

Execution Version



Government of **Western Australia**
Department of **Treasury**
Strategic Projects

Eastern Goldfields Regional Prison Redevelopment Project

Tender Number: BMW 213419/11

Project Agreement

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,

(together, **Project Co**)

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Project Agreement 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**)

Background

1. The State has conducted a public tender process and selected Project Co as the preferred tenderer for the Project.
2. This Agreement sets out the terms on which:
 - (a) Project Co agrees to:
 - (i) undertake and finance the Works;
 - (ii) perform the Services; and
 - (iii) Handover the Works or the Facility (as applicable);
 - (b) the State agrees to pay Project Co the Completion Payment and the Quarterly Service Payment; and
 - (c) the risks associated with the Project are allocated as between the State and Project Co.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

Abatement means an amount in dollars deducted from a Monthly Service Payment in accordance with Schedule 14 (Payment Schedule).

Abatement Regime means the method for abating the Monthly Service Payment as set out in Schedule 14 (Payment Schedule).

Aboriginal Meeting Places means all work necessary for the design, construction and completion of the aboriginal meeting places as described in Schedule 12 (Design Specifications).

Additional Purchase Date has the meaning given to it in the Receivables Purchase Deed.

Adjacent Site means the land identified as such in Schedule 11 (Site Plans).

Agreement means this project agreement between the State and Project Co.

Amortisation Schedule means the scheduled repayment of indebtedness under and in accordance with the Financing Documents.

Artefacts means all artefacts, fossils, bones, coins, articles of value or antiquity, structures and other remains or things of scientific, geological, sociological, cultural, historical or archaeological interest, including all Aboriginal Cultural Material (as defined in the *Aboriginal Heritage Act 1972 (WA)*).

Asset Register refers to the register to be prepared and maintained by Project Co in accordance with Schedule 13 (Services Specifications) as updated and amended in accordance with this Agreement.

Assumed Refinancing means a Refinancing on terms referred to in the Financial Model that occurs in the period commencing no earlier than 9 Months prior to the date shown in the Financial Model and ending no later than the date shown in the Financial Model for that Refinancing. For the avoidance of doubt the Financial Model will take precedence over Project Co's financing proposal to the State in the event of any inconsistency or ambiguity.

Authorisation means any consent, authorisation, registration, filing, agreement, notarisation, clearance, certificate, permission, licence, permit, approval, authority or exemption from, by or with, an Authority, judicial body, stock exchange or any other person.

Authority means:

- (a) any Government Agency, administrative or judicial body or tribunal; and
- (b) any private electricity, telecommunications, gas or other utility company.

Availability Failure has the meaning given to it in Schedule 14 (Payment Schedule).

Base Case Financial Model means the financial model for the Project, (including assumptions, and information, data files, run specification files and output analysis routines used by or incorporated in the financial model), prepared by Project Co in the form provided to the State under Clause 2.2(e).

Base Costs has the meaning given to it in Schedule 4 (Change Compensation Principles).

Best Construction Practices means construction works and practices which are carried out:

- (a) in accordance with Good Industry Practice;
- (b) with due expedition and without unreasonable or unnecessary delay;
- (c) in a manner safe to workers, the general public and the Environment; and
- (d) using new and high quality fixtures, fittings, finishes and materials which are free from defects.

Best Operating Practices means operating, maintenance, refurbishment and repair practices performed in accordance with Good Industry Practice and including everything reasonably necessary to ensure that:

- (a) **(design)**: the Facility is functioning in accordance with the Design Requirements;
- (b) **(performance)**: the Services are delivered using:
 - (i) reliable long-term efficient and safe operating practices which do not impede or otherwise adversely impact the undertaking by the Facility Operator of the Facility Functions;

- (ii) proper equipment, tools and procedures;
 - (iii) workmanship and materials which are fit for purpose; and
 - (iv) replacement parts that are new;
- (c) **(personnel)**: sufficient maintenance personnel are available and are adequately experienced and trained to ensure compliance with this Agreement;
- (d) **(materials)**: adequate materials, resources, Plant and FF&E, consumables and supplies are available to ensure compliance with the requirements of this Agreement under normal conditions and reasonably anticipated abnormal conditions;
- (e) **(advancements)**: there is a commitment to continually meet advancements in technology and improve the standards and quality of the operation, maintenance, refurbishment and repair of the Facility and the manner in which they are carried out; and
- (f) **(maintenance)**: regular and proper maintenance (both routine and non-routine) and prompt repairs to the Facility are undertaken by suitably experienced and trained personnel using adequate materials and in accordance with the manufacturers' recommendations and guidelines.

Bid Design Documentation means the design and other documentation, drawings and plans as set out in Attachment 1 (Bid Design Documentation).

Bill has the same meaning as "bill of exchange" in the *Bills of Exchange Act 1909* (Cth) (but does not include a cheque or payment order).

Builder means the persons engaged by Project Co in accordance with the D&C Subcontract being, at the Date of this Agreement the parties identified in Schedule 1 (Contract Particulars) or any other person who, in addition or substitution, is engaged by Project Co to undertake all, or substantially all of the Works.

Builder Guarantee means each guarantee given by the Builder Guarantor and any other guarantee given by a Builder Guarantor to Project Co in connection with the obligations of a Builder to Project Co in accordance with a D&C Subcontract.

Builder Guarantor means each of Pindan Pty Ltd (ACN 009 009 072) in its personal capacity and as trustee for the Chamois Unit Trust and Leighton Holdings Limited (ACN 004 482 982) and any person who, in addition or substitution, guarantees the obligations of the Builder in accordance with a D&C Subcontract.

Builder Side Deed means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - Builder Side Deed" between Project Co, the State, the Builder Guarantor and the Builder.

Business Day means any day other than:

- (a) a Saturday or a Sunday; or
- (b) a holiday for Perth gazetted in the *Public and Bank Holidays Act 1972* (WA).

Cell means the secure living space for Prisoners which typically accommodates 1 or 2 Prisoners and contains sleeping facilities and ablutions.

Certificate of Completion means:

- (a) the certificate of Stage 1 Technical Completion;

- (b) the certificate of Stage 1 Commercial Acceptance;
- (c) the certificate of Stage 2 Technical Completion; and
- (d) the certificate of Stage 2 Commercial Acceptance,

issued in accordance with Clauses 17 and 19, or any one of these (as applicable).

Chamois Unit Trust means the trust constituted under the Chamois Unit Trust Deed.

Chamois Unit Trust Deed means the deed of trust dated 15 January 1982 between David John Stewart (Founder) and Chamois Nominees Pty Ltd (Trustees) as amended from time to time.

Change Compensation Event means an event set out in Part A, Section 2.1 of Schedule 4 (Change Compensation Principles) which may give rise to the payment of compensation or the granting of any other form of relief by the State in accordance with Schedule 4 (Change Compensation Principles).

Change in Control means where, at any time any person alone or together with any associate or associates (as that term is used in the *Corporations Act 2001* (Cth)), ceases to or commences to, directly or indirectly have Control of an entity.

Change in Law means any one or more of the following:

- (a) a change in, or repeal of, an existing Law;
- (b) the enactment or making of a new Law; or
- (c) a change in the way a Law is applied or is interpreted as a result of a decision of a court of competent jurisdiction whether or not the decision of the court is the first decision on the relevant issue,

excluding:

- (d) a Modification or an FF&E Modification;
- (e) a Change in Policy;
- (f) a change in the way a Law is applied or interpreted as a result of:
 - (i) the failure of Project Co to comply with a Law or any Authorisation,
 - (ii) an illegal act or omission of Project Co or a Project Co Associate; or
 - (iii) any breach of this Agreement by Project Co;
- (g) a change in any Law relating to Taxes including the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the GST Law;
- (h) a change in Law relating to the *Fair Work Act 2009* (Cth);
- (i) a change in Law which was not in force at the Date of this Agreement but which:
 - (i) had been published in a Government Gazette by way of bill, draft bill or draft statutory instrument or otherwise specifically referred to prior to the Date of this Agreement;
 - (ii) is contained or referred to in the Design Requirements, any Disclosed Information provided to Project Co prior to the Date of this Agreement or any Project Document;

- (iii) a party experienced and competent in the implementation of works similar to the Works or the provision of services similar to the Services would have reasonably foreseen or anticipated prior to the Date of this Agreement; or
- (iv) is substantially the same as a Law in force prior to the Date of this Agreement;
- (j) a change in Law relating to the *Civil Liability Act 2002 (WA)* or its application which limits or eliminates the impact of that Act or any legal risk allocation in accordance with this Agreement; or
- (k) a change in Law which is the introduction of the Model WHS Law into Western Australia in its form as at the Date of this Agreement.

Change in Mandatory Requirements means a Change in Law or a Change in Policy (as applicable).

Change in Policy means any one or more of the following:

- (a) the introduction of a new Quality Standard; or
- (b) a material change in a Quality Standard,

but does not include:

- (c) a Modification or an FF&E Modification;
- (d) a Change in Law;
- (e) more efficient usage of the Facility;
- (f) a change to the number of Facility Users from that contemplated in this Agreement or the Disclosed Information as at the Date of this Agreement;
- (g) a new Quality Standard or change to a Quality Standard, that was not in force at the Date of this Agreement but which:
 - (i) had been specifically referred to Project Co prior to the Date of this Agreement;
 - (ii) was contained or referred to in the Design Requirements, any Disclosed Information provided to Project Co prior to the Date of this Agreement or any Project Document;
 - (iii) a party experienced and competent in the implementation of works similar to the Works or the provision of services similar to the Services would have reasonably foreseen or anticipated prior to the Date of this Agreement; or
 - (iv) is substantially the same as a Quality Standard in force prior to the Date of this Agreement; or
- (h) a new Quality Standard or a change in a Quality Standard in response to:
 - (i) the failure of Project Co or a Project Co Associate to comply with a Quality Standard, Law or Authorisation;
 - (ii) an illegal act or omission of Project Co or a Project Co Associate; or
 - (iii) any breach of this Agreement by Project Co.

Change Notice has the meaning given to it in Schedule 4 (Change Compensation Principles).

Claim means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) made:

- (a) in connection with this Agreement, the Facility or the Project;
- (b) at Law; or
- (c) for specific performance, restitution, payment of money (including damages), an extension of time, or any other form of relief.

Cleaning Services means the Services to be provided as described in Part C, Section 2 of Schedule 13 (Services Specification).

Commercial Acceptance means in connection with each Stage, the relevant Commercial Acceptance Criteria have been satisfied, to the reasonable satisfaction of the Project Director.

Commercial Acceptance Criteria means in connection with each Stage, those criteria that are required to be satisfied to achieve Commercial Acceptance of the relevant Stage as set out in the Completion Criteria.

Commercial Acceptance Plan means in connection with each Stage, a plan which must be consistent with the relevant bid Commercial Acceptance Plan that forms part of the bid Project Management Plan set out in Attachment 3 (Bid D&C Documents) and otherwise comply with the requirements for that plan set out in Schedule 18 (D&C Plans and Reports).

Commercial Acceptance Report means in connection with each Stage, a report of that name which sets out in detail each of:

- (a) the relevant Commercial Acceptance Criteria;
- (b) the manner in which the Commercial Acceptance Criteria have been satisfied including all Commercial Acceptance Tests; and
- (c) when the Commercial Acceptance Criteria were satisfied or otherwise failed to be satisfied.

Commercial Acceptance Tests means in connection with each Stage, all tests (excluding the Technical Completion Tests) required to be carried out in accordance with this Agreement or as required by the Project Director to determine that Commercial Acceptance has been achieved (including the tests for each Stage set out in the Completion Criteria).

Commissioning Period means the Stage 1 Commissioning Period and the Stage 2 Commissioning Period, or as the context requires either of them.

Commissioning Period Services means any service Project Co may be directed by the State to perform with respect to the Facility during the Stage 1 Commissioning Period or the Stage 2 Commissioning Period (as applicable), provided that such services are substantially similar to the Services.

Common Terms Deed means the document entitled "Common Terms Deed - Eastern Goldfields Regional Prison Redevelopment Project" between Project Co, Finance Co, the Security Trustee, the Facility Agent and others dated on or about the Date of this Agreement.

Compensable Extension Event means each of the following events:

- (a) **(breach)**: breach by the State of any State Project Document in its capacity as a contracting party to the relevant State Project Document;
- (b) **(act or omission)**: subject to paragraph (d), any act or omission of the State (in its capacity as a contracting party to the relevant State Project Documents) or any State Associate other than any such act or omission which is authorised or permitted in accordance with a State Project Document;
- (c) **(suspension)**: cessation or suspension of any part of the Works being undertaken (or a change in the way the Works are undertaken) because of:
 - (i) a government direction;
 - (ii) a court or tribunal order; or
 - (iii) a requirement of Law,in relation to a Heritage Claim or a Native Title Claim;
- (d) **(industrial action)**: industrial action at the Site or in respect of the Project:
 - (i) which directly affects the Project and occurs:
 - A. in connection with Stage 1, at any time up to the Date of Stage 1 Commercial Acceptance; and
 - B. in connection with Stage 2, at any time up to the Date of Stage 2 Commercial Acceptance; and
 - (ii) which Project Co demonstrates to be the direct result of an act or omission of the State or a State Associate (other than an act or omission authorised or permitted under any State Project Document),

other than any industrial action caused or motivated by opposition to projects being delivered by public private partnerships;
- (e) **(change in Mandatory Requirements)**: a State Change in Mandatory Requirements;
- (f) **(Modifications)**: a Modification or FF&E Modification directed by the State in accordance with Clause 34.1;
- (g) **(Prisoner action)**: Riots, blockades, fires or floods caused by Prisoners;
- (h) **(State Works)**: the performance by the State of any State Works prior to the Date of Stage 1 Technical Completion;
- (i) **(State step-in)**: if:
 - (i) an Emergency occurs; or
 - (ii) the State is required by Law to discharge a statutory power or statutory duty,and such event:
 - (iii) has not been caused by an act or omission of Project Co or a Project Co Associate; and

(iv) is not a Force Majeure Event,

and the State exercises its rights under Clause 43.1; and

(j) **(Contamination)**: Remediation of Contamination for which the State is liable to pay Project Co under Clause 7.3.

Compensable Intervening Event means each of the following events:

- (a) **(breach)**: breach by the State of any State Project Document in its capacity as a contracting party to the relevant State Project Document;
- (b) **(reckless, unlawful or malicious act)**: a reckless, unlawful or malicious act or omission of the State or any State Associate;
- (c) **(suspension)**: cessation or suspension of any part of the Services (or a change in the way the Services are provided) because of:
 - (i) a government direction;
 - (ii) a court or tribunal order; or
 - (iii) a requirement of Law,in relation to a Heritage Claim or a Native Title Claim;
- (d) **(industrial action)**: industrial action at the Operating Phase Site or in respect of the Project which directly affects the Project and which Project Co demonstrates to be the direct result of an act or omission of the State or a State Associate (other than an act or omission authorised or permitted under any Project Document), other than any industrial action caused or motivated by opposition to projects being delivered by public private partnerships;
- (e) **(Prisoner Works Damage)**: damage caused by Prisoners during or as a consequence of any Prisoner Works;
- (f) **(Riot Damage)**: Riot Damage; and
- (g) **(State Prisoner Damage)**: State Prisoner Damage; and
- (h) **(Shared Prisoner Damage)**: Shared Prisoner Damage.

Completion means Stage 1 Technical Completion, Stage 1 Commercial Acceptance, Stage 2 Technical Completion and Stage 2 Commercial Acceptance, or where the context requires, any one of these.

Completion Criteria means:

- (a) in connection with Stage 1 Technical Completion, the Stage 1 Technical Completion Criteria;
- (b) in connection with Stage 1 Commercial Acceptance, the Stage 1 Commercial Acceptance Criteria;
- (c) in connection with Stage 2 Technical Completion, the Stage 2 Technical Completion Criteria; and
- (d) in connection with Stage 2 Commercial Acceptance, the Stage 2 Commercial Acceptance Criteria,

as set out in Schedule 7 (Completion Criteria).

Completion Payment means the payment to be made in accordance with clause 21A.1 (Completion Price) by the State to Project Co of an amount equal to the aggregate of the corresponding Receivables Purchase Payment payable by Finance Co to the State under the Receivables Purchase Deed and the Funding Portion.

Completion Payment Date means, subject to Clause 21A.1, the date for payment of the Completion Price notified by Project Co to the State.

Completion Plans means the Stage 1 Technical Completion Plan, the Stage 1 Commercial Acceptance Plan, the Stage 2 Technical Completion Plan and Stage 2 Commercial Acceptance Plan, or where the context requires, any one of these.

Completion Price means the price to be paid by the State to Project Co in accordance with Clause 21A.1, which must equal the aggregate of the amount of the Receivables Purchase Price calculated under the Receivables Purchase Deed and the Funding Portion.

Completion Tests means the Technical Completion Tests, the Commercial Acceptance Tests and any other completion tests that are required by the Independent Certifier or the State (as applicable) to be performed in accordance with this Agreement.

Condition Precedent means a condition precedent set out in Clause 2.2.

Condition Precedent Deadline Date has the meaning given to it in Clause 2.1(a).

Consortium Entity means:

- (a) Project Co;
- (b) the Builder (up to the end of the D&C Phase);
- (c) the FM Subcontractor;
- (d) the Builder Guarantor; and
- (e) the FM Subcontractor Guarantor.

Construction Licence means the Stage 1 Construction Licence or the Stage 2 Construction Licence (as applicable).

Construction Site means:

- (a) the Stage 1 Construction Site; and
- (b) the Stage 2 Construction Site.

Consumables means materials and goods required by Project Co to perform the Services which are used up or worn out by use rather than Fair Wear and Tear.

Contamination means any contamination or pollutant (as defined in the *Environmental Protection Act 1986 (WA)*) of any part of the Site whether existing prior to, or occurring after the Date of this Agreement.

Contract Administrator means the person appointed to that position, or such other person as may be appointed from time to time to replace that person in accordance with Clause 5.2.

Control means:

- (a) control or influence of, or having the capacity to control or influence the composition of the board or partnership committee, or decision making, directly or indirectly; or

- (b) being in a position to cast, or control the casting of, more than 20% of the maximum number of votes that may be cast at a general meeting of holders of Securities; or
- (c) having a relevant interest (as defined in section 608 of the Corporations Act, but as if a reference in that section to "securities" were a reference to Securities as defined in this Agreement) in more than 20% of the Securities,

of an entity (whether alone or together with any associate (as that term is used in the *Corporations Act 2001* (Cth))).

Controller means a person who has Control of another entity.

Counterparty Details means, in connection with each person (other than the State) who is a party to a State Project Document:

- (a) a certified copy of its constitution (or other constituent documents);
- (b) in the case of a trustee who enters into the State Project Documents on behalf of a trust, a certified copy of the relevant trust deed;
- (c) a certified copy of any powers of attorney under which the person executed each State Project Document; and
- (d) a certified copy of the extract of minutes evidencing the resolutions of its board of directors, authorising the entry into, delivery and observance of obligations in accordance with each State Project Document to which it is a party.

CPI means the Perth All Groups Consumer Price Index published quarterly by the Australian Bureau of Statistics or, if Clause 1.5 applies, the index determined in accordance with that Clause.

D&C Consent Deed means the document entitled "Builder Consent Deed" between Project Co, the Builder, the Builder Guarantor and the Security Trustee dated on or about the Date of this Agreement.

D&C Documents means all the documents that Project Co has prepared, prepares or is required to prepare to undertake the Works including:

- (a) Attachment 1 (Bid Design Documentation);
- (b) Design Documentation; and
- (c) the D&C Plans and Reports,

as updated and amended by Project Co in accordance with this Agreement.

D&C Phase means:

- (a) in connection with the Stage 1 Works, the period commencing on Financial Close and ending on the Date of Stage 1 Commercial Acceptance; and
- (b) in connection with the Stage 2 Works, the period commencing on the Operational Commencement Date and ending on the Date of Stage 2 Commercial Acceptance.

D&C Plans and Reports means each of the documents to be prepared by Project Co for the D&C Phase described in Schedule 18 (D&C Plans and Reports).

D&C Subcontract means the contract for the Works entered into between Project Co, John Holland Pty Ltd and Pindan Contracting Pty Ltd dated on or about the Date of this

Agreement and any other contract between Project Co and a Builder for the undertaking of the Works.

Date for Completion means:

- (a) the Date for Stage 1 Technical Completion;
- (b) the Date for Stage 1 Commercial Acceptance;
- (c) the Date for Stage 2 Technical Completion; or
- (d) the Date for Stage 2 Commercial Acceptance,

as the context requires.

Date for Stage 1 Commercial Acceptance means the date specified as such in Schedule 1 (Contract Particulars), as adjusted (if at all) under Clause 16.

Date for Stage 2 Commercial Acceptance means the date specified as such in Schedule 1 (Contract Particulars), as adjusted (if at all) under Clause 16.

Date for Stage 1 Technical Completion means the date specified as such in Schedule 1 (Contract Particulars), as adjusted (if at all) under Clause 16.

Date for Stage 2 Technical Completion means the date specified as such in Schedule 1 (Contract Particulars), as adjusted (if at all) under Clause 16.

Date of Completion means:

- (a) in connection with Stage 1 Commercial Acceptance, the Date of Stage 1 Commercial Acceptance;
- (b) in connection with the Stage 1 Technical Completion, the Date of Stage 1 Technical Completion;
- (c) in connection with Stage 2 Technical Completion, the Date of Stage 2 Technical Completion; and
- (d) in connection with the Stage 2 Commercial Acceptance, the Date of Stage 2 Commercial Acceptance.

Date of Stage 1 Commercial Acceptance means the date specified in the certificate of Stage 1 Commercial Acceptance.

Date of Stage 2 Commercial Acceptance means the date specified in the certificate of Stage 2 Commercial Acceptance.

Date of Stage 1 Technical Completion means the date specified in the certificate of Stage 1 Technical Completion.

Date of Stage 2 Technical Completion means the date specified in the certificate of Stage 2 Technical Completion.

Date of this Agreement means the date on which the last of the parties executes this Agreement.

DCS means the Department of Corrective Services of Western Australia.

DCS Policy means any policy, guideline, standard, circular directive, practice or procedure of DCS or the State which applies in connection with the construction, operation, management, maintenance or delivery of services at correctional facilities in Western

Australia and which affects the performance and observance by Project Co of its obligations in accordance with this Agreement:

- (a) which is notified to Project Co;
- (b) which is publicly available or otherwise available to Project Co; or
- (c) which Project Co is expressly required by the terms of this Agreement, by Law or by direction of the State to comply with,

unless the State (in its absolute discretion) gives written notice to Project Co that such policy, guideline, standard, circular directive, practice or procedure does not constitute a DCS Policy for the purpose of this Agreement.

Debt means:

- (a) at any time prior to the Date of Stage 1 Commercial Acceptance, principal amounts properly drawn down under the Financing Documents; and
- (b) at any time during the Operating Phase, principal amounts properly drawn down under the Financing Documents less the greater of:
 - (i) so much of that amount which has been amortised or which should have been amortised in accordance with the Amortisation Schedule; or
 - (ii) so much of that amount which, in accordance with the Amortisation Schedule, would have been amortised if each Project Entity had complied with all of its obligations under all of the Project Documents and had incurred no Abatement and the full Quarterly Services Payment and principal and interest under the State Loan Agreement in an amount corresponding to the State Loan Payment (prior to Abatement) had been paid in connection with each Quarter, and all of the obligations of each Project Entity under the Financing Documents had been complied with,

in each case, including accrued interest (which for the avoidance of doubt, does not include default interest) and other amounts payable, and deducting all credit balances on all debt reserve and debt service accounts (however named) held by or on behalf of any Project Entity or any Financier and related to the Project but does not include equity shareholder loans, amounts in the nature of equity or subordinated debt or amounts payable or receivable under any hedging/swap arrangements relevant to the Project.

Default Notice has the meaning given to it in Clause 42.1(b).

Default Rate means a rate equivalent to 4% per annum above:

- (a) the rate (which is expressed as a yield per centum per annum to maturity) which is the buying rate for bank accepted Bills quoted at approximately 10.10am (Perth time) on page "BBSY" of the Reuters Monitor System on that day, having a term of one Month; or
- (b) if that rate is no longer available or, if in the reasonable opinion of the State, that rate becomes an inappropriate rate to benchmark the default rate or becomes incapable of application, the "Bank Bill Rate" means the rate reasonably determined by the State to be the appropriate equivalent rate having regard to prevailing market conditions.

Default Termination Amount means the payment calculated in accordance with Section 3.2(c) of Schedule 10 (Termination Amounts).

Defect means:

- (a) any component of the Works, the Facility or Off-Site Infrastructure which does not comply with the requirements of this Agreement; or
- (b) any defect, shrinkage, fault, or omission in the Works, the Facility or the Off-Site Infrastructure (excluding any normal shrinkage of materials unless that shrinkage would have been accommodated for in accordance with Good Industry Practice).

Defects Liability Period means the period referred to in Clause 14.2.

Deliverable means the Works, the Facility, the D&C Documents, the Operating Plans, Reports and Manuals and any other deliverables required to be delivered or goods or services required to be provided by or for Project Co to the State in accordance with this Agreement (or any part of any of them).

Design Deliverables has the meaning given to it in Schedule 5 (Design Development).

Design Departures Schedule means the schedule of design and technical departures to Schedule 12 (Design Specifications) and Attachment 1 (Bid Design Documentation) as set out in Schedule 22 (Design Departures Schedule).

Design Development Plan has the meaning given to it in Schedule 5 (Design Development).

Design Development Process means the process for the development of the design of the Facility to be implemented in accordance with Schedule 5 (Design Development).

Design Development Sub-Program means the program referred to as such in Section 2.4 of Schedule 6 (Programming Requirements) which forms part of the Works Program prepared, amended and updated in accordance with this Agreement.

Design Documentation means all design documentation (including all drawings, specifications, models, samples and calculations) in computer readable or written form or stored by any other means, that Project Co creates or must necessarily create to undertake the Works, including all Design Deliverables.

Design Package has the meaning given to it in Schedule 5 (Design Development).

Design Requirements means, subject to Clause 1.3(g) the requirements for the design of the Facility set out in:

- (a) Schedule 12 (Design Specifications);
- (b) Attachment 1 (Bid Design Documentation);
- (c) Schedule 22 (Design Departures Schedule); and
- (d) the remainder of this Agreement,

and as required to meet all relevant Quality Standards and Laws.

Development Co-ordinator means the person identified as such in Schedule 1 (Contract Particulars), or such other person as may be appointed from time to time to replace that person, in accordance with Clause 5.6.

Disclosed Information means:

- (a) the Site Information Reports;

- (b) all documents and information provided to Project Co prior to the Date of this Agreement by the State or State Associates in connection with the Project that are not incorporated into this Agreement; and
- (c) all documents and information provided to Project Co by the State or State Associates after the Date of this Agreement in connection with the Project,

excluding the Project Documents.

Dispute has the meaning given to it in Clause 45.1.

Distribution means, without double counting, any:

- (a) dividend, return of capital, or other distribution or payment (in cash or in kind) in connection with the share capital or units of any Project Entity or shareholder loans (or other loans in the nature of equity funding) to, or for the benefit of any Project Entity;
- (b) release by any Project Entity of any actual or contingent liability of any Project Entity or any Equity Investor (or any Related Body Corporate of an Equity Investor); or
- (c) payment, loan or transfer of any assets by any Project Entity to any Equity Investor (or any Related Body Corporate of any Equity Investor) which is not on arm's length commercial terms.

EGRP Unit Trust 1 means the trust constituted under the EGRP Unit Trust 1 Deed.

EGRP Unit Trust 2 means the trust constituted under the EGRP Unit Trust 2 Deed.

EGRP Unit Trust 1 Deed means the deed poll entitled "Trust Deed - Assure Partners (EGRP) Unit Trust 1" dated 27 November 2012.

EGRP Unit Trust 2 Deed means the deed poll entitled "Trust Deed - Assure Partners (EGRP) Unit Trust 2" dated 3 December 2012.

EGRP FF&E means Group 1 FF&E, Group 2 FF&E, Group 3 FF&E and Group 4 FF&E.

Emergency means any event which:

- (a) requires a whole of system emergency response;
- (b) results in a serious security issue occurring at the Facility including a Riot, Unauthorised Secured Facility Escape or Unauthorised Escape;
- (c) without limiting paragraph (d), causes serious personal injury and prevents, or materially delays or disrupts, the performance of the Services by Project Co;
- (d) poses a serious risk to health or safety or the Environment; or
- (e) causes material property damage or destruction to the Works or the Facility.

Encumbrance means a mortgage, charge, pledge, lien, encumbrance, security interest, title retention, preferential right, trust arrangement, contractual right of set-off or any other security agreement or arrangement in favour of any person and includes any Security Interest.

Environment includes:

- (a) ecosystems and their constituent parts, including people and communities;

- (b) natural and physical resources;
- (c) land, soil, plants, habitats, water, atmosphere, climate, sands, odours and tastes;
- (d) the qualities and characteristics of locations, places and areas; and
- (e) the social, economic, aesthetic and cultural aspects of anything mentioned in paragraphs (a) to (d).

Environmental Notice means any notice or direction issued in accordance with any Law or otherwise by any Government Agency relating to the Environment requiring a person to take measures to Remediate any Contamination in, on, under or emanating from the Site including a clean up order, contamination assessment order or remediation order issued in accordance with the *Environmental Protection Act 1986 (WA)*.

Equity Contribution Deeds means *[not disclosed]*.

Equity Documents means *[not disclosed]*.

Equity Investor means each person who has provided or has agreed to provide units, shares and shareholder loans as stated in the Financial Model including any other equity, financial arrangement, security or option issued by, or provided to Project Co which the State has elected to designate as equity funding.

Equity Return means *[not disclosed]*

Estate Services means the Services to be provided by Project Co as described at Part B, of Schedule 13 (Services Specification).

Estate Services Plans means the plans, reports and manuals to be prepared by Project Co under Part F, Sections 3, 8 and 9 of Schedule 13 (Services Specification).

Event of Default means any of the following events:

- (a) **(fraud)**: a Project Entity or any Project Co Associate engages in fraud, collusion or misleading or deceptive conduct in performing their obligations in accordance with the State Project Documents;
- (b) **(false representation)**: a representation or warranty given by a Project Entity in accordance with a State Project Document is found to be materially incorrect or misleading;
- (c) **(finance default)**: any event that would restrict or cancel a Project Entity's ability to obtain or continue to have available finance in accordance with the Financing Documents;
- (d) **(Key Subcontractors)**: Project Co breaches an obligation in Clauses 5.10 or 5.11 in connection with Key Subcontractors or Key Personnel;
- (e) **(Independent Certifier's notice)**: the Independent Certifier notifies the State or Project Co under Clause 12.12(d) that the Explanation or Rectification Plan does not satisfactorily address its concerns or Project Co does not comply with the Rectification Plan in accordance with Clause 12.12(e);
- (f) **(assignment)**: a Project Entity breaches Clause 46.1 in relation to assignment, transfer or disposal of any of its obligations in accordance with the Project Documents;

- (g) **(Change in Control)**: a Change in Control of a Consortium Entity (other than a Project Entity) occurs without the consent of the State in accordance with Clause 46.6 (to the extent such consent is required by Clause 46.6);
- (h) **(Probity Event)**: a Project Entity fails to comply with its obligations in connection with a Probity Event in accordance with Clauses 47.5 to 47.10;
- (i) **(Change in Management)**: a Change in Management occurs and Clause 46.7 applies;
- (j) **(Completion)**: Project Co fails to achieve Completion by the relevant Date for Completion;
- (k) **(Service Failures)**: Service Failures occur and, under the Abatement Regime (whether or not Project Co has actually been subject to Abatement):
 - (i) Project Co accumulates total Abatements:
 - A. of greater than *[not disclosed]* of the aggregate Quarterly Service Payment in any one Operating Month;
 - B. of greater than *[not disclosed]* and up to and including *[not disclosed]* of the aggregate Quarterly Service Payment in any 3 consecutive Operating Months;
 - C. of greater than *[not disclosed]* and up to and including *[not disclosed]* of the aggregate Quarterly Service Payment in any period of 6 consecutive Operating Months; or
 - D. of greater than *[not disclosed]* and up to and including *[not disclosed]* of the aggregate Quarterly Service Payment in any period of 12 consecutive Operating Months; or
 - (ii) at any point in time, the number of Cells which would accommodate *[not disclosed]* Prisoners are Unavailable;
- (l) **(Unauthorised Escape)**: an Unauthorised Escape occurs;
- (m) **(Handover Bond)**: Project Co elects to but fails to provide a Handover Bond in accordance with Clause 32.2(g)(ii)B;
- (n) **(Stage 2 Performance Bond)**: Project Co fails to provide a Stage 2 Performance Bond in accordance with Clause 12.6;
- (o) **(breach not remedied)**: a Project Entity fails to remedy any breach by it of a State Project Document within 20 Business Days (other than a breach set out in paragraphs (a) - (n) of this definition or any of events described in the definition of Immediate Termination Event); or
- (p) **(Insolvency Event of Builder or FM Subcontractor)**: an Insolvency Event occurs in relation to the Builder, the Builder Guarantor, the FM Subcontractor or the FM Subcontractor Guarantor, whether or not Project Co is then in breach of a State Project Document, and that Builder, Builder Guarantor, FM Subcontractor or FM Subcontractor Guarantor is not replaced within 60 days by a party approved by the State taking into account the considerations listed in Clause 46.6(f).

Excepted Risk means, subject to Clause 39.12, the following Force Majeure Events:

- (a) civil riots, rebellions, revolutions, terrorism, insurrections and military and usurped power, act of sabotage, act of public enemy and war (declared or undeclared) and any fire, flood or explosion caused by any of these events; and
- (b) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination,

unless caused by Project Co or any Project Co Associate.

Excess Amount has the meaning given to it in Clause 36.3(e).

Existing Facility means the existing facility identified as such in Schedule 11 (Site Plans).

Existing Facility Site means the land on which the Existing Facility is located as shown in Schedule 11 (Site Plans).

Expiry Date means the date on which the Term expires as determined in accordance with Clause 3.2.

Extension Event means each of the following events:

- (a) a Compensable Extension Event; and
- (b) a Force Majeure Event.

Facility means:

- (a) from the Operational Commencement Date until the Date of Stage 2 Commercial Acceptance, the Stage 1 Facility; and
- (b) from the day after the Date of Stage 2 Commercial Acceptance, the Stage 1 Facility and the Stage 2 Facility.

Facility Agent means, at any time, the person appointed as agent in accordance with the Common Terms Deed. At the Date of this Agreement, the Facility Agent is Commonwealth Bank of Australia (ACN 123 123 124).

Facility Agreement means the document entitled "Senior Bank Debt Syndicated Facilities Agreement - Eastern Goldfields Regional Prison Redevelopment Project" between Project Co, Finance Co, the Security Trustee, the Facility Agent and others dated on or about the date of this Agreement.

Facility Functions means all custodial, custodial support, educational training, rehabilitation, medical and other services which the Facility Operator, the State or other State Associates will undertake at the Facility during the Operating Phase as specified in or reasonably inferred from this Agreement.

Facility Operator means DCS.

Facility Staff means employees, agents, contractors, subcontractors, consultants and authorised officers of the State or the Facility Operator involved in the provision of the Facility Functions or employed at the Existing Facility other than Project Co and the Project Co Associates including all Staff as defined in the Glossary.

Facility Staff Induction and Training Program means the document to be prepared by Project Co in accordance with Part F, Section 7.2 of Schedule 13 (Services Specification).

Facility User Group has the meaning given to it in Schedule 5 (Design Development).

Facility Users means any:

- (a) Facility Staff;
- (b) any visitor to the Facility in connection with the Facility Functions; or
- (c) Project Co, Project Co Associates employed or contracted at the Facility,

but excludes Prisoners or Social Visitors.

Fair Wear and Tear means fair wear and tear that can reasonably be expected to occur in a prison facility of the type and nature and at the location of the Facility.

Fault has the meaning given to it in Schedule 14 (Payment Schedule).

FF&E means furniture, fittings and equipment.

FF&E List means Schedule 17 (FF&E List) as amended in accordance with Clause 11.1 of this Agreement.

FF&E Modification means a material change to the Group 1 FF&E List excluding the following changes:

- (a) a change to any item of Group 1 FF&E if the substituted item of Group 1 FF&E has an equivalent Whole of Life Cost to the relevant item of Group 1 FF&E specified in the Group 1 FF&E List;
- (b) a change which is a consequence of a Change in Mandatory Requirement;
- (c) for the purposes of Clause 34 only, a Minor Modification;
- (d) the procurement of FF&E that Project Co is required to procure:
 - (i) during the Operating Phase in accordance with Clause 26; or
 - (ii) as part of a State Modification; or
- (e) any change to the Group 1 FF&E List made:
 - (i) to address any comments provided by the State Representative or the Independent Certifier with respect to the Group 1 FF&E made in accordance with Schedule 3 (Review Procedures); or
 - (ii) in order for Project Co to satisfy the FFP Warranty.

Final Expiry Date means the date which is 25 years after the Date for Stage 1 Commercial Acceptance.

FFP Warranty means the obligation imposed on Project Co in Clause 4.1.

Final Design Documents means the For Construction Documentation which has been reviewed or deemed to be reviewed by the Project Director in accordance with Schedule 3 (Review Procedures) and Section 8 of Schedule 5 (Design Development).

Finance Co means Stella EGRP Finance Pty Limited (ACN 153 050 198).

Finance Side Deed means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - Finance Side Deed" between the State, Project Co, Finance Co and the Security Trustee.

Financial Close means when the last Condition Precedent to be satisfied (or waived in accordance with Clause 2.4) has been satisfied (or waived in accordance with Clause 2.4) as set out in a notice given by the State to Project Co in accordance with Clause 2.3.

Financial Indebtedness means any indebtedness, present or future, actual or contingent, in connection with moneys borrowed or raised, or any financial accommodation whatsoever, including in accordance with the Financing Documents and the Equity Documents, or under or in connection with any bill, acceptance, guarantee, discounting arrangement, redeemable share or stock, finance or capital lease, hire purchase arrangement, the deferred purchase cost of any asset or service, or any obligation to deliver goods or provide services paid for in advance by any Financier or in connection with any financing transaction.

Financial Model means the Base Case Financial Model updated from time to time in accordance with Clause 49.

Financial Year means each 12 Month period commencing on 1 July and ending on 30 June.

Financiers means the providers of any financial facilities, financial arrangements or accommodation to a Project Entity in accordance with the Financing Documents for the purpose of financing the carrying out of the Project.

Financing Delay Costs means the financing delay costs calculated in accordance with Schedule 4 (Change Compensation Principles).

Financing Documents means:

- (a) the Common Terms Deed;
- (b) the Facility Agreement;
- (c) the Security Trust Deed;
- (d) the Financiers' Securities (as defined in the Finance Side Deed);
- (e) the D&C Consent Deed;
- (f) the FM Consent Deed;
- (g) the Finance Side Deed;
- (h) the Financiers' Certifier Deed of Appointment between Project Co, the Security Trustee, the Facility Agent, and the Financiers' Certifier (as defined in the Common Terms Deed);
- (i) each Swap Agreement (as defined in the Common Terms Deed);
- (j) any fee letters entered into in respect of the foregoing;
- (k) any Account Bank Deed (as defined in the Common Terms Deed);
- (l) any document entered into in connection with a financial transaction approved by the State in accordance with Clause 37.1; and
- (m) any other documents which the parties agree is a Financing Document for the purposes of this Agreement,

but excludes the Equity Documents.

Fit For Purpose means the Facility:

- (a) satisfies each of the purposes, objectives, functions, uses and requirements set out in or reasonably inferred from Schedule 12 (Design Specifications);
- (b) is capable of enabling Project Co to perform the Services in accordance with Schedule 13 (Services Specifications);
- (c) without limiting paragraph (a), facilitates and does not impair the performance of the Facility Functions;
- (d) satisfies all Laws and Quality Standards; and
- (e) is in accordance with all other requirements of this Agreement in connection with the design and construction of the Facility.

Fixed Force Majeure Costs means the sum of those fixed costs:

- (a) incurred by the FM Subcontractor in connection with its key management personnel being those staff with the titles of Mobilisation Manager, Commissioning Manager, Technical Manager, Facility Manager, Technician (Electrical) and Technician (Security Systems/BMS);
- (b) incurred by the FM Subcontractor with respect to insurance premiums, board costs, office rental and office expenses, equipment hire costs, depreciation on items of equipment used by Project Co in the performance of the Services, excluding EGRP FF&E and Consumables not capable of being demobilised and remobilised to a different Site and third party accounting, audit and legal costs,

and which are:

- (c) incurred directly by the FM Subcontractor during the Term in meeting its obligations in accordance with this Agreement and directly attributable to the Project which are not reasonably capable of being deferred or avoided by the FM Subcontractor; and
- (d) evidenced in writing to the Independent Certifier,

excluding, except as expressly provided for in (a) or (b) above, any costs payable by Project Co to the FM Subcontractor for the provision of labour.

FM Consent Deed means the document entitled "FM Consent Deed" between Project Co, the FM Subcontractor and the Security Trustee dated on or about the Date of this Agreement.

FM Designated Areas means the locked areas where dangerous Services Equipment is stored by the FM Subcontractor as shown in the Operating Phase Site Plan.

FM Guarantee means the guarantee given by Honeywell International Inc and any other guarantee given by an FM Subcontractor Guarantor to Project Co in connection with the obligations of an FM Subcontractor to Project Co in accordance with the FM Subcontract.

