or
 - D. made to a court in the course of proceedings to which the disclosing person is a party.
- (c) **(Disclosure to Project Co's Associates):** Without limiting the FM Subcontractor and the FM Subcontractor Guarantor's obligations in accordance with paragraph (a), the FM Subcontractor and the FM Subcontractor Guarantor may disclose Confidential Information to:
 - (i) FM Subcontractor's Associates to the extent necessary for the purpose of undertaking the Project; or
 - (ii) subject to paragraph (d), provided that the FM Subcontractor and the FM Subcontractor Guarantor (as applicable) ensures that those FM Subcontractor's Associates comply with paragraph (a), any prospective financier or equity investor of the Project.
- (d) **(No disclosure):** The FM Subcontractor and the FM Subcontractor Guarantor must not disclose any Confidential Information to any prospective financier or equity investor of the Project until, if required by the State, the State has carried out any Probity Investigations in connection with the relevant entities.
- (e) **(State may disclose):** The State may at any time disclose the Confidential Information and any other information in connection with the Project:
 - (i) to any State department or Minister;

- (ii) to any State Associate to the extent necessary for the purposes of the Project;
 - (iii) in accordance with all Laws;
 - (iv) in the course of official duties by the Minister for Works of Western Australia, the Minister for Corrective Services of Western Australia, the Premier of Western Australia, the Trust, the Treasurer of Western Australia, DCS, the Department of Works of Western Australia or the Department of Treasury and Finance of Western Australia;
 - (v) to satisfy the requirements of parliamentary accountability;
 - (vi) to the Western Australian Auditor-General for the purposes of satisfying its statutory duties;
 - (vii) in accordance with policies of the Western Australian government;
 - (viii) in annual reports of Western Australian DCS, Department of Works and the Department of Treasury and Finance; and
 - (ix) in accordance with the *Freedom of Information Act 1992 (WA)* or the *Parliamentary Commissioners Act 1971 (WA)*.
- (f) **(Government websites):** Subject to Clause 50.1(f) of the Project Agreement, the contents of the State Project Documents and any other document in connection with the Project which is authored or authorised by the State or a Governmental Agency may be published on any Western Australian government internet website.

9.2 Public announcements

Other than as required by law or a stock exchange, the FM Subcontractor and the FM Subcontractor Guarantor must not make any public disclosures, announcements or statements in relation to the Project or the State's or the State Associates' involvement in the Project without the State's prior consent (which will not be unreasonably withheld).

10. Acknowledgment, release and indemnity

10.1 No Liability

Each of Project Co and the FM Subcontractor agree that:

- (a) subject to the Project Agreement and Clause 6, the State will have no Liability to Project Co or the FM Subcontractor in connection with the exercise by the State of its rights in accordance with this document except if:
 - (i) the State has acted fraudulently or unlawfully; or
 - (ii) in the course of exercising its rights in accordance with this document, the State has acted with gross negligence or wilful misconduct; and
- (b) the exercise (or non-exercise) by the State of its rights in accordance with this document will not limit any other right of the State, whether in accordance with this document or otherwise.

10.2 Release and indemnity

Other than in respect of the State's Liability under clause 10.1(a), each of Project Co and the FM Subcontractor releases the State and any party acting for or on behalf of the State (including any Additional Obligor) from any Liability in connection with the exercise by the State of its rights in accordance with this document.

10.3 FM Subcontractor's liability

Despite any other provision of the FM Project Documents:

- (a) the FM Subcontractor's and the FM Subcontractor Guarantor's liability to Project Co, the State and any party acting for or on behalf of the State (including any Additional Obligor) whether in contract (including under any indemnity), tort (including negligence) or equity, under statute or otherwise arising out of, or in connection with the subject matter of the FM Project Documents will be subject to the same limitations as set out in the FM Subcontract; and
- (b) the aggregate liability of the FM Subcontractor and the FM Subcontractor Guarantor to Project Co, the State and any party acting for or on behalf of the State (including any Additional Obligor) (in aggregate) whether in contract (including under any indemnity), tort (including negligence) or equity, under statute or otherwise arising out of, or in connection with the subject matter of the FM Project Documents will be no greater than the FM Subcontractor's aggregate liability to Project Co under the FM Subcontract (as limited by the General Liability Cap, as defined in the FM Subcontract).