FM Help Desk Services the help desk services to be provided by Project Co as described in Part C, Section 6.3 Schedule 13 (Services Specification).

FM Insurances means the workers' compensation insurance and motor vehicle insurance required to be procured by the FM Subcontractor under and in accordance with the requirements of the FM Subcontract.

FM Side Deed means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - FM Side Deed" between Project Co, the State, the FM Subcontractor Guarantor and the FM Subcontractor.

FM Subcontract means the contract for the performance of all or part of the Services entered into between Project Co and Honeywell Limited dated on or about the Date of this Agreement and any other contract between Project Co and an FM Subcontractor for the performance of the Services.

FM Subcontractor means the person engaged by Project Co in accordance with the FM Subcontract being, at the Date of this Agreement Honeywell Limited or any other person who in addition or substitution is engaged by Project Co to perform any of the Services.

FM Subcontractor Margin means the percentage set out in Schedule 1 (Contract Particulars) that the FM Subcontractor may charge on its Minor Works Cost to cover all off-site overheads and administrative and corporate and other like costs and profits.

FM Subcontractor Guarantor means Honeywell International Inc and any person who, in addition or substitution, guarantees the obligations of an FM Subcontractor in accordance with an FM Subcontract.

For Construction Documentation has the meaning given to it in Schedule 5 (Design Development).

Force Majeure Event means any one or more, or a combination, of the following:

- (a) lightning, cyclones, earthquakes, natural disasters, landslides, tsunamis and mudslides;
- (b) civil riots or rebellions (excluding Riots or rebellions by Prisoners), revolutions, terrorism, insurrections and military and usurped power, act of sabotage, act of public enemy and war (declared or undeclared);
- (c) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination unless caused by Project Co or any Project Co Associate;
- (d) fire or flood (excluding fire or flood caused by Prisoners) or explosion caused by events referred to in (a) and (b) above; and
- (e) during the Operating Phase, Utility Interruption upstream of a connection point (subject to Project Co meeting its obligations in the Design Requirements in connection with a Utility Interruption),

which occurs at or directly in the vicinity of the Site or the Facility or impacting on the Site or the Facility which (either separately or together) directly causes Project Co to be unable to comply with all or a material part of its obligations in accordance with this Agreement where the event or its consequences was not caused or contributed to by Project Co or a Project Co Associate, the State or a State Associate.

Force Majeure Termination Amount means the payment calculated as such in Schedule 10 (Termination Amounts).

Force Majeure Termination Event means a Force Majeure Event which prevents Project Co from undertaking all or substantially all of its obligations in accordance with this Agreement for a continuous period exceeding 6 Months.

Functional Brief means Part A of Schedule 12 (Design Specifications).

Funding Date has the meaning given to it in the State Loan Agreement.

Funding Portion has the meaning given to it in the State Loan Agreement.

General Change in Mandatory Requirements means a Change in Mandatory Requirements that is not a State Change in Mandatory Requirements.

Glossary means:

- (a) in connection with Schedule 13 (Services Specifications), Annexure E (Glossary) of Schedule 13 (Services Specifications); and
- (b) in connection with the Output Specifications, Part E (Glossary to the Output Specifications) of the Output Specifications.

Good Industry Practice means:

- (a) with the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a professional, reputable and prudent contractor undertaking works similar to the Works or providing services similar to the Services under conditions comparable to those applicable to the Project; and
- (b) in accordance with all Laws, Authorisations and Quality Standards.

Government Agency means any organ of government, government entity, government authority, body politic (but excluding any political party) or government department.

Group 1 FF&E means all FF&E:

- (a) identified as "Group 1 FF&E" in the Group 1 FF&E List;
- (b) specified in or inferred from the Design Requirements which is classified as Group 1 FF&E in the Design Requirements or would be classified as Group 1 FF&E to ensure that like Group 1 FF&E is grouped together; and
- (c) otherwise required to ensure Project Co will satisfy the FFP Warranty which would be classified as Group 1 FF&E in accordance with Clause 11.1,

but excludes:

- (d) the Group 2 FF&E, Group 3 FF&E or the Group 4 FF&E;
- (e) Plant; and
- (f) Temporary Works.

Group 1 FF&E List means the list of Group 1 FF&E included in the FF&E List and titled "Group 1 FF&E" as updated in accordance with Clause 11.1.

Group 2 FF&E means those items of FF&E to be transferred from the Existing Facility to the Stage 1 Facility in accordance with Clause 11.2.

Group 2 FF&E List means the list of Group 2 FF&E as selected by the State in accordance with Clause 11.2.

Group 3 FF&E means all FF&E:

- (a) identified as "Group 3 FF&E" in the Group 3 FF&E List;
- (b) specified in Schedule 12 (Design Specifications) which is classified as Group 3 FF&E in the Design Requirements or would be classified as Group 3 FF&E to ensure that like FF&E is grouped together; and
- (c) all FF&E which is otherwise notified by the State to Project Co as Group 3 FF&E in accordance with Clause 11.3.

Group 3 FF&E List means the list of Group 3 FF&E included in the FF&E List and titled "Group 3 FF&E" as updated in accordance with Clause 11.3.

Group 4 FF&E means all FF&E:

- (a) identified as "Group 4 FF&E" in the Group 4 FF&E List;
- (b) specified in Schedule 12 (Design Specifications) which is classified as Group 4 FF&E in the Design Requirements or would be classified as Group 4 FF&E to ensure that like FF&E is grouped together; and
- (c) otherwise notified by the State to Project Co as Group 4 FF&E in accordance with Clause 11.4.

Group 4 FF&E List means the list of Group 4 FF&E included in the FF&E List and titled "Group 4 FF&E" as updated in accordance with Clause 11.4.

GST Law has the same meaning given in the *A New Tax System (Goods and Services) Tax Act 1999* (Cth).

Handover means the stage when Project Co has done everything that this Agreement requires to enable Project Co to handover the Works or the Facility (as applicable) in the Handover Condition at the Final Expiry Date or earlier termination of this Agreement.

Handover Bond means a bond provided to the State in accordance with Clause 32 or any bond accepted in substitution for or replacement of that bond.

Handover Condition has the meaning given to it in Clause 32.1.

Handover Package means the documents prepared by Project Co in accordance with Part F, Schedule 13 (Services Specification) as amended or updated in accordance with this Agreement.

Heritage Claim means a claim made in accordance with any Law for the protection, preservation or removal of any Artefact.

ICT means information and communications technology.

Immediate Termination Event means any of the following events:

- (a) **(abandonment)**: Project Co wholly or substantially abandons the Works or the Services;
- (b) **(Insolvency Event of Project Entity)**: an Insolvency Event occurs in relation to a Project Entity or any Partner, whether or not a Project Entity is then in breach of a State Project Document;
- (c) **(Insolvency Event of Builder or FM Subcontractor)**: an Insolvency Event occurs in relation to the Builder, the Builder Guarantor, the FM Subcontractor or the FM Subcontractor Guarantor whether or not Project Co is then in breach of a State Project Document, and that Builder, Builder Guarantor, FM Subcontractor or FM Subcontractor Guarantor is not replaced within 12 Months by a party approved by the State taking into account the considerations listed in Clause 46.6(f);
- (d) **(Service Failures)**: there are Service Failures and, under the Abatement Regime (whether or not Project Co has actually been subject to Abatement), Project Co accumulates total Abatements:

- (i) of greater than an average of *[not disclosed]* of the aggregate Quarterly Service Payment in any *[not disclosed]* consecutive Operating Months;
 - (ii) of greater than an average of *[not disclosed]* of the aggregate Quarterly Service Payment in any *[not disclosed]* consecutive Operating Months; and
 - (iii) of greater than an average of *[not disclosed]* of the aggregate Quarterly Service Payment in any *[not disclosed]* consecutive Operating Months;
- (e) **(Unauthorised Secured Facility Escape):** *[not disclosed]* Unauthorised Secured Facility Escapes occur in any *[not disclosed]* consecutive Months;
 - (f) **(multiple Events of Default):** a total of *[not disclosed]* Default Notices have been issued in any *[not disclosed]* consecutive Months other than where any such Default Notice is issued as a consequence of an Event of Default under paragraph (k) of the definition of Event of Default; or
 - (g) **(Change in Control):** a Change in Control of a Project Entity occurs without the consent of the State in accordance with Clause 46.6 (to the extent such consent is required by Clause 46.6).

Incident has the meaning given to it in Schedule 14 (Payment Schedule).

Increased State Risk Allocation means any increase in the risks for the State in relation to the Project as a result of entry into the Securitised Licence Structure or the State Loan Agreement.

Indemnified Persons has the meaning given to it in Clause 38.12.

Independent Certifier means the entity appointed as the Independent Certifier in accordance with the Independent Certifier Deed of Appointment, as replaced (if at all) in accordance with Clause 5.8.

Independent Certifier Deed of Appointment means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - Independent Certifier Deed of Appointment" between the State, Project Co and the Independent Certifier dated on or about the Date of this Agreement.

Independent Expert means a person with suitable expertise and experience required to determine a Dispute having regard to the nature of the Dispute, appointed in accordance with Clause 45.

Indexed with respect to an amount which is required to be indexed in accordance with this Agreement, means, on the date specified in this Agreement, that amount will be adjusted in accordance with the formula set out below and then rounded upwards or downwards to the nearest whole number:

$$\text{Adjusted amount} = \text{Indexation Factor} \times \text{Original Amount}$$

where:

Indexation Factor = the annual CPI figure published immediately before the relevant adjustment date divided by the annual CPI figure for the equivalent quarter in the previous year.

Original Amount = the amount (whether previously adjusted or not) applicable immediately prior to the relevant

adjustment date (disregarding rounding (if any) applied to that amount at the previous adjustment date).

Indirect or Consequential Loss means, subject to Clause 38.15(b) and 38.15(d), any:

- (a) loss of opportunity, profit, anticipated profit, business, business opportunities or revenue or any failure to realise anticipated savings; or
- (b) any penalties payable under contracts other than this Agreement.

Initial Partners means:

- (a) Assure Partners (EGRP) 1 Pty Ltd (ACN 160 900 149) as trustee of the Assure Partners (EGRP) Unit Trust 1; and
- (b) Assure Partners (EGRP) 2 Pty Ltd (ACN 161 471 316) as trustee of the Assure Partners (EGRP) Unit Trust 2.

Insolvency Event means the occurrence of any of the following events:

- (a) **(informs creditors)**: an entity informs its creditors generally that it is insolvent;
- (b) **(receiver)**: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in connection with any of the assets of an entity;
- (c) **(execution)**: a distress, attachment or other execution is levied or enforced upon or against any assets of an entity and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;
- (d) **(application)**: an application is made for the administration, dissolution or winding up of an entity which application is not stayed within 10 Business Days of being made;
- (e) **(winding up)**: an order is made for the administration, dissolution or winding up of an entity;
- (f) **(resolution)**: a resolution is passed for the administration or winding up of an entity other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;
- (g) **(arrangement or composition)**: an entity enters, or resolves to enter into or has a meeting of its creditors called to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;
- (h) **(statutory demand)**:
 - (i) an entity fails to comply with, or apply to have set aside, a statutory demand within 10 Business Days of the time for compliance; or
 - (ii) if the entity applies to have the statutory demand set aside within 14 Business Days of the time for compliance, the application to set aside the statutory demand is unsuccessful and the entity fails to comply with the statutory demand within 5 Business Days of the order of the court dismissing the application;

- (i) **(execution levied against it)**: an entity has an execution levied against it by creditors, debenture holders or trustees or under a floating charge, which is not satisfied, withdrawn or dismissed within 10 Business Days; or
- (j) **(insolvency)**: an entity is unable to pay its debts when they fall due, or is deemed unable to pay its debts in accordance with any applicable Law.

Insurance Proceeds Account means the account established in accordance with Clause 39.10.

Insurance Payment has the meaning given to it in Section 5.1(a) of Part C of Schedule 9 (Insurance).

Insurances or Insurance Policy means the insurances required to be effected and maintained in accordance with this Agreement.

Intellectual Property Rights means all intellectual and industrial property rights, including trade marks, copyright (including future copyright), inventions, patents, designs, circuits and other eligible layouts, database rights, and other intellectual property rights as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation dated 14 July 1967, including any application or right to apply for registration of any of these rights.

Intervening Event means each of the following events:

- (a) **(Compensable Intervening Event)**: a Compensable Intervening Event;
- (b) **(State act or omission)**: an act or omission by the State or any State Associate which prevents, hinders or disrupts Project Co in the implementation of the Project in accordance with the Project Documents, excluding an act or omission by the State or State Associate which is:
 - (i) in undertaking the Facility Functions;
 - (ii) authorised or permitted under any Project Document (where applicable);
 - (iii) a reasonably foreseeable consequence of undertaking the Facility Functions or the acts or omissions permitted under the Project Documents; or
 - (iv) caused by an act or omission of Project Co (other than an act or omission of Project Co authorised or permitted under a Project Document);
- (c) **(Force Majeure)**: a Force Majeure Event;
- (d) **(Riot)**: Riots, blockades, fires or floods any of which are caused by Prisoners;
- (e) **(Prisoner Works)**: the performance of Prisoner Works at the Facility; and
- (f) **(third party works or services)** the performance of works or services by the State or a third party engaged by the State in accordance with Clause 28.1(d)(ii), 30.8, 34.1(e)(iii), 31.9(c) or 43.1(a) or Section 5(g)(iii) of Schedule 4, which prevents, hinders or disrupts Project Co in the implementation of the Project in accordance with the Project Documents, excluding where the State or the relevant third party (as applicable) performs the works or services:
 - (i) in accordance with the State Project Documents (other than in respect of Clause 34.1(e)(iii)); and

- (ii) during any Step-In by the State due to an Immediate Termination Event or due to an Event of Default, breach or a negligent act or omission of Project Co or a Project Co Associate.

Invoice means:

- (a) a tax invoice for payment in the form agreed between the parties (each acting reasonably) which must contain a full break down of all elements of the payment to be made in accordance with that invoice and any other items reasonably requested by the State; and
- (b) a statement in the form agreed between the parties (each acting reasonably) after Financial Close which must contain a full break down of all elements of the State Loan Payments and any other items in relation to the State Loan Agreement reasonably requested by the State.

Key Personnel means the persons listed in Schedule 1 (Contract Particulars) who are to carry out the roles and functions described in that Schedule, as amended from time to time in accordance with Clause 5.11.

Key Subcontractor means:

- (a) the Builder;
- (b) the FM Subcontractor; and
- (c) any subcontractors to Project Co or a Project Co Associate or any of their subcontractors who are required to perform any part of the Works or Services set out in Schedule 1 (Contract Particulars),

and any replacement of them in accordance with this Agreement.

Key Subcontracts means:

- (a) the D&C Subcontract;
- (b) the FM Subcontract; and
- (c) any subcontract entered with any Key Subcontractors identified in paragraph (c) of the definition of Key Subcontractor.

Known Pre-Existing Contamination means all Pre-Existing Contamination to the extent and of the nature identified in the Site Information Reports.

Land Conditions means any physical conditions on, under, or over the surface, or in the vicinity of the Site, including:

- (a) **(water)**: ground water, ground water hydrology, the existence of any wells and the effects of any de-watering;
- (b) **(physical structures)**: physical and structural conditions above, upon and below the ground including any Infrastructure, partially completed structures, Artefacts or in ground works;
- (c) **(vegetation)**: pastures, grasses or other vegetation on the Site;
- (d) **(topography)**: topography, ground surface and sub-surface conditions and geology including rock or other materials;

- (e) **(climate)**: climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand seasons, mud and other effects of climatic and weather conditions;
- (f) **(Contamination)**: any Contamination;
- (g) **(safety)**: any solid, liquid, gas, odour, heat, sound, vibration, radiation or substance which makes or may make the Environment:
 - (i) unsafe or unfit for habitation or occupation by persons or animals;
 - (ii) degraded in its capacity to support plant life;
 - (iii) Contaminated; or
 - (iv) otherwise environmentally degraded;
- (h) **(physical conditions)**: all other physical conditions and characteristics of or in the vicinity of the Site, on or below the surface which may affect Project Co's ability to perform its obligations in accordance with this Agreement; and
- (i) **(easements)**: all easements over or in connection with the Site,

whether or not they were in existence or known to Project Co before the Date of this Agreement.

Law means:

- (a) Commonwealth, Western Australian or local government legislation, including statutes ordinances, instruments, codes (but excluding any building codes or Australian Standards), requirements, regulations, by-laws and other subordinate legislation;
- (b) common law; and
- (c) principles of equity.

Liability includes any debt, obligation, claim, action, cost, (including legal costs, deductibles or increased premiums) expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), actual, prospective or contingent and whether or not currently ascertainable and whether arising under or for breach of contract, in tort (including negligence), restitution, pursuant to statute or otherwise at Law.

Licence Payment means the licence payments payable by Project Co to the State under the Operating Phase Licence.

Made Safe or **Make Safe** has the meaning given to it in Schedule 14 (Payment Schedule).

Make Safe Time has the meaning given to it in Schedule 14 (Payment Schedule).

Management Services Agreement means the agreement of that name and dated on or about the date of this Agreement between Project Co, Finance Co and Capella Management Services Pty Ltd (ACN 127 727 842).

Management Team means the management team established in accordance with Clause 5.7(a).

Margin means an amount on account of off-site and on-site overheads and administrative and corporate and other like costs and profit.

Minister means a minister acting for and on behalf of the Crown in right of the State of Western Australia.

Minor Modification means a Modification or FF&E Modification:

- (a) the estimated Base Cost of which does not exceed the Minor Modification Threshold; and
- (b) which is implemented in accordance with Clause 10.

Minor Modification Running Schedule has the meaning given to it in Clause 10.2.

Minor Modification Threshold means an amount of *[not disclosed]* (as Indexed on each anniversary of Financial Close).

Minor Works means any:

- (a) services or change to the Facility required by the State or the Facility Operator during the Operating Phase which has a total Minor Works Price less than \$10,000 in connection with each Minor Works Notice (as Indexed on each anniversary of Financial Close); and
- (b) any other works agreed by the parties to be Minor Works,

but does not include:

- (c) a Modification, an FF&E Modification or for the purposes of Clause 10 only, a Minor Modification;
- (d) Prisoner Works;
- (e) any change required to ensure the Facility satisfies the FFP Warranty or to rectify a Defect; or
- (f) any works or services that form part of the Works or Services.

Minor Works Cost means:

- (a) the direct cost actually and properly incurred by Project Co in carrying out the Minor Works excluding the labour or provision of services where this could reasonably have been expected to be provided by the FM Subcontractor as part of the Services being undertaken at the relevant time; and
- (b) the expected cost of performance of any future services as a direct result of the Minor Works discounted back to the date of completion of the Minor Works using the Equity Return,

payable in accordance with Clause 28.

Minor Works Limit means an amount of:

- (a) \$100,000 for the first Operating Year; and
- (b) \$75,000 for each Operating Year thereafter (as Indexed on each anniversary of the Operational Commencement Date) and as increased pursuant to Clause 28.5.

Minor Works Notice has the meaning given to it in Clause 28.1(a).

Minor Works Price means the fixed lump sum price payable to Project Co in connection with the Minor Works.

Minor Works Quote has the meaning given to it in Clause 28.1(b).

Model Output Schedule means the work sheets in the Financial Model identified as the Model Output Schedule, a printout of which is signed or initialled by an authorised representative of the State and Project Co (amongst others) on or before Financial Close and as amended from time to time in accordance with Clause 49.

Model WHS Law means the Model WHS Legislation and Model WHS Regulations as published by the Commonwealth Government of Australia current as at the date of this Agreement, or any Law which is substantially the same as the Model WHS Legislation and Model WHS Regulations.

Modification means:

- (a) in the period prior to:
 - (i) the Date of Stage 1 Commercial Acceptance in connection with the Stage 1 Works; and
 - (ii) the Date of Stage 2 Commercial Acceptance in connection with the Stage 2 Works,any change to the Design Requirements including any addition, decrease, omission, deletion or removal to or from the relevant Works which result from a change to the Design Requirements;
- (b) in the period from the Operational Commencement Date:
 - (i) any change to Schedule 13 (Services Specifications) or scope of Services;
 - (ii) any change to the Facility, including any addition, decrease, omission, deletion or removal to or from the Facility; or
 - (iii) any work Project Co is required to undertake or services Project Co is required to deliver due to any defect in Prisoner Works or damage caused by Prisoner Works;
- (c) any change to the Design Requirements or the Works which results from the selection of Group 2 FF&E; and
- (d) any change expressly deemed to be a Modification in this Agreement,

but excludes:

- (e) any change of the type referred to in paragraphs (a) to (d) which does not increase the capital cost of the Works, the Whole of Life Costs or the achievement of Completion;
- (f) an FF&E Modification;
- (g) for the purposes of Clause 34 only, a Minor Modification;
- (h) Minor Works or Prisoner Works;
- (i) any maintenance or refurbishment to any part of the Facility, the replacement of any items of FF&E or the performance of any additional Services which arise as a result of any increase in Prisoner numbers of not more than 25 from the number of Prisoners required to be accommodated in the Facility in accordance with Schedule 13 (Services Specifications); and

- (j) any change referred to in paragraphs (a) to (d) required to ensure the Facility is Fit For Purpose or to rectify a Defect.

Modification Order means an order given by the State in accordance with Clause 34.1 which requires Project Co to proceed with a Modification or FF&E Modification.

Modification Quote means the quote prepared by Project Co in accordance with Clause 34.1(b).

Month means a calendar month.

Monthly Service Payment has the meaning given in Schedule 14 (Payment Schedule).

Monthly Performance Report has the meaning given to it in Part F, Schedule 13 (Services Specification).

Monthly Works Plan means the plan to be prepared by Project Co in accordance with Part F of Schedule 13 (Services Specification).

Monthly Works Report means the report to be prepared by Project Co in accordance with Schedule 18 (D&C Plans and Reports).

Mural means the aboriginal mural currently located in the Existing Facility as described in Schedule 12 (Design Specifications).

Mural Works means all work necessary for the disassembly, relocation, construction and completion of the Mural.

Mural Works Price means the price in the Mural Works Subcontract for carrying out the Mural Works adjusted in accordance with Clause 13.2.

Mural Works Subcontract has the meaning given to it in Clause 13.1(c).

Mural Works Subcontractor has the meaning given to it in Clause 13.1(c).

Native Title Claim means an application for a determination of native title in accordance with the *Native Title Act 1993* (Cth) or any other similar Law.

Official Prisoner Visitor means those persons permitted to visit a Prisoner pursuant to Sections 61 to 65 of the *Prisons Act 1981* (WA).

Off-Site Infrastructure means the infrastructure identified in Schedule 8 (Off-Site Infrastructure Works).

Off-Site Infrastructure Works means all works necessary for the design, construction, completion, commissioning and handback of the Off-Site Infrastructure including all Modifications and FF&E Modifications and rectification of Defects.

Off-Site Infrastructure Completion means the stage when Project Co has done everything that this Agreement requires to enable Project Co to handback the Off-Site Infrastructure to the owner of the item of Off-Site Infrastructure in accordance with this Agreement.

Off-Site Infrastructure Construction Areas means the land on which the Off-Site Infrastructure Works are to be completed as shown in Schedule 11 (Site Plans).

Operating Month means each Month falling within the Operating Phase provided that:

- (a) the first Operating Month will be the period from the Operational Commencement Date to the end of that current Month; and

- (b) the last Operating Month will be the period from the start of the immediately previous Month until the Expiry Date or earlier termination of this Agreement.

Operating Plans, Reports and Manuals means the Operating Phase documents to be prepared by Project Co as described in Part F, Schedule 13 (Services Specification).

Operating Phase means the period commencing on the Operational Commencement Date and ending on the Expiry Date.

Operating Phase Licence means the licence granted by the State to Project Co in accordance with Clause 3.5 as amended in accordance with that Clause.

Operating Phase Site means the area on which the Facility is located as described and shown on the Operating Phase Site Plan as updated as part of the Stage 1 Commercial Acceptance Criteria and the Stage 2 Commercial Acceptance Criteria.

Operating Phase Site Plan means the plan prepared and amended in accordance with Clause 3.4 which identifies the boundaries of the land on which the Facility is located.

Operating Year means each calendar year during the Operating Phase with the first Operating Year commencing on the Operational Commencement Date and ending on the last day of that calendar year, and the last Operating Year ending on the Expiry Date or earlier termination of this Agreement.

Operational Commencement Date means the day after the Date of Stage 1 Commercial Acceptance for the Stage 1 Facility.

Operations Payment Statement means the statement of that name to be prepared by the State in accordance with Clause 36.4(b).

Original Date for Stage 1 Commercial Acceptance means 31 July 2015.

Output Specifications means the documents set out in Schedule 12 (Design Specifications), being:

- (a) Introduction to Output Specification;
- (b) Part A: Functional Brief;
- (c) Part B: Architectural Specification;
- (d) Part C: Technical Specification;
- (e) Part D: Not used;
- (f) Part E: Glossary to the Output Specifications; and
- (g) any relevant appendices or attachments to the above.

Outstanding Item means a minor Defect which in the opinion of the Independent Certifier or the Project Director (as applicable):

- (a) does not prevent the Facility, the Works or the Off-Site Infrastructure Works (as applicable) from being Fit For Purpose;
- (b) Project Co has reasonable grounds for not promptly rectifying; and
- (c) can be corrected without prejudicing the use of the Facility for the performance of the Facility Functions.

Partner Representative has the meaning given to it in the Partnership and Investors Deed.

Partners means the Initial Partners and each other partner of the Partnership from time to time.

Partnership means the Assure Partners (EGRP) Partnership consisting of Assure Partners (EGRP) 1 Pty Ltd as trustee of the EGRP Unit Trust 1 and Assure Partners (EGRP) 2 Pty Ltd as trustee of the EGRP Unit Trust 2 and established in accordance with the Partnership and Investors Deed.

Partnership and Investors Deed means *[not disclosed]*

Payment Directions Deed means the document entitled "Payment Directions Deed" between the State, each Project Entity and the Facility Agent and dated on or about the date of Financial Close.

Performance Failure has the meaning given to it in Schedule 14 (Payment Schedule).

Performance Monitoring Program means all the performance monitoring activities (including frequencies, systems, methods and audit tools) that Project Co must undertake to monitor the quality of Services required to be performed by Project Co in accordance with this Agreement.

Pest Control Services means the Services to be provided by Project Co as described in Part C, Section 4.2 of Schedule 13 (Services Specifications).

Plant means all plant, machinery and equipment and other items (including furniture, fixtures and fittings) which:

- (a) are necessary to ensure the Facility is Fit For Purpose;
- (b) are referred to in the Design Requirements; or
- (c) without limiting paragraphs (a) or (b), Project Co or any of its Subcontractors constructs, locates or installs within the Facility or becomes part of the Facility, or which is used for operating or maintaining the Facility or performing the Services,

but excludes any:

- (d) EGRP FF&E; or
- (e) item listed in paragraphs (a), (b) or (c) which are Temporary Works.

PPSA means the *Personal Properties Securities Act 2009* (Cth).

Pre-Existing Contamination means any Contamination of the Existing Facility Site which is in existence at the Date of Stage 1 Commercial Acceptance.

Principal Contractor has the meaning given to it in the Model WHS Law.

Prisoner means a 'prisoner' as defined in the Prisons Act.

Prisoner Information means any information relating to Prisoners at the Facility.

Prisoner Soft Landscaping Areas means the land identified as such in the Operating Phase Site Plan.

Prisoner Visitor means any Official Prisoner Visitor or Social Visitor who attends the Facility for the purposes of visiting a Prisoner and for the avoidance of doubt excludes all visitors who visit the Facility in connection with the Facility Functions.

Prisoner Works has the meaning given to it in Clause 29(a).

Prisoner Works Damage means damage to the Facility caused by the performance of Prisoner Works which could not reasonably be expected to have been prevented by Project Co or a Project Co Associate as part of Project Co's obligations in accordance with this Agreement and does not arise as a result of the damaged item or area being used for its reasonable and proper purposes having regard to Project Co's obligation to ensure the Facility is Fit For Purpose.

Prisoner Works Notice has the meaning given to it in Clause 29(a).

Prisons Act means the *Prisons Act 1981* (WA).

Probity Event includes any event or thing which:

- (a) relates to a Related Person or a Consortium Entity and has a material adverse effect on the public interest, or public confidence, in the Project;
- (b) has a material adverse effect on, or on the perception of, the character, integrity or honesty of a Related Person; or
- (c) involves a material failure of a Consortium Entity to achieve or maintain:
 - (i) reasonable standards of ethical behaviour;
 - (ii) the avoidance of conflicts of interest which will have a material adverse effect on the ability of the Consortium Entity to perform and observe its obligations in connection with the Project; or
 - (iii) other standards of conduct that would otherwise be expected of a party involved in a State government project.

Probity Investigation means such probity and criminal investigations to report on the character, honesty and integrity of persons or standards of conduct of corporations or other entities as are required by Law or by the State from time to time, to ensure that a person or entity is fit and proper for its proposed or continued involvement in the Project.

Project means:

- (a) undertaking and financing the Works;
- (b) the performance of the Services; and
- (c) Handover of the Works or the Facility (as applicable),

in accordance with this Agreement.

Project Co Associate means:

- (a) the Project Co Representative;
- (b) any Consortium Entity;
- (c) officers, agents, advisers, consultants, contractors and employees of Project Co, the Builder, the FM Subcontractor and any other Subcontractor; and
- (d) any visitor to the Site invited onto the Site by Project Co or a Project Co Associate,

but does not include Project Co or the Independent Certifier.

Project Co FF&E means the Group 1 FF&E, the Group 2 FF&E and the Group 3 FF&E.

Project Co Representative means the person nominated as such in Schedule 1 (Contract Particulars), or such other person as may be appointed from time to time to replace that person in accordance with Clause 5.5.

Project Director means the person appointed to that position in Schedule 1 (Contract Particulars), or such other person as may be appointed from time to time to replace that person in accordance with Clause 5.2.

Project Documents means:

- (a) this Agreement;
- (b) the Operating Phase Licence;
- (c) the D&C Subcontract;
- (d) the FM Subcontract;
- (e) the State Deed of Charge;
- (f) the Finance Side Deed;
- (g) the Builder Side Deed;
- (h) the FM Side Deed;
- (i) each Builder Guarantee;
- (j) the FM Guarantee;
- (k) the Equity Documents;
- (l) the Financing Documents;
- (m) the Independent Certifier Deed of Appointment;
- (n) Receivables Purchase Deed;
- (o) Payment Directions Deed;
- (p) State Loan Agreement; and
- (q) any other document or agreement entered into under or for the purposes of supplementing, replacing, amending or novating, any of them or any other documents as the parties agree is a Project Document.

Project Entity means:

- (a) Project Co; and
- (b) Finance Co,

or if the context requires, the relevant one of them.

Project Management Plan means the project plan for the D&C Phase to be prepared by Project Co in accordance with Schedule 18 (D&C Plans and Reports).

Prolongation Costs has the meaning given to it in Schedule 4 (Change Compensation Principles).

Quality Standards means all standards, codes, specifications and requirements to be complied with in accordance with, and subject to, the terms of this Agreement including:

- (a) the standards, policies, instructions and other procedures set out in, or otherwise expressly referred to in, the Design Requirements and Schedule 13 (Services Specifications);
- (b) the National Construction Code of Australia (**NCC**);
- (c) the relevant standards, codes and guides of Standards Australia and Standards New Zealand (or, where an Australian Standard or a New Zealand Standard does not exist, the relevant British standard or international standard);
- (d) the standards, codes and guides published by the National Occupational Health and Safety Commission;
- (e) the *Disability Discrimination Act 1992* (Cth);
- (f) Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites, ANZECC/MHNR;C;
- (g) all Environment Protection Authority (WA) publications and bulletins;
- (h) all standards, codes and guides published by the WorkCover Corporation of Western Australia and SafeWork WA;
- (i) all relevant State policies;
- (j) all DCS Policies;
- (k) all requirements of Utility providers and Government Agencies; and
- (l) all other standards, codes, specifications and requirements relevant to the Works or the Facility,

as may be amended or updated from time to time.

Quarter means:

- (a) the period commencing on the Operational Commencement Date and ending on the day before the first Quarterly Date during the Operating Phase for the Stage 1 Facility;
- (b) each 3 Month period commencing on a Quarterly Date; and
- (c) the period commencing on the last Quarterly Date during the Operating Phase for the Facility and ending on the Expiry Date.

Quarterly Date means every 1 January, 1 April, 1 July and 1 October during the Operating Phase.

Quarterly Performance Report has the meaning given to it in Part F, Schedule 13 (Services Specification).

Quarterly Service Payment has the meaning given to it in Schedule 14 (Payment Schedule).

Receivables has the meaning given to it in the Receivables Purchase Deed.

Receivables Purchase Deed means the document entitled "Receivables Purchase Deed" between the State and each Project Entity, dated on or about the date of Financial Close.

Receivables Purchase Payment has the meaning given to it in the Receivables Purchase Deed.

Receivables Purchase Price means the amount payable by Finance Co to the State under the Receivables Purchase Deed as calculated in accordance with that document.

Receivables Refund Payment has the meaning given to it in the Receivables Purchase Deed.

Records means any information or documents created or procured by a Project Entity or any Subcontractor in connection with delivering the Project including:

- (a) the D&C Documents, Operating Plans, Reports and Manuals;
- (b) the audited accounts referred to in Clause 48(e);
- (c) copies of all notices relating to Distributions;
- (d) all records in connection with the repayment of Debt;
- (e) National Police Certificates; and
- (f) books of account, computer print-outs, records, correspondence, invoices, instructions, plans, drawings, receipts and memoranda, whatever the form, including information stored by computer and other devices.

Rectification Period has the meaning given to it in Schedule 14 (Payment Schedule).

Refinancing means:

- (a) **(amendments)**: any amendment to or novation, supplement or replacement of any Financing Document;
- (b) **(rights, waivers and consents)**: the exercise of any right, or the request for a grant of any waiver or consent, in accordance with any Financing Document;
- (c) **(rights and interests)**: the disposition of any rights or interests in, or the creation of any rights of participation in connection with the Financing Documents or the creation or granting of any other form of benefit or interest in either the Financing Documents or the contracts, revenues or assets of Project Co whether by way of security or otherwise;
- (d) **(restructure)**: any new financing arrangements entered into by Project Co which has the effect of restructuring the financing arrangements as at Financial Close; or
- (e) **(effect of restructure)**: any other step, arrangement or new contractual or financing arrangement that has an effect which is similar to any matter described in paragraphs (a) to (d),

which will give rise to a Refinancing Loss or a Refinancing Gain, but does not include:

- (f) **(derivatives)**: the entry into derivative transactions contemplated to be entered into on or before Financial Close by the Financing Documents;
- (g) **(syndication)**: the syndication or subscription of any debt in accordance with the Financing Documents that is contemplated at the date of Financial Close;
- (h) **(transfer)**: the transfer or sell down of any bonds, debt or equity in an arm's length transaction at market value;
- (i) **(identity of Financiers)**: secondary disposals of investments or commitments of Financial Indebtedness in the ordinary course of a Financier's business which

change the identity of Financiers but not the commercial terms of the Financing Documents;

- (j) **(amendment or restatement)**: any amendment or restatement of any Financing Documents which is as a direct result of an amendment or waiver to cure any actual or potential event of default in accordance with any Financing Document; or
- (k) **(interest rate swap)**: to the extent that any interest rate swap confers on a hedge counterparty a right to break a swap consequent on the hedge counterparty ceasing to be a finance party under the Financing Documents, the exercise of any such right.

Refinancing Event means an event set out in paragraphs (a) to (e) of the definition of Refinancing.

Refinancing Gain has the meaning given to it in Clause 37.5(a).

Refinancing Impact has the meaning given to it in Clause 37.5(a).

Refinancing Loss has the meaning given to it in Clause 37.5(d).

Refurbishment Works means the periodic maintenance, refurbishment or replacement of any elements comprising the Facility in accordance with the Estate Services Plans or otherwise as necessary to ensure Project Co:

- (a) satisfies the FFP Warranty;
- (b) complies with Schedule 13 (Services Specifications); and
- (c) complies with all relevant Laws, Authorisations and Quality Standards.

Relevant Amount has the meaning given to it in clause 38.1.

Related Body Corporate has the same meaning as "related body corporate" in the *Corporations Act 2001* (Cth) but as if a reference in that Act to a "subsidiary" were a reference to a Subsidiary as defined in this Agreement.

Related Person means:

- (a) a director, secretary or Partner Representative of a Consortium Entity; or
- (b) any officer or employee, agent or contractor of a Consortium Entity who:
 - (i) has the ability to exercise influence or control in relation to the Consortium Entity, or in matters relating to the Project;
 - (ii) works at the Site; or
 - (iii) has access to confidential information concerning the Project or the Facility Users.

Relevant Period has the meaning given to it in the State Loan Agreement.

Remedial Period has the meaning given to it in Schedule 14 (Payment Schedule).

Remediate or Remediation means to rehabilitate the land, restore the land, remove, destroy, dispose of, neutralise, treat, cap or monitor or take other action to prevent or minimise Contamination being caused.

Reputable Insurer means an insurance company having a financial performance rating of at least A- by AM Best or a financial strength rating of at least A- by Standard and Poor's (Australia) Pty Limited.

RFP means the document entitled "Request for Proposal" issued by the State in connection with the Project on 18 January 2012.

Required Rating has the meaning given to it in Clause 12.6.

Review Period has the meaning given to it in Schedule 3 (Review Procedures).

Reviewable Services Date means:

- (a) the fifth anniversary of the Operational Commencement Date; and
- (b) the date which is every 5 years thereafter until the Expiry Date.

Reviewable Services means the following services:

- (a) Waste Management Services;
- (b) Cleaning Services; and
- (c) Pest Control Services.

Reviewable Services Term means each period of 5 years of the Term commencing on the Operational Commencement Date and ending on the Expiry Date.

Riot or Riots means any action by 5 or more Prisoners in concert, using or intending to use force against any opposition and acting in a manner to cause alarm.

Riot Damage means damage to the Facility caused by a Riot that:

- (a) could not reasonably be expected to have been prevented by Project Co or a Project Co Associate as part of Project Co's obligations in accordance with this Agreement; and
- (b) was not caused by an act or omission of Project Co or a Project Co Associate.

Schedule of Accommodation means the schedule of accommodation included at Appendix B to the Output Specifications.

Securities means shares, units, interests in a partnership and any other interests which would constitute "securities" as defined in the Corporations Act 2001 (Cth).

Security Trust Deed means the deed entitled "Security Trust Deed - Eastern Goldfields Regional Prison Project" between the Security Trustee, Project Co and others dated on or about the Date of this Agreement.

Secured Facility Area means each part of the Facility which may only be accessed through the security barriers within the gatehouse building of the Facility.

Secure Perimeter means all elements of the secure perimeter solution, including all associated systems, to secure the perimeter of the Operating Phase Site, as required by the Design Requirements.

Securitized Licence Structure means the Receivables Purchase Deed, the Operating Phase Licence, the Payment Directions Deed and Clause 21A (other than Clause 21A.3).

Securitized Modification Payment means an amount equal to the corresponding Receivables Purchase Payment in respect of the additional receivables purchased by

Finance Co from the State under the Receivables Purchase Deed resulting from the Change Compensation Event.

Security Interest has the meaning given to it in section 12 of the PPSA.

Security Trustee means, at any time, the person appointed as security trustee in accordance with the Security Trust Deed. At the Date of this Agreement, the Security Trustee is as set out in Schedule 1 (Contract Particulars).

Services means the services to be performed by Project Co in accordance with Schedule 13 (Services Specifications).

Services Equipment means:

- (a) items of FF&E used by Project Co in the performance of the Services; and
- (b) Consumables,

excluding EGRP FF&E.

Service Failure means Performance Failures and Availability Failures or where the context requires, either one of these.

Services Training and Induction Program means the document to be prepared by Project Co in accordance with Part F, Section 7.3 of Schedule 13 (Services Specifications).

Service Standards means:

- (a) in connection with the Estate Services, the service standards stipulated in Part B, Section 4 of Schedule 13 (Service Specifications);
- (b) in connection with the Cleaning Services, the service standards stipulated in Part C, Section 2.3 of Schedule 13 (Service Specifications);
- (c) in connection with the Waste Management Services, the service standards stipulated in Part C, Section 3.3 of Schedule 13 (Service Specifications);
- (d) in connection with the Pest Control Services, the service standards stipulated in Part C, Section 4.3 of Schedule 13 (Service Specifications);
- (e) in connection with the Utility Management Services, the service standards stipulated in Part C, Section 5.4 of Schedule 13 (Service Specifications); and
- (f) in connection with the FM Help Desk Services, the service standards stipulated in Part C, Section 6.4 of Schedule 13 (Service Specifications).

Shared Prisoner Damage means damage caused by Prisoners or Prisoner Visitors to the Facility that:

- (a) could not reasonably be expected to have been prevented by Project Co or a Project Co Associate as part of Project Co's obligations in accordance with this Agreement; or
- (b) was not caused by an act or omission of Project Co or a Project Co Associate,

excluding State Prisoner Damage and Riot Damage.

Site means the Construction Sites and the Operating Phase Site.

Site Access and Interface Protocols means the protocols for accessing the Construction Sites during the D&C Phase as set out in the Project Management Plan.

Site Information Reports means each of the following reports:

- (a) Site Investigation Report prepared by Maunsell Aecom and dated November 2007;
- (b) Geotechnical Investigation Report prepared by Golder Associates and dated November 2008;
- (c) Aboriginal Heritage Survey;
- (d) Airport Noise Level Measurements prepared by Herring Storer Acoustics and dated 28 April 2011;
- (e) Asbestos Management Plan; and
- (f) Feature Survey – Kalgoorlie-Boulder Airport and Eastern Goldfields Regional Prison prepared by Whelans and dated April 2011.

Site Information Report Agreements means each of the agreements entered into by the State or a State Associate with a Site Information Report provider for the purposes of providing, or in connection with provision of, the relevant Site Information Report.

Social Visitor means a person permitted to visit that Prisoner pursuant to and in accordance with Regulation 52 of the *Prisons Regulations 1982 (WA)*.

Soft Landscaping Works Areas means the areas within the Facility described and shown on the Operating Phase Site Plan.

Stage means each of Stage 1 and Stage 2 as the context requires.

Stage 1 means all of the Stage 1 Works.

Stage 2 means all of the Stage 2 Works.

Stage 1 Commissioning Period means, in connection with Stage 1, the period commencing on the Date of Stage 1 Technical Completion and ending on the Date of Stage 1 Commercial Acceptance.

Stage 2 Commissioning Period means, in connection with Stage 2, the period commencing on the Date of Stage 2 Technical Completion and ending on the Date of Stage 2 Commercial Acceptance.

Stage 1 Construction Licence has the meaning given to it in Clause 3.3(a).

Stage 2 Construction Licence has the meaning given to it in Clause 3.3(b).

Stage 1 Construction Site means the land on which the Facility is to be constructed as shown in Schedule 11 (Site Plans).

Stage 2 Construction Site means the land on which the Stage 2 Works are to be completed as shown in Schedule 11 (Site Plans).

Stage 1 Facility means the entire physical infrastructure and grounds to be designed, constructed, completed and commissioned by Project Co on the Stage 1 Construction Site including all Project Co FF&E installed or located in that facility but excluding all Temporary Works, the Mural, the Aboriginal Meeting Places and the Group 4 FF&E.

Stage 2 Facility means the entire physical infrastructure and grounds to be designed, constructed, completed and commissioned by Project Co on the Stage 2 Construction Site including all Project Co FF&E installed or located in that facility but excluding all Temporary Works, the Mural, the Aboriginal Meeting Places and the Group 4 FF&E.

Stage 2 Performance Bond means an irrevocable and unconditional bond provided to the State in accordance with Clause 12.5 or any bond accepted in substitution for or replacement of that bond.

Stage 1 State Access Period has the meaning given to it in Clause 18.1(a).

Stage 2 State Access Period has the meaning given to it in Clause 18.1(b).

Stage 1 Works has the meaning given to it in Clause 12.1.

Stage 2 Works has the meaning given to it in Clause 12.1.

State means the Crown in right of the State of Western Australia and includes a department established in accordance with the *Public Sector Management Act 1994 (WA)* and a Minister of the Crown in right of the State of Western Australia.

State Access Period means:

- (a) in connection with Stage 1, the Stage 1 State Access Period; and
- (b) in connection with Stage 2, the Stage 2 State Access Period.

State Associate means officers, agents, advisers, consultants, contractors and employees of the State including the Facility Operator (but does not include Project Co, Project Co Associates, Western Power or the Independent Certifier).

State Change in Mandatory Requirements means a Change in Mandatory Requirements which specifically and only affects Western Australia and is made by the State.

State Deed of Charge means the document entitled "Eastern Goldfields Regional Prison Redevelopment Project - State Deed of Charge" between amongst others, the State and Project Co.

State Loan means the loan to be made available to the State by Finance Co pursuant to the State Loan Agreement.

State Loan Agreement means the document entitled "State Loan Agreement" between the State and Finance Co and dated on or about the date of Financial Close.

State Loan Payment has the meaning given to it in the State Loan Agreement.

State Modification has the meaning given to it in Clause 34.1(a).

State Operational Commissioning means:

- (a) in connection with Stage 1, the operational commissioning to be conducted by the State during the Stage 1 Commissioning Period described in Clause 18 and in the State Operational Commissioning Plan; and
- (b) in connection with Stage 2, the operational commissioning to be conducted by the State during the Stage 2 Commissioning Period described in Clause 18 and in the State Operational Commissioning Plan.

State Operational Commissioning Plan means the plan of that name to be prepared by the State which sets out the State's methodology for State Operational Commissioning.

State Prisoner Damage means damage caused by Prisoners or Prisoner Visitors to:

- (a) the Group 2 FF&E, Group 3 FF&E or Group 4 FF&E; or
- (b) the Prisoner Soft Landscaping Areas,

that:

- (c) could not reasonably be expected to have been prevented by Project Co or a Project Co Associate as part of Project Co's obligations in accordance with this Agreement; or
- (d) was not caused by an act or omission of Project Co or a Project Co Associate, excluding Riot Damage.

State Project Documents means:

- (a) this Agreement;
- (b) the Operating Phase Licence;
- (c) the Finance Side Deed;
- (d) the State Deed of Charge;
- (e) the Builder Side Deed;
- (f) the FM Side Deed;
- (g) the Independent Certifier Deed of Appointment; and
- (h) any other Project Document to which the State is a party.

State Representative means:

- (a) until the date upon which the Contract Administrator is appointed under Clause 5.2(c), the Project Director, and any person authorised to act as the Project Director;
- (b) from the date upon which the Contract Administrator is appointed under Clause 5.2(c) until the Date of Stage 2 Commercial Acceptance, the Project Director or the Contract Administrator (as applicable given their respective roles) and any person authorised to act as the Project Director or the Contract Administrator; and
- (c) from the Date of Stage 2 Commercial Acceptance, the Contract Administrator and any person authorised to act as the Contract Administrator.

State Security Measures means the security escorts and other measures the State provides for the security of:

- (a) the Facility;
- (b) the State and the State Associates;
- (c) Facility Users; and
- (d) the Prisoners and Prisoner Visitors,

as a consequence of a failure of Project Co to meet its obligations in accordance with this Agreement.

State Selected FF&E has the meaning given to it in Clause 35(b).

State WOL Cost Savings has the meaning given to it in Clause 35(a).

State Works means any works required to be performed by the State in connection with the Project prior to the Date of Stage 1 Technical Completion.

State Works Notice has the meaning given to it in Clause 15.1(a).

Subcontract means an agreement which Project Co intends to, or does, enter into with a Subcontractor.

Subcontractor means any person with whom Project Co intends to, or does, enter into an agreement to subcontract any part of the Project.

Subsidiary has the same meaning as "subsidiary" in the Corporations Act, except that an entity may be a subsidiary of a partnership or trust and a trust or partnership may be a Subsidiary of an entity, for the purposes of which a unit or other beneficial or partnership interest will be regarded as a share.

Tax means any tax, levy, impost, deduction, charge, duty or withholding which is levied or imposed by a Government Agency, including any income, capital gains, withholding, stamp and transaction tax, duty or charge together with interest, penalties, charges, fees, or other amounts (if any) imposed or made on or in connection with the above and Taxation will be construed accordingly.

Technical Completion means in connection with each Stage, the relevant Technical Completion Criteria have been satisfied to the satisfaction of the Independent Certifier.

Technical Completion Criteria means in connection with each Stage, those criteria that are required to be satisfied to achieve Technical Completion as set out in the Completion Criteria.

Technical Completion Plan means in connection with each Stage, a plan to be prepared by Project Co which must be consistent with the relevant bid Technical Completion Plan that forms part of the bid Project Management Plan set out in Attachment 3 (Bid D&C Documents) and otherwise comply with the requirements for that plan set out in Schedule 18 (D&C Plans and Reports).

Technical Completion Report means in connection with each Stage, a report of that name which sets out in detail each of:

- (a) the relevant Technical Completion Criteria;
- (b) the manner in which the Technical Completion Criteria have been satisfied including all Technical Completion Tests; and
- (c) when the Technical Completion Criteria were satisfied or otherwise failed to be satisfied.

Technical Completion Tests means in connection with each Stage, all tests (excluding the Commercial Acceptance Tests) required to be carried out in accordance with this Agreement or as required by the Independent Certifier to determine that Technical Completion has been achieved (including the tests for each Stage set out in the Completion Criteria) other than the Commercial Acceptance Tests.

Technical Specifications means Part C of Schedule 12 (Design Specifications).

Temporary Works means plant, machinery and FF&E and other items used by Project Co or its Subcontractors solely for the purpose of enabling or facilitating construction of the Facility which does not become part of the Facility and will not be used for operating or maintaining the Facility or performing the Services.

Tender Expiry Date means the date which is 3 Months after the then current Reviewable Services Term.

Tender Process means the processes in procuring the implementation of the Project commencing from the issue of the State's invitation to submit an expression of interest dated 29 April 2011 up to the Date of this Agreement, including the process described as the Tender Process, the Structured Negotiation Phase and the Exclusive Negotiation Phase in the RFP.

Term means the term commencing on Financial Close and ending on the Expiry Date.

Termination Amount means a Force Majeure Termination Amount, a Default Termination Amount or a Voluntary Termination Amount (as applicable).

Transition means the process of moving all Group 2 FF&E and Prisoners from the Existing Facility into the Stage 1 Facility in accordance with the Transition Plan.

Transition Plan means a plan to be prepared by Project Co which must be consistent with the bid Transition Plan set out in Attachment 3 (Bid D&C Documents) and otherwise comply with the requirements for that plan set out in Schedule 18 (D&C Plans and Reports).

Transition Working Group means a group, established by the State and selected from the Facility Users and DCS, for the purpose of consulting with Project Co in relation to the Stage 1 Commissioning Period, Stage 2 Commissioning Period and the Transition Period.

Transition Period means the period commencing on the Operational Commencement Date and ending 1 week after the Operational Commencement Date.

Trusts means each of EGRP Unit Trust 1 and EGRP Unit Trust 2.

Unauthorised Escape means each event which results in a Prisoner or Prisoners escaping from the Facility as a result of a direct act or omission of Project Co or any Project Co Associate (other than a failure to confront or stop an escaping Prisoner) which is not expressly permitted in accordance with this Agreement (excluding an Unauthorised Secured Facility Escape).

Unauthorised Secured Facility Escape means each event which results in a Prisoner or Prisoners escaping from the Secured Facility Area as a direct result of an act or omission of Project Co or any Project Co Associate (other than a failure to confront or stop an escaping Prisoner) which is not expressly permitted in accordance with this Agreement.

Unavailable or **Unavailability** has the meaning given to it in Schedule 14 (Payment Schedule).

Uninsurable Risk means a risk that is required to be insured in accordance with this Agreement and for which insurance is available at the Date of this Agreement but:

- (a) becomes unavailable in the recognised international insurance market in connection with that risk by a Reputable Insurer; or
- (b) in connection with which the insurance premium payable for insuring that risk with a Reputable Insurer becomes, after the Date of this Agreement, at such a level or the terms and conditions are such that the risk is not generally being insured against by private sector providers of facilities in Australia or the United Kingdom similar to the Facility,

provided that the uninsurability in accordance with paragraphs (a) or (b) is not caused by any act or omission of Project Co or a Project Co Associate.

Unscheduled has the meaning given to it in Schedule 14 (Payment Schedule)

Utility means any utility service, including water, electricity, gas, telephone, drainage, sewerage, stormwater and communications services.

Utility Infrastructure means any part of the supply, distribution or reticulation network operated or managed by a utility, including poles, pipes, pipeline, cables, wires, conduits, tunnels, aqueduct, electrical installation, telecommunications plant, water channel, and railway and electronic communications systems but not including communications systems provided as part of the Facility as generally described in the Design Requirements.

Utility Interruption means any one or more Utilities external to the boundaries of the Site are not available during the Operating Phase (either at all or in the necessary quantity) for use for any reason other than because of:

- (a) an act or omission or lack of diligence by Project Co or a Project Co Associate; or
- (b) a dispute between Project Co and the relevant Utilities provider regardless of why that dispute is initiated or by whom or the likely result of the dispute.

Utilities Management Services has the meaning given to it in Part C Section 5 of Schedule 13 (Services Specification).

Voluntary Termination Amount means the payment calculated as such in accordance with Schedule 10 (Termination Amounts).

Waste Management Services means the Services to be provided as described in Part C Section 3 of Schedule 13 (Services Specifications).

[not disclosed]

[not disclosed]

Whole of Life Costs means the anticipated total capital and operating costs to be incurred by Project Co in connection with an item of Plant or Group 1 FF&E during the Term, assuming usage as intended by the Design Requirements consisting of:

- (a) design, re-design, purchase, insurance, transportation, storage, removal, replacement, dismantling, installation, associated Utility Infrastructure and commissioning (including any fees, Margins and preliminaries); and
- (b) lifecycle replacement, maintenance, insurance and the need for additional security to be lodged (including any fees, Margins and preliminaries).

Works means the Stage 1 Works, the Stage 2 Works, the Mural Works and the Off-Site Infrastructure Works or any of these, as the context requires.

Works Program means a program of the activities required to undertake the Works containing the details required by Schedule 6 (Programming Requirements) or which the Independent Certifier otherwise reasonably requires, as prepared and updated in accordance with this Agreement.

WPW Agreement has the meaning given to it in Clause 7.5A.1(b).

WPW Price has the meaning given to it in Clause 7.5A.2(a).

1.2 Interpretation

In this Agreement 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), a trust, a trustee 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 Agreement;
- (e) **(other persons)**: a reference to any party or person includes each of their legal representatives, trustees, 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 Agreement)**: a reference to this Agreement or to any other deed, agreement, document or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (h) **(plan)**: a reference to any D&C Plan or Report or Operating Plan, Report or Manual is a reference to that D&C Plan or Report or Operating Plan, Report or Manual as amended or updated from time to time in accordance with this Agreement;
- (i) **(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;
- (j) **(rights)**: a reference to a right includes any benefit, remedy, discretion, authority or power;
- (k) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (l) **(headings)**: headings are for convenience only and do not affect the interpretation of this Agreement;
- (m) **(inclusive)**: a reference to this Agreement includes all Schedules and Attachments;
- (n) **(Clauses)**: a reference to:
 - (i) a Clause, Schedule or Attachment is a reference to a Clause, Schedule or Attachment of or to this Agreement;
 - (ii) a paragraph is a reference to a paragraph in the Clause in which the reference appears; and
 - (iii) a Section is a section of a Schedule;

- (o) **(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;
- (p) **(\$)**: a reference to "\$" is to Australian currency;
- (q) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (r) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (s) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this Agreement or any part;
- (t) **(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;
- (u) **(remedy)**: the use of the word "remedy" or any form of it in this Agreement means that the event to be remedied must be cured or its effects overcome;
- (v) **(may)**: the term may, when used in the context of a power or right exercisable by the State, the State Representative or the Facility Operator, means that the State, the State Representative or the Facility Operator can exercise that right or power in its absolute and unfettered discretion and the State, the State Representative or the Facility Operator has no obligation to Project Co to do so;
- (w) **(no double counting)**: if this Agreement requires calculation of an amount payable to a party there must be no double counting in calculating that amount; and
- (x) **(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 Agreement.

1.3 Related matters

- (a) **(Provisions limiting or excluding Liability)**: Any provision of this Agreement 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) **(Cost of performing obligations)**: Each party must perform its obligations in accordance with this Agreement at its own cost, unless expressly provided otherwise.
- (c) **(Project Co obligations)**: In complying with or accepting any obligation or risk in accordance with this Agreement, Project Co must procure that, to the extent applicable, Project Co's Associates are required to comply with or accept the relevant obligation or risk and not cause Project Co to breach its obligations in accordance with this Agreement.
- (d) **(Business Day)**: If the day on or by which any thing is to be done in accordance with this Agreement is not a Business Day, that thing must be done on the next Business Day.
- (e) **(Discretion)**: Any consent or approval in accordance with this Agreement from the State, the Facility Operator or a State Representative may be given or

withheld, or may be given subject to such conditions (other than the payment of money), as the State, the Facility Operator or a State Representative (in its absolute discretion) thinks fit, unless this Agreement provides otherwise.

- (f) **(Agreement composition):**
- (i) this Agreement comprises:
 - A. Clauses 1 to 54;
 - B. Schedule 1 (Contract Particulars) to Schedule 22 (Design Departure Schedule); and
 - C. Attachment 1 (Bid Design Documentation) to Attachment 5 (Financial Model).
 - (ii) Project Co agrees:
 - A. to the extent that an Attachment seeks to impose any obligations on the State, such obligations will not be legally binding on the State (unless a corresponding obligation is expressly imposed on the State or a State Associate in a Clause or a Schedule and then subject to paragraph (ii)(B)); and
 - B. Project Co is not entitled to make any Claim against the State or for any Liabilities incurred by Project Co in connection with a breach of an obligation imposed on the State in an Attachment unless such Liabilities are also incurred by Project Co as a consequence of a breach of a corresponding obligation imposed on the State in a Clause or a Schedule.
- (g) **(Order of precedence):** The following order of precedence applies in the event of any inconsistency, ambiguity or discrepancy between the various documents comprising this Agreement:
- (i) Clauses 1 to 54 and Schedule 1 (Contract Particulars) to Schedule 11 (Site Plans), Schedule 14 (Payment Schedule) and Schedule 16 (Confidential Provisions);
 - (ii) Schedule 22 (Design Departure Schedule)
 - (iii) Schedule 12 (Design Specifications);
 - (iv) Schedule 13 (Services Specifications);
 - (v) Attachment 1 (Bid Design Documentation), except where the Bid Design Documentation is inconsistent with Schedule 12 (Design Specifications), in which case the Bid Design Documentation will prevail over Schedule 12 (Design Specifications) if and to the extent that:
 - A. the ambiguity, discrepancy or inconsistency between the Bid Design Documentation (as applicable) and Schedule 12 (Design Specifications) is specifically identified in Schedule 22 (Design Departure Schedule);; or
 - B. if sub-paragraph A. does not apply, the State Representative determines in its absolute discretion that

the Bid Design Documentation shall prevail over Schedule 12 (Design Specifications); and

(vi) the remaining Schedules and Attachments,

except to the extent that any part of the various documents listed above impose a greater or higher requirement, standard, quality, level of service, quantum or scope than any other part of the documents listed above, in which case, that greater or higher requirement, standard, quality, level of service, quantum or scope prevails.

(h) **(Ambiguous terms):**

- (i) If either party identifies any inconsistency, ambiguity or discrepancy within or between any of the documents or categories of documents identified in paragraph (g), then that party must notify the other party of the inconsistency, ambiguity or discrepancy as soon as possible and in no case later than 5 Business Days after becoming aware of the inconsistency, ambiguity or discrepancy.
- (ii) If Project Co issues a notice in accordance with paragraph (i), it must not take any further action in connection with the ambiguity, discrepancy or inconsistency until a notice is received from the State in accordance with paragraph (iii) or if no notice is received, 5 Business Days has elapsed.
- (iii) Within 5 Business Days of receipt of a notice in accordance with paragraph (i), the State will direct Project Co as to how to resolve any ambiguity, discrepancy or inconsistency the subject of the notice in accordance with:
 - A. the order of precedence in paragraph (i); or
 - B. if the relevant inconsistency, ambiguity or discrepancy cannot be resolved in accordance with paragraph A:
 - 1) in accordance with any process for resolving such inconsistencies, ambiguities and discrepancies contained in the relevant document; or
 - 2) otherwise as determined by the State acting reasonably.
- (iv) Project Co must comply with any direction issued by the State in accordance with this paragraph (h).

1.4 Authorities

Project Co agrees that:

- (a) there are Authorities with jurisdiction over the Project and parts of the Site;
- (b) such Authorities may, from time to time and at any time, exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Project and parts of the Site; and
- (c) except as otherwise expressly provided in this Agreement, Project Co bears the full risk of all occurrences of the kind referred to in paragraph (b) and will not be entitled to make any Claim against the State in connection with such occurrences.

1.5 Changes to indices

The following rules apply to all amounts in this Agreement that are required to be adjusted in accordance with an index:

- (a) if there is a change in the coverage of the index from that applying at the Date of this Agreement and the new index is linked to another index, the defined term is to be referable to the new index;
- (b) if the index is published and:
 - (i) there is a change in its coverage and it is not linked to another index; or
 - (ii) there is a change in its periodicity,the parties must request the President of the Institute of Actuaries (or the President's nominee) determine:
 - (iii) whether the index remains appropriate as a general indicator of the rate of price change for the relevant goods and services; and
 - (iv) if it is not, what other index should be used as a substitute index for the purpose of this Agreement,

and that determination is final and binds the parties;

- (c) if there is a change in the reference base of the index from that applying at the Date of this Agreement and the Australian Bureau of Statistics:
 - (i) provides a conversion factor, that conversion factor must be applied to calculate revised figures for the purpose of the defined term's use in this Agreement, in terms of the new reference base; or
 - (ii) does not provide a conversion factor, the parties must request the President of the Institute of Actuaries (or the President's nominee) to calculate a revised index for the purposes of the defined term's use in this Agreement, and that calculation is final and binds the parties;
- (d) if the index ceases to be published and the Australian Bureau of Statistics:
 - (i) publishes another index which is:
 - A. a replacement of that index; and
 - B. linked to the index,the defined term must be re-calculated to the same reference base as the replacement;
 - (ii) does not publish another index which is linked to the index, the parties must request the President of the Institute of Actuaries (or the President's nominee) to calculate a revised index for the purposes of the defined term's use in this Agreement, and that calculation is final and binds the parties; or
 - (iii) does not publish another index in place of the index, the parties must request the President of the Institute of Actuaries (or the President's nominee) to determine an appropriate index which is a general indicator of the rate of price change for the relevant goods and services, and that determination is final and binds the parties; and

- (e) if a Change in Mandatory Requirements causes a material aberration in the index, the index must be adjusted to remove the impact of that material aberration in accordance with any such methodology published by a responsible Government Agency for adoption by business or, in the absence of such publication, within 6 Months of the occurrence of the material aberration as agreed by the parties or, in the absence of agreement, as determined by an Independent Expert in accordance with Clause 45.

1.6 Partnership and Investors Deed

- (a) The obligations, undertakings, representations, warranties, indemnities and liabilities of Project Co under the Project Documents bind all the Partners jointly and severally as partners.
- (b) Without prejudice to anything else contained in this Agreement or any other Project Document, if the membership of the Partnership changes from the Initial Partners for any reason whatsoever the Project Documents continue to bind each former partner and each current partner of the Partnership in respect of any accrued Liabilities that were incurred by Project Co during the period that the former partner was a member of the Partnership.
- (c) Without prejudice to anything else contained in this Agreement or other Project Document, if Project Co for any reason at any time ceases business, each Project Document continues to bind:
 - (i) the Partners; and
 - (ii) any former partners of the Partnership in respect of any accrued Liabilities that were incurred by Project Co during the period that the former partner was a member of the Partnership.

2. Conditions Precedent

2.1 Commencement

- (a) Subject to paragraph (b), this Agreement will not commence unless and until each of the Conditions Precedent has been satisfied or waived by 2pm on the date that is 20 Business Days after the Date of this Agreement, or such other date as the parties may agree (**Conditions Precedent Deadline Date**) in accordance with this Clause 2.
- (b) The following Clauses of this Agreement commence at the Date of this Agreement:
 - (i) Clause 1 (Definitions and interpretation);
 - (ii) this Clause 2;
 - (iii) Clause 5.2 (Project Director and Contract Administrator);
 - (iv) Clause 5.5 (Project Co Representative);
 - (v) Clause 5.8 (Independent Certifier);
 - (vi) Clause 8.3 (Occupational health, safety and rehabilitation);
 - (vii) Clauses 38.12 (Indemnity for Project Co breach);
 - (viii) Clause 38.13 (Third party liability indemnity);

- (ix) Clause 39.1 (D&C Phase Insurances);
- (x) Clause 39.3 (General insurance requirements);
- (xi) Clause 39.4 (Terms of Insurances);
- (xii) Clause 39.7 (Evidence of Insurance);
- (xiii) Clause 40 (Compliance with Laws);
- (xiv) Clause 41 (Representations and warranties);
- (xv) Clause 42 (Default);
- (xvi) Clause 45 (Dispute resolution);
- (xvii) Clause 46 (Assignment and ownership);
- (xviii) Clause 50 (Confidentiality);
- (xix) Clause 52 (Notices); and
- (xx) Clause 54 (General).

2.2 Conditions Precedent

This Agreement is conditional on Project Co delivering to the State all of the following in a form and substance reasonably satisfactory to the State:

- (a) **(Counterparty Details):** duly completed Counterparty Details;
- (b) **(legal opinion):** a legal opinion given for the benefit of the State from solicitors acting for each Consortium Entity as to:
 - (i) the legal capacity and corporate power of that Consortium Entity to enter into and perform its obligations in accordance with the State Project Documents;
 - (ii) the enforceability of the State Project Documents against the relevant Consortium Entity; and
 - (iii) due execution of the Project Documents by the Consortium Entity;
- (c) **(counterparts):** original counterparts of all State Project Documents (other than this Agreement and the Operating Phase Licence) and certified copies of all other Project Documents all duly executed by all parties other than the State;
- (d) **(Financing Documents and Equity Documents):** certified copies of the Financing Documents, Equity Documents and Management Services Agreement duly executed by all parties to them, and evidence that all conditions precedent to the Financing Documents and Equity Documents coming into force and all conditions precedent to funding and drawdown of the facilities for the Project have been satisfied (or waived in accordance with their terms) other than the giving of the State notice under Clause 2.3;
- (e) **(Financial Model):** the Financial Model as varied from the Financial Model at the Date of this Agreement in accordance with Schedule 2 (Financial Close Adjustment Protocol);
- (f) **(Copies of Insurances):** evidence of Insurances required to be effected and maintained during the D&C Phase as required by Clause 39.7; and

- (g) **(Certificates)**: a certificate from an insurance broker as to the currency of all Insurances required to be effected and maintained in accordance with this Agreement during the D&C Phase (whether the State is required to be an insured or not), and such evidence as is necessary to demonstrate the compliance of each such policy with the requirements of this Agreement.

2.3 Satisfaction of Conditions Precedent

- (a) Project Co must satisfy each Condition Precedent by the Condition Precedent Deadline Date and must notify the State as each Condition Precedent is satisfied.
- (b) When the last of the Conditions Precedent to be satisfied or waived has been satisfied or waived, the State must confirm that all of the Conditions Precedent have been satisfied or waived and the date upon which the last of the Conditions Precedent was satisfied or waived.

2.4 Waiver of Conditions Precedent

A Condition Precedent is only waived if the State gives notice of the waiver of the Condition Precedent to Project Co.

2.5 Failure to satisfy Condition Precedents

- (a) If a Condition Precedent has not been satisfied or waived by the Condition Precedent Deadline Date, then this Agreement will terminate upon the State giving not less than 5 Business Days notice in writing to Project Co.
- (b) If this Agreement is terminated in accordance with paragraph (a) then:
 - (i) each of the other Project Documents will be taken to have been terminated at the time this Agreement is terminated; and
 - (ii) Project Co will not be entitled to bring any Claim against the State arising out of or in connection with:
 - A. the failure of the Conditions Precedent to be satisfied;
 - B. the termination of this Agreement; or
 - C. the Project or the State Project Documents,

except for any Claim arising prior to the date of termination in connection with the Clauses identified in Clause 2.1(b).

3. Term and tenure

3.1 Commencement date

Subject to Clause 2.1, this Agreement commences on the date of Financial Close.

3.2 Expiry Date

This Agreement shall terminate on the Final Expiry Date unless this Agreement is terminated earlier, in which case this Agreement shall expire on the date of such earlier termination (**Expiry Date**).

3.3 Access arrangements during D&C

- (a) **(Access for Stage 1 Works):** Commencing on Financial Close and ending on the Date of Stage 1 Commercial Acceptance, the State will provide Project Co and Project Co's Associates with a non-exclusive licence to access the Stage 1 Construction Site to the extent necessary to perform the Stage 1 Works and provide the Stage 1 Commissioning Period Services (**Stage 1 Construction Licence**).
- (b) **(Access for Stage 2 Works):** Subject to Clause 12.1(b), commencing on the Operational Commencement Date and ending on the Date of Stage 2 Commercial Acceptance, the State will provide Project Co and Project Co's Associates with a non-exclusive licence to access the Stage 2 Construction Site to the extent necessary to perform the Stage 2 Works (**Stage 2 Construction Licence**).
- (c) **(Risk of obtaining access to additional land):** Except as set out in paragraphs (a) and (b), Project Co is solely responsible for obtaining access to and from any land outside the Construction Sites to which access is required to carry out the Works including the Off-Site Infrastructure Construction Areas.
- (d) **(Adequate access):** Project Co:
 - (i) accepts all risks in connection with the adequacy of access to the Construction Sites; and
 - (ii) accepts all risks associated with access to the Off-Site Infrastructure Construction Areas to the extent such areas are outside of the Construction Sites.
- (e) **(No exclusive access):** The State is not required to provide Project Co exclusive access to the Construction Sites and Project Co must allow the State and the State Associates access to the Construction Sites, the Off-Site Infrastructure Construction Areas in accordance with the Site Access and Interface Protocols and to perform the State Works and to exercise their rights, powers and functions and to perform their obligations, in accordance with this Agreement.
- (f) **(Termination of Stage 1 Construction Licence):** The Stage 1 Construction Licence will terminate on the grant of the Operating Phase Licence in accordance with Clause 3.5, or on earlier termination.
- (g) **(Termination of Stage 2 Construction Licence):** The Stage 2 Construction Licence will terminate on the amendment of the Operating Phase Licence in accordance with Clause 3.5(e), or on earlier termination.

3.4 Operating Phase Site Plan

- (a) No later than 3 Months prior to Stage 1 Commercial Acceptance, Project Co must submit to the Project Director for approval in accordance with Schedule 3 (Review Procedures), for inclusion in the Operating Phase Licence, an Operating Phase Site Plan which must include:
 - (i) a description of the Operating Phase Site for the Stage 1 Facility; and
 - (ii) as an annexure, a plan of the Operating Phase Site prepared and certified by a licensed surveyor.
- (b) No later than 3 Months prior to Stage 2 Commercial Acceptance, Project Co must submit to the Project Director for approval in accordance with Schedule 3 (Review Procedures) an amended Operating Phase Site Plan which:

- (i) must include a description of the Operating Phase Site for the Stage 1 Facility and the Stage 2 Facility;
- (ii) must include as an annexure an amended plan of the Operating Phase Site for the Facility to take into account the Stage 2 Facility prepared and certified by a licensed surveyor; and
- (iii) identify those areas required to be identified in the Operating Phase Site Plan in accordance with this Agreement.

3.5 Grant of Operating Phase Licence

- (a) **(Operating Phase Licence Term):** Subject to Stage 1 Commercial Acceptance having occurred, the State will procure the grant of the Operating Phase Licence to Project Co:
 - (i) for a term which will:
 - A. commence on the Operational Commencement Date; and
 - B. end on the Expiry Date; and
 - (ii) on the terms and conditions set out in Schedule 21 (Operating Phase Licence),
- (b) **(Delivery of Operating Phase Licence):** Not later than 20 Business Days prior to the expected Date of Stage 1 Commercial Acceptance, Project Co must prepare and deliver to the State for review in accordance with Schedule 3 (Review Procedures) three counterparts of the Operating Phase Licence which:
 - (i) must include:
 - A. the description of the Operating Phase Site for the Stage 1 Facility; and
 - B. as an annexure, the Operating Phase Site Plan for the Stage 1 Facility prepared and certified by a licensed surveyor; and
 - (ii) are:
 - A. executed by Project Co; and
 - B. complete, except for those matters that the State is authorised to complete in accordance with paragraph (c).
- (c) **(Authority to complete):** Project Co authorises the State to complete the Operating Phase Licence by inserting:
 - (i) the commencement date of the Operating Phase Licence as determined in accordance with paragraph (a); and
 - (ii) any other particulars necessary to complete the Operating Phase Licence.
- (d) **(Execution):** The State, in accordance with paragraph (c), will complete the counterparts of the Operating Phase Licence delivered by Project Co, execute each counterpart and return one of the completed and executed counterparts to Project Co.

- (e) **(Amendment of Operating Phase Licence):** Not later than 20 Business Days prior to the expected Date of Stage 2 Commercial Acceptance, Project Co must prepare and deliver to the State three counterparts of an amending deed to the Operating Phase Licence executed by Project Co which must include:
 - (i) the description of the Operating Phase Site for the Stage 1 Facility and the Stage 2 Facility amended to take into account the changes to the Stage 1 Facility as a result of the Stage 2 Works; and
 - (ii) as an annexure the Operating Phase Site Plan for the Stage 1 Facility and the Stage 2 Facility amended to take into account the Stage 2 Facility prepared and certified by a licensed surveyor,

which were reviewed and amended by the State under Schedule 3 (Review Procedures).
- (f) **(Execution):** The State will execute the amending deed and return one of the completed and executed counterparts to Project Co.
- (g) **(Operating Phase Licence binding):** The State and Project Co will be bound by the terms and conditions of the Operating Phase Licence from the Operational Commencement Date (including as it is required to be amended under Clause 3.5(e)) whether or not the relevant licence has been executed by the State and Project Co.
- (h) **(Licence Payment):** Project Co must pay the Licence Payment to the State under and in accordance with the terms of the Operating Phase Licence.

3.6 Permitted use and security

- (a) Project Co must not use or permit the use of the Site for any purpose other than as permitted in accordance with this Agreement and the Operating Phase Licence.
- (b) Project Co must keep the Works and the Site safe, secure and free from all unauthorised access during the construction and implementation of the Works.

3.7 Requirements for access

- (a) At all times when accessing the Site, Project Co must comply with the requirements set out in Schedule 19 (Security Procedures).
- (b) The State will, and will procure that, the State Associates comply with the Site Access and Interface Protocols during the D&C Phase when the State or the State Associates access the Stage 1 Construction Site or the Stage 2 Construction Site (as applicable).
- (c) The State will, and will procure that, the State Associates comply with the reasonable directions of Project Co during the Operating Phase (which are of temporary duration) when the State or the State Associates access the FM Designated Areas provided such directions do not prevent, or unduly delay or disrupt, the performance of the Facility Functions.

3.8 Access to areas outside the Site

- (a) Project Co agrees that:
 - (i) the Site is adjacent or proximate to the Adjacent Site; and
 - (ii) the Stage 1 Construction Site will be adjacent or proximate to the Existing Facility and that the Existing Facility will be occupied and

operational from Financial Close until the end of the Transition Period.

- (b) Project Co must comply with any reasonable request by the Project Director to amend the Project Management Plan having regard to the acknowledgement in paragraph (a).
- (c) Project Co must not access or enter:
 - (i) the Adjacent Site without the prior written consent of and on terms agreed with the State and the Local Council; nor
 - (ii) the Existing Facility, except in accordance with Schedule 19 (Security Procedures) or any other procedures notified to Project Co by the State or the Facility Operator.
- (d) Except to the extent expressly permitted in accordance with this Agreement, Project Co must not compromise, hinder, disrupt or otherwise adversely effect:
 - (i) the Existing Facility prior to the Date of Stage 1 Commercial Acceptance; or
 - (ii) the Adjacent Site.
- (e) Where the State and the Facility Operator provide Project Co with consent to access the Existing Facility under paragraph (c), the terms of such access may be varied from time to time by the State and Project Co shall comply with any such varied terms.

4. General obligations

4.1 FFP Warranty

Project Co must, at all times on and from:

- (a) the Date of Stage 1 Commercial Acceptance, ensure that the Stage 1 Facility (excluding any Group 2 FF&E or Group 3 FF&E) is Fit For Purpose and continues to be Fit For Purpose at all times throughout the Term by reference to the standards existing at the Date of Stage 1 Commercial Acceptance; and
- (b) the Date of Stage 2 Commercial Acceptance ensure that the Stage 2 Facility is Fit For Purpose and continues to be Fit For Purpose at all times throughout the Term by reference to the standards existing at the Date of Stage 2 Commercial Acceptance.

4.2 Project Co takes all risks

- (a) Project Co must deliver the Project in accordance with the Project Documents.
- (b) Except as otherwise expressly provided in the State Project Documents:
 - (i) Project Co accepts all risks in connection with delivering the Project; and
 - (ii) Project Co is not entitled to make any Claim against the State in connection with the Project or the Project Documents.

4.3 Mitigation by Project Co

- (a) In this Clause 4.3, "**Relevant Relief Event**" means the occurrence of any event which entitles Project Co to:
- (i) an extension of time;
 - (ii) compensation;
 - (iii) relief from performance of any of its obligations in any State Project Document; or
 - (iv) bring any other Claim against the State,
- in accordance with this Agreement.
- (b) If a Relevant Relief Event occurs, Project Co must:
- (i) use its reasonable endeavours to mitigate the effects of the Relevant Relief Event; and
 - (ii) for this purpose, comply with all reasonable directions of the State concerning the Relevant Relief Event and its consequences.
- (c) Notwithstanding any other Clause in this Agreement, the State's Liability in connection with Relevant Relief Events will be reduced to the extent Project Co fails to comply with its obligations set out in paragraph (b).

4.4 No limitation on obligations

- (a) Neither the State nor (except as otherwise expressly provided in the Independent Certifier Deed of Appointment) the Independent Certifier owes any duty of care to Project Co to:
- (i) review any Deliverable submitted by Project Co; or
 - (ii) inspect or review the Works or the Facility,
- for Defects, other errors or omissions or compliance with the State Project Documents.
- (b) No:
- (i) review of, comments upon, or notice in connection with, or any failure to review, comment upon or give notice in connection with, any Deliverable submitted by Project Co or any other direction, act or omission of the State or the Independent Certifier in connection with any Deliverable;
 - (ii) inspection or review of the Works or the Facility by (or on behalf of) the State or the Independent Certifier;
 - (iii) compliance by Project Co with its obligations under the State Project Documents or any failure by (or on behalf of) the State, or the Independent Certifier to detect any non-compliance by Project Co with its obligations under the State Project Documents, including where any failure arises from any negligence on the part of the State or the Independent Certifier; or
 - (iv) Deliverable prepared by Project Co,

will:

- (v) relieve Project Co from, or alter or affect, its liabilities, obligations or responsibilities whether under the State Project Documents or otherwise according to Law; or
- (vi) prejudice the State's rights against Project Co whether under the State Project Documents or otherwise according to Law.

4.5 Acts or omissions of Project Co

Notwithstanding the express rights and entitlements Project Co has under the State Project Documents, Project Co is not entitled to bring any Claim against the State or any State Associate and neither the State nor any State Associate will have Liability to Project Co or any Project Co Associate in connection with the State Project Documents to the extent that the event for which Project Co is otherwise entitled to bring a Claim or the State would otherwise have a Liability was caused or contributed to by any act or omission of Project Co or a Project Co Associate except where such act or omission is in accordance with any State Project Document.

4.6 Indemnities

To the extent that Project Co is required to indemnify the State or any State Associate against any Liability in accordance with this Agreement, Project Co's liability to indemnify will be reduced to the extent any such Liability arises due to:

- (a) a fraudulent, negligent, unlawful or wilful act of omission of the State or State Associate; or
- (b) a breach by the State of a State Project Document.

4.7 Perfection of Security Interests

Project Co must take all necessary steps to ensure that all Encumbrances which it or the State holds are enforceable and continuously perfected (whether in accordance with the PPSA or otherwise) until the obligations they secure are satisfied or they are released for value where a failure to take the necessary steps could have a material adverse effect.

5. Contract administration

5.1 Parties' representatives

The parties may exercise any of their rights or perform any of their obligations in accordance with this Agreement through their representatives appointed in accordance with this Agreement.

5.2 Project Director and Contract Administrator

- (a) **(Directions):** Subject to paragraphs (b) and (c), the State Representative may administer this Agreement as the State's delegate and:
 - (i) give directions and notices to be given by the State; and
 - (ii) receive all notices and documents to be received by the State,in connection with this Agreement.
- (b) **(Appointment of Project Director):** Until the Date of Stage 2 Commercial Acceptance, the State will ensure that at all times (except for handover periods during which the Executive Director of Strategic Projects (or his or her delegate)

may act as the Project Director) a natural person is appointed by it as the Project Director.

- (c) **(Appointment of Contract Administrator):** The State will ensure that a natural person is appointed by it as the Contract Administrator no later than 6 Months (or as soon thereafter as practicable) before the Date for Stage 1 Commercial Acceptance.
- (d) **(Duties during the period of appointment):** Subject to paragraph (k), the Project Director and the Contract Administrator will exercise the powers, authority and functions of the State Representative as set out in this Agreement, the other State Project Documents and any other power, authority or function delegated in writing by the State to the Project Director or the Contract Administrator and notified to Project Co.
- (e) **(Agent):** The State Representatives will carry out their powers, authority and functions in accordance with paragraph (d), as the agent of the State.
- (f) **(Compliance):** Without limiting its rights and obligations in accordance with this Agreement, but subject to paragraph (d), Project Co must comply with any direction by the State Representative given or purported to be given in accordance with this Agreement and any direction given by the State Representative which may give rise to a Modification, FF&E Modification or entitle Project Co to relief in accordance with the terms of this Agreement.
- (g) **(Oral directions):** The State Representative may give a direction orally but will as soon as practicable confirm that direction in writing.
- (h) **(Directions from other people):** Project Co must not accept or act upon directions in connection with the Works from an employee or agent of the State other than a State Representative or a delegate of the State Representative appointed in accordance with Clause 5.3 acting in accordance with this Agreement.
- (i) **(Vary or terminate delegation):** The State may vary or terminate any delegated power or authority of a State Representative but must promptly notify Project Co of any such variation or termination.
- (j) **(Replacement):** The State may at any time replace a State Representative, in which event the State will appoint another person as the State Representative and notify Project Co of that appointment.
- (k) **(Project Director or Contract Administrator):** Where the Agreement requires a State Representative to give or receive notices, give directions or administer this Agreement:
 - (i) until the Date of Stage 1 Commercial Acceptance, the Project Director will give or receive notices, give such directions or administer this Agreement; and
 - (ii) from the Operational Commencement Date, the Contract Administrator will give or receive notices, give such directions or administer this Agreement.