11. Dispute resolution

- (a) If a matter is referred for determination in accordance with this Clause 11:
 - (i) any dispute or difference of opinion arising between the parties in relation to that matter must be resolved in the same manner that disputes or differences of opinion referred for expert determination in accordance with the Project Agreement are resolved; and
 - (ii) accordingly, the provisions of Clause 45 (Dispute Resolution) of the Project Agreement are incorporated into this document but as if:
 - A. the only persons party to the Project Agreement, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute; and
 - B. the only matters for expert determination in accordance with those provisions are the matters referred for expert determination in accordance this document.
- (b) Each party may refer a dispute, despite any other provision, in accordance with this document to dispute resolution in accordance with this Clause 11.

12. GST

- (a) **(Construction):** In this Clause 12:
 - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law;
 - (ii) GST Law has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
 - (iii) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.
- (b) **(Nominated entity):** The State confirms that the entity nominated to be responsible for the administration of the State's GST reporting obligations (**Nominated Entity**)

is registered for GST as at the date of this document. The parties acknowledge that the Nominated Entity will be responsible for administering the obligations in accordance with this Clause on behalf of the State.

- (c) **(Additional amount):** Unless otherwise expressly stated, and except in connection with a supply to which paragraph (d) applies, all prices or other sums payable or consideration to be provided in accordance with this document are exclusive of GST.
- (d) **(Non-monetary consideration):** Subject to paragraph (i), if some or all of the consideration for a taxable supply made by a party in connection with this document is not expressed as an amount of money (**Non Monetary Consideration**) and also constitutes a taxable supply by the recipient, the parties agree that:
 - (i) the Non Monetary Consideration is GST inclusive and will not be increased on account of GST under paragraph (e); and
 - (ii) FM Subcontractor will, after consultation with and the approval of the State (such approval not to be unreasonably withheld or delayed), instruct a suitably qualified professional valuer to determine, in accordance with the principles set out by the Commissioner of Taxation in GST Ruling GSTR 2001/6 or any replacement ruling, the GST inclusive market value of any Non Monetary Consideration provided by the supplier and the recipient; and
 - (iii) the FM Subcontractor will notify the State of the amount determined by the valuer within 15 days of the end of the Month in which this document is entered.
- (e) **(Payment of GST):**
 - (i) Subject to paragraph (i), if GST is payable on any supply made by a party (**Supplier**) under or in connection with this document, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.
 - (ii) The recipient will pay the amount referred to in subparagraph (i) in addition to and at the same time that the consideration for the supply is to be provided in accordance with this document.
- (f) **(Gross-up of non-monetary consideration supplies):** If, at any time a supplier has a GST liability for a tax period in connection with a taxable supply to which paragraph (d) applies (**Non Monetary Consideration Supplies**) that exceeds the input tax credit to which the supplier is entitled in respect of its acquisition of the recipient's taxable supplies (**Acquisition**) for that tax period:
 - (i) the consideration for the Non Monetary Consideration Supplies is not GST inclusive and that consideration must be increased on account of GST under paragraph (e);
 - (ii) the recipient of the Non Monetary Consideration Supply must pay to the supplier the amount by which that consideration must be increased on account of GST under paragraph (e) less the input tax credit (if any) to which the supplier is entitled in respect of the Acquisitions within 5 Business Days of being requested in writing by the supplier to do so; and
 - (iii) the parties will do all things required, including issuing new tax invoices and adjustments notes (if necessary) to give effect to this paragraph (f).
- (g) **(Tax invoices):**

- (i) The Supplier must deliver an Invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under paragraph (e) or paragraph (f).
 - (ii) The recipient can withhold payment of any amount payable in accordance with this Clause 12 until the Supplier provides an Invoice or an adjustment note, as appropriate.
- (h) **(Adjustment event):** If an adjustment event arises in connection with a taxable supply made by a Supplier in accordance with this document, the amount payable by the recipient in accordance with this Clause 12 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.
- (i) **(Reimbursements):** Where a party is required in accordance with this document to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
- (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
 - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.