5.3 Further State delegations

- (a) The State may at any time delegate the exercise of any power or authority of a State Representative in accordance with this Agreement to a person other than a then appointed State Representative and may terminate or vary that delegation.

- (b) In connection with any delegation in accordance with paragraph (a), the State will promptly notify Project Co 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.
- (c) Any direction given by a State delegate in accordance with its delegation in accordance with this Clause 5.3 will be deemed to be a direction of the State Representative.

5.4 Facility Operator

- (a) **(Facility Operator):** The State will procure that the Facility Operator exercises the power, duties and functions of the Facility Operator as stated in this Agreement or any other State Project Document and any other power, duty or function delegated in writing by the State to the Facility Operator and notified to Project Co.
- (b) **(Functions under Law):** The Facility Operator may exercise all powers, duties or functions bestowed upon it in accordance with the relevant Law.
- (c) **(Agency):** The Facility Operator will undertake the powers, duties and functions referred to in paragraph (a) as agent of the State.
- (d) **(State may exercise power):** The State may exercise any power or duties or functions delegated to the Facility Operator.
- (e) **(Vary or terminate delegation):** The State may vary or terminate any delegated power duty or function of the Facility Operator but must promptly notify Project Co of any such variation or termination.

5.5 Project Co Representative

- (a) **(Contact):** The Project Co Representative must act as the principal point of contact between Project Co and the State and be available to the State as and when required.
- (b) **(Presence):** Project Co must ensure that the Project Co Representative is present at the Site at such times as are necessary to ensure that Project Co is complying with its obligations in accordance with this Agreement and upon reasonable request by the State Representative.
- (c) **(Directions):** A direction is given to Project Co if it is given to the Project Co Representative.
- (d) **(Replacement):** Project Co may only replace the Project Co Representative if any such replacement has the prior approval of the State (which must not be unreasonably withheld).
- (e) **(Employee of Project Co):** The Project Co Representative must be an officer or employee of Project Co or a Related Body Corporate of Project Co (as that term is defined in the *Corporations Act 2001* (Cth)).
- (f) **(Authority and skills):** Project Co will ensure that at all times during his or her appointment, the Project Co Representative has:
 - (i) the authority to perform its role and duties and discharge its obligations in accordance with paragraph (g) and elsewhere in this Agreement; and
 - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Project Co Representative.

- (g) **(Duties during the Term):** The Project Co Representative will be the principal person responsible for direct liaison with the State in connection with this Agreement and the Project during the Term and must perform the duties of the Project Co Representative in accordance with this Agreement, including to:
- (i) **(spokesperson):** act as the spokesperson for Project Co;
 - (ii) **(partnership):** ensure the ongoing implementation of a partnership with the State;
 - (iii) **(management):** understand, co-ordinate and manage all phases of the Project throughout the Term;
 - (iv) **(liaison):** liaise and generally deal with stakeholders;
 - (v) **(manage):** represent the views of Project Co and manage and co-ordinate issues with any Project Co Associate prior to presentation to the State; and
 - (vi) **(presence):** ensure a strong presence and consistent project management role for Project Co in the implementation of the Project.

5.6 Development Co-ordinator

- (a) **(Contact):** The Development Co-ordinator must be available to the State as and when required.
- (b) **(Presence):** Project Co must ensure that the Development Co-ordinator is present at the Construction Sites at such times as are necessary to ensure that Project Co is complying with its obligations in accordance with this Agreement and upon reasonable request by the State Representative.
- (c) **(Reporting):** The Development Co-ordinator must report directly to the Project Co Representative.
- (d) **(Replacement):** Project Co may only replace the Development Co-ordinator if any such replacement has the prior approval of the State (which must not be unreasonably withheld).
- (e) **(Employee of Project Co):** The Development Co-ordinator must be an officer or employee of Project Co or a Related Body Corporate of Project Co (as that term is defined in the *Corporations Act 2001* (Cth)).
- (f) **(Authority and skills):** Project Co will ensure that at all times during his or her appointment, the Development Co-ordinator has:
 - (i) the authority to perform its role and duties and discharge its obligations in accordance with paragraph (g) and elsewhere in this Agreement; and
 - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Development Co-ordinator.
- (g) **(Duties during the Term):** The Development Co-ordinator must perform the duties of the Development Co-ordinator in accordance with this Agreement, including to:
 - (i) manage and be heavily engaged in the Design Development Process in accordance with Schedule 5 (Design Development) and otherwise with this Agreement;

- (ii) co-ordinate and liaise with the Subcontractors and oversee compliance by the Builder and other Subcontractors with the Subcontracts;
- (iii) co-ordinate all Design Documentation and all information within them, and all communications with the State and the State Representative in connection with the Design Documentation;
- (iv) examine the Design Documentation prior to submission to the State Representative in accordance with Schedule 3 (Review Procedures), for errors, omissions, inconsistencies and discrepancies and take all steps to ensure they are rectified;
- (v) certify all Design Documentation prior to submission to the State as complying with the relevant requirements of this Agreement including the Design Requirements;
- (vi) convene and attend regular co-ordination meetings with the State Representative;
- (vii) attend on and liaise with the persons performing the testing (including the Completion Tests) and commissioning of the Works; and
- (viii) co-ordinate the execution of the Works to ensure that Completion is achieved by each Date for Completion.

5.7 Management Team

- (a) **(Establishment):** The parties will establish a team consisting of:
 - (i) the State Representative;
 - (ii) two or more other representatives of the State notified by the State to Project Co from time to time;
 - (iii) the Project Co Representative;
 - (iv) two other persons nominated by Project Co to the State from time to time; and
 - (v) such other members as the parties may agree from time to time,
 (together the **Management Team**).
- (b) **(Chair of meetings):** The State Representative will chair Management Team meetings.
- (c) **(Appointment of delegates):** The members of the Management Team may, by notice to the other members of the Management Team, appoint a delegate to:
 - (i) attend any Management Team meetings in their absence; and
 - (ii) otherwise discharge their responsibilities in accordance with this Clause 5.7.
- (d) **(Functions):** The functions of the Management Team will be to:
 - (i) monitor the overall progress of the Project and compliance with this Agreement;

- (ii) endeavour to resolve any matters referred to the Management Team by a party, including any Disputes referred to the Management Team in accordance with Clause 45;
 - (iii) review all progress reports provided by Project Co, its Subcontractors and the Independent Certifier; and
 - (iv) discuss and consider any other issues in connection with the Project.
- (e) **(Meetings)**: The Management Team must:
 - (i) meet Monthly during the Term; or
 - (ii) conduct its meetings in the manner agreed by its members from time to time.
- (f) **(Meeting agendas)**: The State Representative must determine the agenda for each meeting referred to in paragraph (e) and in determining each agenda the State Representative:
 - (i) subject to paragraph (ii) below, must include any items notified to it in writing by Project Co and received no later than 2 Business Days prior to the date of the meeting; and
 - (ii) is not required to include any item proposed by Project Co if, in the State Representative's reasonable opinion, the matters to which the item relates do not fall within or relate to the functions of the Management Team.
- (g) **(Monthly reports and plans)**: Project Co must no later than 5 Business Days before each meeting of the Management Team convened in accordance with paragraph (e)(i), give each member of the Management Team and the Independent Certifier (for the duration only of the Independent Certifier's term under the Independent Certifier Deed of Appointment):
 - (i) prior to the Date for Stage 1 Commercial Acceptance a Monthly Works Report prepared in accordance with Schedule 18 (D&C Plans and Reports); and
 - (ii) during the Operating Phase a Monthly Performance Report, the Monthly Works Plan prepared in accordance with Part F of Schedule 13 (**Service Specification**) and where applicable the Quarterly Performance Report.
- (h) **(Minutes)**: The State will take minutes of each Management Team meeting and distribute such minutes prior to the next Management Team meeting.
- (i) **(Other attendees)**: The State may require that:
 - (i) the Independent Certifier attend any meeting of the Management Team; and
 - (ii) Project Co procure the attendance of senior representatives of any of the Builder, the FM Subcontractor, a Financier or any of Project Co's Associates at any meeting of the Management Team and Project Co must comply with any such request.
- (j) **(Advisory only)**: The role of the Management Team is advisory only and its decisions or recommendations are not binding on the parties.

- (k) **(Rights and obligations unaffected)**: The parties' involvement in the Management Team does not affect their respective rights and obligations in accordance with this Agreement.
- (l) **(No restriction)**: The Management Team will not have any power to require any of the parties, a State Associate or a Project Co Associate to act or refrain from acting in any way.
- (m) **(No reliance or Claim)**: Neither the State nor Project Co will be entitled to make any Claim against any member of the Management Team in connection with anything which any such member does or fails to do in its capacity as a member of the Management Team.
- (n) **(Other meetings)**: If requested by the State, Project Co must ensure that appropriate personnel are available to attend meetings convened by the State in connection with the Works during the D&C Phase and the Services during the Operating Phase.

5.8 Independent Certifier

- (a) **(Project Co nominates 3 firms)**: Project Co must, prior to Financial Close, nominate at least 3 firms that have submitted tenders to Project Co from which the State will select the Independent Certifier, each of which must:
 - (i) **(expertise)**: have appropriate qualifications and experience;
 - (ii) **(no conflicts)**: have no interest or duty which may conflict with the role of the Independent Certifier in accordance with this Agreement;
 - (iii) **(execution)**: indicate its willingness to execute the Independent Certifier Deed of Appointment without substantial amendment;
 - (iv) **(insurance)**: have professional indemnity insurance in accordance with the requirements of the Independent Certifier Deed of Appointment; and
 - (v) **(information)**: provide such information in relation to fees and other matters as the State reasonably requires.
- (b) **(State's rights)**: The State may request additional information from and conduct interviews with any of the firms nominated by Project Co and shall provide any such additional information to Project Co and allow Project Co to attend and assist in any interview process.
- (c) **(State selects)**: The State may select one of the firms nominated by Project Co in accordance with paragraph (a) to act jointly on behalf of the State and Project Co as the Independent Certifier.
- (d) **(Not agent)**: The Independent Certifier is appointed jointly by the parties and will act independently and not as agent of either party.
- (e) **(State refusal)**: If the State, acting reasonably, refuses to select one of the 3 firms nominated by Project Co within 10 Business Days of Project Co's nomination, Project Co must, within 5 Business Days of receiving notice from the State of that refusal, nominate 3 other firms in accordance with paragraph (a) and the process in paragraphs (b) to (e) will apply again.
- (f) **(Ability to act for Subcontractors and Financiers)**: Project Co must not, and must ensure that its Subcontractors and Financiers do not, appoint the Independent Certifier to act in any role under or relating to the D&C Subcontract, the FM Subcontract, any other Subcontract, or subject to paragraph (g), the

Project, without the prior written consent of the State Representative and on such terms approved by the State Representative.

- (g) **(Role):** The role, functions, rights and liabilities of the Independent Certifier and the parties' rights and obligations in connection with the Independent Certifier are set out in the Independent Certifier Deed of Appointment.
- (h) **(Final and binding):** Except if:
 - (i) there is an express provision in this Agreement to the contrary; or
 - (ii) the Independent Certifier is acting as an Independent Expert in accordance with Clause 45.3,determinations of the Independent Certifier will be final and binding on the State and Project Co.
- (i) **(No approval):** No certificate or notice given by, or other act or omission of, the Independent Certifier will:
 - (i) constitute an approval by the State of Project Co's performance of its obligations in accordance with the State Project Documents; or
 - (ii) prejudice any rights or powers of the State whether in accordance with the State Project Documents or otherwise according to Law.
- (j) **(Appointment and replacement):** If:
 - (i) the Independent Certifier Deed of Appointment is terminated in accordance with its terms; or
 - (ii) the Independent Certifier is, for any reason, not appointed or ceases to act as the Independent Certifier,the State and Project Co must jointly engage another person to act as Independent Certifier on substantially the same terms as the Independent Certifier Deed of Appointment in accordance with the process set out in paragraphs (a) to (e).
- (k) **(Decisions of previous Independent Certifier):** The new Independent Certifier appointed in accordance with paragraph (j) is bound by the exercise of any functions performed or decisions made by the previous Independent Certifier which would have been binding on the previous Independent Certifier.

5.9 Subcontracting

Project Co:

- (a) is not relieved from any of its obligations and Liabilities in accordance with this Agreement as a result of subcontracting any of those obligations or Liabilities;
- (b) remains responsible for the performance of all Subcontractors and agrees that a breach by a Subcontractor or a failure by a Subcontractor to comply with the obligations of Project Co in accordance with this Agreement is a breach or failure of Project Co;
- (c) is entirely responsible for all Liabilities suffered or incurred by the State in connection with any acts, omissions, defaults, negligence or termination of any Subcontractors (and those of the employees and agents of any Subcontractors); and

- (d) must consult with Aboriginal groups in the greater Kalgoorlie area and any other relevant Aboriginal groups to promote and encourage the engagement of Aboriginals as Subcontractors or subcontractors to Subcontractors in all categories of employment.

5.10 Competence

- (a) If the State notifies Project Co of any person employed or engaged in undertaking the Works or performing the Services, who in the State's reasonable opinion, is incompetent, negligent, dishonest or guilty of misconduct or breaches of any DCS Policy relevant to the security of the Facility, or relevant to the Works or the Services, then Project Co must promptly:
 - (i) remove the person or ensure that such person is promptly removed from undertaking the Works or performing the Services;
 - (ii) replace the person or ensure that such person is promptly replaced; and
 - (iii) ensure that this person is not again employed or engaged in undertaking the Works or performing the Services.
- (b) Project Co must ensure that all Project Co Associates hold appropriate qualifications and have received appropriate training for their intended duties and provide evidence of such qualifications and training to the Facility Operator as reasonably requested.

5.11 Key Personnel and Key Subcontractors

- (a) Project Co must employ or procure the engagement of the Key Personnel and Key Subcontractors in the positions stated in Schedule 1 (Contract Particulars).
- (b) Project Co must procure from each Key Subcontractor who is a direct Subcontractor of Project Co an executed direct deed:
 - (i) in respect of the Builder or the FM Subcontractor, in the form as agreed by the State; and
 - (ii) otherwise, in the form of Schedule 15 (Pro Forma Direct Deed).
- (c) Subject to the State's rights as set out in Clause 5.10, Project Co must not replace or allow the replacement of the Key Personnel and Key Subcontractors in their roles without the State's prior approval in accordance with paragraph (d).
- (d) If Project Co or a Subcontractor seeks to replace a Key Subcontractor or a member of Key Personnel, the State may not unreasonably withhold or delay its approval of a proposed replacement of the:
 - (i) Key Subcontractor to be replaced if:
 - A. the Key Subcontractor has suffered an Insolvency Event;
 - B. there has been a Change in Control in breach of Clause 46.6(a); or
 - C. the Key Subcontractor has breached the terms and conditions of the relevant Key Subcontract; and
 - D. Project Co has:

- 1) demonstrated that the proposed replacement Subcontractor is appropriately technically qualified, has adequate experience (technical or otherwise, as the role requires) in relation to the proposed role, has sufficient financial standing and is of good repute; and
 - 2) procured from the proposed replacement Subcontractor (where it is a direct Subcontractor of Project Co), an executed direct deed in the form of Schedule 15 (Pro Forma Direct Deed); or
- (ii) the Key Personnel to be replaced, if Project Co has demonstrated that the proposed replacement person is appropriately technically qualified, has adequate experience (technical or otherwise, as the role requires) in relation to the proposed role and is of good repute.
- (e) Project Co must, in circumstances where it makes any Claim against the State as a consequence of a Claim that has been made by a Key Subcontractor against Project Co, take reasonable steps to ensure that any such Claim made by the Key Subcontractor is not vexatious or mischievous, prior to making any related Claim against the State.

5.12 Key Subcontracts

- (a) Project Co must seek the State's prior approval (which will not be unreasonably withheld) to the terms of, and any amendment to, the D&C Subcontract or the FM Subcontract.
- (b) Project Co must not itself or allow at any time termination, rescission, novation or assignment of any Key Subcontracts without the State's prior consent (which will not be unreasonably withheld).

5.13 Requirements for Subcontracting

Project Co must not engage or permit the engagement of any Subcontractor, or enter into or permit the entry into any Subcontract, unless:

- (a) if the State requires Probity Investigations to be carried out, the State's probity requirements as described in Clauses 47.5 to 47.10 (inclusive) are satisfied;
- (b) the proposed Subcontractor has the financial capacity, experience and capability to perform the obligations of Project Co to be Subcontracted to at least the standards required by this Agreement;
- (c) in connection with a Subcontractor, the Subcontract or direct deed in the form of Schedule 15 (Pro Forma Direct Deed) (if any), to be entered into by the Subcontractor contains further provisions expressly recognising and permitting the exercise by the State of:
 - (i) its rights under and contains all relevant provisions prescribed by (if applicable), Clauses 5.6, 5.11, 5.12, 5.14, 9.2(d), 13, 15, 28, 31, 38.14, 38.15, 39, 41, 42, 43, 44, 46, 47.5 to 47.10 (inclusive) and 50.1; and
 - (ii) its rights to take an assignment of any performance bond in accordance with its terms;

- (d) where the Subcontractor is to be engaged to provide any of the Services, the Subcontractor is certified to ISO9001:2000; and
- (e) where the Subcontractor is the Builder, the Builder is certified to ISO14001.

5.14 Security of payment

- (a) This Clause will apply only to the extent that the *Construction Contracts Act 2004* (WA) (**CCA**) applies to any Subcontract.
- (b) Expressions defined or used in the CCA have the same meaning for the purposes of this Clause 5.14 (unless the context otherwise requires).
- (c) If the CCA applies to any Subcontract, Project Co must:
 - (i) within 2 Business Days of receiving any application or notice in accordance with the CCA, give a copy of that application or notice to the State; and
 - (ii) within 1 Business Day of receiving any notice of a Subcontractor's intention to suspend work under a Subcontract in accordance with the CCA, give a copy of that notice to the State.

6. D&C Plans and Reports

6.1 General obligations

- (a) (**Submission**): Project Co must prepare and submit to the State and the Independent Certifier and update the D&C Plans and Reports in accordance with Schedule 18 (D&C Plans and Reports) for review in accordance with Schedule 3 (Review Procedures).
- (b) (**Additional information**): Project Co must provide any additional information in connection with the D&C Plans and Reports reasonably requested by the State or the Independent Certifier.
- (c) (**Compliance**): Project Co must comply with the then current version of each D&C Plan and Report.

6.2 Works Program

- (a) (**Submission**): Project Co must submit to the State and the Independent Certifier the Works Program for review in accordance with Schedule 3 (Review Procedures) by the times set out in and in accordance with the requirements of Schedule 6 (Programming Requirements).
- (b) (**Compliance**): The Works Program submitted in accordance with paragraph (a) must:
 - (i) be consistent with Attachment 2 (Bid Works Program); and
 - (ii) comply with the requirements for the Works Program set out in Schedule 6 (Programming Requirements).
- (c) (**Program must reflect progress**): Project Co must ensure that the Works Program at all times reflects the actual progress of the Works being undertaken.
- (d) (**Update**): Without limiting paragraph (c), Project Co must update the Works Program in accordance with Schedule 6 (Programming Requirements).

- (e) **(Review):** Project Co must present each updated Works Programs at the meetings of the Management Team convened in accordance with Clause 5.7.
- (f) **(Assessing Claims):** Neither the State nor the Independent Certifier is required to use the Works Program for any purpose, including for the purpose of assessing any Claim made by Project Co.

7. The Site

7.1 Condition of land

Except as expressly provided in this Agreement, the State makes no representation and gives no warranty to Project Co in connection with:

- (a) the Site;
- (b) the accuracy of any information contained in or any omissions from the Site Information Reports;
- (c) the existence, location, condition or availability of any Utility Infrastructure; and
- (d) any Land Conditions.

7.2 Contamination

- (a) If Project Co discovers any Contamination in, on, over, under or emanating from the Site (whether or not Project Co has caused or contributed to that Contamination), it must notify the State as soon as practicable, but nevertheless within 5 Business Days after the discovery of the Contamination.
- (b) Each party must promptly provide the other party with a copy of any Environmental Notice served on it, and copies of all related correspondence (including correspondence received prior to and after the Environmental Notice).
- (c) Project Co must:
 - (i) Remediate:
 - A. any Contamination in, on, or under the Site; or
 - B. any Contamination which has emanated or is emanating from the Site,in accordance with all Laws and any Environmental Notice; and
 - (ii) comply with all requirements of any Government Agency in connection with any Contamination referred to in paragraph (i) or the Remediation of such Contamination.
- (d) If Project Co believes in good faith, based on professional advice, that an Environmental Notice can and should be successfully challenged or appealed, Project Co must:
 - (i) promptly notify the State and give the State a copy of all information and advice it has received in support of this view;
 - (ii) if the Environmental Notice is addressed to the State, obtain the consent of the State prior to commencing any action to challenge or appeal the Environmental Notice on behalf of the State;

- (iii) keep the State promptly and fully informed at all times of the progress of any action taken to challenge or appeal the Environmental Notice; and
- (iv) notwithstanding any challenge or appeal, take all reasonable steps to contain the Contamination and continue to satisfy the requirements of the Environmental Notice until the Environmental Notice is stayed, quashed, overturned, set aside or revoked.

7.3 Project Co's entitlement to Compensation for Remediation

Project Co will be entitled to compensation from the State in accordance with Schedule 4 (Change Compensation Principles) for Remediating Contamination in compliance with Clause 7.2 if:

- (a) the Contamination:
 - (i) is Pre-Existing Contamination which is not Known Pre-Existing Contamination;
 - (ii) is caused or to the extent contributed to by the State or a State Associate after the Date of this Agreement (except to the extent Project Co is required to manage or mitigate against the risk of such Contamination in accordance with this Agreement or it is reasonably practicable for Project Co to guard against such a risk); or
 - (iii) has migrated onto the Site from land or premises adjoining the Site after the Date of this Agreement (except to the extent Project Co is required to manage or mitigate against the risk of such contamination, or a competent and experienced contractor, acting reasonably in the circumstances, would have taken preventative measures to prevent or minimise such migration);
- (b) Project Co has submitted a Change Notice to the State Representative in accordance with Schedule 4 (Change Compensation Principles); and
- (c) Project Co has complied with the State Representative's reasonable directions in relation to the relevant Contamination.

7.4 Assignment of Site Information Reports

- (a) To the extent the State is able to do so, the State assigns the benefit of any warranties contained in the Site Information Report Agreements to Project Co.
- (b) The State will procure that the Minister issues any required notices under Section 20 of the *Property Law Act 1969 (WA)* to effect the assignment of the warranties under paragraph (a) within a reasonable time after Financial Close.

7.5 Utilities

Subject to Clause 7.5A, Project Co must:

- (a) **(enquiries)**: make enquiries as to the location of existing Utility Infrastructure and liaise with the owner of that Utility Infrastructure and the relevant Utility services provider as to the need for any potential relocation, protection or decommissioning of the Utility Infrastructure (as applicable);
- (b) **(Utility works)**: undertake, or procure that a Utility services provider undertakes all necessary work in connection with Utility Infrastructure within the Construction Site required to deliver the Facility;

- (c) **(notice)**: notify the State at least 14 days before any connection, disconnection or interference with existing Utility Infrastructure and liaise with the State as to how best to manage the disconnection or interference taking into account the nature and requirements of the Construction Site;
- (d) **(supply)**: ensure the continuous supply of Utilities to and within the Construction Sites;
- (e) **(agreements)**: subject to paragraph (h), enter into all agreements for the supply of Utilities with the Utility providers;
- (f) **(payment)**: pay for all Utilities consumed or used in undertaking the Works in accordance with the agreements entered into with the Utility providers;
- (g) **(indemnity)**: indemnify the State against any Claim or Liability incurred in connection with:
 - (i) any damage or disruption to any Utility Infrastructure; or
 - (ii) the removal, relocation or carrying out of works to Utility Infrastructure; and
- (h) **(utility agreements)**: provide to the relevant State Representative for review in accordance with Schedule 3 (Review Procedures) any proposed agreement for the supply of Utilities to the Facility during the Operating Phase.

7.5A [not disclosed]

7.6 Native Title Claims and Heritage Claims

- (a) As between the State and Project Co:
 - (i) the State is responsible for responding to any Native Title Claim in connection with any part of the Site; and
 - (ii) the State will be responsible for the payment of any compensation or other moneys required to be paid to any native title holders of the Site or any part of it as a consequence of a Native Title Claim.
- (b) If there is a Native Title Claim or Heritage Claim in connection with the Site or any part of it, then Project Co must:
 - (i) continue to perform its obligations in accordance with this Agreement, except to the extent otherwise:
 - A. directed by the State;
 - B. ordered by a court or tribunal; or
 - C. required by Law; and
 - (ii) provide all reasonable assistance required by the State or State Associates in dealing with the Native Title Claim or Heritage Claim.

7.7 Artefacts

- (a) Any Artefacts discovered on or under the surface of the Site are the absolute property of the State.
- (b) If an Artefact is discovered on the Site or any part of it, then Project Co must:

- (i) immediately notify the State of that discovery;
- (ii) take every reasonable precaution to prevent the Artefacts from being damaged or removed until appropriate arrangements for dealing with, or removing, the Artefacts have been made;
- (iii) continue to perform its obligations in accordance with this Agreement, except to the extent otherwise:
 - A. directed by the State;
 - B. ordered by a court or tribunal; or
 - C. required by Law; and
- (iv) comply with any direction of the State or State Associates in connection with any Artefact.

7.8 General Environment provisions

Project Co must ensure that in delivering the Project:

- (a) it complies with all Laws and other requirements of this Agreement for the protection of the Environment;
- (b) it does not cause an Environmental incident; and
- (c) it immediately notifies the State of:
 - (i) any non-compliance with the requirements of this Clause 7.8;
 - (ii) any Environmental incident; or
 - (iii) the receipt of any notice, order or communication received from an authority for the protection of the Environment.

8. Provisions applying to the D&C Phase and Operating Phase

8.1 Signage

Project Co may erect or permit to be erected on the Site or the Facility during the Term only those signs:

- (a) required by Law;
- (b) provided for in the Design Requirements; or
- (c) provided for in Schedule 13 (Services Specifications),

unless otherwise approved by the State.

8.2 Industrial issues

- (a) Except as expressly provided in Clause 15 and Clause 25, Project Co is solely responsible for the management of all industrial matters in connection with delivering the Project including the conduct of all proceedings, conferences, negotiations and dealings with unions and union representatives.

- (b) Project Co must observe the requirements of all relevant industrial awards and workplace agreements and must immediately notify the State if a strike or any other form of industrial unrest occurs and provide full details if requested.

8.3 Occupational health, safety and rehabilitation

- (a) **(OHS Laws):** In this Clause 8.3, "**OHS Laws**" means all statutes, regulations and other subordinate legislation in force or that come into force during the Term in the State of Western Australia and the Commonwealth in connection with occupational health and safety including the *Occupational Safety and Health Act 1984* (WA) and the *Occupational Safety and Health Regulations 1996* (WA), the proposed *Work Health and Safety Act 2011* (WA) and any regulations made thereunder, including the *Work Health and Safety Regulations 2011* (WA) and any occupational health and safety accreditation scheme established under the *Building and Construction Industry Improvement Act 2005* (Cth) or the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* (Cth).
- (b) **(Health, safety and welfare):** Project Co must ensure the health, safety and welfare of all persons present on or entering the Site.
- (c) **(Comply with OHS Laws):** Project Co must comply with all OHS Laws and upon the reasonable request of the State or the Independent Certifier, demonstrate compliance with OHS Laws.
- (d) **(Cooperation and notice):** Project Co must:
 - (i) subject to Clauses 3.7(b) and 3.7(c), cooperate with any other contractors or other persons engaged in or associated with the business of the State in order to maintain uniform health and safety practices;
 - (ii) cooperate with the State to enable the State to comply with its obligations in accordance with all relevant OHS Laws; and
 - (iii) participate in any on-site committee in connection with health and safety, including attending any meetings as requested by the Facility Operator.
- (e) **(Ultimately responsible):** Project Co accepts that it is ultimately responsible for:
 - (i) the control and management of the Construction Sites for the purposes of delivering the Project and discharging the duties imposed by the OHS Laws; and
 - (ii) all health and safety at the Construction Sites, including the provision of appropriate equipment and facilities,from the Date of this Agreement until:
 - (iii) in connection with the Stage 1 Works, the Date of Stage 1 Commercial Acceptance; and
 - (iv) in connection with the Stage 2 Works, from the end of the Transition Period to the Date of Stage 2 Commercial Acceptance,and that it cannot delegate or assign this responsibility to a third party without the consent of the State.

- (f) **(OHS records):** Project Co must retain up to date health and safety records and make these available to the Facility Operator as requested by the Facility Operator from time to time.
- (g) **(Model WHS Law):** If the State enacts the Model WHS Law during the course of the Project and the Model WHS Law applies to the Project, then the State will appoint the Builder as the Principal Contractor under the Model WHS Law in respect of the Construction Sites and the parties shall agree amendments to this Clause 8 to ensure that the risk allocation and requirements of this Clause 8 are maintained having regard to the provisions of the Model WHS Law.

8.4 Occupational health and safety incident reports

Project Co must immediately notify the State if a significant occupational health and safety incident occurs on the Site that causes, or is likely to cause, personal injury, death or damage to property or closure of the Site.

8.5 State's right to enter, inspect and test

- (a) **(Right of entry):** During the Term, the State or any nominee of the State may inspect or test, or require Project Co to inspect or test, any part of the Works or the Facility upon giving reasonable notice to Project Co, provided that the State and any nominee of the State complies with clauses 3.7(b) and 3.7(c).
- (b) **(Project Co to assist):** If requested by the State, Project Co must assist the State to exercise its right to inspect and test the Works or the Facility.
- (c) **(Costs of inspection or testing):** Subject to paragraph (d), the State will bear the costs reasonably incurred of any inspection or test conducted in accordance with paragraph (a).
- (d) **(Project Co must bear costs):** Project Co must bear the costs of the inspection and testing:
 - (i) to the extent that the inspection or testing reveals any Defect;
 - (ii) if the inspection or test:
 - A. is a Completion Test or is an inspection or test required to be carried out in connection with a Completion Test; or
 - B. was otherwise required by this Agreement to be carried out by Project Co or should have been carried out by Project Co in accordance with Best Construction Practices or Best Operating Practices.

9. Design

9.1 Design obligations

Project Co must design the Facility and the Off-Site Infrastructure so that the Facility and Off-Site Infrastructure, when constructed in accordance with the Final Design Documents, satisfies the FFP Warranty.

9.2 Design Development Process

- (a) Project Co agrees that:
 - (i) Project Co must comply with the Design Development Process in developing the Design Deliverables;

- (ii) the purpose of the Design Development Process is to develop, refine and finalise Attachment 1 (Bid Design Documentation) such that Final Design Documents are created in accordance with this Agreement; and
 - (iii) the conduct of the Design Development Process itself does not constitute a Modification or FF&E Modification or otherwise enable Project Co to make any Claim against the State or any State Associate for any Liabilities incurred by Project Co in connection with the conduct of the Design Development Process.
- (b) Project Co must conduct and manage all aspects of the Design Development Process in accordance with:
- (i) the approved Design Development Plan;
 - (ii) Schedule 5 (Design Development);
 - (iii) Good Industry Practice,
- and as otherwise required in accordance with this Agreement.
- (c) Project Co must submit the Design Documentation to the State and the Independent Certifier in accordance with the requirements of Schedule 5 (Design Development) and Schedule 3 (Review Procedures).
- (d) The State will review the Design Deliverables submitted or resubmitted by Project Co in accordance with Schedule 3 (Review Procedures).

9.3 Not to proceed

Project Co must not proceed to the next stage of the Design Development Process or commence construction of the Works except as set out in Section 2.5 of Schedule 5 (Design Development).

9.4 Changes to Design Deliverables

If Project Co proposes any changes to Attachment 1 (Bid Design Documentation) or Design Deliverables then Project Co must submit all proposed changes to the State and the Independent Certifier and the requirements of Schedule 3 (Review Procedures) apply to those proposed changes.

10. Minor Modifications

10.1 Purpose and timing

- (a) This Clause 10 only applies, in respect of each Design Package, from Financial Close until the end of the Design Development Process for that Design Package in connection with the Stage 1 Works or the Stage 2 Works (as applicable).
- (b) The parties agree that the purpose of this Clause 10 is to:
 - (i) better facilitate and more efficiently give effect to Minor Modifications during the Design Development Process; and
 - (ii) ease the administrative burden on Project Co and the State in the implementation of Minor Modifications.
- (c) Project Co must seek to give effect to the process stated in Clause 10.1(b) in complying with its obligations under this Clause 10.

10.2 Minor Modification Running Schedule

- (a) Project Co must prepare and continually update a running schedule of all proposed and approved Minor Modifications (**Minor Modifications Running Schedule**).
- (b) The Minor Modifications Running Schedule must be in a form approved by the State and at a minimum contain the following information with respect to each proposed Minor Modification:
 - (i) a unique code, number or identifier (which must not be changed or removed from the Schedule regardless of whether a proposed Minor Modification has been rejected or otherwise);
 - (ii) reasons why Project Co considers that the proposed change, item of work, activity or component constitutes a Minor Modification;
 - (iii) the impact of the proposed Minor Modification on the Design Requirements, the performance by Project Co of the Services, the provision of the Facility Functions and Project Co's ability to satisfy the FFP Warranty;
 - (iv) to the extent applicable, the name of the State Associate that has requested the proposed Minor Modification, the reason for the proposed Minor Modification and details of the relevant Facility User Group that has requested the proposed Minor Modification (or to which the proposed Minor Modification relates);
 - (v) the proposed amount payable by the State to Project Co or by Project Co to the State for the proposed Minor Modification calculated in accordance with Schedule 4 (Change Compensation Principles); and
 - (vi) details of the total amount payable to Project Co or the State for all Minor Modifications which have been previously approved by the Project Director.

10.3 Minor Modifications meeting

- (a) **(Meeting)**: The State or Project Co may convene a meeting concerning the Minor Modifications Running Schedule within 2 Business Days notice and the parties (including the Project Director and the Development Co-ordinator) must attend such meeting.
- (b) **(Project Director's election)**: To the extent that the Minor Modifications Running Schedule contains the information required by Clause 10.2 for each of the proposed Minor Modifications, the Project Director may, among other things:
 - (i) dispute Project Co's reasoning that a proposed change, item of work, activity or component constitutes a Minor Modification;
 - (ii) approve in writing one or more of the proposed Minor Modifications identified in the Minor Modifications Running Schedule;
 - (iii) elect to further consider a proposed Minor Modification; or
 - (iv) otherwise request Project Co to provide additional information concerning a proposed Minor Modification.
- (c) **(Removal)**: Subject to Project Co's right to refer the matter for resolution in accordance with Clause 45, if the Project Director disputes Project Co's reasoning that a proposed change, item of work, activity or component

constitutes a Minor Modification, Project Co must remove the item from the Minor Modifications Running Schedule and mark the relevant item "rejected" and if directed by the Project Director, proceed to carry out the work that had been the subject of the alleged Minor Modification.

- (d) **(Project Co to implement):** If the Project Director approves in writing a proposed Minor Modification identified in the Minor Modifications Running Schedule:
 - (i) Project Co must implement the Minor Modification; and
 - (ii) subject to the proposed amount payable by the State to Project Co or by Project Co to the State for the proposed Minor Modification identified in the Minor Modifications Running Schedule being correctly calculated in accordance with Schedule 4 (Change Compensation Principles), the State must pay to Project Co or Project Co must pay to the State that proposed amount for the approved Minor Modification in accordance with Schedule 4 (Change Compensation Principles).
- (e) **(Further Information):** If the Project Director elects to consider a proposed Minor Modification further, Project Co must provide any further information requested by the State or otherwise retain the proposed Minor Modification on the Minor Modifications Running Schedule until receipt of written approval from the Project Director or otherwise.

10.4 Value management

Project Co must:

- (a) regularly arrange and conduct detailed value management workshops with the Project Director, the relevant Facility User Group, the Builder and any other parties notified by the State for the purpose of identifying proposed changes to the scope of the Works (including omissions to the scope of the Works) which will result in costs savings to the State and otherwise minimise the State's liability to Project Co for approved Minor Modifications; and
- (b) otherwise work collaboratively with the State and the Project Director to identify potential cost savings which will minimise the State's liability to Project Co for approved Minor Modifications.

10.5 Payment and other entitlements

- (a) Subject to paragraph (d), the amount payable to either party in connection with Minor Modifications will be calculated in accordance with Schedule 4 (Change Compensation Principles).
- (b) Project Co will not be entitled to any extension to any Date for Completion or the payment of any Prolongation Costs or Financing Delay Costs in connection with a Minor Modification.
- (c) Project Co must not implement a proposed Minor Modification, and will not be entitled to make any Claim against the State or any State Associate in connection with a Minor Modification, unless it has been approved by the Project Director in accordance with this Clause 10.
- (d) To the extent that Project Co is entitled to payment for carrying out a Minor Modification, Project Co:
 - (i) will only be entitled to be paid Base Costs in connection with that Minor Modification; and

- (ii) will not be entitled to be paid any Margin.

10.6 Changes to Minor Modification Process

In circumstances where the State considers that the Minor Modification process is not meeting the purposes set out in Clause 10.1, the State Representative may, at its discretion, direct Project Co to no longer use the Minor Modification process set out in this Clause 10 in which case all Minor Modifications will be managed in accordance with the process set out in Clause 34 and this Clause 10 will be deemed not to operate.

11. FF&E during Stage 1

11.1 Selection and procurement of Group 1 FF&E

Project Co must:

- (a) update the Group 1 FF&E List to reflect the outcome of the Design Development Process;
- (b) without limiting paragraph (a), update the Group 1 FF&E List:
 - (i) ensuring that like Group 1 FF&E is grouped together;
 - (ii) to address any comments provided by the Project Director or the Independent Certifier with respect to Group 1 FF&E in accordance with Schedule 3 (Review Procedures); and
 - (iii) as necessary to ensure that Project Co will satisfy the FFP Warranty;
- (c) other than for the purposes of meeting its obligations under paragraph (b) or in carrying out an FF&E Modification not decrease the quantity or procure Group 1 FF&E of a lesser quality (or attributes which contribute to a determination as to quality, including specification, brand, place of manufacture) than an item identified in the Group 1 FF&E List as at the Date of this Agreement; or
- (d) delay the timing for the final selection of those items of Group 1 FF&E which have high technical obsolescence risk in the Group 1 FF&E Lists to a time as close as reasonably possible to the Date of Stage 1 Commercial Acceptance, to better ensure that as at the Date of Stage 1 Commercial Acceptance, Project Co has procured the most technically up to date items of such Group 1 FF&E, without delaying Project Co in achieving Stage 1 Commercial Acceptance; and
- (e) procure the Group 1 FF&E as identified in the Group 1 FF&E Lists (amended only in accordance with this Clause 11.1 or as a result of an FF&E Modification).

11.2 Selection and transfer of Group 2 FF&E

- (a) The State will select Group 2 FF&E for transfer from the Existing Facility to the Stage 1 Facility and prepare the Group 2 FF&E List when reasonably required by Project Co prior to the date of Stage 1 Technical Completion.
- (b) Project Co must defer as long as reasonably possible the time for the State to select the Group 2 FF&E.
- (c) Project Co will transfer the Group 2 FF&E from the Existing Facility to the Stage 1 Facility.
- (d) Project Co must transfer the Group 2 FF&E from the Existing Facility during the Transition Period.

- (e) Project Co will be released from all Claims and Liabilities in connection with the transfer of Group 2 FF&E except to the extent that Project Co or a Project Co Associate damages the Group 2 FF&E or fails to comply with its obligations in accordance with this Agreement in connection with the Group 2 FF&E.

11.3 Group 3 FF&E

- (a) Subject to paragraph (c), the State will provide Project Co with information to update the Group 3 FF&E List no earlier than 6 Months prior to the expected Date of Stage 1 Commercial Acceptance and Project Co must update the Group 3 FF&E List to reflect this information.
- (b) Project Co will procure Group 3 FF&E in accordance with the Group 3 FF&E List in accordance with paragraph (c).
- (c) Project Co must delay the requirement for the State to provide the information for Project Co to update the Group 3 FF&E List to a time which is as close as reasonably possible to the Date of Stage 1 Commercial Acceptance in order to ensure that:
 - (i) the accrual of any warranty period in connection with the Group 3 FF&E prior to the Date of Stage 1 Commercial Acceptance is minimised; and
 - (ii) as at the Date of Stage 1 Commercial Acceptance the most technically up to date FF&E is purchased,without delaying Project Co in achieving Stage 1 Commercial Acceptance.