13. Notices

- (a) **(Form of notices):** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this document (in this Clause 13, "**Notices**"):
- (i) must be in writing; and
 - (ii) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary, Partner Representative or authorised agent of, that party.
- (b) **(Procedure for sending notices):** All Notices must be:
- (i) delivered or posted by prepaid post to the address; or
 - (ii) sent by email in the form of a .pdf file letter (or such other form agreed by the State) to the email address,

of the addressee set out below (or as otherwise notified by that party to each other party from time to time).

State

[not disclosed]

[LR1]Project Co

[not disclosed]

FM Subcontractor

[not disclosed]

FM Subcontractor Guarantor

[not disclosed]

- (c) **(Date of receipt):** Subject to paragraph (d), a Notice is taken to be received by the addressee:
 - (i) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia;
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient; and
 - (iii) in the case of delivery by hand, on delivery.
- (d) **(Next Business Day):** If the communication is taken to be received on a day which is not a Business Day or after 5.00 pm, it is taken to be received at 9.00 am on the next Business Day.
- (e) **(Notices sent by email):** In connection with Notices sent by email:
 - (i) only the letter in .pdf format attached to the email and any attachments to such letter which are referred to in the letter, will form part of the communication in accordance with this Clause 13. Any text in the body of the email or the subject line will not form part of the Notice; and
 - (ii) Project Co must ensure that, in connection with any communications in accordance with or in connection with this document:
 - A. its firewall and/or mail server (as applicable):
 - 1) allows messages of up to 14 MB to be received;
 - 2) does not trap any messages in the spam filter which have been sent from any State domain; and
 - 3) automatically sends a receipt notification to the sender upon receipt of a message; and
 - B. its systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

14. General

14.1 Relationship of parties

- (a) No duty of good faith is implied on the State in connection with its relationship with any of the parties.
- (b) Neither the Project Documents nor the relationship created by them, are intended to create, and will not be construed as creating, any partnership or joint venture as between the parties.
- (c) Project Co and the FM Subcontractor must not act as or represent itself to be the servant or agent of the State.

14.2 State's rights, duties, powers and functions

- (a) **(State's own interests)**: Unless this document expressly provides otherwise, nothing in this document gives rise to any duty on the part of the State to consider interests other than its own interests when exercising any of its rights or performing any of its obligations in accordance with the State Project Documents.
- (b) **(State's powers, functions or duties)**: Notwithstanding anything contained or implied in this document to the contrary, the parties expressly agree that the State is not obliged to exercise a power, function or duty which is granted to or within the responsibility of any other Governmental Agency, or to influence, over-ride or direct any Governmental Agency in the proper exercise and performance of its legal duties and functions.
- (c) **(No fettering)**: Nothing contained in this document or contemplated by this document has the effect of constraining the State or placing any fetter on the State's discretion to exercise or not to exercise any of its statutory rights, duties, powers or functions.
- (d) **(No Claim)**: Subject to paragraph (e), Project Co and the FM Subcontractor will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its statutory rights or powers.
- (e) **(Liability for breach)**: Paragraphs (a) to (d) do not limit any Liability which the State would have had to any party in accordance with any State Project Document as a result of a breach by the State of a term of any State Project Document but for paragraphs (a) to (d).

14.3 Reasonable endeavours

If there is any statement in this document that the State will use "reasonable endeavours" in relation to an outcome it means that:

- (a) the State will take steps to bring about the relevant outcome so far as it is reasonably able to do so having regard to its resources and other responsibilities;
- (b) the State cannot guarantee the relevant outcome; and
- (c) the State, by undertaking to exercise reasonable endeavours, is not required to:
 - (i) interfere with or influence the exercise of any statutory power or discretion by any body, including a Governmental Agency; or
 - (ii) act in any other way that the State regards as not in the public interest.

14.4 Entire agreement

The State Project Documents constitute the entire agreement and understanding between the parties and supersede any prior agreement (whether in writing or not), negotiations, discussions, understandings and agreements between the parties in relation to the subject matter of this document.

14.5 Counterparts

This document may be executed in any number of counterparts and all of such counterparts taken together will be deemed to constitute one and the same instrument.

14.6 Governing law

This document is governed by and will be construed according to the Laws of Western Australia and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of that State and the courts competent to determine appeals from those courts.