11.4 Group 4 FF&E

- (a) The State will provide information to Project Co to update the Group 4 FF&E List until the Date of Stage 1 Commercial Acceptance and Project Co must promptly provide any updated Group 4 FF&E List to the State.
- (b) The State will select and procure, install/locate and commission the Group 4 FF&E in accordance with Clause 15 and update the Group 4 FF&E List accordingly.
- (c) Project Co must do all things reasonably necessary including, if reasonably possible, changing the sequencing of its construction and its construction methodology to defer for as long as possible the need for the State to select, procure, install, locate or commission the Group 4 FF&E in order to facilitate the State's requirements that the Facility has the most technically up to date Group 4 FF&E at the Date of Stage 1 Commercial Acceptance and any warranty period in connection with any Group 4 FF&E prior to the Operational Commencement Date is minimised.

11.5 Installation and Commissioning of Project Co FF&E

- (a) Project Co must install or locate (as applicable depending on whether the Equipment is loose or fixed) all items of Project Co FF&E into the Stage 1 Facility:
 - (i) in accordance with the For Construction Documentation;
 - (ii) to the extent that the For Construction Documentation does not identify locations for the placement of loose items of Project Co FF&E, in accordance with the Project Director's directions; and

- (iii) so that the Facility meets the FFP Warranty.
- (b) Project Co must commission and undertake all Completion Tests in connection with the Project Co FF&E in accordance with the Completion Criteria and the Completion Plan.
- (c) Project Co will be released from all Claims and Liabilities in connection with Group 2 FF&E to the extent that it is unable to successfully commission or undertake Completion Tests of that Group 2 FF&E save to the extent that the failure of such Group 2 FF&E is caused by an act or omission of Project Co or a Project Co Associate.

12. Construction

12.1 Stage 1 Works and Stage 2 Works

- (a) The Works are divided in two phases:
 - (i) the Stage 1 Works consisting of all work necessary for the design, construction, completion and commissioning of the Stage 1 Facility, (including the completion and commissioning of the Secure Perimeter for the Stage 1 Facility) and the Off-Site Infrastructure Works including any Modifications, Minor Modifications and FF&E Modifications and any rectification of Defects in the Stage 1 Works or the Stage 1 Facility (the **Stage 1 Works**); and
 - (ii) the Stage 2 Works consisting of all work necessary for the decommissioning and demolition of the Existing Facility, the design, construction, completion and commissioning of the Secure Perimeter for the Stage 1 Facility and the Stage 2 Facility, the Mural Works and the Remediation of the Site on which the Existing Facility is located including any Modifications, Minor Modifications and FF&E Modifications and any rectification of Defects in the Stage 2 Works or the Stage 2 Facility (the **Stage 2 Works**).
- (b) Project Co must not commence the Stage 2 Works until the Date of Stage 1 Commercial Acceptance and must not demolish any of the Existing Facility until the end of the Transition Period when all Prisoners have been transferred from the Existing Facility.
- (c) Project Co must construct the Works in accordance with the Final Design Documents.

12.2 Works

- (a) Project Co must not commence the Works until the draft Project Management Plan submitted in accordance with Clause 6.1(a) is reviewed and, if necessary amended in accordance with Schedule 3 (Review Procedures).
- (b) Project Co must undertake the Works and deliver the Project in accordance with:
 - (i) the Design Requirements;
 - (ii) the D&C Documents;
 - (iii) the Final Design Documents;
 - (iv) any Modification Order;
 - (v) Minor Modifications;

- (vi) the requirements of the State Project Documents; and
- (vii) Best Construction Practices.

12.3 Site Security, interference, obstruction and nuisance

- (a) Without limiting Project Co's obligations under Clause 12.2, Project Co must, in undertaking the Works:
 - (i) **(tidy)**: keep the Construction Sites tidy and free of refuse;
 - (ii) **(secure)**: keep the Construction Sites secure and safe and free from all unauthorised access including complying with Schedule 19 (Security Procedures);
 - (iii) **(nuisance)**: prevent nuisance, noise, dust, air pollution, odour, vibration and any disturbance to areas adjacent to the Construction Sites from exceeding reasonable levels;
 - (iv) **(protect)**: take all measures necessary to protect and ensure the safety of other people and property in accordance with Best Construction Practices;
 - (v) **(interference)**: without limiting any obligation under Schedule 19 (Security Procedures) avoid or minimise unreasonable interference with:
 - A. the passage of people and vehicles around the Construction Sites and to the Existing Facility;
 - B. the operations or activities carried out in the vicinity of the Construction Sites and the Existing Facility; and
 - (vi) **(damage)**: take all measures to protect property outside of the Construction Sites that may be affected by the Works and to the extent that Project Co or a Project Co Associate causes damage to property outside of the Construction Sites, promptly rectify that damage.
- (b) If in the reasonable opinion of the State or the Independent Certifier, the levels of nuisance or interference referred to in paragraph (a) are not reasonable or are not in the interests of the safety of persons on the Construction Sites or any other areas adjacent to the Construction Sites, Project Co must comply with any reasonable direction of the State or the Independent Certifier to:
 - (i) stop or change the manner of undertaking the Works; and
 - (ii) amend the Project Management Plan and submit it to the State for review in accordance with Schedule 3 (Review Procedures).

12.4 State access to performance bonds held by Project Co for Stage 1 Works and Defects

- (a) If in breach of Clause 16.1, Project Co fails to achieve Stage 1 Commercial Acceptance by the Date for Stage 1 Commercial Acceptance the State may take action to rectify the failure and the reasonable costs and expenses incurred by the State to rectify such failure will be a debt due and payable by Project Co to the State provided that, the State may only take such action where Project Co is not diligently pursuing the remediation of that Event of Default in accordance with the remedy program agreed or determined under Clause 42.2.

- (b) Without limiting the State's rights in accordance with this Agreement or at Law, the State may require Project Co to call on any performance bond it holds for the Stage 1 Works and pay the State the amount called to satisfy any debt due under paragraph (a).
- (c) Nothing in this Clause 12.4 limits Project Co's obligations in accordance with this Agreement including:
 - (i) Project Co's obligations to achieve Completion and deliver the Services in accordance with this Agreement;
 - (ii) any warranties given by Project Co in accordance with this Agreement; or
 - (iii) the State's right to make Abatements in accordance with the Abatement Regime.

12.5 Provision of Stage 2 Performance Bond

- (a) Project Co must provide or procure the Builder to provide, the State with a Stage 2 Performance Bond of which the State is the beneficiary for *[not disclosed]* of the value of the Stage 2 Works no later than 5 Business Days prior to Stage 1 Commercial Acceptance.
- (b) Subject to its rights to have recourse to the Stage 2 Performance Bond, the State must release any Stage 2 Performance Bond to the Builder within 20 Business Days after the Date of Stage 2 Commercial Acceptance.
- (c) The Stage 2 Performance Bond is security for the performance of the Stage 2 Works.

12.6 Requirements for Stage 2 Performance Bond

The Stage 2 Performance Bond must be:

- (a) in the form of Schedule 20 (Stage 2 Performance Bond) (or such other form as the State may approve);
- (b) in favour of the State;
- (c) a continuing liability from the date of issue;
- (d) have an expiry date (if any) which is no earlier than 3 Months after the expected Date for Stage 2 Commercial Acceptance;
- (e) at all times provided by an APRA licensed bank that maintains a credit rating of at least A- by Standard and Poor's (Australia) Pty Limited or A3 by Moody's Investors Service, Inc (**Required Rating**);
- (f) payable at an office of the issuer in Perth; and
- (g) where required, duly stamped.

12.7 Expiry Date

- (a) If the Stage 2 Performance Bond has an expiry date, Project Co must procure a replacement Stage 2 Performance Bond (which complies with the requirements of the Stage 2 Performance Bond it is replacing) 20 Business Days prior to the expiry of the Stage 2 Performance Bond.

- (b) If Project Co fails to procure a replacement Stage 2 Performance Bond by the time required in paragraph (a), the State may at any time from that date draw down the full remaining value of the Stage 2 Performance Bond, and hold the cash as security for performance of Project Co's obligation in accordance with this Agreement.

12.8 Interest

- (a) The State:
 - (i) is not obliged to pay Project Co or any Project Co Associate interest on:
 - A. the Stage 2 Performance Bond; or
 - B. subject to paragraph (b), the proceeds of the Stage 2 Performance Bond if it is converted into cash; and
 - (ii) does not hold the proceeds referred to in paragraph (i)B on trust for Project Co or any Project Co Associate.
- (b) If the State makes a call upon the Stage 2 Performance Bond and obtains cash as a consequence or uses the cash referred to in Clause 12.7(b):
 - (i) the State will pay simple interest, at the rate applying for the purpose of Clause 54.1, on the amount of any cash obtained in excess of the sum to which the State is entitled at the time of such call; and
 - (ii) the sum attracting interest pursuant to paragraph (i) will be further reduced by any unsatisfied amounts which subsequently become payable (whether as a debt, by way of damages or otherwise) by Project Co to the State at the time such amounts become payable.

12.9 Replacement of Stage 2 Performance Bond

If the issuer of a Stage 2 Performance Bond ceases to have the Required Rating, then Project Co must:

- (a) promptly, and within 5 Business Days of Project Co becoming aware that the Stage 2 Performance Bond ceases to have the Required Rating, notify the State of that circumstance; and
- (b) within 30 Business Days of being requested to do so, procure the issue to the State of a replacement bond which satisfies the requirements of Clause 12.6.

12.10 Demand

- (a) The State may make a demand on the Stage 2 Performance Bond or use the proceeds held in accordance with Clause 12.7(b), for the cost to the State of rectifying Project Co's failure to achieve Stage 2 Commercial Acceptance where Project Co fails to achieve Stage 2 Commercial Acceptance by the Date for Stage 2 Commercial Acceptance (whether or not the costs the State incurs or alleges to have incurred for the failure to achieve Stage 2 Commercial Acceptance by the Date for Stage 2 Commercial Acceptance are disputed by Project Co or any Project Co Associate).
- (b) Project Co must not take and must procure that no Project Co Associate takes any steps to injunct or otherwise restrain:
 - (i) the issuer of the Stage 2 Performance Bond from paying the State pursuant to the Stage 2 Performance Bond;

- (ii) the State from making a demand or receiving payment under the Stage 2 Performance Bond; or
- (iii) the State using the proceeds of the Stage 2 Performance Bond.

12.11 Disputed calls on Stage 2 Performance Bond

If the issuer of a Stage 2 Performance Bond makes a payment to the State as a result of a demand made under the Stage 2 Performance Bond in accordance with Clause 12.10 or the State uses the cash referred to in Clause 12.7(b) and it is later agreed or determined that Project Co was not liable to pay to the State all or part of the amount in connection with which demand and payment was made or to use the cash referred to in Clause 12.7(b), then the State must pay to Project Co on demand:

- (a) all or part of the amount (**Required Amount**) which Project Co was not liable to pay to the State; and
- (b) the lesser of Project Co's cost of funds, and interest at the Default Rate calculated on a daily basis from (and including) the date the issuer of the Stage 2 Performance Bond met the demand under Clause 12.10(a) or the date on which the State uses the cash referred to in Clause 12.7(b) (as applicable) to the date the Required Amount is paid to Project Co. Such interest must be paid on the date the Required Amount is paid to Project Co.

12.12 Independent Certifier's review of construction

- (a) (**Review by Independent Certifier**): Project Co agrees that, in accordance with the Independent Certifier Deed of Appointment and if requested by the State, the Independent Certifier may:
 - (i) review the construction of the Works to ensure that the Works are being undertaken in accordance with the Works Program and the other requirements of this Agreement and that Commercial Acceptance will be achieved by the relevant Date for Commercial Acceptance; and
 - (ii) review the Works to ensure that the Works Program accurately reflects the actual progress of the Works.
- (b) (**Notice of non-compliance**): If the Independent Certifier believes that Project Co is not undertaking the Works in accordance with the Works Program and the other requirements of this Agreement or that in its opinion Project Co will not achieve Commercial Acceptance by the relevant Date for Commercial Acceptance, the Independent Certifier may, in accordance with the Independent Certifier Deed of Appointment, give notice to the State and Project Co of its opinion together with its reasons for forming that opinion.
- (c) (**Project Co's response**): Within 10 Business Days of receipt of the Independent Certifier's notice in accordance with paragraph (b) Project Co must:
 - (i) notify the State and the Independent Certifier of any matters in connection with which it disagrees with the Independent Certifier's opinion together with its reasons for doing so (**Explanation**); and
 - (ii) to the extent it does not disagree, provide a detailed plan and a program for the rectification of any non-compliance which must include a date by which rectification will be achieved (**Rectification Plan**).
- (d) (**Notice by Independent Certifier**): Within 15 Business Days of receipt of the Explanation or Rectification Plan, the Independent Certifier must give notice to

the State and Project Co of its opinion as to whether or not the Explanation or the Rectification Plan satisfactorily addresses its concerns together with its reasons for forming that opinion.

- (e) **(Compliance)**: If the Independent Certifier notifies the State and Project Co that, in its opinion:
 - (i) a Rectification Plan satisfactorily addresses its concerns, Project Co must comply with the Rectification Plan; or
 - (ii) a Rectification Plan does not address its concerns, this will constitute an Event of Default.
- (f) **(Explanation)**: If the Independent Certifier notifies Project Co and the State that, in its opinion:
 - (i) the Explanation is satisfactory and that the Works comply with the Works Program and the other requirements of this Agreement, Project Co may proceed with the Works; or
 - (ii) that the Explanation is not satisfactory, this will constitute an Event of Default .

13. Mural Works

13.1 Mural Works Subcontract

- (a) **(Tender process)**: Project Co must:
 - (i) prepare tender packages for the Mural Works which include any requirements notified to Project Co in writing by the Project Director;
 - (ii) provide the Project Director with copies of each of the tender packages for review by the Project Director and make any amendments to the tender packages reasonably required by the Project Director prior to release of packages to proposed tenderers; and
 - (iii) obtain a minimum of two separate quotes (or fewer quotes as approved by the State from experienced, independent and capable contractors who are acceptable to the State (acting reasonably)) to perform the Mural Works.
- (b) **(Project Co to select)**: Project Co must select a subcontractor from the tender process to perform the Mural Works in consultation with the State.
- (c) **(Mural Works Subcontract)**: Subject to paragraph (d), Project Co must enter into an agreement with the successful subcontractor (**Mural Works Subcontractor**) on the terms of the relevant proposal from the subcontractor and any amendments to that proposal as approved by the State (such approval not to be unreasonably withheld) (**Mural Works Subcontract**).
- (d) **(State to review Subcontract)**: Project Co must submit the proposed Mural Works Subcontract to the Project Director for review in accordance with the Schedule 3 (Review Procedures).
- (e) **(Execute in accordance with Mural Works Subcontract)**: Without limiting its other obligations in accordance with this Agreement, Project Co must procure that the Mural Works are executed in accordance with the terms of the relevant Mural Works Subcontract.

13.2 Mural Works price

- (a) **(Price):** The Mural Works Subcontract must include a price for the carrying out of the Mural Works which:
 - (i) must not be less than the bid amount for the Mural Works Subcontract set out in Schedule 1 (Contract Particulars); and
 - (ii) will only be adjusted in accordance with this Clause 13.
- (b) **(Lump Sum):** The Mural Works Price must be a fixed lump sum price.
- (c) **(Price Adjustments):** Project Co must advise the Project Director in writing as soon as possible after it becomes aware of circumstances which are likely to cause an adjustment to the Mural Works Price (**Mural Works Price Adjustment Notice**).
- (d) **(Mural Works Price Adjustment Notice):** The Mural Works Price Adjustment Notice must contain the following details:
 - (i) the reasons for the potential adjustment to the Mural Works Price;
 - (ii) the likely quantum of the adjustment to the Mural Works Price; and
 - (iii) Project Co's proposed strategy for minimising the quantum of any adjustment to the Mural Works Price.
- (e) **(Minimise Adjustments):** Project Co must:
 - (i) liaise with the Project Director concerning its proposed strategy for minimising the quantum of any adjustment to the Mural Works Price; and
 - (ii) invite the Project Director to participate in any discussions with the Mural Works Subcontractor concerning minimising the quantum of any adjustment to the Mural Works Price.
- (f) **(Adjustment):** The State will only be liable for any adjustment to the Mural Works Price if:
 - (i) that adjustment is made in accordance with the terms of the Mural Works Subcontract and the need for such an adjustment has not been caused by (or to the extent contributed by) an act or omission of Project Co or a Project Co Associate other than where such act or omission is undertaken in accordance with this Agreement; and
 - (ii) unless otherwise agreed with the Project Director (acting reasonably), Project Co has provided the Mural Works Price Adjustment Notice in accordance with paragraph (c).
- (g) **(Payment):** Subject to this Clause 13, the State must pay Project Co for the Mural Works, the Mural Works Price.
- (h) **(No Claim):** Project Co is not entitled to make any Claim against the State or any State Associate for payment to it of any Margin for, arising out of or in connection with the execution of the Mural Works.
- (i) **(Quarterly Services Payment):** The State must pay Project Co the Mural Works Price as an adjustment to the first Quarterly Service Payment after the Operational Commencement Date.

14. Off-Site Infrastructure Works

14.1 Off-Site Infrastructure Completion

- (a) Project Co must fully consult with all owners of Off-Site Infrastructure so as to ensure that:
 - (i) Project Co identifies the usual requirements of owners for works in the nature of the relevant Off-Site Infrastructure Works; and
 - (ii) each item of Off-Site Infrastructure is completed in accordance with this Agreement.
- (b) Off-Site Infrastructure Completion will not be achieved until:
 - (i) the Off-Site Infrastructure Works have been completed in accordance with the State Project Documents subject only to Outstanding Items;
 - (ii) Project Co has issued a notice to the State, the Independent Certifier and the relevant owner of the Off-Site Infrastructure which:
 - A. states that it considers that the Off-Site Infrastructure has been completed in accordance with the State Project Documents; and
 - B. lists any Outstanding Items;
 - (iii) Project Co, the Independent Certifier and the owner of the Off-Site Infrastructure have jointly inspected the Off-Site Infrastructure at a time to be agreed (or in the absence of agreement determined by the Independent Certifier) which will be no more than 5 Business Days after receipt of Project Co's notice in accordance with paragraph (b)(ii); and
 - (iv) following the joint inspection in accordance with paragraph (b)(iii), the Independent Certifier has issued to the State, the owner of the Off-Site Infrastructure and Project Co a notice confirming that the Off-Site Infrastructure has been completed subject only to Outstanding Items of the kind referred to in paragraph (b)(i).

14.2 Defects Liability Period for Off-Site Infrastructure Works

Each item of Off-Site Infrastructure has:

- (a) a Defects Liability Period that commences on the date of Off-Site Infrastructure Completion relating to that item of Off-Site Infrastructure and ends 12 Months after the relevant date of Off-Site Infrastructure Completion; and
- (b) a further Defects Liability Period of 12 Months which commences on the date on which a Defect in the Off-Site Infrastructure is corrected,

provided that the maximum combined Defects Liability Period for any item of Off-Site Infrastructure is no longer than 24 Months.

14.3 Correction of Defects in Off-Site Infrastructure Works

- (a) Project Co must correct all Defects in connection with the Off-Site Infrastructure Works or the Off-Site Infrastructure of which Project Co becomes aware, or which are notified to Project Co, prior to or during the relevant Defects Liability Period.

- (b) Project Co must give notice to the State and the Independent Certifier that a Defect has been corrected promptly after the correction of that Defect.
- (c) Without limiting paragraph (a), if Project Co reasonably considers that the Defect the subject of any notice in accordance with paragraph (a) was directly caused by any breach of any State Project Document by the State or a wrongful act or omission of the State then the costs reasonably incurred in correcting that Defect will be a debt due and payable by the State to Project Co, except to the extent that:
 - (i) the Defect was caused or contributed to by Project Co or Project Co's Associates; or
 - (ii) insurance proceeds, damages or other compensation is received by Project Co or any Project Co Associate in connection with the Defect (or would have been received by Project Co but for the act or omission of Project Co).

15. State Works

15.1 State notification of State Works

- (a) The State must notify Project Co of the period during which it needs access to a particular area or areas within the Facility prior to the Date for Stage 1 Technical Completion for the purposes of carrying out any State Works (**State Works Notice**) in accordance with this Clause 15.
- (b) The State Works Notice must include the following details with respect to the relevant State Works:
 - (i) details of the discrete areas within the Facility that the State requires access to for the purposes of carrying out the relevant State Works and the timing and extent of such access;
 - (ii) details of the relevant State Works to be carried out in each of the discrete areas within the Facility;
 - (iii) details of the method intended to be used to carry out the relevant State Works;
 - (iv) details of the timing for the execution of the relevant State Works; and
 - (v) to the extent that the State requires specific components of the Works to have been completed prior to the carrying out of the relevant State Works, details of the relevant components of the Works.

15.2 Timing for State notification of State Works

The State must issue State Works Notices one Month prior to the dates for commencement by the State of the State Works as determined in accordance with Clause 15.1(b)(iv).

15.3 Project Co obligations

Project Co must:

- (a) provide the State or relevant State Associates with access to the relevant areas within the Facility in accordance with a State Works Notice;
- (b) ensure that the works specified in the State Works Notice in accordance with Clause 15.1(b)(v) have been completed to such a stage and are otherwise in

such condition as to enable the State to carry out the State Works the subject of the State Works Notice; and

- (c) otherwise provide the reasonable assistance required by the State to enable the State to carry out the State Works.

16. Time

16.1 Dates for Completion

Project Co must:

- (a) regularly, expeditiously and diligently undertake the Works; and
- (b) achieve Completion by the relevant Date for Completion.

16.2 Delays to achieving Completion

If Project Co reasonably forms the view that it will be delayed, or is likely to be delayed, in achieving Completion, Project Co must give the State and the Independent Certifier a Change Notice stating:

- (a) the details of the delay or disruption and Project Co's anticipated Date of Completion;
- (b) the steps, if any, Project Co proposes to take to prevent or minimise the delay or disruption; and
- (c) the date that Project Co expects to achieve Completion.

16.3 Form of extension of time claim

If Project Co will be delayed, or is likely to be delayed, in achieving Completion by an Extension Event, Project Co's Change Notice submitted in accordance with Clause 16.2 must set out:

- (a) **(particulars)**: detailed particulars and evidence of the Extension Event causing the delay;
- (b) **(consequences)**: detailed particulars of the consequences or the likely consequences of the Extension Event including details of how Project Co will be delayed, or is likely to be delayed, by the Extension Event;
- (c) **(days claimed)**: Project Co's estimate of the total number of days of extension of time claimed to the relevant Date for Completion;
- (d) **(costs payable)**: if Project Co believes the Extension Event is a Compensable Extension Event, details of the Prolongation Costs and the Financing Delay Costs (if applicable) claimed and calculated in accordance with Clause 16.9;
- (e) **(Change Compensation Principles)**: other information so that the Change Notice is in accordance with Schedule 4 (Change Compensation Principles); and
- (f) **(other information)**: such other information reasonably requested by the State.

16.4 Submission of updated extension of time claim

If the effects of the Extension Event continue beyond the period of extension claimed, and if Project Co wishes to Claim an extension of time in connection with such further delay, Project Co must submit an updated Change Notice to the Independent Certifier:

- (a) before the expiry of the extension granted in accordance with Clause 16.6; and
- (b) containing the information required by Clause 16.3.

16.5 Conditions precedent to extension

- (a) Project Co will only be entitled to an extension of time if:
 - (i) Project Co has been, or is likely to be, delayed by an Extension Event:
 - A. in connection with the Stage 1 Works occurring between Financial Close and the Date of Stage 1 Commercial Acceptance; and
 - B. in connection with the Stage 2 Works occurring between Financial Close and the Date of Stage 2 Commercial Acceptance,

in a manner which will delay, or is likely to delay, Completion;
 - (ii) Project Co has not been given an instruction to accelerate the execution of the Works if acceleration to overcome the delay is reasonably achievable;
 - (iii) Project Co submits a Change Notice to the State in accordance with Clauses 16.2 and 16.3 within 10 Business Days from the earlier of the date Project Co became aware, or ought reasonably to have become aware that it will be delayed or is likely to be delayed in achieving Completion by an Extension Event; and
 - (iv) Project Co has complied with all of its obligations in accordance with Schedule 3 (Review Procedures) and Schedule 6 (Programming Requirements) in connection with the Works Program relevant to the Claim for an extension of time.
- (b) In determining any extension of time, the Independent Certifier must take into account all relevant evidence presented by the parties and may have regard to but will not be bound by the Works Program.

16.6 Extension of time

If Project Co has satisfied the requirements set out in Clauses 16.3 and 16.5, the Independent Certifier will, within 20 Business Days of receipt of the Change Notice in accordance with Clauses 16.2 or 16.4 (as applicable), extend the relevant Date for Completion by a reasonable period and notify Project Co of the extension granted.

16.7 Concurrent delays and Project Co contribution to Extension Event

- (a) If Project Co has made a Claim for an extension of time in accordance with this Clause 16, Project Co is not entitled to an extension of time to the relevant Date for Completion where a delay to Completion would have occurred due to an event other than the Extension Event, for the period of the delay to the extent that the delay would have occurred as a result of such other event.

16.8 Unilateral extensions

- (a) Subject to paragraph (b), if the State considers that any act or omission of the State or a State Associate will, or is likely to, delay Project Co from achieving Completion, the State may by notice to Project Co, unilaterally extend any Date

for Completion, whether or not Project Co has made, or is entitled to make, a Claim for an extension of time in accordance with this Clause 16.

- (b) The State is not required to exercise the State's discretion in accordance with paragraph (a) for the benefit of Project Co or at all.
- (c) The exercise or failure to exercise the State's discretion in accordance with this Clause 16.8 is not capable of being the subject of a Dispute in accordance with Clause 45 or otherwise subject to review.
- (d) The State's discretion in accordance with paragraph (a) must not be used if the Independent Certifier is otherwise required to extend a Date for Completion in accordance with Clause 16.6.

16.9 Compensable Extension Events

- (a) Subject to paragraph (b), to the extent that a delay is caused by a Compensable Extension Event for which Project Co is granted an extension of time in accordance with Clause 16.6, the State will compensate Project Co for the following calculated in accordance with Schedule 4 (Change Compensation Principles):
 - (i) Prolongation Costs and Financing Delay Costs, to the extent that Project Co is delayed, or will be delayed, in achieving Stage 1 Technical Completion or Stage 1 Commercial Acceptance; and
 - (ii) Prolongation Costs only, to the extent that Project Co is delayed, or will be delayed, in achieving Stage 2 Technical Completion or Stage 2 Commercial Acceptance.
- (b) Where the delay is caused by an event of the type described in paragraph (j) of the definition of Compensable Extension Event, Project Co will be entitled to only 50% of the Prolongation Costs and Financing Delay Costs (as applicable) payable in accordance with paragraph (a).

16.10 Force Majeure Events

- (a) Where the Extension Event is a Force Majeure Event, the obligations of each party in accordance with this Agreement which are affected by the Force Majeure Event will be suspended, but only to the extent that, and for so long as, the Force Majeure Event prevents that party from meeting its obligations in accordance with this Agreement.
- (b) A party's failure to perform its obligations in accordance with this Agreement which are suspended in accordance with paragraph (a) will not be a breach of this Agreement, an Event of Default or an Immediate Termination Event during the period of suspension in accordance with paragraph (a).

16.11 Acceleration

- (a) If the Works are delayed, the State may direct Project Co to give the State a Change Notice prepared in accordance with Schedule 4 (Change Compensation Principles) within 10 Business Days which states:
 - (i) the amount payable to Project Co as a consequence of accelerating the Works to the extent necessary to overcome the delay and whether the acceleration is likely to result in Completion being achieved by the Date for Completion; or
 - (ii) that acceleration is not reasonably achievable.

- (b) Project Co must calculate the amount payable to Project Co in accordance with the principles set out in Schedule 4 (Change Compensation Principles).
- (c) Following receipt of Project Co's Change Notice, the State and Project Co must meet to agree the contents of the Change Notice and provided that acceleration is reasonably achievable, the State may direct Project Co to accelerate the Works to the extent necessary to overcome the delay in accordance with Project Co's Change Notice and Project Co must comply with the State's direction.
- (d) If the State directs Project Co to accelerate the Works and Project Co would, but for the direction, have been granted an extension of time to the relevant Date for Completion for the delay in accordance with Clause 16.6, the State will pay Project Co the amount calculated in accordance with Schedule 4 (Change Compensation Principles).

17. Technical Completion

17.1 Notice before Technical Completion

- (a) Project Co must give the State and the Independent Certifier separate notices:
 - (i) 6 Months;
 - (ii) 3 Months;
 - (iii) 30 Business Days; and
 - (iv) 15 Business Days,
 prior to the date upon which it reasonably expects to achieve Stage 1 Technical Completion.
- (b) Project Co must give the State and the Independent Certifier separate notices:
 - (i) 20 Business Days; and
 - (ii) 10 Business Days,
 prior to the date upon which it reasonably expects to achieve Stage 2 Technical Completion.
- (c) If, after Project Co gives the State and the Independent Certifier a notice in accordance with paragraph (a) or paragraph (b), any expected Date of Technical Completion changes, Project Co must notify the State and the Independent Certifier promptly of the revised date.

17.2 Technical Completion Plan

- (a) At the same time as Project Co notifies the State and the Independent Certifier of the date on which it reasonably expects to achieve Technical Completion in accordance with Clause 17.1(a)(i) or 17.1(b)(i), Project Co must submit to the State and the Independent Certifier a draft Technical Completion Plan for review in accordance with Schedule 3 (Review Procedures).
- (b) Where Project Co notifies the State and the Independent Certifier of the date upon which it reasonably expects to achieve Technical Completion in accordance with:
 - (i) in connection with Stage 1, Clauses 17.1(a)(ii) to 17.1(a)(iv); or

- (ii) in connection with Stage 2, Clause 17.1(b)(ii),

and Project Co is aware of any changes to the form of Technical Completion Plan submitted under paragraph (a), Project Co must submit to the State and the Independent Certifier an updated Technical Completion Plan for review in accordance with Schedule 3 (Review Procedures).

- (c) The Independent Certifier may require Project Co to include additional Technical Completion Tests in the Technical Completion Plan if the Independent Certifier considers that the Technical Completion Tests proposed by Project Co are not sufficient to demonstrate that the Technical Completion Criteria are satisfied.

17.3 Technical Completion Tests

- (a) Project Co must carry out all Technical Completion Tests in accordance with and otherwise comply with the approved Technical Completion Plan and this Clause 17.
- (b) Project Co must:
 - (i) within 3 Months of each anticipated date of Technical Completion, give the Independent Certifier and the Project Director a notice setting out the anticipated dates on which all Technical Completion Tests will be performed;
 - (ii) no later than 2 Business Days prior to the date for conducting any Technical Completion Test identified in the notice under paragraph (i) give the Independent Certifier and the Project Director an updated notice identifying any changes to the date upon which the relevant Technical Completion Test will be performed (such date must be not earlier than the date stated in the original notice);
 - (iii) allow the Independent Certifier to take samples, make measurements and otherwise carry out whatever checks and investigations they may reasonably require in order to ensure that any Technical Completion Test has been successfully carried out;
 - (iv) conduct the Technical Completion Tests to the reasonable satisfaction of the Independent Certifier;
 - (v) comply with all reasonable directions of the Independent Certifier in relation to the conduct of any Technical Completion Tests; and
 - (vi) if a test fails, immediately inform the Independent Certifier and the Project Director and carry out rectification works to enable retesting to occur as soon as possible.

17.4 Unsuccessful Technical Completion Test

- (a) If Project Co fails to successfully complete a Technical Completion Test (which must be successfully completed prior to Technical Completion), the Independent Certifier may:
 - (i) refuse to issue the certificate of Technical Completion; or
 - (ii) subject to Clause 17.8, identify the unsuccessful Technical Completion Test as an Outstanding Item.
- (b) The Independent Certifier may waive the requirement for Project Co to satisfy a Technical Completion Test.

17.5 Initial Technical Completion Report

- (a) Project Co must submit to the Independent Certifier (for review in accordance with Schedule 3 (Review Procedures)) and provide a copy to the State of a draft Technical Completion Report in connection with Technical Completion 20 Business Days prior to the date on which it anticipates reaching Technical Completion.
- (b) Project Co must submit to the State and the Independent Certifier (for review in accordance with Schedule 3 (Review Procedures)) a further draft Technical Completion Report in connection with Technical Completion 5 Business Days prior to the date on which it anticipates reaching Technical Completion. The draft Technical Completion Report must reflect all Technical Completion Tests undertaken in connection with Technical Completion to the date of the further draft Technical Completion Report.
- (c) Project Co must take into account and comply with any directions reasonably given by the Independent Certifier in connection with preparing for Technical Completion.

17.6 Notice of Technical Completion

- (a) When Project Co is of the reasonable opinion that it has achieved Technical Completion, Project Co must provide:
 - (i) notice of its opinion that it has achieved Technical Completion; and
 - (ii) the Technical Completion Report,to the State and the Independent Certifier.
- (b) Project Co may not submit the information to the State and the Independent Certifier in accordance with paragraph (a) until a date which is 10 Business Days after the submission of the relevant draft Technical Completion Report in accordance with Clause 17.5.

17.7 Determination of Technical Completion

- (a) If in the opinion of the Independent Certifier, Technical Completion is achieved, the Independent Certifier must issue to Project Co a certificate of Technical Completion stating the date on which Project Co achieved Technical Completion.
- (b) If Technical Completion has not been achieved, the Independent Certifier must issue to Project Co and the State a notice containing details of the outstanding Technical Completion Criteria that must be satisfied by Project Co as a condition precedent to achieving Technical Completion.
- (c) The Independent Certifier may in its sole and absolute discretion issue a certificate of Technical Completion if Technical Completion has been achieved notwithstanding that Project Co has not issued a notice in accordance with Clause 17.6(a).
- (d) The issue of a certificate of Technical Completion in accordance with this Clause does not constitute evidence that Project Co has satisfied the FFP Warranty.

17.8 Outstanding Items

- (a) The Independent Certifier may issue a certificate of Technical Completion with an attached list of Outstanding Items which Project Co must rectify within a reasonable period of time as determined by the Independent Certifier.
- (b) Project Co must submit to the State and the Independent Certifier for review in accordance with Schedule 3 (Review Procedures), a program for the completion of the Outstanding Items within 5 Business Days after the issue of a certificate of Technical Completion which attaches a list of Outstanding Items.
- (c) Project Co must complete any Outstanding Items in accordance with the program as reviewed and amended in accordance with Schedule 3 (Review Procedures) to the reasonable satisfaction of the Independent Certifier.

17.9 Final Technical Completion Report

Project Co must submit to the State and the Independent Certifier a final Technical Completion Report no later than 20 Business Days after the Date of Technical Completion.

18. Commissioning Period

18.1 Minimum for Commissioning Period and State Access Period

- (a) Project Co must give the State 24 hour exclusive, continued and uninterrupted access to the Facility for 35 consecutive days during the Stage 1 Commissioning Period (**Stage 1 State Access Period**).
- (b) Project Co must give the State 24 hour exclusive, continued and uninterrupted access to the Facility for 21 consecutive days during the Stage 2 Commissioning Period (**Stage 2 State Access Period**).
- (c) Provided the State complies with the Site Access and Interface Protocols, Project Co will not have any entitlement to make any Claim against the State for any delay to the Works caused by any access to or work undertaken by the State on the Site during each State Access Period.

18.2 State Operational Commissioning

- (a) (**Intended activities**): The State's intended activities for State Operational Commissioning include:
 - (i) operational exercises;
 - (ii) conduct of State designed scenarios to test the functionality of the Facility;
 - (iii) the conduct of State designed exercises and scenarios to test the interface between the Facility and the provision by the State of the Facility Functions;
 - (iv) installation or placement (as applicable), commissioning and testing (by the State or a third party engaged by the State) of the Group 4 FF&E;
 - (v) training the State and State Associates in the use of the EGRP FF&E;
 - (vi) carrying out induction training for the State and State Associates;

- (vii) conducting functionality scenario testing to ensure that the Facility Operator and State Associates (as applicable) may provide the Facility Functions in accordance with the State's operational requirements;
 - (viii) stocking up the Facility with items necessary for the provision of the Facility Functions (except for those items for which Project Co is responsible);
 - (ix) conducting dry run rehearsals of the Transition process; and
 - (x) the conduct of such other activities or exercises reasonably identified by the Project Director as constituting State Operational Commissioning.
- (b) **(Draft State Operational Commissioning Plan):** The State will provide Project Co with a copy of the draft State Operational Commissioning Plan 6 Months prior to each Date for Technical Completion.
 - (c) **(Final State Operational Commissioning Plan):** The State will provide Project Co with a copy of the final State Operational Commissioning Plan 3 Months prior to each Date for Technical Completion.
 - (d) **(Project Co comments):** Project Co may provide the State with any comments it has in respect of the State Operational Commissioning Plan.
 - (e) **(Time for Project Co comments):** Project Co must provide any comments under paragraph (d) within 15 Business Days of the receipt of the relevant State Operational Commissioning Plan.
 - (f) **(State to amend):** The State must amend the State Operational Commissioning Plan to the extent that undertaking the State Operational Commissioning in accordance with the State Operational Commissioning Plan would materially adversely affect the ability of Project Co to meet its obligations under this Agreement.
 - (g) **(Integration with Commercial Acceptance Plan):** Project Co must ensure that the activities described within the State Operational Commissioning Plan are integrated with and included within Project Co's relevant Commercial Acceptance Plan.
 - (h) **(State Operational Commissioning):** The State must carry out the State Operational Commissioning in accordance with the State Operational Commissioning Plan and the Commercial Acceptance Plan.
 - (i) **(Compliance):** The State will procure that the State Associates who access the Construction Sites or the Facility during each Commissioning Period:
 - (i) comply with the State Operational Commissioning Plan and the Site Access and Interface Protocols; and
 - (ii) subject to the terms of the State Operational Commissioning Plan and the relevant State Access Period, do not interfere with, prevent, disrupt or delay Project Co in achieving Commercial Acceptance.
 - (j) **(Reasonable assistance):** Project Co must provide all reasonable assistance to the State in carrying out the State Operational Commissioning.

18.3 Project Co activities during the Commissioning Period

- (a) During each Commissioning Period Project Co must:

- (i) provide the Commissioning Period Services in accordance with this Agreement and Best Operating Practices;
 - (ii) otherwise prepare for Commercial Acceptance in accordance with the Commercial Acceptance Plan;
 - (iii) assist the State in carrying out the State Operational Commissioning; and
 - (iv) not compromise, hinder, disrupt or otherwise adversely affect the carrying out by the State of the State Operational Commissioning.
- (b) The costs of performing the Stage 1 Commissioning Period Services will be a debt due and payable by the State to Project Co as a lump sum adjustment to the first Quarterly Services Payment.
- (c) If, in performing the Stage 2 Commissioning Period Services, Project Co is prevented from or fails to perform the Services, this will not:
- (i) result in any adjustment to Project Co's Quarterly Services Payment or State Loan Payment;
 - (ii) result in any Abatement of the Quarterly Services Payment or State Loan Payment; and
 - (iii) entitle the State to make any Claim against Project Co in connection with the performance by Project Co of the Stage 2 Commissioning Period Services or failure by Project Co to perform the Services.

19. Commercial Acceptance

19.1 Compliance with requirements as if Technical Completion

Project Co must comply with the requirements set out in Clauses 17.1, 17.3, 17.4, 17.5, 17.6, 17.8 and 17.9 as if:

- (a) references to Technical Completion referred to in those Clauses 17.1, 17.3, 17.4, 17.5, 17.6, 17.8 and 17.9 are references to Commercial Acceptance;
- (b) the reference to the Technical Completion Plan in Clause 17.3 is a reference to the Commercial Acceptance Plan;
- (c) references to the Technical Completion Report in Clauses 17.5, 17.6 and 17.9 are references to the Commercial Acceptance Report; and
- (d) references to the Independent Certifier in Clauses 17.1, 17.3(b)(iii)-(v), 17.4, 17.5, 17.6, 17.8 and 17.9 are references to the Project Director.

19.2 Submission of Commercial Acceptance Plan

- (a) At the same time as Project Co notifies the State of the date on which it reasonably expects to achieve each Technical Completion in accordance with Clause 17.1, Project Co must submit to the State and the Project Director a draft Commercial Acceptance Plan for review in accordance with Schedule 3 (Review Procedures).
- (b) The Project Director may require Project Co to include additional Commercial Acceptance Tests in the Commercial Acceptance Plan if the Project Director considers that the Commercial Acceptance Tests proposed by Project Co are

not sufficient to demonstrate that the Commercial Acceptance Criteria are satisfied.

19.3 Determination of Commercial Acceptance

- (a) If in the opinion of the Project Director, Commercial Acceptance is achieved, the Project Director must issue to Project Co a certificate of Commercial Acceptance stating the date on which Project Co achieved Commercial Acceptance.
- (b) If Commercial Acceptance has not been achieved, the Project Director must issue to Project Co and the State a notice containing details of the outstanding Commercial Acceptance Criteria that must be satisfied by Project Co as a condition precedent to achieving Commercial Acceptance.
- (c) Subject to paragraph (e), the Project Director may in its sole and absolute discretion, issue a certificate of Commercial Acceptance if Commercial Acceptance has been achieved notwithstanding that Project Co has not issued a notice in accordance with Clause 17.6(a) (as amended by Clause 19.1).
- (d) The issue of a certificate of Commercial Acceptance in accordance with this Clause does not constitute evidence that Project Co has satisfied the FFP Warranty.
- (e) Notwithstanding any other provision of this Agreement, the Project Director:
 - (i) is under no obligation to certify Stage 1 Commercial Acceptance prior to the Original Date for Stage 1 Commercial Acceptance regardless of whether Stage 1 Commercial Acceptance has been achieved prior to the Original Date for Stage 1 Commercial Acceptance;
 - (ii) must not certify Stage 1 Commercial Acceptance prior to the Original Date for Stage 1 Commercial Acceptance without the consent of Project Co (which consent must not be unreasonably withheld or delayed).

20. Transition of Existing Facility

20.1 Transition Plan

- (a) Without limiting Project Co's obligations under this Clause 20 or Schedule 18 (D&C Plans and Reports), the State will notify Project Co of its intended Transition activities 6 Months prior to the Date for Stage 1 Commercial Acceptance.
- (b) Project Co must submit the Transition Plan to the State for review in accordance with Schedule 3 (Review Procedures) 3 Months prior to the Date for Stage 1 Commercial Acceptance.
- (c) Except to the extent otherwise agreed, the Transition Plan must incorporate the State's intended Transition activities referred to in paragraph (a).
- (d) Project Co must submit an updated Transition Plan to the State for review and approval in accordance with Schedule 3 (Review Procedures) 1 Month prior to the Date for Stage 1 Commercial Acceptance.

20.2 State Transition Responsibilities

- (a) The State must procure that:

- (i) the Transition Working Group is available on reasonable notice and at regular intervals during the Stage 1 Commissioning Period to review, assist and provide input into the Stage 1 Commercial Acceptance Plan and the Operating Plans, Reports and Manuals;
 - (ii) the Contract Administrator manages the transition of all Existing Facility functions during the transition process;
 - (iii) to the extent reasonably required by Project Co and where agreed with the State, Project Co has access to the Existing Facility and related facilities prior to Transition in order to relocate the Group 2 FF&E;
 - (iv) on or before Transition, each Existing Facility employee:
 - A. removes all personal effects from the Existing Facility; and
 - B. is available to undertake all necessary training required by the Contract Administrator.
- (b) During the Transition Period the State will be responsible for:
- (i) packing files, computer equipment and documents;
 - (ii) nominating the locations to which boxes, furniture and computer equipment shall be moved;
 - (iii) unpacking boxes once moved to their nominated locations in the Stage 1 Facility; and
 - (iv) transferring any hard copy and electronic files which are required to be transferred from the Existing Facility to the Stage 1 Facility after the Operational Commencement Date.

20.3 Project Co Transition Responsibilities

During the Transition Period Project Co will be responsible for:

- (a) moving files, computer equipment and documents from the Existing Facility once packed to the locations in the Stage 1 Facility as directed by the Contract Administrator; and
- (b) moving any Group 2 FF&E from the Existing Facility to the Stage 1 Facility.

21. Not used

21A Securitised Licence Structure

21A.1 Completion Price

- (a) In consideration of the execution of the Works, the State agrees to pay to Project Co the Completion Price by paying the Completion Payment on the Completion Payment Date.
- (b) The State has no obligation to pay the Completion Payment unless and to the extent that the State receives the corresponding Receivables Purchase Payment from Finance Co under the Receivables Purchase Deed or Funding Portion under the State Loan Agreement.

- (c) The amount of the Completion Payment and the corresponding Receivables Purchase Payment may only be adjusted:
 - (i) to reflect a Change Compensation Event occurring prior to the Date of Stage 2 Completion in respect of which finance has been provided under the Finance Documents (and such finance is to be applied in respect of amounts owing to the Builder) and calculated in accordance with Section 2.3A of Part A of Schedule 4 (Change Compensation Principles); and
 - (ii) otherwise by agreement in writing between the parties prior to the Date of Stage 2 Completion,

provided that no adjustment to the Completion Payment or the corresponding Receivables Purchase Payment will affect the limitation referred to in Clause 21A.1(b).
- (d) Notwithstanding any other clause of any Project Document, the State may not set off any amount due and payable by Project Co or Finance Co to the State under the Project Documents against the Completion Payment.
- (e) If the Completion Payment is adjusted in accordance with Clause 21A.1(c), the State and Project Co agree to adjust the Licence Payment payable under the Operating Phase Licence in accordance with Section 2.3A of Part A of Schedule 4 (Change Compensation Principles).
- (f) To the extent it has not already passed, all right, title and interest of Project Co or Finance Co in the Receivables to which the Completion Payment applies passes to the State on payment by the State under Clause 21A.1(a).
- (g) Notwithstanding anything else in the Project Documents, the State acknowledges that, if the Receivables Purchase Payment is not received in full or at all under the Receivables Purchase Deed, or the Funding Portion is not received in full or at all under the State Loan Agreement, the State's only right or remedy in respect of such non-payment is the relief from payment of the Completion Payment under Clause 21A.1(b).

21A.2 Securitised Modification Payment

- (a) If a Change Compensation Event occurs on or after the Date of Stage 2 Completion and the State requests that Project Co (either itself or via Finance Co), and Project Co (or Finance Co) agrees to provide financing for that event under the Change Compensation Principles, the State must pay the Securitised Modification Payment to Project Co (or as Project Co directs) on the Additional Purchase Date.
- (b) The State has no obligation to pay the Securitised Modification Payment unless and to the extent that it receives the corresponding additional Receivables Purchase Price from Finance Co under the Receivables Purchase Deed in relation to that Change Compensation Event.
- (c) The State may not set off any amount due and payable by Project Co or Finance Co to the State under the Project Documents against any Securitised Modification Payment.
- (d) To the extent it has not already passed, all right, title and interest of Project Co in the Receivables to which the Securitised Modification Payment applies passes to the State on payment by the State under Clause 21A.2(a).
- (e) The State acknowledges that, if the additional Receivables Purchase Price in relation to a Change Compensation Event is not received in full or at all under

the Receivables Purchase Deed, the State's only right or remedy in respect of such non-payment is the relief from payment of the corresponding Securitised Modification Payment under Clause 21A.2(b).

21A.3 No change in risk allocation

- (a) The parties acknowledge and agree that neither the Securitised Licence Structure nor the State Loan Agreement is intended to result in an Increased State Risk Allocation.
- (b) If the State believes (on reasonable grounds supported by external advice) that the Securitised Licence Structure results or is likely to result in an Increased State Risk Allocation, then it may give Project Co a notice stating that the Securitised Licence Structure is to be amended to the extent necessary to ensure there is no Increased State Risk Allocation.
- (c) Project Co agrees to do anything reasonably requested by the State in a notice given by the State under Clause 21A.3(b) or otherwise reasonably necessary to modify the Securitised Licence Structure to ensure there is no Increased State Risk Allocation.
- (d) Project Co undertakes not to make any Claim inconsistent with the acknowledgement in Clause 21A.3(a).
- (e) Project Co acknowledges and agrees that:
 - (i) damages may not be an adequate remedy for the State for any failure by Project Co to comply with the undertaking in Clause 21A.3(a); and
 - (ii) if there is a breach or purported breach by Project Co of its obligation in Clause 21A.3(b), the State may seek and is entitled to injunctive or declaratory relief.

22. Defects

- (a) **(All Defects)**: Subject to paragraphs (b) and (f), Project Co must rectify all Defects during the Term regardless of whether or not such Defects are the subject of a notice under this Clause 22. Project Co's obligation to rectify Defects in the Off-Site Infrastructure or Off-Site Infrastructure Works ends at the end of the relevant Defects Liability Period referred to in Clause 14.3.
- (b) **(Notice)**: If the State Representative is of the opinion that there is a Defect, then the State Representative may give a notice to Project Co specifying the Defect, requiring Project Co to rectify the Defect and specifying a reasonable time within which this must occur.
- (c) **(Project Co to rectify)**: If a notice is given under paragraph (b), Project Co must rectify the Defect within the time specified in the State Representative's notice.
- (d) **(State may rectify)**: If the Defect is not rectified by Project Co within the time specified in the State Representative's notice, then the State is entitled to rectify the Defect itself or engage a third party to rectify the Defect and the cost of any such rectification work will be a debt due and payable by Project Co to the State.
- (e) **(Call on bond)**: Without limiting the States' rights in accordance with this Agreement or at Law, the State may require Project Co to call on any performance bond it holds for the Stage 1 Works and pay the State the amount called to satisfy the costs under paragraph (d).

- (f) **(Not affected)**: Neither the State's rights, nor Project Co's liability, whether in accordance with this Agreement or otherwise at Law in connection with Defects will be:
 - (i) affected or limited by the rights conferred upon the State by this Clause 22 or any other provision of this Agreement; or
 - (ii) affected or limited by the failure of the State to exercise any such rights.
- (g) **(Mural Works and Aboriginal Meetings Places)**: Project Co is not required to rectify Defects in the Mural Works and Aboriginal Meeting Places except to the extent that the relevant Defect was caused by the negligent, unlawful, wilful or fraudulent act or omission by Project Co or any Project Co Associate.

23. Operating Plans, Reports and Manuals

- (a) **(Submission and update)**: Project Co must prepare and submit to the State and the Independent Certifier and update and resubmit to the State and the Independent Certifier the Operating Plans, Reports and Manuals in accordance with Part F, Schedule 13 (Services Specification) for review in accordance with Schedule 3 (Review Procedures).
- (b) **(Delivery)**: Unless otherwise agreed in writing by the State, Project Co must perform the Services and deliver the Project in accordance with the Operating Plans, Reports and Manuals.
- (c) **(Compliance)**: Project Co must comply with the then current version of each Operating Plan, Report and Manual.

24. Operations

24.1 Services

- (a) Project Co must perform the Services throughout the Operating Phase:
 - (i) so that:
 - A. the Service Standards set out in Schedule 13 (Services Specifications) are met; and
 - B. the Facility complies at all times with the FFP Warranty; and
 - (ii) in accordance with Best Operating Practices, DCS Policy and otherwise in accordance with this Agreement.
- (b) If Project Co fails to perform the Services in accordance with this Agreement then Project Co will be subject to Abatement in accordance with Schedule 14 (Payment Schedule).
- (c) Project Co must, in performing the Services:
 - (i) minimise disruption to the Facility Operator in carrying out the Facility Functions;
 - (ii) not compromise any security requirements in connection with the Facility, as defined in DCS Policy;
 - (iii) ensure that at all times, the Facility meets the FFP Warranty; and

- (iv) provide all technical and managerial support and advice as reasonably required by the Facility Operator.

24.2 Performance Monitoring Program

Project Co must:

- (a) monitor its own performance in accordance with the Performance Monitoring Program; and
- (b) provide the Facility Operator with 24 hours written notice prior to undertaking all inspections and audits and allow the Facility Operator to attend such inspections and audits.

24.3 Deferral of Maintenance

- (a) Except where any delay or rescheduling would result in a breach of Law, the Contract Administrator may request that an activity described in the Monthly Works Plan be delayed or rescheduled if it is likely to disrupt the Facility Operator in carrying out the Facility Functions.
- (b) Project Co must comply with any such request of the Contract Administrator unless Project Co reasonably considers that the delay or rescheduling would cause or increase the likelihood of a Service Failure, in which case Project Co must notify the Contract Administrator of this opinion.
- (c) Upon receipt of a notice from Project Co under paragraph (b), the Contract Administrator may either withdraw its request for the activity to be delayed or rescheduled or require that the activity be delayed notwithstanding Project Co's notice, in which case Project Co must comply with the Contract Administrator's direction.
- (d) If the Contract Administrator requires the activity to still be delayed or rescheduled and a Service Failure occurs as a consequence of such delay or rescheduling, the Contract Administrator's direction will be deemed to be an Intervening Event.

24.4 Liaison

During the Operating Phase, Project Co must regularly liaise with:

- (a) the Facility Operator and Facility Staff in undertaking or preparing to undertake action which may impact upon the delivery of Facility Functions or upon the comfort or wellbeing of Facility Users or Prisoners; and
- (b) external advisers and Government Agencies as required by the Contract Administrator from time to time, in connection with the Services provided.

25. Training and induction during Operating Phase

25.1 Facility Staff training

Without limiting any other provision, Project Co must if notified in writing by the Facility Operator from time to time:

- (a) provide induction and training in accordance with the Facility Staff Induction and Training Program to all new Facility Staff;
- (b) without limiting Project Co's obligation under paragraph (a), provide training to Facility Staff nominated by the Facility Operator to enable them to deliver the

Facility Staff Induction and Training Program if required and ensure that all necessary training material is provided to facilitate the necessary on-site training by the Facility Staff; and

- (c) provide updated induction and training to Facility Staff if the Facility Staff Induction and Training Program is amended during the Term.

25.2 Services Training and Induction Program

Project Co must:

- (a) ensure all Project Co Associates involved in the performance of the Services undertake and successfully complete training and induction in accordance with the Services Training and Induction Program prior to performing Services at the Facility;
- (b) notify the Contract Administrator and Facility Operator upon each Project Co Associate's completion of the training and induction program;
- (c) provide ongoing training to Project Co Associates as agreed with the Facility Operator and at least annually;
- (d) ensure Project Co Associates involved in the performance of the Services attend training conducted by the Facility Operator annually and as otherwise notified by the Facility Operator from time to time; and
- (e) provide appropriate replacement staff so as to continue to perform the Services while Project Co Associates attend any required training.

25.3 Records

Project Co must retain records of all training records (including if reasonably practicable, by way of continuing professional development through 'tool box talks', training events, information sheets and on-the-job training) in order to demonstrate the competencies of all Project Co Associates engaged in delivering the Services at any time on request of the Contract Administrator.

25.4 Provision of State Security Measures

- (a) If Project Co requires that a Project Co Associate who has not attended and successfully completed the Services Training and Induction Program or met the requirements set out in Schedule 19 (Security Procedures) has access to the Secured Facility Area, Project Co must:
 - (i) request the Contract Administrator's prior written approval at least 48 hours before the Project Co Associate is required to have access to the Secured Facility Area including details of the proposed date, time, duration and reason for the access; and
 - (ii) request the Contract Administrator to provide the State Security Measures while the relevant Project Co Associate has access to the Secured Facility Areas.
- (b) The State must use its reasonable endeavours to provide the State Security Measures in accordance with a request submitted by Project Co in accordance with paragraph (a).
- (c) If the State is not able to provide the State Security Measures in accordance with a request submitted by Project Co in accordance with paragraph (a) it must

provide the State Security Measures as soon as practicable and as otherwise agreed by the State and Project Co.

- (d) A failure by the State to provide the State Security Measures in accordance with the request submitted by Project Co pursuant to paragraph (a) will not:
 - (i) be an Intervening Event;
 - (ii) relieve Project Co from or alter any of its Liabilities or obligations under the Agreement; or
 - (iii) prejudice the State's rights against Project Co.

25.5 Project Co liable for costs of State Security Measures

Project Co acknowledges that it is liable for and must pay to the State the reasonable costs incurred by the State in providing the State Security Measures and such amount will be a debt due and payable by Project Co to the State.

26. FF&E during the Operating Phase

26.1 Title and Responsibility for Risk

- (a) The State will own all FF&E during the Operating Phase.
- (b) Project Co must transfer title to any Group 1 FF&E and Group 3 FF&E:
 - (i) which is procured by Project Co prior to Stage 1 Commercial Acceptance at Stage 1 Commercial Acceptance; and
 - (ii) which is procured by Project Co after Stage 1 Commercial Acceptance, at the time of procurement,to the State, free from all Encumbrances.
- (c) Subject to the terms of this Agreement, Project Co will be responsible for the performance of and loss or damage to all Group 1 FF&E and Services Equipment during the Term.
- (d) Subject to the terms of this Agreement, the State will be responsible for the performance of and loss and damage to all Group 2 FF&E, Group 3 FF&E and Group 4 FF&E for the Operating Phase save to the extent caused by Project Co or a Project Co Associate.

26.2 Asset Register

- (a) Project Co must prepare and maintain an Asset Register in accordance with Schedule 13 (Service Specifications).

26.3 Maintenance and replacement of FF&E and during Operating Phase

- (a) **(Group 1 FF&E):** Project Co must maintain, replace and repair all Group 1 FF&E and Plant until the end of the Operating Phase in accordance with the Estate Services Plans and Schedule 13 (Services Specifications).
- (b) **(Maintenance and repair of Group 2 FF&E and Group 3 FF&E):** Project Co must maintain and repair all Group 2 FF&E and Group 3 FF&E until the end of the Operating Phase in accordance with the Estate Services Plans and Schedule 13 (Services Specifications).

- (c) **(Replacement of Group 2 FF&E and Group 3 FF&E):** Subject to paragraph (d), the State will, during the Term:
- (i) replace Group 2 FF&E and Group 3 FF&E during the Term if an item:
 - A. is not Fit for Purpose;
 - B. is exhibiting continuous faults; or
 - C. is leading to faults which are causing continual disruptions to the operation of the Facility as a result of being worn or tired;
 - (ii) notify Project Co of the Group 2 FF&E or Group 3 FF&E (as applicable) being replaced; and
 - (iii) in connection with replacements under paragraph (i), ensure that the replacement Group 2 FF&E or Group 3 FF&E (as applicable) does not materially increase the cost to Project Co or any Project Co Associate of performing the Services.
- (d) **(Cost of replacement):** The replacement of the Group 2 FF&E and the Group 3 FF&E in accordance with paragraph (c) will be at the State's Costs unless the need to replace the Group 2 FF&E or Group 3 FF&E is due to the failure of Project Co or any Project Co Associate to comply with Project Co's obligations under this Agreement in respect of that Group 2 FF&E or Group 3 FF&E in which case the reasonable replacement costs will be a debt due and payable by Project Co to the State.
- (e) **(Group 1 FF&E or Plant):** Where Project Co is required to replace Group 1 FF&E or Plant, it must do so using FF&E and Plant that:
- (i) has the same standard relative to the market for that FF&E and Plant at the time of replacement, as the Group 1 FF&E being replaced had relative to the market at the time that the Group 1 FF&E or Plant was purchased;
 - (ii) has at least the same levels of quality and are as technically up to date as that which would be used in accordance with Best Operating Practices;
 - (iii) has a design life equal to or greater than the terms of the Group 1 FF&E or Plant being replaced; and
 - (iv) does not materially increase operating or maintenance costs to the Facility Operator, the cost of any Reviewable Services or any other costs payable by the State (in relation to Group 1 FF&E or Plant where alternative FF&E on comparable terms is readily available and would not have had such an effect).
- (f) **(FF&E):** Project Co must:
- (i) ensure all items of FF&E are securely stored to prevent unauthorised access;
 - (ii) ensure all items of FF&E are accounted for and present on the completion of each activity or use;
 - (iii) ensure all fuel to be used in the performance of the Services is dispensed in a Non-Prisoner Area and accounted for via the use of a log book;

- (iv) ensure machinery and dispensing mechanisms have lockable fuel caps;
- (v) advise the Facility Operator promptly and no later than 3 Business Days after it becomes aware of any item of FF&E or Services Equipment which has not been accounted for and co-operate with the Facility Operator in conducting all necessary procedures to establish and rectify such events leading to the unaccountability;
- (vi) develop a tools management and safety policy and submit for review in accordance with Schedule 3 (Review Procedures);
- (vii) maintain records of FF&E and Services Equipment audits and make such records available to the Facility Operator on request; and
- (viii) ensure all deliveries of FF&E and Services Equipment within the Secure Perimeter occur during times agreed with the Facility Operator.

26.4 Services Equipment

Project Co must:

- (a) provide all Services Equipment;
- (b) maintain the Services Equipment in such a manner to ensure that the health and safety of Facility Users or Prisoners are not adversely affected; and
- (c) store all Services Equipment in a clean and tidy manner in areas agreed by the Facility Operator and restrict access to such areas in accordance with all DCS Policies.

27. Deferral of Refurbishment Work

- (a) **(Deferral)**: Project Co may only defer any Refurbishment Works in accordance with this Clause 27 and only if, notwithstanding such deferral, Project Co will continue to satisfy the FFP Warranty.
- (b) **(Proposal)**: If Project Co proposes to defer any Refurbishment Works specified in any Estate Services Plan, submitted for review in accordance with Schedule 3 (Review Procedures), it must identify in any updated Estate Services Plan each proposed deferral and the period of time of deferral.
- (c) **(State may reject)**: The State may reject any Estate Services Plan updated in accordance with paragraph (b):
 - (i) in accordance with Schedule 3 (Review Procedures); or
 - (ii) if the Contract Administrator is of the view, acting reasonably, that such plans will not enable Project Co to meet its obligations under paragraph (a) or for the reasons set out in (d) below.
- (d) **(Reasons for (c) rejection)**: The State may reject any Estate Services Plan updated in accordance with paragraph (b) if Project Co's proposed deferral under paragraph (b) would, if approved, result in the relevant Refurbishment Works being deferred by a period (measured in Operating Years) equal to or greater than *[not disclosed]* of the period for the relevant Refurbishment Works specified in the Estate Services Plan immediately prior to that updated Estate Services Plan in which the Refurbishment Works are proposed to be deferred.

28. Minor Works

28.1 Process for performance of Minor Works

- (a) **(Facility Operator notice):** The Facility Operator may at any time from the Operational Commencement Date, notify Project Co of any Minor Works required to be performed by way of a notice entitled 'Minor Works Notice' (**Minor Works Notice**).
- (b) **(FM Subcontractor Notice):** As soon as possible but in any event no later than 5 Business Days of receipt by Project Co of a Minor Works Notice, Project Co must procure the FM Subcontractor to prepare and submit for the approval of the Facility Operator a notice entitled '**Minor Works Quote**' which sets out:
- (i) the Minor Works Price calculated on an open book basis with the breakdown of goods, services, labour, equipment, materials, subcontract costs and any recurring costs clearly set out and available for review by the Facility Operator;
 - (ii) an estimate of the time to complete the proposed Minor Works;
 - (iii) details of any Subcontractors proposed to be engaged to implement the Minor Works;
 - (iv) details of the impact, if any, of the Minor Works on:
 - A. the provision by Project Co of the Services;
 - B. Project Co's ability to comply with this Agreement; or
 - C. the undertaking by the State of the Facility Functions;
 - (v) whether the sum of the Minor Works Price and all other payments paid or payable for Minor Works undertaken in accordance with this Clause 28 in that Operating Year will exceed the Minor Works Limit and if not, the amount available for future Minor Works in that Operating Year; and
 - (vi) any other particulars reasonably requested by the Facility Operator or the Contract Administrator, as applicable.
- (c) **(Facility Operator to advise):** Within a reasonable time of receiving a Minor Works Quote, the State must ensure that the Facility Operator advises Project Co, whether the Minor Works Quote is approved or rejected by the Facility Operator.
- (d) **(Rejection):** If the Facility Operator rejects the Minor Works Quote then the Facility Operator may:
- (i) elect not to proceed with the proposed Minor Works;
 - (ii) proceed to implement the works itself or engage a third party to carry out the required works, in which case the works will not be Minor Works; or
 - (iii) take such other course of action it considers necessary in the circumstances.

- (e) **(Approval):** If the Facility Operator approves the Minor Works Quote, Project Co must carry out the Minor Works for the Minor Works Price included in the relevant Minor Works Quote.
- (f) **(Not to commence):** Project Co must not commence any work and will not incur any cost, and will not have any entitlement to make any Claim in connection with any proposed Minor Works unless a Minor Works Quote has been approved in accordance with paragraph (c).

28.2 Notice of Minor Works

- (a) If in Project Co's opinion, any direction given by the State, the Contract Administrator or the Facility Operator other than any such direction given in a Minor Works Notice constitutes or involves Minor Works, Project Co must provide written notice to this effect to the Facility Operator within 48 hours of receipt of the direction.
- (b) If the Facility Operator agrees that the direction constitutes and involves Minor Works then the Facility Operator will serve a Minor Works Notice and the process for performance of the Minor Works will proceed in accordance with Clause 28.1.
- (c) Project Co must not commence any work the subject of a direction which it believes constitutes a direction to perform Minor Works unless the Facility Operator agrees that the direction constitutes Minor Works and the Facility Operator approves the Minor Works Quote under Clause 28.1(c).

28.3 Variations to the approved Minor Works Costs

- (a) Unless otherwise agreed with the Facility Operator at the time it receives the Minor Works Quote, the Minor Works Price must be a fixed lump sum.
- (b) Where the Facility Operator has agreed in accordance with paragraph (a) that the Minor Works Price is not a fixed lump sum price, or where the actual Minor Works Costs incurred in connection with Minor Works implemented in accordance with Clause 28.1(e) are likely to exceed the Minor Works Price approved in accordance with Clause 28.1(c):
 - (i) Project Co must ensure that prior to exceeding the approved Minor Works Price, it advises the Facility Operator and the Contract Administrator that the Minor Works Cost is likely to exceed the approved Minor Works Price and the amount by which it proposes the Minor Works Price should be increased and the reasons for this;
 - (ii) the State must ensure that the Facility Operator advises Project Co within 48 hours of receiving the information required to be provided under paragraph (i), whether the Facility Operator approves the increased Minor Works Price and the FM Subcontractor must not proceed with the additional Minor Works until such time as such approval is received; and
 - (iii) if the Facility Operator does not approve the additional Minor Works Price, the Facility Operator may direct Project Co to immediately discontinue the Minor Works and must (if applicable) pay Project Co the Minor Works Cost for the Minor Works undertaken by the FM Subcontractor, and any reinstatement costs reasonably incurred, up to the date of any such direction up to the amount of the approved Minor Works Price.

28.4 Completion

Project Co must notify the Facility Operator upon completion of the Minor Works implemented in accordance with Clause 28.1(e).

28.5 Payment for Minor Works

- (a) **(No increase)**: Subject to paragraph (b), Project Co acknowledges that it is not be entitled to any increase to the Quarterly Service Payment as a result of performing any Minor Works.
- (b) **(State to pay)**: If:
 - (i) the performance of any Minor Works will result in the Minor Works Limit for any Operating Year being exceeded; and
 - (ii) the State has approved the Minor Works that resulted in the Minor Works Limit being exceeded in accordance with Clause 28.1(c),the State must pay for Minor Works that exceed the Minor Works Limit within 20 Business Days of receipt of an Invoice from Project Co.
- (c) **(No Margin)**: Project Co, the FM Subcontractor and any other Subcontractor who undertakes the Minor Works are not entitled to payment of any Margin in connection with the Minor Works other than the FM Subcontractor Margin in accordance with Schedule 4 (Change Compensation Principles).
- (d) **(Minor Works Limit)**: If the Minor Works Limit for the previous Operating Year is not fully expended, the State may require:
 - (i) Project Co to pay any amount of the relevant Minor Works Limit not expended and such amount will be a debt due and payable by Project Co to the State; or
 - (ii) any amount of the relevant Minor Works Limit not expended to be carried over to the following Operating Year in which case the amount of the Minor Works Limit for that following Operating Year will be increased by the amount not expended.
- (e) **(Project Co to pay)**: If 1 Month prior to the end of the Term the then current Minor Works Limit for that Operating Year has not been fully expended or repaid in accordance with paragraph (d)(i), Project Co must pay to the State the amount of any remaining monies as a lump sum at the time of presentation of the last Invoice in accordance with Clause 36.4 and such amount will be a debt due and payable to the State.
- (f) **(Final Month payment)**: The State must pay for any Minor Works undertaken during the final Month prior to the end of the Term within 20 Business Days of receipt of an Invoice from Project Co.

28.6 Subcontract provisions

Project Co must ensure that any FM Subcontract in connection with Minor Works contains:

- (a) provisions (including acknowledgements, agreements and warranties) to give effect to the regime set out in Clause 28.1 to 28.5; and
- (b) acknowledgements by the FM Subcontractor that:

- (i) it will not be entitled to make any Claim in connection with the Minor Works unless it strictly complies with the notice provisions set out in this Clause 28; and
- (ii) it will not be entitled to payment of any Margin (other than the FM Subcontractor Margin) for Minor Works.

29. Prisoner Works

- (a) **(State notice):** The State may at any time, notify Project Co of any Services or any addition, decrease, omission, deletion or removal to or from the Facility that the State requires the Prisoners to perform (**Prisoner Works**) by way of a notice entitled 'Prisoner Works Notice' (**Prisoner Works Notice**) setting out:
 - (i) an outline of the proposed Prisoner Works, including an overview of the method of performing the Prisoner Works; and
 - (ii) an estimate of the time to complete the proposed Prisoner Works and the date and time when the proposed Prisoner Works will be performed.
- (b) **(Access):** Project Co must provide any access required for the completion of the applicable Prisoner Works in accordance with the Prisoner Works Notice.
- (c) **(Impact of Prisoner Works):** The parties agree that the performance of Prisoner Works will not:
 - (i) result in any adjustment to Project Co's Quarterly Services Payment, or State Loan Payment, except where the Prisoner Works gives rise to a Compensable Intervening Event;
 - (ii) result in any Abatement of the Quarterly Services Payment; or
 - (iii) entitle the State to make any Claim against Project Co in connection with the performance of the Prisoner Works.
- (d) **(Completion):** The State must promptly notify Project Co in writing upon completion of the Prisoner Works.
- (e) **(Prisoner Works Handback):** Within 10 Business Days of receipt of a notice under paragraph (d), Project Co must submit to the State in accordance with Schedule 3 (Review Procedures) a Prisoner Works Handback Notice which must:
 - (i) attach copies of any required changes to the Operating Plans Reports and Manuals as a result of the Prisoner Works;
 - (ii) set out detailed particulars of the occurrence and impact of the relevant Prisoner Works including any impact on:
 - A. the workmanship, quality, appearance or durability of any part of the Facility (including any items of FF&E);
 - B. the warranties given by Project Co in the Agreement including the Facility meeting, or the ability to maintain the Facility so that it meets, the FFP Warranty; or
 - C. the performance of any other of Project Co's obligations under the Project Documents.

- (iii) contain a warranty by Project Co that the Facility, upon completion of the Prisoner Works the subject of the Prisoner Works Handback Notice:
 - A. continues to meet, and remains capable of being maintained so as to meet the FFP Warranty and the requirements of the Agreement; and
 - B. will enable Project Co at all times during the Operating Phase to provide the Services in accordance with the Agreement,except to the extent that it is agreed or determined that the Prisoner Works have had an adverse effect on, the matters referred to in paragraph (ii).

30. Intervening Events

30.1 Intervening Events

- (a) If Project Co believes an Intervening Event has occurred which has prevented or delayed, or will prevent or delay, performance of the Services then Project Co must submit a Change Notice in accordance with Schedule 4 (Change Compensation Principles).
- (b) A notice submitted under paragraph (a) must contain:
 - (i) details of:
 - A. the nature of the Intervening Event including details of the basis on which Project Co has formed the opinion that the event constitutes an Intervening Event;
 - B. the obligations affected by the Intervening Event and an estimate of the time (if any) during which Project Co will be unable to carry out the affected obligation; and
 - C. any damage caused by the Intervening Event;
 - (ii) any other information required by the State; and
 - (iii) if Project Co believes the Intervening Event is a:
 - A. Compensable Intervening Event, details of any amount, calculated in accordance with Part A, Section 7.4 of Schedule 4 (Change Compensation Principles), to which it considers it is entitled; or
 - B. Force Majeure Event for which Project Co is entitled to payment under Clause 30.7, details (including evidence to the State's satisfaction) that the circumstances referred to in Clause 30.7 have occurred and details of the calculation of any payment claimed in accordance with Clause 30.7.
- (c) Within 5 Business Days of the date of each Change Notice submitted under this Clause 30, the parties must seek to agree on:
 - (i) whether the occurrence set out in the Change Notice is an Intervening Event;

- (ii) the consequences and the required relief (if any);
 - (iii) the action Project Co is required to take to minimise the consequences of the Intervening Event; and
 - (iv) all insurance moneys to which Project Co will be entitled as a result of an Intervening Event.
- (d) After the meeting under paragraph (c), the State will provide Project Co minutes of meeting, including detailing any matters agreed.

30.2 Conditions Precedent to relief

It is a condition precedent to any relief or entitlement in connection with an Intervening Event being granted in accordance with this Agreement, that:

- (a) Project Co submits its Change Notice and any updated Change Notice in accordance with and has otherwise complied with this Clause 30;
- (b) neither Project Co nor any Project Co Associate has, by act or omission (other than any act or omission expressly permitted and undertaken in accordance with this Agreement), directly or indirectly caused the Intervening Event;
- (c) the cause of the Intervening Event was beyond the reasonable control of Project Co or any Project Co Associate; and
- (d) Project Co has taken and is continuing to take all proper and reasonable steps:
 - (i) to minimise the duration of the Intervening Event; and
 - (ii) to avoid or minimise the consequences of the Intervening Event, including:
 - A. by putting in place temporary measures reasonably required by the State; and
 - B. by continuing to take proper and reasonable steps (including expenditure of money, rescheduling of manpower and resources and implementing appropriate temporary measures) to cure, avoid or minimise the consequence of the Intervening Event (including any damage to the Facility).

30.3 Obligations suspended

- (a) Subject to paragraph (c), to the extent that the Intervening Event prevents Project Co from performing the Services in accordance with this Agreement:
 - (i) the obligation to perform such Services will be suspended; and
 - (ii) the failure to perform such suspended obligations will not be a breach of this Agreement by Project Co, an Event of Default or an Immediate Termination Event,

but only until the Intervening Event ceases to prevent performance of the relevant obligation, or would have ceased to prevent performance had Project Co complied with Clause 30.2(d).
- (b) Nothing in this Clause 30 entitles Project Co to any relief from its obligations in accordance with this Agreement which are not affected by the Intervening Event.

- (c) Where an Intervening Event results from State Prisoner Damage, Section 4.11 of Schedule 14 (Payment Schedule) will apply.

30.4 Payment

Notwithstanding that:

- (a) Project Co's obligation to perform the Services affected by any Intervening Event is suspended; or
- (b) the Services are being provided by the State in accordance with this Agreement, the State will continue to pay the Quarterly Service Payment and State Loan Payment in connection with the Services affected by the Intervening Event for the period of suspension under Clause 30.3 after deducting:
 - (c) the amount of recurrent costs which are not in fact incurred by Project Co during the period, because the obligation to provide the relevant Services has been suspended or those Services are being provided by the State in accordance with this Agreement; and
 - (d) to the extent that the Intervening Event or the risk giving rise to the Intervening Event is required to be insured against in accordance with this Agreement, the amounts of such insurances that are paid or would have been payable had Project Co complied fully with its obligations in accordance with this Agreement.

30.5 Compensable Intervening Events

If Project Co's obligations are suspended under Clause 30.3 because of a Compensable Intervening Event, the State will pay Project Co an amount calculated in accordance with Schedule 4 (Change Compensation Principles), provided that Project Co has complied and continues to comply with Clause 30.2(d) including by minimising the impact of the Compensable Intervening Event and its costs resulting from the Compensable Intervening Event.

30.6 Cessation of Intervening Event

Project Co must:

- (a) notify the State immediately after it ceases to be prevented from performing any of its obligations in accordance with this Agreement as a result of an Intervening Event; and
- (b) once any necessary repairs to, or reconstruction of the Works or the Facility has been completed by Project Co in accordance with this Agreement, immediately recommence performance of all obligations suspended as a result of the Intervening Event, and the State may no longer exercise its rights under this Clause 30 in connection with the relevant Intervening Event.

30.7 Relief for Force Majeure

- (a) **(Abatement during force majeure):** Notwithstanding that:
 - (i) Project Co's obligations to perform the Services affected by a Force Majeure Event are suspended; or
 - (ii) the Services are being provided by the State in accordance with this Agreement,

subject to paragraph (c), the Quarterly Service Payment (and State Loan Payment in accordance with Clause 36.3(e)) will still be subject to abatement in accordance with the Abatement Regime to the extent Services are not being provided in accordance with this Agreement as a result of a Force Majeure Event.

(b) **(Event of Default):** Any application of the Abatement Regime in accordance with Clause 30.7(a) to the extent applicable as a result of any Force Majeure Event, will not be included in the calculation of Abatements for the purposes of determining whether an Event of Default or Immediate Termination Event has occurred, provided that Project Co is complying with its obligations under Clause 4.3.

(c) **(Application):** If:

- (i) Project Co's obligations are suspended due to the occurrence of a Force Majeure Event, in accordance with Clause 30.3;
- (ii) the suspension results in the Quarterly Services Payment or State Loan Payment being abated to such an extent that the sum of the components of the Quarterly Service Payment and State Loan Payment (without double counting) is less than the sum of:
 - A. each Project Entity's scheduled principal repayments and interest on its Debt obligations; and
 - B. *[not disclosed]* of the Fixed Force Majeure Costs; and
- (iii) the circumstances giving rise to the Force Majeure Event are not:
 - A. risks which are, or should be insured in accordance with this Agreement;
 - B. risks which are Uninsurable (as agreed or determined); or
 - C. insurable risks customarily insured by operators of facilities similar to the Facility or providing services similar to the Services,

the State must pay Project Co the amount calculated in accordance with paragraph (d) in accordance with Schedule 4 (Change Compensation Principles).

(d) **(Amount payable):** For the duration of the Force Majeure Event for which Project Co is entitled to payment under paragraph (c), the amount of the payment to be made by the State to Project Co must be the minimum amount necessary to enable the relevant Project Entity to pay:

- (i) its scheduled principal repayments and interest on its Debt; and
- (ii) *[not disclosed]* of the Fixed Force Majeure Costs,

less the Quarterly Services Payment and State Loan Payment payable to Project Co under paragraph (a).

(e) **(Dispute):** Any dispute as to any amounts payable under this Clause is to be determined by an Independent Expert in accordance with Clause 45.

30.8 Alternative arrangements

Without limiting Clause 43, during the period of suspension for a Force Majeure Event during the Operating Phase which impacts on the Facility, the State may make alternative arrangements for the performance of any suspended obligations (without incurring any liability to Project Co).

31. Repricing Reviewable Services

31.1 Preparation of repricing

- (a) No later than 15 Months before each Reviewable Services Date, Project Co must meet with the State to agree:
 - (i) changes to be made to Schedule 13 (Services Specifications) for the Reviewable Services for the purposes of the next Reviewable Services Term including in connection with any Changes in Mandatory Requirements and State Modifications;
 - (ii) a timetable for the repricing of the Reviewable Services; and
 - (iii) any bundling of the Reviewable Services for repricing.
- (b) No later than 13 Months before each Reviewable Services Date, Project Co must provide the State with Schedule 13 (Services Specifications) and Schedule 14 (Payment Schedule) updated in accordance with paragraph (a) for review and approval by the State in accordance with Schedule 3 (Review Procedures).
- (c) If:
 - (i) agreement is reached in connection with the matters referred to in paragraph (a), the repricing of Reviewable Services shall proceed in accordance with this Clause 31 as amended in accordance with the matters agreed; or
 - (ii) no agreement is reached in connection with any of the matters in paragraph (a), insofar as this relates to:
 - A. changes to be made to Schedule 13 (Services Specifications) or Schedule 14 for the Reviewable Services for the purposes of the next Reviewable Services Term (other than pricing for the relevant Reviewable Services), Schedule 13 (Services Specifications) shall be changed in accordance with the State's requirements;
 - B. the timetable for the repricing of the Reviewable Services, the timetable in this Clause 31 shall prevail; or
 - C. any bundling of the Reviewable Services for repricing, the Reviewable Services shall be bundled as required by the State.

31.2 Request for offer to reprice

- (a) **(Offer):** The Contract Administrator may request Project Co to submit an offer for the provision of each Reviewable Service or a package of the Reviewable Services (as agreed or determined in accordance with Clause 31.1) for the ensuing Reviewable Services Terms.

- (b) **(Project Co offer)**: Whether or not the Contract Administrator has made a request in accordance with paragraph (a), no later than 11 Months before the Reviewable Services Date, Project Co may submit an offer for the provision of the Reviewable Services for the ensuing Reviewable Services Term as agreed or determined in accordance with Clause 31.1.
- (c) **(Offer detail)**: Project Co's offer must:
 - (i) break down the price for each of the Reviewable Services for the ensuing Reviewable Services Terms; and
 - (ii) detail all of the relevant factors and inputs into the proposed price including proposals in connection with labour and materials required to perform the Services.
- (d) **(Offer submitted)**: If Project Co submits an offer in accordance with paragraph (a) or (b), then:
 - (i) for a period of 4 Months after the offer is submitted the Contract Administrator agrees to negotiate exclusively with Project Co for the provision of the relevant Reviewable Service during the applicable ensuing Reviewable Services Term; and
 - (ii) the Contract Administrator will, by a date no later than 1 Month after the expiration of that 4 Month period, advise Project Co whether:
 - A. Project Co's final offer is acceptable to the State for the provision of the relevant Reviewable Service during the applicable ensuing Reviewable Services Term; or
 - B. whether the State requires a competitive tender to be conducted under Clause 31.4.
- (e) **(Offer remains open)**: Notwithstanding that the State may require Project Co to conduct a competitive tender in accordance with Clauses 31.4(d)(ii) Project Co's offer must remain open for subsequent acceptance by the State under Clause 31.1 until the Tender Expiry Date.

31.3 No offer made

If Project Co does not submit an offer under Clause 31.2(a) or 31.2(b):

- (a) provision of those Reviewable Services will continue on the then current terms and pricing for the ensuing Reviewable Services Term; or
- (b) without limiting the State's rights in accordance with this Agreement, the State may require a competitive tender to be conducted in accordance with Clause 31.4.