14.7 No waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or this document by the State will not in any way preclude, or operate as a waiver of, any exercise or enforcement of that or any other right, power or remedy provided by Law or this document.
- (b) No waiver by the State of a breach of any term of this document will operate as a waiver of another breach of that term or of a breach of any other term of this document.

14.8 Variations and waivers

No variation, modification or waiver of any provision in this document, nor consent to any departure by any party from any such provision, will be of any effect unless it is in writing and signed by the parties or (in the case of a waiver) by the party giving it. Any such variation, modification, waiver or consent will be effective only to the extent to or for which it may be made or given.

14.9 Amendments

This document may only be varied by a deed executed by or on behalf of each party.

14.10 Joint and several liability

- (a) If Project Co consists of more than one person, then the rights and obligations of Project Co in accordance with this document are joint and several as between those persons.
- (b) If the FM Subcontractor consists of more than one person, then the rights and obligations of the FM Subcontractor in accordance with this document are joint and several as between those persons.

14.11 Indemnities

- (a) Each indemnity in this document is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination or expiration of this document.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this document.
- (c) A party must pay on demand any amount it must pay in accordance with an indemnity in this document.
- (d) The State, the FM Subcontractor and Project Co agree that:
 - (i) each indemnity or promise referred to in this document in favour of Indemnified Persons is held on trust by the State for the benefit of any of the Indemnified Persons; and
 - (ii) the consent of the Indemnified Persons referred to in paragraph (i) will not be required for any amendment to, or waiver of rights in accordance with a State Project Document.

14.12 Clauses to survive termination

- (a) All provisions of this document which expressly or by implication from their nature are intended to survive termination, completion or expiration of this document will survive such termination, completion or expiration, including any provision which is in connection with:
 - (i) the State's rights to set-off and to recover money;
 - (ii) confidentiality or privacy;
 - (iii) any obligation to make and records available to the State;
 - (iv) any indemnity given in accordance with this document; or
 - (v) any right or Liability arising on termination of this document.
- (b) Nothing in this Clause 14.12 prevents any other provision of this document, as a matter of interpretation, also surviving the termination of this document.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this document. All rights and obligations in accordance with this document survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this document.

14.13 Costs and expenses

Except as otherwise provided in this document, each party must:

- (a) pay its own costs and expenses in connection with negotiating, preparing, executing and performing this document; and
- (b) perform its obligations in accordance with this document at its own cost.

14.14 Further acts and documents

- (a) At the request of the State, each other party to this document must promptly enter into an agreement in form and substance approved by the State reflecting the novation of the FM Subcontract as contemplated in this document and take such other action as is required to vest in the State full legal and equitable title to any retention account, bank guarantee, performance bond, letter of credit or other security held by Project Co to secure the obligations of the FM Subcontractor in accordance with the FM Subcontract.
- (b) For valuable consideration, Project Co and the FM Subcontractor each irrevocably appoints the State, on its behalf and in its name or otherwise, as its attorney to do anything which Project Co or the FM Subcontractor (as applicable) is obliged to do (but has not done within 5 Business Days of written request) in accordance with paragraph (a). Each of Project Co and the FM Subcontractor agree to ratify and confirm whatever any such attorney lawfully does in the exercise of the power of attorney in this paragraph (b).
- (c) Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to each party) required by Law or reasonably requested by another party to give effect to this document.

14.15 Severability of provisions

Any provision of this document that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does

not invalidate the remaining provisions of this document nor affect the validity or enforceability of that provision in any other jurisdiction.

Executed as a deed.

Signed for and on behalf of the Minister For Works by Troy Raymond Buswell MLA, Treasurer of Western Australia pursuant to a delegation from the Minister for Works to the Treasurer dated 1 July 2011 made pursuant to section 5A(f) of the Public Works Act 1902 in the presence of:

Signature of **Troy Raymond Buswell MLA, Treasurer of Western Australia**

Signature of witness

Name of witness

Signed for and on behalf of the State of Western Australia by the Honourable Murray John Cowper MLA, Minister for Training and Workforce Development; Corrective Services in the presence of:

Signature of **Honourable Murray John Cowper, MLA Minister for Training and Workforce Development; Corrective Services**