31.4 Competitive tender

- (a) **(Competitive Tender)**: Within 1 Month of the State's request under Clause 31.2(d) or Clause 31.3(b), if the State requires a competitive tender pursuant to Clause 31.1 or 31.3, Project Co must conduct the competitive tender in accordance with this Clause 31.4.
- (b) **(Review of request for tender)**: Project Co must provide to the Contract Administrator, the request for tender Project Co proposes to issue to prospective tenderers and the list of proposed tenderers for each of the Reviewable Services that are to be put out to competitive tender, (which must address the criteria in

paragraphs (c) and (e)), for review in accordance with Schedule 3 (Review Procedures).

- (c) **(Request for tender content):** The proposed request for tender must:
- (i) provide such information concerning the Project, the relevant Reviewable Services and the Project Documents as the State reasonably requires to ensure the tenderers are fully informed of the opportunity tendered (including details of the evaluation criteria set out in paragraph (e));
 - (ii) impose a duty of confidentiality on tenderers;
 - (iii) require tenders to be conforming, and irrevocable until 1 Month after the relevant current Reviewable Services Term;
 - (iv) require tenderers to comply with the Subcontracting requirements set out in Clause 5.13;
 - (v) attach a draft Subcontract:
 - A. substantially on the same terms (other than price and term and any amendments required in accordance with Clause 31.1) as the current Subcontract for the provision of those tendered Reviewable Services; and
 - B. which provides for the review of those Reviewable Services in accordance with the terms of this Clause 31; and
 - (vi) require tenderers to accept the terms of the draft Subcontract.
- (d) **(Offers):** Project Co must procure offers in response to the request for tender reviewed by the Contract Administrator in accordance with paragraph (a), by competitive tender from at least 3 experienced and capable service providers for the relevant component of the Reviewable Services which may include any one of the existing FM Subcontractor or Project Co but not more than any one of these parties for each component of the Reviewable Services (without the consent of the Contract Administrator), and otherwise must not include (without the consent of the Contract Administrator):
- (i) any Project Co Associate;
 - (ii) any Related Body Corporate to any other of the service providers asked by Project Co to submit an offer; or
 - (iii) any service provider that has not received the prior approval of the State (which must not be unreasonably withheld).
- (e) **(Content of offers):** Each offer obtained under paragraph (d) must address the following criteria:
- (i) details of the contract price, which reflect a competitive pricing of those Reviewable Services in the then current market;
 - (ii) current capacity and capability to carry out the Reviewable Services over the Reviewable Services Term, including current workload and resources plans, key people, subcontractors and consultants;
 - (iii) previous performance of services similar to the relevant Reviewable Services together with referees;

- (iv) financial capacity; and
- (v) demonstration that Project Co will be able to continue to meet the relevant Performance Standards.

31.5 Sufficient information

Project Co will, within 3 Months of the notice from the State under Clause 31.2(d)(ii) or 31.3(b) provide to the Contract Administrator:

- (a) copies of all conforming offers it has been given under the tender pursuant to Clause 31.4;
- (b) Project Co's evaluation report in connection with each offer;
- (c) Project Co's recommendation as to the preferred tenderer; and
- (d) such further details as the Contract Administrator reasonably requires in relation to the tender and the offers.

31.6 Consultation

- (a) During the period of 1 Month following provision of the information under Clause 31.5, Project Co will consult with the State concerning the offers for the provision of Reviewable Services made in accordance with Clause 31.4, to attempt to reach agreement on the appointment of one of the tenderers for the provision of the Reviewable Services for the ensuing Reviewable Services Term having regard to:
 - (i) the experience and capability of each tenderer;
 - (ii) the extent to which each offer provides value for money to the State as against each of the other offers; and
 - (iii) the ability of Project Co to continue to meet the section of Schedule 13 (Services Specifications) specified by the State in its notice under Clause 31.1 and otherwise comply with this Agreement on subcontracting the relevant Reviewable Service to any of the tenderers.
- (b) Project Co must not enter into any such contract with any tenderers for the provision of the Reviewable Services without the prior agreement of the State.

31.7 Consents to Probity Investigations

Project Co must ensure that each of the tenderers for the Reviewable Services and any persons likely to be associated with the provision of the Reviewable Services provide their written consent to the carrying out of any Probity Investigations required by the State.

31.8 Probity officer and State Contract Administrator

The State may, at any time, appoint a probity officer or have the Contract Administrator oversee the tender process referred to in this Clause 31 and Project Co must:

- (a) provide all assistance and information required by the Contract Administrator or probity officer; and
- (b) comply with all directions of the probity officer or Contract Administrator, in connection with the tender process.

31.9 Failure to agree

If none of the offers made by the tenderers are acceptable to the State, the State may:

- (a) accept the offer made by Project Co under Clause 31.1;
- (b) require Project Co to proceed to provide the Reviewable Services under the current terms and pricing in accordance with Clause 31.11; or
- (c) omit the Reviewable Services from the Services by way of a Modification Order and carry out the Reviewable Services itself or procure a third party to carry out the Reviewable Services (in which case the Quarterly Services Payment will be adjusted in accordance with Schedule 4 (Change Compensation Principles) for the omission of the Reviewable Services).

31.10 Appointment

- (a) If a tender is acceptable to the State, Project Co will (subject only to the conduct of Probity Investigations satisfactory to the State) subcontract, or ensure that the FM Subcontractor subcontracts, the provision of the relevant Reviewable Services for the ensuing Reviewable Services Term to the successful tenderer, pursuant to a Subcontract which complies with the tender requirements of Clause 31.4.
- (b) A Subcontract entered into in accordance with this Clause 31 will be deemed to be approved by the State for the purposes of Clause 5.13.

31.11 Continued provision of Reviewable Services

- (a) Subject to paragraph (b), without limiting the State's rights in accordance with this Agreement, if:
 - (i) an offer is made by Project Co under Clause 31.2 and the State does not accept Project Co's offer; and
 - (ii) a Subcontractor has not yet been appointed under Clause 31.10 to provide the Reviewable Services by the date of the commencement of the relevant Reviewable Services Term.

Project Co will continue to provide the relevant Reviewable Services on the terms and pricing for the then current Reviewable Services Term and in accordance with Schedule 13 (Services Specifications), until such time as a Subcontractor is appointed under Clause 31.10 and commences provision of those Reviewable Services.

- (b) If the period for provision of the Reviewable Services by Project Co under paragraph (a) extends beyond the Tender Expiry Date, the State will pay the price offered under Clause 31.2 backdated to the Tender Expiry Date.

32. Handover

32.1 Handover Condition

For the purpose of this Clause 32, "**Handover Condition**" means the required condition of the Works or the Facility (as applicable) upon the Expiry Date, which:

- (a) if Handover of:

- (i) the Stage 1 Works is to occur prior to the Date of Stage 1 Commercial Acceptance; or
- (ii) the Stage 2 Works is to occur prior to the Date of Stage 2 Commercial Acceptance,

is the condition that the Works and the Construction Sites would be in if Project Co had complied with all of its obligations in connection with the Works and the Construction Sites in accordance with this Agreement having regard to the time and circumstances of the termination;

- (b) if Handover of the Stage 1 Facility occurs during the Operating Phase and prior to or on the date which is 2 years before the Final Expiry Date, is the condition that the Facility would be in if Project Co had complied with all of its obligations in connection with this Agreement up to the time of termination; or
- (c) if Handover of the Facility occurs after the date which is 2 years prior to the Final Expiry Date, is the condition that:
 - (i) the Facility and the Operating Phase Site would be in as at that date:
 - A. if the requirements of the Estate Services Plans had been fully implemented as required up to that date;
 - B. if all Scheduled and Unscheduled Services had been completed as required up to that date;
 - C. so that the Facility (excluding the Group 2 FF&E and the Group 3 FF&E) and the relevant Operating Phase Site can reasonably be expected to continue to meet Schedule 13 (Services Specifications) for 5 years after the Expiry Date without any major maintenance or refurbishment works, other than routine maintenance that Project Co would have had to carry out in accordance with this Agreement if the Expiry Date was in fact 5 years later than the Expiry Date; and
 - D. if Project Co satisfied all other relevant obligations in accordance with this Agreement.

32.2 Obligations approaching end of Operating Phase

- (a) **(Independent certifier):** No later than 12 Months before the inspections to be undertaken in accordance with paragraph (b), Project Co and the State must meet to determine the identity of an independent certifier to be appointed jointly by Project Co and the State in accordance with Clause 5.8 to carry out the tasks identified in this Clause 32.2.
- (b) **(Joint inspection):** Project Co, the State and the independent certifier appointed in accordance with paragraph (a) must carry out joint inspections of the Works or the Facility (as applicable):
 - (i) at least:
 - A. 3 years before the expected expiry of the Operating Phase; and
 - B. every 6 Months after that initial inspection until the end of the Operating Phase; or

- (ii) if this Agreement is to be terminated prior to the expiry of the Operating Phase, such shorter period before the date of termination as is required by the State,

(each a **Condition Review Date**).

- (c) **(Program to achieve proper Handover)**: Following each inspection in accordance with paragraph (b), the independent certifier must give to the State and Project Co a written report (**Outstanding Matters Report**) specifying:
 - (i) the Site or the Facility (as applicable), will as at the Expiry Date be in a condition which satisfies the Handover Condition;
 - (ii) the works to be undertaken or services to be performed to enable the Facility to meet the Handover Condition on the Expiry Date and a program for undertaking such works or services (**Final Refurbishment Works**); and
 - (iii) an estimate of the total costs of carrying out those works (including an appropriate margin for risks and contingencies) determined in accordance with Best Construction Practices or Best Operating Practices (as applicable).
- (d) **(Disputing Outstanding Matters Report)**: If Project Co or the State do not agree with any aspect of the Outstanding Matters Report:
 - (i) either party may give details of such objections to the other party and the independent certifier within 10 Business Days of receipt of the report; and
 - (ii) the parties will discuss in good faith to reach agreement on:
 - A. the scope and cost of the Final Refurbishment Works; and
 - B. a program for carrying out the Final Refurbishment Works.
- (e) **(No agreement reached)**: If the parties cannot reach agreement on the relevant aspects of the Outstanding Matters Report within a further 10 Business Days of the date on which the objections are provided in accordance with paragraph (d), the matters may be referred by either party for resolution by an Independent Expert in accordance with Clause 45.
- (f) **(Update of Works Program or Estate Services Plans)**: Within 1 Month of the delivery of each Outstanding Matters Report, the Works Program or the relevant Estate Services Plans (as applicable) must be amended by Project Co to include the Final Refurbishment Works Project Co is required to undertake in accordance with the then current Outstanding Matters Report. The updated Works Program or Estate Services Plans will be submitted to the State for review in accordance with Schedule 3 (Review Procedures).
- (g) **(Implement program)**: Without limiting Project Co's obligations in accordance with this Agreement:
 - (i) Project Co must carry out the Final Refurbishment Works and implement the program agreed or resolved in accordance with this Clause 32; and
 - (ii) after a Condition Review Date, if the amount of all of the aggregate of the remaining Quarterly Service Payments and State Loan Payments is or will be after the next Quarterly Service Payment or State Loan Payment, equal to or less than 120% of the estimated total cost of the

remaining Final Refurbishment Works (as determined in accordance with this Clause 32), Project Co must, within 5 Business Days of the Condition Review Date, elect to:

- A. deposit into an account opened by the State in the State's name with a registered bank as nominated by the State (the **Handover Escrow Account**) each subsequent Quarterly Service Payment and State Loan Payment made to Project Co until the amount in the Handover Escrow Account is equal to or more than 120% of the estimated total cost of the remaining Final Refurbishment Works (as agreed or determined in accordance with this Clause 32); or
 - B. provide to the State an unconditional on demand bond having a face value equal to 120% of the estimated total cost of the remaining Final Refurbishment Works (as agreed or resolved in accordance with this Clause 32), and which the State may call upon in accordance with paragraph (l) or (o) (**Handover Bond**); and
- (iii) if Project Co fails to make an election within 5 Business Days of the Condition Review Date in accordance with paragraph (ii), Project Co will be deemed to have elected that paragraph (ii)A will apply.
- (h) **(Interest on Handover Escrow Account):** Interest earned on money standing to the credit of the Handover Escrow Account will be deposited into the Handover Escrow Account and Project Co will be entitled, on request, to receive copies of the statements of account for the Handover Escrow Account.
- (i) **(Excess amounts in Handover Escrow Account):** If at any time the balance of the Handover Escrow Account exceeds the estimated total costs of the remaining Final Refurbishment Works (as agreed or resolved) then the amount of the excess will be a debt due and payable by the State to Project Co and will be added to the next Quarterly Service Payment or State Loan Payment otherwise due and payable from the State to Project Co.
- (j) **(Payments from Handover Escrow Account):** The State may draw on the Handover Escrow Account:
- (i) to fund the completion of any Final Refurbishment Works in accordance with paragraph (n) or reimburse the State's costs of undertaking any Final Refurbishment Works in accordance with paragraph (n);
 - (ii) to pay Project Co the costs of undertaking the Final Refurbishment Works provided that the balance of the Handover Escrow Account will not be less than the estimate of the total costs of the Final Refurbishment Works outstanding at that time; and
 - (iii) no later than 20 Business Days after completion of all Final Refurbishment Works, to pay the balance of the Handover Escrow Account to Project Co.
- (k) **(Money remaining in Handover Escrow Account):** If after:
- (i) the State has recovered the amounts (if any) owing in accordance with paragraph (n) or (o); and
 - (ii) any set-off or deduction by the State in accordance with Clause 54.2,

there is any money remaining in the Handover Escrow Account, then such money must be paid by the State to Project Co.

- (l) **(Calls on Handover Bond):** The State may make a demand on the Handover Bond:
 - (i) to fund completion of any final Refurbishment Works or reimburse the State's costs in accordance with paragraph (j)(i); or
 - (ii) where the State makes an election under paragraph (o) to relieve Project Co of its obligation to perform the Final Refurbishment Works.
- (m) **(Return of Handover Bond):** The State must return any Handover Bond to Project Co within 20 Business Days after completion of all Final Refurbishment Works required to be undertaken.
- (n) **(Completion of Final Refurbishment Works by the State):** If Project Co fails to undertake any Final Refurbishment Works when required to do so in accordance with this Clause 32.2, the State may undertake and complete those Final Refurbishment Works.
- (o) **(State election):** The State may, by giving Project Co reasonable prior notice, relieve Project Co from its obligation to implement any Final Refurbishment Works in which case the estimated value of the relevant Final Refurbishment Works as determined in accordance with this Clause 32.2, will be a debt due and owing to the State so that:
 - (i) the State shall be entitled to retain the balance of the Handover Escrow Account; or
 - (ii) provided that prior notice is given to Project Co and the aggregate of the remaining Quarterly Service Payments and State Loan Payments are insufficient to cover the estimated value of the relevant Final Refurbishment Works, make a demand on the Handover Bond for the shortfall.

32.3 Handover

Without limiting Clause 32.4, upon the Expiry Date, Project Co must:

- (a) **(conditions):** handover the Works or the Facility (as applicable) and the Operating Phase Site (including all rights, title and interest in them) to the State or its nominee free from any encumbrances and in a state and condition which complies with the Handover Condition;
- (b) **(transfer):** transfer to the State or its nominee all rights, title and interest in Plant and FF&E required to allow the State or its nominee to operate, maintain and repair the Works or the Facility (as applicable) to the standards required in accordance with this Agreement free from any encumbrances;
- (c) **(manuals):** deliver to the State or its nominee the Handover Package and all manuals, records, plans and other information under the control of Project Co which are relevant to the design, construction, operation, maintenance or repair of the Works or the Facility (as applicable);
- (d) **(novation):** procure the novation or failing this the assignment to the State or its nominee of:
 - (i) such contracts for works or services to which it, the Builder or the FM Subcontractor is a party as they relate to the Works, the Services or the Facility as the State may nominate; and

- (ii) any leases, subleases and licences agreed to by the State;
- (e) **(Intellectual Property Rights)**: grant or procure the grant to the State or its nominee of such Intellectual Property Rights as will enable the State or its nominee to be in a position to design, construct, operate, maintain and repair the Works or the Facility (as applicable) at the performance standards stated in this Agreement;
- (f) **(Insurances)**: pay to the State or its nominee any insurance proceeds from any Insurances for the reinstatement or replacement of the Works or the Facility (as applicable) to the extent not already reinstated or replaced, and assign to the State any rights available to Project Co under the Insurances;
- (g) **(Insurance Proceeds Account)**: pay to the State or its nominee the balance of the Insurance Proceeds Account as of that date;
- (h) **(Authorisations)**: do all acts and things necessary to enable the State (or its nominee) to have obtained all Authorisations necessary for the operation, maintenance and repair of the Works or the Facility (as applicable); and
- (i) **(operations)**: do all other acts and things to enable the State (or its nominee) to be in a position to deliver the Project at the standards stated in this Agreement, with minimum disruption.

32.4 Assistance in securing continuity

Project Co must, before the end of the Operating Phase, do all things reasonably required by the State to ensure the smooth and orderly transfer of responsibility for the Project to the State or its nominee including:

- (a) meeting with the State and such other persons notified by the State to discuss the Project;
- (b) providing access to its operations for the purpose of familiarisation; and
- (c) providing sufficient information to the State or its nominee to determine the status and condition of the Project and any Works Programs in place at the time.

33. Change in Mandatory Requirements

33.1 Relief for Change in Mandatory Requirements

- (a) If:
 - (i) a State Change in Mandatory Requirements occurs during the Term and the State Change in Mandatory Requirements has had or will have a material effect on the capital or operating costs of delivering the Project in accordance with this Agreement; or
 - (ii) a General Change in Mandatory Requirements occurs during the Operating Phase and the General Change in Mandatory Requirement has had or will have an effect on the capital or operating costs of delivering the Project in accordance with this Agreement (excluding in connection with Reviewable Services); and

Project Co is obliged to comply with the Change in Mandatory Requirement and is not otherwise directed by the State in accordance with Clause 40.2(e), then,

- (iii) Project Co may, within 30 Business Days of the Change in Mandatory Requirement referred to in paragraph (i) or (ii) being introduced,

submit a Change Notice that complies with the requirements of Part A, Section 3 of Schedule 4 (Change Compensation Principles); and

(iv) *[not disclosed]*

(b) *[not disclosed]*

(c) If the State considers that a State Change in Mandatory Requirements has occurred in accordance with paragraph (a)(i) or a General Change in Mandatory Requirements has occurred in accordance with paragraph (a)(ii) and Project Co has not submitted a Change Notice in accordance with paragraph (a), the State may request Project Co to submit a Change Notice that complies with the requirements of paragraph (a).

33.2 Conditions Precedent

It is a condition precedent to Project Co's entitlement in accordance with Clause 33.1(a) that:

- (a) Project Co has submitted a Change Notice in accordance with Clause 33.1(a)(iii); and
- (b) neither Project Co nor any Project Co Associate has, by any act or omission, directly or indirectly caused the relevant State Change in Mandatory Requirements or the relevant General Change in Mandatory Requirements.

33.3 Other relief

If a State Change in Mandatory Requirements or General Change in Mandatory Requirements for which Project Co is entitled to compensation under Clause 33.1(a) gives rise to an Extension Event, any entitlement to an extension of time, Financing Delay Costs and Prolongation Costs must be claimed in accordance with Clause 16.

33.4 Reviewable Services

Project Co is not entitled to make any Claim against the State for any increase in the Costs of the Reviewable Services as a consequence of a General Change in Mandatory Requirements.

34. Modifications

34.1 Modifications proposed by the State

- (a) **(Directing a Modification):** At any time, the State may give Project Co:
 - (i) a notice directing Project Co to undertake a Modification or FF&E Modification (**Modification Order**); or

- (ii) a request for Project Co to submit a Modification Quote for a proposed Modification or FF&E Modification, including any measurements, evidence of costs or other specific information that the State requires Project Co to include in its Modification Quote (**Modification Price Request**),

(State Modification).

- (b) **(Submission of Modification Quote):** If the State issues a Modification Price Request, Project Co must submit a Modification Quote to the State:
 - (i) within 20 Business Days of receipt of the Modification Price Request; or
 - (ii) at such later time as agreed by the State (acting reasonably).
- (c) **(Contents of Modification Quote):** The Modification Quote must be prepared in accordance with Schedule 4 (Change Compensation Principles).
- (d) **(Extensions Event and Intervening Event):** If a State Modification will give rise to an Extension Event or an Intervening Event, any entitlement to an extension of time, Prolongation Costs, Financing Delay Costs or relief in accordance with Clause 30 must be claimed in accordance with Clause 16 or Clause 30 (as applicable) and any Claim for such relief must not also be included in the Modification Quote or the costs of undertaking the Modification Order.
- (e) **(State response to Modification Quote):** Within 20 Business Days (or such longer period as the State reasonably requires, given the size and complexity of the proposed Modification or FF&E Modification) after receiving a Modification Quote, the State must:
 - (i) issue a Modification Order to Project Co directing Project Co to carry out the Modification or FF&E Modification on the terms set out in the Modification Quote;
 - (ii) notify Project Co that it does not agree with the Modification Quote;
 - (iii) notify Project Co that it does not wish to proceed with the proposed Modification or FF&E Modification or that it will undertake the proposed Modification or FF&E Modification itself or engage a third party to undertake the proposed Modification or FF&E Modification; or
 - (iv) require Project Co to undertake a tender process in connection with the Modification or FF&E Modification in accordance with Part A, Section 5 of Schedule 4 (Change Compensation Principles).
- (f) **(Project Co to implement Modification):** If the State issues a Modification Order to Project Co in accordance with paragraphs (a) or (e), Project Co must implement the Modification or FF&E Modification in accordance with the Modification Order.
- (g) **(Failure to agree):** If the State informs Project Co that it does not agree with the Modification Quote in accordance with paragraph (e) and the parties are unable to agree on the terms for the Modification or FF&E Modification within 5 Business Days of the State's notice in accordance with paragraph (e) and:
 - (i) the terms that the parties are unable to agree relate to the amount payable for the Modification or FF&E Modification, the amount for the Modification or FF&E Modification will be determined by the Independent Expert in accordance with the principles stated in Part A,

Section 6 of Schedule 4 (Change Compensation Principles) and the State may at its election:

- A. issue a Modification Order on the terms of the Modification Quote as varied by the Independent Expert; or
 - B. inform Project Co that it does not wish to proceed with the Modification or FF&E Modification; or
- (ii) the terms that the parties are unable to agree do not relate to the amount payable for the Modification or FF&E Modification, the State may issue a Modification Order on terms determined by the State acting reasonably and Project Co must implement the Modification or FF&E Modification in accordance with the Modification Order but may refer the matter to dispute resolution in accordance with Clause 45.
- (h) **(Payment for Modification):** If Project Co implements a Modification or FF&E Modification in accordance with a Modification Order, the State will pay Project Co the amount for implementing the Modification or FF&E Modification as set out in the Modification Order calculated in accordance with Schedule 4 (Change Compensation Principles). If the Modification Order gives rise to a Saving, Project Co will pay to the State the amount of the Saving.
- (i) **(Payment for Modification Quote):** If:
- (i) Project Co is required to prepare a Modification Quote in accordance with paragraph (b); and
 - (ii) the cost of preparing the Modification Quote, as calculated in accordance with Part A, Section 7 of Schedule 4 (Change Compensation Principles), is more than \$5,000 if prepared by the Builder (excluding any internal costs of Project Co or the Builder) and more than \$2,500 if prepared by the FM Subcontractor (excluding any internal costs of Project Co or the FM Contractor),
- the State will pay Project Co the cost (including any internal costs) of the preparation and submission of the Modification Quote in accordance with Part A, Section 7.1 of Schedule 4 (Change Compensation Principles):
- (iii) if the State does not issue a Modification Order, within 20 Business Days of receiving an invoice from Project Co for such cost provided that the relevant Modification Quote has been prepared and submitted in accordance with this Agreement; or
 - (iv) if the State does issue a Modification Order, as part of the amount payable by the State for the Modification or FF&E Modification.

34.2 Modifications proposed by Project Co

- (a) Project Co may, for its convenience, request the State to direct a Modification or FF&E Modification by submitting a notice to the State which contains details of the proposed Modification or FF&E Modification and satisfies the requirements of Clause 34.1(a)(ii).
- (b) The State may direct a Modification or FF&E Modification in accordance with Project Co's notice by issuing a Modification Order.
- (c) Project Co is not relieved from performing or observing its obligations in accordance with this Agreement as a result of the failure by the State to issue a Modification Order in connection with a Modification or FF&E Modification requested by Project Co.

34.3 Project Co Modification consented to by State

If the State issues a Modification Order in accordance with Clause 34.2:

- (a) Project Co will, subject to complying with any conditions in the Modification Order, carry out the Project Co Modification; and
- (b) Project Co will carry out the Project Co Modification at its own cost and will not be entitled to make any Claim against the State in connection with the Project Co Modification.

34.4 Not to commence before issue

Project Co must not begin any work or incur any cost, and will not have any entitlement to make any Claim in connection with a Modification or FF&E Modification unless a Modification Order has been issued by the State in accordance with this Clause 34.4.

34.5 Updated documents

- (a) Project Co must submit to the State three paper copies, three electronic versions in .pdf format and three electronic versions in original format of the following documents following completion of any Modification or FF&E Modification (if and to the extent applicable given the nature of the Modification or FF&E Modification):
 - (i) all final drawings, specifications, models, samples and calculations used to undertake the Modification or FF&E Modification; and
 - (ii) amended versions of any Deliverable necessary to identify and incorporate the Modification or FF&E Modification.
- (b) To the extent that the State has agreed, or it is determined, that an adverse effect on the matters referred to in Section 3 of Part B of Schedule 4 (Change Compensation Principles) has occurred or will occur on implementation of the Modification or FF&E Modification, this Agreement will be varied in accordance with the relevant Change Response or as determined in accordance with Clause 45 to the extent necessary to ensure that the obligations and warranties given by Project Co under this Agreement will not be breached as a result of the implementation of the Modification or FF&E Modification.

34.6 Direction giving rise to a Modification

- (a) **(Direction):** If Project Co believes any direction by the State (other than a Modification Order) constitutes or involves a Modification or FF&E Modification, Project Co must:
 - (i) within 5 Business Days of receiving the direction, give notice to the State that it considers the direction constitutes or involves a Modification or FF&E Modification; and
 - (ii) within 5 Business Days of giving the notice in accordance with paragraph (a)(i), submit a Claim to the State which must include:
 - A. detailed particulars concerning the direction upon which the Claim is based and the reason why Project Co believes it constitutes a Modification or FF&E Modification;
 - B. Project Co's fixed price quote for the cost of implementing the direction as a Modification or FF&E Modification calculated in accordance with the principles in Part A,

Section 7 of Schedule 4 (Change Compensation Principles); and

- C. the period of any delay caused by the Modification or FF&E Modification in connection with which Project Co would be entitled relief in accordance with Clause 16.
- (b) **(Condition Precedent)**: Project Co's compliance with paragraph (a) is a condition precedent to Project Co's entitlement to be paid for a direction which Project Co believes to be a Modification or FF&E Modification.
- (c) **(Confirmation)**: Within 5 Business Days of the State receiving any notice from Project Co in accordance with paragraph (a), the State may:
- (i) confirm that the direction is in fact a Modification or FF&E Modification by issuing a Modification Order (in which case the fixed price quote referred to in paragraph (a) shall be the Modification Quote for the purposes of Clause 34.1(b);
 - (ii) vary the direction and confirm that the varied direction is a Modification or FF&E Modification by issuing a Modification Order;
 - (iii) withdraw the direction, in which case Project Co must not comply with the direction and is not entitled to make any Claim against the State or any State Associate in connection with the direction; or
 - (iv) inform Project Co that, in the State's view, the direction is not a Modification or FF&E Modification.
- (d) **(Dispute)**: If Project Co disputes the State's view notified in accordance with paragraph (c)(iv) or the State does not issue a direction in accordance with paragraph (c), Project Co must continue to undertake the Works, perform the Services and deliver the Project (including the works or services the subject matter of any direction) but may refer the matter for resolution in accordance with Clause 45.
- (e) **(No commencement)**: Project Co must not commence any work the subject of a direction which it believes constitutes a Modification or FF&E Modification until the State has acted in accordance with paragraphs (c)(i), (ii) or (iv).

35. Whole of Life

- (a) **(Minimise Cost)**: Subject to this Clause 35, at all times prior to the Date for Stage 1 Commercial Acceptance, Project Co must procure Group 1 FF&E that minimises the cost to the State and the State Associates of providing the then current Facility Functions or otherwise operating the Facility (**State WOL Cost Savings**).
- (b) **(Requirements)**: If at any time prior to the Date for Stage 1 Commercial Acceptance, the State Representative considers it likely that any item of Group 1 FF&E does not satisfy the requirements of paragraph (a) and there is an alternative item of FF&E available that satisfies such requirements and otherwise has the same functionality as the Group 1 FF&E (**State Selected FF&E**), the State Representative will:
- (i) notify Project Co accordingly; and
 - (ii) provide Project Co with the details of the State WOL Cost Savings generated by the State Selected FF&E.

- (c) **(Project Co to agree):** Within 10 Business Days of receipt of the notification from the State in accordance with paragraph (a), Project Co must either:
- (i) agree to procure the item of State Selected FF&E as Group 1 FF&E instead of the Group 1 FF&E; or
 - (ii) prove to the reasonable satisfaction of the State Representative on an open book basis in accordance with Part A, Section 2.2(d) of Schedule 4 (Change Compensation Principles) that the relevant item of State Selected FF&E:
 - A. will not enable Project Co to satisfy the FFP Warranty or comply with the Design Requirements;
 - B. will prevent Project Co from achieving Stage 1 Commercial Acceptance by the Date for Stage 1 Commercial Acceptance;
 - C. will have a greater Whole of Life Cost than the Group 1 FF&E; or
 - D. the amount of the increase in the Whole of Life Cost of the State Selected FF&E is greater than the amount of the State WOL Cost Savings generated by the State Selected FF&E.
- (d) **(Project Co able to prove):** If Project Co is able to prove, to the reasonable satisfaction of the State Representative, the matters set out in paragraph (c)(ii), Project Co may procure the relevant item of Group 1 FF&E, subject to that item otherwise satisfying the terms of this Agreement.
- (e) **(Project Co unable to prove):** If Project Co is not able to prove to the reasonable satisfaction of the State Representative the matters set out in paragraph (c)(ii) Project Co must procure the State Selected FF&E.
- (f) **(Change not a Modification):** Any change in the selection of an item of Group 1 FF&E in accordance with this Clause shall not be a State Modification, FF&E Modification or Minor Modification and Project Co will not be entitled to make any Claim against the State or any State Associate arising in connection with such change in the selection of an item of Group 1 FF&E.

36. Payments during Operating Phase

36.1 Quarterly Service Payment

Project Co will be paid the Quarterly Service Payment:

- (a) calculated in accordance with Schedule 14 (Payment Schedule); and
- (b) in arrears,

less the State Loan Payment from the Operational Commencement Date.

36.2 Other payments

- (a) The State will pay any payment (other than the Quarterly Service Payment or State Loan Payments) which may become due and payable to Project Co, and Project Co will pay any payment which may become due and payable to the State at the time specified in, and in accordance with, this Agreement or the relevant State Project Documents.

- (b) If no time is specified for the payment of the relevant amount in accordance with paragraph (a), the payment will be made within 20 Business Days of a demand being made after the occurrence of the circumstance giving rise to the Liability.

36.3 Reduction of Quarterly Service Payment and State Loan Payment

- (a) **(Calculation)**: The Quarterly Service Payment has been calculated assuming the provision of all Services in accordance with this Agreement for the Operating Phase.
- (b) **(Reduction)**: The Quarterly Service Payment may be reduced to the extent and in the manner described in the Abatement Regime to reflect the agreed principle that the State will only pay for the quantum and quality of Services provided (and this reduction may also affect the quantum of State Loan Payments).
- (c) **(Additional reductions)**: In addition to any reductions to the Quarterly Services Payment under the Abatement Regime:
- (i) the amount of *[not disclosed]* per Prisoner in connection with each Prisoner who escapes as part of an Unauthorised Secured Facility Escape up to a maximum of *[not disclosed]* per Unauthorised Secured Facility Escape will be a debt due and payable by Project Co to the State;
 - (ii) if the fire brigade is summoned to the Facility by the activation of the fire alarm system in the Facility where there is no fire and the cause of the activation:
 - A. is the failure of the fire alarm system or some other item of Plant or Group 1 FF&E to meet the requirements of this Agreement; or
 - B. an act or omission of Project Co (which is not expressly permitted and undertaken in accordance with this Agreement),the costs charged to the State for attendance of the fire brigade will be a debt due and payable by Project Co to the State; and
 - (iii) without limiting Clause 25.5, if as a consequence of Project Co failing to:
 - A. provide the Services in accordance with Schedule 13 (Services Specifications); or
 - B. otherwise perform its obligations in accordance with this Agreement,the State is required to provide State Security Measures, the reasonable costs of providing the State Security Measures will be a debt due and payable by Project Co to the State.
- (d) **(Genuine pre-estimate)**: Project Co agrees that the amounts in paragraph (c) reflect a genuine pre-estimate of the additional costs and expenses the State will incur as a result of the Unauthorised Secured Facility Escape of a Prisoner or Prisoners respectively.
- (e) **(State Loan Payment)**: The parties acknowledge and agree that to the extent a State Loan Payment payable by the State under the State Loan Agreement exceeds the Quarterly Service Payment payable by the State for that Quarter (after any Abatement of that Quarterly Service Payment) (the **Excess Amount**);

- (i) the relevant State Loan Payment will be reduced to the extent of that Excess Amount so that the relevant State Loan Payment does not exceed the Quarterly Service Payment for that Quarter, with such reduction to occur prior to the deduction of the State Loan Payment from the Quarterly Service Payment in accordance with Clause 36.1; and
- (ii) the State's obligation to pay the Excess Amount in relation to the State Loan is fully and finally released and discharged.

For the avoidance of doubt, Project Co provides this acknowledgement for and on behalf of itself and Finance Co and will ensure that Finance Co complies with this acknowledgement in relation to Finance Co's rights under the State Loan Agreement.

36.4 Payment

- (a) **(Operations Payment Claim)**: Within 5 Business Days after the date Project Co delivers the Quarterly Performance Report for a Quarter, Project Co must prepare and provide to the State an Invoice for the Quarterly Service Payment and State Loan Payment (as applicable) for that Quarter, calculated in accordance with Schedule 14 (Payment Schedule).
- (b) **(Operations Payment Statement)**: The State:
 - (i) may recalculate the amounts in any Invoice if the State believes that this is necessary for the Invoice to correctly reflect the amount payable to or by Project Co in accordance with this Agreement; and
 - (ii) will, within the later of:
 - A. 5 Business Days after receipt by the State of an Invoice; and
 - B. 10 Business Days of receipt by the State of the relevant Quarterly Performance Report,
 provide to Project Co a statement (**Operations Payment Statement**) stating the amount payable to or by Project Co and any recalculations made to the amounts set out in the Invoice (including deduction of the State Loan Payment if that payment has been made under the State Loan Agreement).
- (c) **(Tax Invoice)**: Project Co will provide the State a reissued Invoice in connection with any supplies the subject of the Operations Payment Statement within 5 Business Days of receipt of the Operations Payment Statement.
- (d) **(Timing of payment)**: Payment of the amount stated to be payable to or by Project Co in the Operations Payment Statement will be made by the State to Project Co or by Project Co to the State (as applicable) within 10 Business Days of receipt of the reissued Invoice described in paragraph (c).
- (e) **(Payment not evidence of proper performance)**: The payment of Quarterly Service Payments and State Loan Payments by the State to Project Co will not of itself be evidence that the Services have been performed by Project Co in accordance with the State Project Documents.
- (f) **(Dispute)**: Without limiting its obligations under paragraph (c), Project Co may dispute the amount in any Operations Payment Statement in accordance with Clause 45. Any dispute in connection with the amount of any Abatement shall be determined in accordance with Clause 45.

- (g) **(Acknowledgement):** The parties agree and acknowledge that information regarding the State Loan Payment has been included in the relevant Invoice only to assist in the determination of the amount to be paid by the State to Finance Co under the State Loan Agreement and that the State is under no obligation to pay any amount to Project Co under this Agreement relating to the State Loan Payment.

36.5 Abatement as only monetary compensation

- (a) Subject to paragraph (b), reduction of the Quarterly Service Payment and the State Loan Payment by application of the Abatement Regime will be the only monetary compensation payable by Project Co to the State for Service Failures which activate the Abatement Regime.
- (b) Paragraph (a) will not affect or limit the State's rights in accordance with Clauses 12.4(a), 12.4(b), 36.3 38.12, 38.13 and 42, or the State's rights to any Termination Amount or the amounts set out in paragraph (c) below.
- (c) Paragraph (a) will not affect or limit the State's right to make a Claim against Project Co (including making a claim for money) to the extent that the State has not been compensated for a loss, cost or expense by the reduction in the Quarterly Service Payment or State Loan Payment under Clause 36.3 for:
- (i) any costs and expenses incurred by the State in exercising its rights in accordance with Clause 43.1(a), 43.1(b) or 43.1(c) as a consequence of a Service Failure; and
 - (ii) any reasonably foreseeable economic loss of the State or any Indemnified Person caused by a Service Failure where the Service Failure is caused by any:
 - A. breach of any Law; or
 - B. negligent, unlawful, wilful or fraudulent act or omission, by Project Co or any Project Co Associate, to the extent that:
 - C. that economic loss is recovered or recoverable by Project Co under an Insurance Policy (assuming compliance by Project Co with this Agreement and any such Insurance Policy); or
 - D. Project Co recovers under an indemnity for such economic loss under the terms of any of the Project Documents.
- (d) To the extent that Project Co must pay to the State any costs referred to in paragraph (c) in excess of the Quarterly Service Payment and such remaining amount is not received by reducing the State Loan Payment in accordance with Clause 36.3(e), each future Quarterly Service Payment and State Loan Payment will be reduced to the extent necessary for the State to recover those costs in full. To the extent the State is then unable to recover its costs, all such amounts will be a debt due and payable by Project Co to the State.
- (e) **(Economic loss):** To the extent that Project Co has an indemnity for any economic loss of the State as referred to in this Clause 36.5(e) under the terms of any Project Document, Project Co must use all reasonable endeavours to pursue recovery under that indemnity for such economic loss (including the prosecution of any Claim in accordance with the terms of the relevant Project Document).

37. Refinancings

37.1 Consent to new financing arrangements

- (a) Project Co must not (and must ensure that each other Project Entity does not) enter into or implement any Refinancing without the prior consent of the State, which must not be unreasonably withheld and which will be given or withheld within 20 Business Days of receipt of the information provided by Project Co in accordance with Clause 37.2(a).
- (b) Subject to paragraph (c), it will be reasonable for the State to withhold such consent if:
 - (i) **(risks and liabilities)**: the effect of the Refinancing would be an increase or adverse change in the profile of the risks or liabilities of the State in accordance with any State Project Document without adequate compensation to the State;
 - (ii) **(not arm's length)**: the terms and conditions of the Refinancing are not on arm's length commercial terms or are not in accordance with market practice at the time;
 - (iii) **(more onerous)**: the terms and conditions of the Refinancing (taken as a whole) are materially more onerous or disadvantageous to any Project Entity than the terms and conditions in accordance with the existing Financing Documents and the State considers the Project Entity will be unable to adequately service and repay the Financial Indebtedness assumed under the transactions or that such Financial Indebtedness will adversely impact on the Project Entity's ability to perform its obligations in accordance with the Project Documents;
 - (iv) **(other purposes)**: the Financial Indebtedness assumed under the transactions will not be used solely for the Project; or
 - (v) **(failure to comply)**: Project Co failed to comply with this Clause 37.
- (c) If an event referred to in paragraph (a) is also an Assumed Refinancing, it will be unreasonable for the State to withhold its consent to the Assumed Refinancing:
 - (i) if the primary reason for the Assumed Refinancing is to prevent the maturity date of a Financing Document being reached, provided that Project Co has not unreasonably delayed the undertaking of the Assumed Refinancing and has acted in a manner that a normal market participant would in the circumstances with respect to the Assumed Refinancing;
 - (ii) if the indebtedness after execution of the Assumed Refinancing (excluding any indebtedness required to pay break costs for swap transactions required as part of the Assumed Refinancing) would not at any time exceed the indebtedness forecast in the Financial Model to be owing to the Financiers at that time; and
 - (iii) if reasonably requested by the State, Project Co can demonstrate to the reasonable satisfaction of the State that the Assumed Refinancing does not materially adversely effect the contractual liabilities of the State to any party under a State Project Document (other than as reflected in the Financial Model prior to the execution of the proposed Assumed Refinancing).

37.2 Details of new financing transactions

- (a) Project Co must promptly (and at least 30 Business Days prior to a proposed Refinancing) provide the State with full details of any proposed Refinancing, including:
 - (i) a copy of the proposed financial model relating to it;
 - (ii) the basis for the assumptions used in the proposed financial model (which must be consistent with those used in the Financial Model, except to the extent directly arising from the transactions);
 - (iii) a comparison with any Assumed Refinancing; and
 - (iv) a certificate in terms acceptable to the State from the auditors of such financial model.
- (b) The proposed financial model must show, amongst other things, the material changes to Project Co's obligations to its Financiers and any anticipated Refinancing Gain or Refinancing Loss (as applicable). The proposed financial model may only make changes from the Financial Model to the extent directly arising from the proposed Refinancing.
- (c) Without limiting Clause 37.1(a), Project Co agrees that the State will have unrestricted rights of audit of any proposed financial model and documentation, including formulae and calculations used in connection with a proposed Refinancing.