Signature of witness

Name of witness

Executed by Assure Partners (EGRP) 1 Pty Ltd (ACN 160 900 149) as trustee of the Assure Partners (EGRP) Unit Trust 1 for and on behalf of the Assure Partners (EGRP) Partnership by its attorney under Power of Attorney dated in the presence of:

Signature of Witness

Print full name of Witness

Executed by Assure Partners (EGRP) 2 Pty Ltd (ACN 161 471 316) as trustee of the Assure Partners (EGRP) Unit Trust 2 for and on behalf of the Assure Partners (EGRP) Partnership by its attorney under Power of Attorney dated in the presence of:

Signature of Witness

Print full name of Witness

Signature of Witness

Print full name of Witness

Signature of Attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Print name of Attorney

Signature of Attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Print name of Attorney

Signature of Attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Print name of Attorney

Executed by Honeywell Limited (ABN 74 000 646 882) by its attorney under power of attorney dated 11 October 2012 in the presence of:

Signature of Witness

Name of Witness in full

Executed by Honeywell International Inc by:

Signature of Witness

Name of Witness in full

Signature of Attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Name of Attorney

Signature of Vice President and Treasurer

Name of Vice President and Treasurer

Schedule 1 – FM Subcontractor Statements

1. Contents of FM Subcontractor Statement

All Default Event Notices must include the following information in connection with the Default Event:

- (a) all amounts due and payable to the FM Subcontractor in accordance with the FM Subcontract on or before the date of the Default Event Notice but remaining unpaid at such date;
- (b) the nature and, to the best of the FM Subcontractor's knowledge and belief, the amount of any monetary claim asserted by the FM Subcontractor in connection with the FM Subcontract against Project Co; and
- (c) if the FM Subcontractor intends to terminate the FM Subcontract due to a default or breach of condition of a non-financial nature or intends to claim damages or to seek some other form of relief:
 - (i) the provisions of the FM Subcontract alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable the State to identify the material facts;
 - (iii) the steps reasonably required to remedy the Default Event (if reasonably capable of remedy);
 - (iv) the time within which the specified steps can reasonably be expected to be taken;
 - (v) the amount of damages claimed and the manner in which they have been calculated; and
 - (vi) any other relief to be sought.

2. Warranty of accuracy

The FM Subcontractor warrants to the State that each FM Subcontractor Statement will be, subject to unintended error which the FM Subcontractor agrees to rectify, true, complete and accurate statements of the amounts to which the FM Subcontractor considers itself entitled.

3. Verification of FM Subcontractor Statements

The State may appoint a firm of independent chartered accountants or a firm of technical advisers to verify (at Project Co's cost) the FM Subcontractor Statements, and the FM Subcontractor must, subject to such firm(s) executing a confidentiality agreement on such terms as the FM Subcontractor may reasonably request, permit such firm(s) to have access to and to make copies of all records, documents, data and accounting and other information not subject to legal (including solicitor and own client) and other professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such FM Subcontractor Statements.

4. FM Subcontractor Statements to be conclusive evidence

- (a) Each of the State, Additional Obligor or Receiver (**Statement Beneficiary**) is entitled to rely on the FM Subcontractor Statements for the purpose of determining the extent of the matters occurring prior to a Default Event which are required to be remedied and the requirements to effect the remedy of that Default Event by a Statement Beneficiary.

- (b) The FM Subcontractor Statements will be conclusive evidence in favour of any Statement Beneficiary that the FM Subcontractor has waived and abandoned all claims then known or which ought reasonably to have been known to the FM Subcontractor in connection with the FM Subcontract prior to the date of the Default Event Notice.
- (c) Paragraphs (a) and (b) are without prejudice to the rights of the FM Subcontractor to pursue any claims against Project Co following the end of the Step-in Period.
- (d) For the avoidance of doubt, a FM Subcontractor Statement will not prevent any Statement Beneficiary from disputing the amount of any claim by the FM Subcontractor or the existence of any default by Project Co in accordance with the FM Subcontract. In the case of any such dispute:
 - (i) the relevant Statement Beneficiary must pay the amount (if any) not in dispute;
 - (ii) the dispute must be referred to expert determination in accordance with Clause 11;
 - (iii) upon resolution of the dispute, the parties must make payments as determined by the expert; and
 - (iv) during the period of dispute resolution, all parties must continue to perform their obligations in accordance with this document and the Project Documents.