37.3 Documents

- (a) Project Co must not (and must ensure that each other Project Entity does not) execute or amend any document in connection with a proposed Refinancing (including by amending a Financing Document) without the prior consent of the State which must not be unreasonably withheld if they are on substantially the same terms disclosed to the State under Clause 37.2.
- (b) Project Co must, within 5 Business Days of the execution of any Financing Document in connection with a Refinancing, deliver to the State a certified true copy of each amended and amending Financing Document.
- (c) Project Co must not (and must ensure that each other Project Entity does not) execute any Refinancing documentation until all new Financiers have executed a deed with the State substantially in the form of the Finance Side Deed and the existing Financiers have executed any document reasonably requested by the State to terminate their rights in accordance with the then current Finance Side Deed.

37.4 Costs of new financing transactions

- (a) Project Co must pay the State its costs (including any legal or financial advisers fees incurred by the State) reasonably incurred in connection with a Refinancing.
- (b) For the purposes of calculating any Refinancing Impact under this Clause 37, Project Co may include an estimate of the costs to be paid to the State in accordance with paragraph (a) where the State has agreed the amount of those costs in writing.

37.5 Calculation of Refinancing Gain

- (a) Subject to this Clause 37.5, a Refinancing Gain in connection with a Refinancing Event means the greater of zero and the amount (**Refinancing Impact**) calculated in accordance with the formula $A - B$ where:
- A = the net present value of the pre-investor tax Distributions forecast to be made from the effective date of the Refinancing Event in accordance with the Financial Model as updated in accordance with this Agreement to take account of the Refinancing Event; and
- B = the net present value of the pre-investor tax Distributions forecast to be made from the effective date of the Refinancing Event in accordance with the Financial Model in the form it existed in absence of the Refinancing Event.
- (b) The Refinancing Impact will be determined ignoring the impact of non-Refinancing impacts on Distributions such as revenues, costs, Taxes, reserves or levels of retained cash (other than revenue received, costs incurred or Taxes, reserves or levels of retained cash changed as a result of the Refinancing Event) being different than forecast by the Financial Model.
- (c) In calculating the Refinancing Impact the present values in A and B will be expressed as an aggregate amount as at the date of the Refinancing Event, and will be calculated using the annual forecast pre-investor tax equity internal rate of return as set out in the Financial Model as the nominal discount rate.
- (d) A Refinancing Loss in connection with a Refinancing Event means a Refinancing Impact of an amount less than or equal to zero.
- (e) For the purposes of calculating a Refinancing Impact:
- (i) it will be assumed that the terms of the Refinancing will only apply for the actual tenor of that Refinancing and not the balance of the Term;
 - (ii) the costs and expenses incurred by Project Co in connection with the Refinancing will be taken into account when calculating net present value of the pre-investor tax Distributions; and
 - (iii) Project Co may take into account an estimate of amount payable to the State in accordance with Clause 37.4 to the extent that the State has agreed that amount in writing.

37.6 Sharing of Refinancing Gains

- (a) If a Refinancing gives rise to a Refinancing Gain, the State and Project Co will share the Refinancing Gain in the following order:
- (i) Project Co will be entitled to 100% of any Refinancing Gain until it recovers the sum of any Refinancing Losses from previous Refinancings; then
 - (ii) the State will be entitled to 50% of the remaining Refinancing Gain.
- (b) The State may, taking into account the nature and timing of the Refinancing Gain, elect to receive its share of the Refinancing Gain as a direct payment (to the extent a Project Entity receives its Refinancing Gain as a direct payment).
- (c) Project Co must provide (and must ensure that each other Project Entity provides) the State with all information concerning the Refinancing and

Distributions that the State may require in order to calculate the Refinancing Gain and Refinancing Loss.

38. Risk and Liability

38.1 Liability for late completion

- (a) Subject to paragraph (b), the State acknowledges and agrees that the State's sole financial remedy, and Project Co's sole financial Liability, for failure to achieve Stage 1 Commercial Acceptance by the Date for Stage 1 Commercial Acceptance is limited to the amount of the Quarterly Services Payment and State Loan Payment not required to be paid by the State in those circumstances (the **Relevant Amount**) and fully and finally satisfied by the State not paying the Relevant Amount.
- (b) Project Co acknowledges and agrees that paragraph (a) does not limit:
 - (i) where this Agreement is terminated as a result of a termination for an Event of Default, Project Co's Liability for any loss (including in respect of delay) incurred by the State;
 - (ii) the State's rights in respect of an event giving rise to delay; or
 - (iii) Project Co's Liability for any loss arising from the consequences of the event causing the delay, other than the delay.

38.2 Risk of loss or damage

Project Co bears the risk of loss or damage to:

- (a) the Stage 1 Works until the Date of Stage 1 Commercial Acceptance;
- (b) the Stage 2 Works from the end of the Transition Period until the Date of Stage 2 Commercial Acceptance;
- (c) the Off-Site Infrastructure Works from Financial Close until the date of Off-Site Infrastructure Completion; and
- (d) the Facility until the Expiry Date,

in accordance with this Clause 38.

38.3 State election to reinstate

- (a) Project Co must promptly notify the State of any loss or damage to the Works, the Facility, the Group 4 FF&E, the Mural, the Aboriginal Meeting Places or the Soft Landscaping Works Areas.
- (b) Within 60 Business Days of any loss or damage to the Works or the Facility (as applicable) (or such longer period as the State reasonably requires in order to assess the situation and form its intention), the State must notify Project Co whether it requires Project Co:
 - (i) to repair or rebuild the Works or the Facility; or
 - (ii) not to repair or rebuild the Works or the Facility,

for which Project Co retains the risk of loss or damage in accordance with Clause 38.1.

38.4 Reinstatement

- (a) If the State notifies Project Co that it requires Project Co to repair or rebuild the Works or the Facility in accordance with Clause 38.3(b)(i), Project Co must:
 - (i) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work;
 - (ii) promptly consult with the State and carry out such steps as are necessary to ensure the prompt repair and reinstatement of the loss or damage so that, subject to paragraph (iv):
 - A. the Works or the Facility comply with the requirements of the State Project Documents;
 - B. to the greatest extent possible, Project Co continues to comply with its obligations in accordance with the State Project Documents; and
 - C. the State is fully informed of the progress of the repair and reinstatement activities;
 - (iii) subject to paragraphs (b) to (d), bear the cost of repairing or rebuilding the Works or the Facility (as applicable); and
 - (iv) unless directed by the State to repair or rebuild the Works to a different specification, repair or rebuild the Works in accordance with the Design Requirements.
- (b) Where the State exercises its rights under paragraph (a), subject to Clauses 38.5, 38.6 and 38.7:
 - (i) Project Co must pay for the cost of repairing or rebuilding the Works or the Facility, as a result of the damage or destruction from the proceeds of any Insurance Policy, covering the physical loss, destruction or damage;
 - (ii) the State will make available to Project Co the proceeds of any Insurance Policy received by the State for the purpose of repairing or rebuilding the Works or the Facility (whether on the same or different specifications) as a result of the damage or destruction; and
 - (iii) any cost of repairing or rebuilding the Works or the Facility not covered by such Insurances or indemnity will, subject to paragraph (c), be funded by Project Co.
- (c) If:
 - (i) the State determines under paragraph (a)(iv) that the Works or the Facility is to be rebuilt or repaired on the basis of different specifications to the Design Requirements (as amended for any Modifications or FF&E Modifications); and
 - (ii) the incremental cost of repairing or rebuilding according to such specifications exceeds the total cost of repairing or rebuilding the Works or the Facility according to the Design Requirements (as amended for any Modifications or FF&E Modifications),

the State will bear the amount (if any) of the excess either agreed or if not agreed, determined in accordance with Clause 45 (to the extent that insurance

proceeds are insufficient for this purpose), as determined in accordance with Schedule 4 (Change Compensation Principles).

- (d) Where the repairing or rebuilding of the Works or the Facility to different specifications to the Design Requirements will increase or decrease the cost of providing the Services over the remainder of the Term, the State will:
- (i) pay the reasonable increased costs of Project Co to the extent there is an increase in cost; and
 - (ii) be entitled to the benefit of decreased costs if there is an decrease in cost to Project Co,

calculated in accordance with Schedule 4 (Change Compensation Principles).

38.5 Excepted Risk

- (a) If the event which gave rise to the loss or damage is an Excepted Risk and the State requires Project Co to repair or reinstate the Works or the Facility the parties will use reasonable endeavours to agree on how the Works or Facility will be reinstated and the cost of doing so in accordance with Schedule 4 (Change Compensation Principles).
- (b) If the parties are unable to agree on how the Works or the Facility will be repaired or reinstated, the State must notify Project Co that:
- (i) the Works or Facility will be repaired or reinstated as an Excepted Risk, in which case the notice will be deemed to be a Modification or FF&E Modification and the State must issue a Modification Order; or
 - (ii) it no longer requires Project Co to repair or reinstate the Works or the Facility and the provisions of Clause 38.9(b) will apply.

38.6 Uninsurable Risk

If the event which gave rise to the loss or damage to the Facility or the Works is an Uninsurable Risk to which Clause 39.11 applies the State will indemnify Project Co in accordance with that Clause.

38.7 Compensable Intervening Event

If the event which gave rise to the loss or damage is caused by a Compensable Intervening Event and the State requires Project Co to repair or reinstate the Facility, the State will pay Project Co in accordance with Schedule 4 (Change Compensation Principles).

38.8 Minor damage

If any damage for which the State is liable to pay or indemnify Project Co is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by Project Co:

- (a) without incurring significant additional costs;
- (b) through the use of its site-based resources during normal working hours; and
- (c) without adversely affecting the ability of Project Co to perform the Services,

then Project Co must bear the cost of rectifying such damage.

38.9 Consequences of not repairing or rebuilding

If the State notifies Project Co not to repair or rebuild the Works or the Facility (as applicable) in accordance with Clause 38.3(b)(ii) the State must:

- (a) omit the relevant part of the Works or the Facility from the Project, in which case the notice of the State in accordance with Clause 38.3(b)(ii) will be deemed to be a Modification or FF&E Modification and the State must issue a Modification Order; or
- (b) if the loss of or damage was caused by:
 - (i) an Event of Default or Immediate Termination Event, terminate this Agreement for default in accordance with Clause 44.3 or 44.4 (as applicable);
 - (ii) a breach by the State of a State Project Document or wilful act or omission of the State or a State Associate or Compensable Intervening Event, terminate this Agreement for convenience in accordance with Clause 44.1; or
 - (iii) a Force Majeure Event, Uninsurable Risk or Excepted Risk, immediately terminate this Agreement by notice to Project Co and:
 - A. this Agreement will terminate on the date stated in the State's notice; and
 - B. the State will pay to Project Co the Force Majeure Termination Amount.

38.10 Damage to third party property

- (a) Project Co must avoid interference with, or obstruction or damage to, any property in the vicinity of the Site arising out of or in connection with delivering the Project.
- (b) If any loss of or damage to real or personal property of third parties or the State (other than the Works or the Facility) occurs in connection with delivering the Project, Project Co must:
 - (i) promptly repair such loss or damage; and
 - (ii) reasonably compensate the affected person for that loss or damage (if Project Co has a legal liability to do so and as agreed with the affected person).

38.11 Damage to Mural Works

Project Co bears the risk of loss or damage to the Mural Works only to the extent that such damage is caused by any breach of this Agreement by Project Co or negligent acts or omissions of Project Co, any Project Co Associate or the Mural Works Subcontractor.

38.12 Indemnity for Project Entity breach

Subject to Clause 38.1, Project Co indemnifies the State and any State Associates (**Indemnified Persons**) against any Claim or Liability incurred in connection with any breach by a Project Entity or any Project Co Associate of a Project Document or any negligent act or omission of a Project Entity or a Project Co Associate.

38.13 Third party liability indemnity

Project Co indemnifies the State and the Indemnified Persons against:

- (a) any loss of or damage to property of the State or Indemnified Persons (other than the Works or the Facility (as applicable) which is subject to the regime set out in Clauses 38.1 to 38.10); and
- (b) any Liability incurred by the Indemnified Persons in connection with any loss of or damage to third party property or injury to, disease or death of a person in connection with:
 - (i) delivering the Project; or
 - (ii) the use or occupation of the Site by Project Co or Project Co's Associates.

38.14 Application of Civil Liability Act

- (a) **(Interpretation):** In this Clause 38.14 only, "**Legislation**" means Part 1F of the *Civil Liability Act 2002* (WA) and any equivalent statutory provision in any other state or territory.
- (b) **(Legislation excluded):** The operation of the Legislation is excluded in relation to all and any rights, obligations and Liabilities arising out of or in connection with this Agreement in delivering the Project whether such rights, obligations or Liabilities are sought to be enforced as a breach of contract or Claim in tort (including negligence), in equity or otherwise at Law.
- (c) **(Agreement specifies Liabilities):** Without limiting the generality of paragraph (b), it is further agreed that the rights, obligations and Liabilities of the parties (including those relating to proportionate liability) are as stated in this Agreement and not otherwise whether such rights, obligations and Liabilities are sought to be enforced as a breach of contract or Claim in tort (including negligence), in equity or otherwise at Law.
- (d) **(Subcontracts):** Project Co must:
 - (i) include a term in each Subcontract that excludes the application of the Legislation in relation to all and any rights, obligations or Liabilities of either party in accordance with each Subcontract whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort (including negligence), in equity or otherwise at Law; and
 - (ii) require each Subcontractor to include, in any further contract that it enters into with a third party for the undertaking of the Works, the performance of the Services or delivery of the Project, a term that excludes the application of the Legislation in relation to all and any rights, obligations or Liabilities of either party in accordance with each further contract whether such rights, obligations or Liabilities are sought to be enforced by a Claim in contract, tort (including negligence), in equity or otherwise at Law.
- (e) **(Insurance):** Project Co must ensure that all Insurances required by this Agreement which cover third party Liability:
 - (i) cover Project Co for potential Liability to the State assumed by reason of the exclusion of the Legislation; and

- (ii) do not exclude cover for any potential Liability Project Co may have to the State in accordance with or by reason of this Agreement.

38.15 Indirect or Consequential Loss

- (a) Despite any provision of this Agreement, neither the State nor any Indemnified Person has any Liability to Project Co or any Project Co Associate, nor will Project Co or any Project Co Associate be entitled to make any Claim, in respect of Indirect or Consequential Loss incurred or sustained by Project Co or any Project Co Associate as a result of any act or omission of the State or any Indemnified Person (whether negligent or otherwise) or as a result of a breach of a State Project Document by the State.
- (b) The following do not constitute Indirect and Consequential Loss of Project Co or a Project Co Associate:
 - (i) Liability arising from criminal acts or fraud on the part of the State or a State Associate;
 - (ii) Liability arising from wilful misconduct under any Project Document on the part of the State or a State Associate;
 - (iii) Liability arising from any loss of or damage to third party property or injury to, disease or death of a person;
 - (iv) Liability to the extent which, by Law, the parties cannot limit or exclude;
 - (v) any other moneys expressly payable to the Project Co under the Project Documents other than for loss of opportunity, profit, anticipated profit, business, business opportunities or revenue or any failure to realise anticipated savings;
 - (vi) any amounts payable by the State under Schedule 4 (Change Compensation Principles) or Schedule 10 (Termination Amounts); or
 - (vii) amounts payable under Clause 37.6.
- (c) Despite any other provision of this Agreement neither Project Co nor any Project Co Associate has any Liability to the State or any Indemnified Person, nor will the State or any Indemnified Person be entitled to make any Claim, in respect of any Indirect or Consequential Loss incurred or sustained by the State or any Indemnified Person as a result of any act or omission of Project Co or any Project Co Associate (whether negligent or otherwise) or as a result of any breach of a State Project Document by Project Co.
- (d) The following do not constitute Indirect or Consequential Loss for the purposes of paragraph (c):
 - (i) Liability for which Project Co is insured under an Insurance Policy or would have been insured but for any breach of the Insurance Policy by Project Co or any Project Co;
 - (ii) Liability for which Project Co recovers pursuant to an indemnity under any Project Documents;
 - (iii) Liability arising from criminal acts or fraud on the part of Project Co or any other Project Co Associate;
 - (iv) Liability arising from wilful misconduct under any Project Document on the part of Project Co or any Project Co;

- (v) Liability arising from any loss of or damage to third party property or injury to, disease or death of a person;
 - (vi) Liability to the extent which, by Law, the parties cannot limit or exclude;
 - (vii) the direct costs incurred by the State in rectifying a Defect for which Project Co is liable under this Agreement;
 - (viii) Liability in respect of any Abatement or a Claim under Clauses 36.3 or 36.5(c)(ii);
 - (ix) any amounts payable by Project Co under Schedule 4 (Change Compensation Principles) or Schedule 10 (Termination Amounts);
 - (x) any statutory fine arising from any breach of Law by Project Co;
 - (xi) abandonment of the Works or Services by Project Co;
 - (xii) any other moneys expressly payable to the State under the Project Documents other than for loss of opportunity, profit, anticipated profit, business, business opportunities or revenue or any failure to realise anticipated savings; or
 - (xiii) amounts payable under Clause 37.6.
- (e) To the extent that the Liability of Project Co is the subject of an indemnity under a Project Document, Project Co must use all reasonable endeavours to pursue recovery under that indemnity (including the prosecution of any Claim in accordance with the terms of the relevant Project Document).

39. Insurance

39.1 D&C Phase Insurances

During the D&C Phase, Project Co must effect and maintain or cause to be effected and maintained each of the Insurances:

- (a) stated in Part A of Schedule 9 (Insurance); and
- (b) as a prudent owner and operator would obtain and maintain when undertaking work of a similar nature to the Works.

39.2 Operating Phase Insurances

From the Date of Stage 1 Commercial Acceptance, Project Co must effect and maintain or cause to be effected and maintained each of the Insurances:

- (a) stated in Part B of Schedule 9 (Insurance); and
- (b) as a prudent owner and operator would obtain and maintain for the operation and maintenance of facilities of a similar nature to the Facility.

39.3 General insurance requirements

Project Co must:

- (a) **(Reputable Insurers):** ensure that all Insurances are effected by Reputable Insurers;

- (b) **(deductibles)**: pay all deductibles payable in connection with any of the Insurances including if the claim is made by the State or any State Associates insured under the Insurance except to the extent that the insured risk for which the deductible is to be paid has occurred as a consequence of any breach of a State Project Document by the State or any negligent act or omission by the State or any State Associate;
- (c) **(premiums)**: punctually pay all premiums and other amounts payable in connection with the Insurances effected by it, and give the State copies of receipts for payment of premiums if and when requested by the State;
- (d) **(no alteration)**: not alter, extend or discontinue or cancel any Insurance, or allow any Insurance to lapse where this would result in the relevant Insurance not meeting the requirements of this Agreement, without the prior approval of the State;
- (e) **(do not prejudice)**: not do or permit, or omit to do, anything which prejudices any Insurance;
- (f) **(rectify)**: promptly rectify anything which might, if not rectified, prejudice any Insurance;
- (g) **(fully disclose)**: fully and promptly disclose all material information to all relevant insurers (and any persons acting on their behalf) relating to the Insurances (whether held solely or jointly with others) in all respects;
- (h) **(comply)**: comply at all times with the terms of each Insurance;
- (i) **(do everything to enable State recovery)**: other than the FM Insurances, do everything reasonably required by the State or any State Associate in whose name an Insurance Policy is effected and maintained to enable the State or State Associate (as applicable) to claim, and to collect or recover, money due in accordance with or in connection with any Insurance Policy;
- (j) **(indemnities secondary)**: other than the FM Insurances, ensure that the terms of the Insurances do not require the State or State Associates to exhaust any indemnities referred to in this Agreement as a condition precedent to the insurer considering or responding to any Claim; and
- (k) **(notify)**: promptly notify the State of any occurrence that may give rise to a claim in connection with the Project under any Insurance, except in relation to any employers' liability, workers' compensation insurance and motor vehicle insurance.

39.4 Terms of Insurances

Project Co will ensure that each of the Insurances it is responsible for effecting and maintaining or causing to be effected and maintained in accordance with this Agreement (other than the FM Insurances):

- (a) contains terms, if relevant and to the extent permitted by Law, to the effect that the insurer:
 - (i) will not impute to any insured party any knowledge or intention or a state of mind possessed or allegedly possessed by any other insured party;
 - (ii) in the case of Insurances in accordance with which the State is also entitled to cover, agrees that the interests of the insured include the entire assets and undertaking of the Project and the Facility and

waives any rights of subrogation which it may have against any insured party;

- (iii) in the case of liability insurances, agrees to treat each insured as a separate insured party as though a separate contract of insurance had been entered into with each of the insured parties, without increasing the deductibles or reducing the overall limit of indemnity; and
 - (iv) no reduction in limits or coverage affecting the Project or the Facility will be made during the period of insurance, except under the circumstances and to the extent permitted by the *Insurance Contracts Act 1984* (Cth) and with not less than 30 days prior notification to the State; and
- (b) take proper account of the nature and objectives of the Project and the Facility, the responsibilities and entitlements of the various insureds' in connection with this Agreement and are on terms otherwise acceptable to the State (whose acceptance will not unreasonably be withheld).

39.5 Additional Insurance

- (a) If the State at any time reasonably requires Project Co to:
- (i) arrange Insurance against a risk not specifically provided for or contemplated in accordance with Schedule 9 (Insurance); or
 - (ii) other than in respect of the FM Insurances, increase the extent of, or change the terms of, an existing Insurance from that set out in Schedule 9 (Insurance),
- it may notify Project Co and request that Project Co give effect to its requirements.
- (b) Project Co must promptly inform the State of the amount of any additional premium payable in giving effect to the requirement of the State in accordance with paragraph (a) before it implements the requirement, and the State will advise Project Co whether it still requires Project Co to give effect to that requirement.
- (c) The cost of any additional premiums paid on any additional, increased or varied Insurances required by the State in accordance with paragraph (b) will be a debt due and payable by the State to Project Co.

39.6 Insurances primary

- (a) Except for the FM Insurances and the professional indemnity insurance referred to in Schedule 9 (Insurance), the Insurances are primary and not secondary to the indemnities referred to in this Agreement.
- (b) The State is not obliged to make a Claim or institute proceedings against any insurer under the Insurances before enforcing any of its rights or remedies under the indemnities referred to in this Agreement or generally.
- (c) Project Co is not relieved from and remains fully responsible for its obligations in accordance with this Agreement regardless of whether the Insurances respond or fail to respond to any claim and regardless of the reason why any Insurance responds or fails to respond.

39.7 Evidence of Insurance

Project Co must give the State:

- (a) certified copies of all policies (other than in respect of the professional indemnity insurance or the FM Insurances), certificates of currency (in respect of all insurances), renewal certificates and endorsement slips (other than in respect of the FM Insurances), as soon as it receives them from the insurer of the relevant Insurance; and
- (b) evidence satisfactory to the State that the Insurances continue to be maintained in accordance with this Agreement, whenever reasonably requested by the State.

39.8 State may effect Insurances

- (a) The State may (but is not obliged to) procure or effect and maintain the relevant Insurances and pay the premium:
 - (i) if Project Co fails to provide evidence satisfactory to the State within 10 days of a request in accordance with Clause 39.7; or
 - (ii) in the event of any default by Project Co in obtaining or maintaining Insurances in accordance with this Clause 39 or if any Insurance that Project Co is responsible for effecting and maintaining in accordance with this Agreement becomes void or voidable.
- (b) The costs reasonably incurred by the State in connection with taking such action will be recoverable from Project Co as a debt due and payable by Project Co to the State.

39.9 Review of Operating Phase insurances

- (a) The State and Project Co will meet:
 - (i) 6 Months prior to the anticipated Date of Stage 1 Commercial Acceptance; and
 - (ii) 6 Months prior to every 5th anniversary of the Date of Stage 1 Commercial Acceptance,

(each an **Insurance Review Commencement Date**) to review the minimum limits of liability, sub-limits of liability and deductibles for the Insurances required for the Operating Phase which must be effected and/or maintained during the ensuing 5 year period with a view to reaching agreement upon the limits, sub-limits and deductibles which will apply during that ensuing 5 year period.
- (b) To the extent that the State and Project Co are able to reach agreement within 2 Months after the Insurance Review Commencement Date on the limits, sub-limits and deductibles to apply during the ensuing 5 year period, Project Co must, from the commencement and for the duration of the relevant 5 year period, cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed.
- (c) To the extent that the State and Project Co are unable to reach agreement within 2 Months after the Insurance Review Commencement Date, then:
 - (i) those limits, sub-limits and deductibles which have not been agreed will be referred for dispute resolution in accordance with Clause 45; and

- (ii) if the relevant limits, sub-limits and deductibles have not been agreed or resolved in accordance with the dispute resolution process before the commencement of the relevant 5 year period, then Project Co must, pending the outcome of the dispute resolution process, cause the then current levels of the relevant limits, sub-limits and deductibles to be adjusted in accordance with increases in the CPI from the date of the relevant limit, sub-limit or deductible was last reviewed or adjusted.
- (d) The State and Project Co agree that the limits, sub-limits and deductibles are to be agreed or resolved (as applicable) having regard to:
- (i) the nature of the Project;
 - (ii) the Insurances which Project Co has effected, or caused to be effected, at that time and the risks covered in accordance with those insurances;
 - (iii) the risks sought to be insured;
 - (iv) the risks which a prudent insured would seek to insure;
 - (v) the terms on which insurance is available;
 - (vi) the commercial reasonableness of those terms;
 - (vii) the insurances and risk management practices generally applying in industry;
 - (viii) any events that have an impact on the cost of procuring insurance in the global insurance market generally; and
 - (ix) any other factors which the State and Project Co may agree to be appropriate.

39.10 Insurance Proceeds Account

- (a) **(Establish account):** Project Co must:
- (i) establish an account to be known as the “**Insurance Proceeds Account**”;
 - (ii) maintain that account in the name of Project Co with a financial institution nominated by Project Co and approved by the State (such approval not to be unreasonably withheld) or with a financial institution that is a party to the Finance Side Deed;
 - (iii) give details of that account to the State;
 - (iv) notify the financial institution referred to in paragraph (ii) of the charge over the Insurance Proceeds Account in accordance with the State Deed of Charge and procure, and copy the State with, acknowledgement of the notice from the financial institution; and
 - (v) procure the agreement of the financial institution referred to in paragraph (ii) not to exercise any right of set-off or combination of accounts in relation to the Insurance Proceeds Account.
- (b) **(Deposit insurance proceeds):** Project Co and the State must deposit all insurance moneys received under the contract works policy and the industrial special risks policy into the Insurance Proceeds Account.

- (c) **(Application of moneys):** Subject to the Finance Side Deed, moneys in the Insurance Proceeds Account may only be applied towards the repair or reinstatement of the Project.
- (d) **(Records):** Project Co must give the State records of expenditure from the Insurance Proceeds Account within 45 days of such expenditure.
- (e) **(Surplus funds):** Any funds remaining in the Insurance Proceeds Account after application in respect of repair or reinstatement of the Facility will, subject to the inclusion of insurance proceeds in any Termination Amount and any right of set-off the State may have, be payable to Project Co.

39.11 Uninsurable Risks

- (a) If a risk is an Uninsurable Risk then:
 - (i) Project Co must notify the State within 5 Business Days of becoming aware that the risk has become an Uninsurable Risk; and
 - (ii) the State must meet with Project Co within 5 Business Days after receipt of Project Co's notice to discuss the risk, including whether the risk is in fact an Uninsurable Risk.
- (b) If both parties agree (or if not, it is determined in accordance with Clause 45), that a risk is an Uninsurable Risk and that Uninsurable Risk occurs, the parties must meet further to discuss how the risk should be managed.
- (c) If the parties cannot agree on how to manage the Uninsurable Risk, then the State must (at the State's option) either:
 - (i) indemnify Project Co against any Claim or Liability incurred in connection with the Uninsurable Risk, up to an amount equal to the insurance proceeds that would have been payable had the relevant Insurance continued to be available on the previous terms of that Insurance; or
 - (ii) immediately terminate this Agreement by notice to Project Co.
- (d) If the State elects to terminate this Agreement in accordance with paragraph (c)(ii):
 - (i) this Agreement will terminate on the date stated in the State's notice; and
 - (ii) the State will pay to Project Co the Force Majeure Termination Amount.

39.12 Review of Uninsurable Risks and Excepted Risks

Project Co must be vigilant in reviewing the insurance market generally, to ascertain whether an Uninsurable Risk or Excepted Risk has become insurable, and in any event must require its insurance brokers to test the market and determine whether, and if so what, insurance terms as to both premium and coverage are available in connection with that risk, from Reputable Insurers, at intervals of not more than 12 Months. If upon such review it is found that the relevant Uninsurable Risk or Excepted Risk is insurable, then Project Co will promptly procure the insurance in connection with that risk in accordance with this Clause 39.

40. Compliance with Laws

40.1 Authorisations

Project Co must obtain and maintain all Authorisations in connection with the Project (including all conditions of such Authorisations).

40.2 Compliance with Laws and Authorisations

- (a) Subject to paragraph (e), Project Co must comply with and ensure that all elements of the Project comply with:
 - (i) all applicable Laws and Authorisations; and
 - (ii) if applicable, the Code of Practice for the Building and Construction Industry in Western Australia.
- (b) Project Co must:
 - (i) give all notices and pay all fees and other amounts required to be paid in connection with delivering the Project; and
 - (ii) give the State copies of all documents (including Authorisations and other notices) issued to it in connection with the Project by any Authority.
- (c) Project Co must provide all information and assistance reasonably required by the State or the Facility Operator in order for the State or the Facility Operator to discharge any obligation it has in accordance with any Law or Authorisation in connection with the Project.
- (d) Nothing in this Agreement will limit or exclude any functions or powers of the Office of the Inspector of Custodial Services conferred under the *Inspector of Custodial Services Act 2003* (WA) in connection with the Works, the Facility or the Services.
- (e) Where a Change in Policy that constitutes a State Change in Mandatory Requirements occurs, Project Co must notify the State and comply with the relevant Quality Standards (as changed) unless the State directs Project Co not to comply with the relevant Quality Standards (as changed) (which direction may only be given where Project Co is not otherwise legally obliged to comply with the Change in Policy).

40.3 Privacy

- (a) Without limiting Clause 40.2, Project Co must comply with:
 - (i) its obligations (if any) under or arising pursuant to the *Privacy Act 1988* (Cth) to the extent relevant to this Agreement;
 - (ii) any directions made by a Privacy Commissioner relevant to this Agreement; and
 - (iii) any other reasonable direction relating to privacy which is given by the State or the Facility Operator.
- (b) If Project Co is exempt from compliance with the *Privacy Act 1988* (Cth) because its annual turnover is less than the prescribed threshold, and if Project Co is not subject to an approved privacy code, Project Co must comply with the

National Privacy Principles set out in the *Privacy Act 1988* (Cth) as if it were required to comply with that legislation.

41. Representations and warranties

41.1 General representations

Project Co represents and agrees that:

- (a) **(Project Documents)**: the execution, delivery and performance of the Project Documents to which each Project Entity is a party does not violate any Law, or any document or agreement to which that Project Entity is a party or which is binding on it or any of its assets;
- (b) **(valid and legally binding)**: each Project Document to which each Project Entity is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
- (c) **(not trustee)**: no Project Entity or any Partner is the trustee or Responsible Entity (as that term is defined in the *Corporations Act 2001* (Cth)) of any trust nor do they hold any property subject to or impressed by any trust other than the EGRP Unit Trust 1 and EGRP Unit Trust 2;
- (d) **(no subsidiaries)**: no Project Entity or Partner has any subsidiaries;
- (e) **(no tax consolidation)**: no Project Entity or Partner is part of any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth), except with the consent of the State;
- (f) **(no other trade)**: no Project Entity or Partner has traded since being constituted, other than for the purposes of entering into the Project Documents and delivering the Project and has no Liabilities other than those that have arisen in connection with entering into the Project Documents;
- (g) **(no material financial change)**: there has been no material change in the financial condition of each Project Entity and each Partner (since being constituted), and the Equity Investors, the Builder or the FM Subcontractor (since the date of their last audited accounts) which would prejudice the ability of any Project Entity to perform its obligations in accordance with the Project Documents;
- (h) **(accounts)**: each Project Entity's most recent consolidated and unconsolidated audited (as applicable) accounts:
 - (i) give a true and fair view of its state of affairs as at the date to which they relate and the results of its operations for the accounting period ended on such date;
 - (ii) have been prepared in accordance with the Corporations Act or the Partnership and Investors Deed (as applicable) and established accounting practices and processes, disclosed in such accounts; and
 - (iii) disclose all Financial Indebtedness and other contingent liabilities in respect of it;
- (i) **(status)**: the Partnership is a partnership duly and validly constituted and existing under the Laws of Victoria and the Partnership and Investors Deed and each Initial Partner is the sole trustee of a trust duly and validly constituted and existing under the Laws of Victoria and (as applicable) the EGRP Unit Trust 1 Deed or the EGRP Unit Trust 2 Deed;

- (j) **(sole partners)**: the Initial Partners are the sole partners of the Partnership;
- (k) **(transactions permitted)**: the execution of and fulfilment, for and on behalf of the Partnership, of its obligations under the Project Documents and each transaction contemplated under those documents does not and will not violate the Partnership and Investors Deed;
- (l) **(Project assets)**: all of the assets, property and revenue required to carry on the business of the Partnership is and will at all times form part of the Partnership's assets;
- (m) **(Partnership Representatives)**: the Partnership Representatives have been validly appointed pursuant to the Partnership and Investors Deed; and
- (n) **(personal capacity)** neither Assure Partners (EGRP) 1 Pty Ltd nor Assure Partners (EGRP) 2 Pty Ltd will:
 - (i) in their personal capacity, at any time hold any assets relevant to, required for or otherwise in connection with the Project and all such assets will at all times be held by the Trusts and the Partnership; or
 - (ii) at any time hold any assets or incur any liabilities other than as relevant to, as required by or otherwise in connection with their role as trustee of the Trusts.

41.2 Project Co's representations

Project Co represents and agrees that:

- (a) **(informed itself)**: it has informed itself as to the nature of the Project;
- (b) **(assessed risks)**: it has assessed the risks which it is assuming in accordance with the State Project Documents;
- (c) **(Land Conditions)**: it has examined the Site and their surroundings and has done everything possible to inform itself sufficiently as to access to those areas and the Land Conditions which may affect delivery of the Project;
- (d) **(own investigations)**: it enters into this Agreement based on its own investigations, interpretations, deductions, information and determinations;
- (e) **(resources and expertise)**: it has the resources and expertise required to perform the obligations imposed on Project Co in accordance with this Agreement including to deliver the Project in accordance with this Agreement; and
- (f) **(Lobbyist)**: any "Lobbyist" (as that term is defined in Public Sector Commissioner's Circular 2009-13 "Public Sector Commissioner's Circular" which can be found at: www.publicsector.wa.gov.au/PSCCirculars) that it or any Project Co Associate has employed, engaged or has otherwise involved, directly or indirectly, in connection with this Agreement, is duly registered as a "Lobbyist" in terms of that Public Sector Commissioner's Circular and has fully complied with its obligations under it.

41.3 Undertaking in respect of Records

- (a) Project Co must ensure that all Records (other than those referred to in paragraphs (e) and (f) of the definition of Records) are true, correct and complete at all times.
- (b) Project Co:

- (i) must ensure that those Records referred to in paragraph (f) of the definition of Records are true, complete and correct upon submission of such Records to the State; and
- (ii) warrants, in respect of each National Police Certificate submitted to the State, that at the time of submission of that National Police Certificate, it has no reason to believe that that National Police Certificate is not true, complete and correct.

41.4 Disclosed Information

- (a) Project Co agrees that prior to the Date of this Agreement it has done everything that would be expected of a prudent, competent and experienced contractor and service provider in assessing the risks that it is assuming in accordance with this Agreement, in particular the nature of the Site.
- (b) Project Co represents and agrees that it did not rely upon any Disclosed Information or any other information or the adequacy, accuracy, suitability or completeness of the Disclosed Information or any other information for the purposes of entering into this Agreement and the other State Project Documents.
- (c) Project Co agrees that:
 - (i) **(no representation)**: except as set out in Clause 7.4, the State and State Associates have not made and make no representation, and give no warranty or guarantee in connection with any information, data and documents (including the Site Information Reports and other Disclosed Information) obtained by the State from investigations carried out by the State or on its behalf by independent consultants;
 - (ii) **(information only)**: the Disclosed Information is provided by the State for information purposes only;
 - (iii) **(other information)**: there may be other information which the State or a State Associate is aware of or has in its possession which may be relevant to the rights and obligations of the parties in accordance with this Agreement which may not have been provided to Project Co or to which no reference has been made;
 - (iv) **(intellectual property)**: all Intellectual Property Rights in the Disclosed Information remain the property of the State;
 - (v) **(no offer)**: the Disclosed Information does not form part of this Agreement or constitute an invitation, offer or recommendation by or on behalf of the State; and
 - (vi) **(third parties)**: if the Disclosed Information was prepared by third parties, the State is a mere conduit in connection with the information contained in that Disclosed Information.
- (d) Project Co will not make any Claim against the State for any Liabilities incurred or suffered by Project Co or any Project Co Associate in connection with:
 - (i) any inadequacy, inaccuracy or incompleteness in any of the Disclosed Information;
 - (ii) the provision of, or the purported reliance upon, or use of, the Disclosed Information by Project Co or any Project Co Associate; or

- (iii) a failure by the State or State Associate to provide any other information, data or documents to Project Co.

41.5 Repetition of representations and warranties

Each representation and warranty contained in this Agreement:

- (a) is made on the Date of this Agreement; and
- (b) the representation and warranty contained in Clause 41.1 will be deemed to be repeated each day during the Term,

with reference to the facts and circumstances then subsisting.

41.6 Reliance on representations and warranties

Project Co agrees that the State has relied on the representations and warranties of Project Co set out in this Agreement in entering into this Agreement.

42. Default

42.1 Notice of Project Co default

- (a) Project Co must:
 - (i) promptly notify the State upon the occurrence of an Event of Default; and
 - (ii) immediately take steps to commence the remedy of and mitigate the effects of the Event of Default.
- (b) If Project Co notifies the State of an Event of Default in accordance with paragraph (a) or the State considers an Event of Default has occurred, the State may give Project Co a notice (**Default Notice**) which contains:
 - (i) details of the Event of Default;
 - (ii) if the Event of Default is capable of being remedied, a date by which Project Co must remedy the Event of Default; and
 - (iii) if the Event of Default is not capable of being remedied, a date by which Project Co must comply with any reasonable requirements of the State in connection with that Event of Default.

42.2 Project Co to comply with Default Notice and provide remedy program

If the State gives a Default Notice to Project Co, then:

- (a) Project Co must comply with the Default Notice; and
- (b) unless the relevant Event of Default is a failure to pay money or to provide or replace the Handover Bond:
 - (i) Project Co must give the State a program to either remedy the Event of Default or comply with any reasonable requirements of the State in accordance with the terms of the State's Default Notice which will specify steps to address the underlying cause of the Event of Default and to avoid similar Events of Default occurring in the future;

- (ii) the parties must consult to develop and agree the remedy program; and
- (iii) following agreement or determination of the remedy program, Project Co must implement and comply with the remedy program.

42.3 Requests for extensions to remedy period

If Project Co considers, in good faith, that the time stated in a Default Notice is not reasonable, it must immediately notify the State of that belief, the reasons for that belief and the time which it believes is reasonably required to remedy the Event of Default or comply with any reasonable requirements of the State.

42.4 When extensions to be given

- (a) Subject to paragraph (b), if Project Co gives a notice in accordance with Clause 42.3 and Project Co is and has been diligently pursuing:
 - (i) the remediation of the Event of Default; or
 - (ii) compliance with any reasonable requirements of the State in connection with an Event of Default that is not capable of remedy,

then the time stated in the Default Notice will be extended by such period as the State determines is reasonably required to enable Project Co to either remedy the Event of Default or comply with any reasonable requirements of the State.
- (b) Project Co is only entitled to one extension in connection with the same Event of Default.

42.5 Disputes

If Project Co considers that the time stated in the Default Notice given by the State in accordance with Clause 42.1, is not reasonable and the State does not extend such time in accordance with Clause 42.4(a) or there is a failure to agree a remedy program as required by Clause 42.2(b) it:

- (a) may (provided that it is and has either been diligently pursuing the remediation of the Event of Default or compliance with any reasonable requirements of the State) refer the matter for resolution in accordance with Clause 45; and
- (b) whilst the matter is being determined, must continue to diligently pursue either the remediation of the Event of Default or compliance with any reasonable requirements of the State.

43. Step-in by the State

43.1 Right of Step-In

If:

- (a) an Emergency occurs;
- (b) an Immediate Termination Event occurs;
- (c) a State Cure Notice (as that term is defined in the relevant side deed) has been issued by the Builder or the FM Subcontractor (as applicable); or
- (d) the State is required by Law to act to discharge a statutory power or duty,

(Step-in Event),

the State or a nominee of the State may elect to:

- (e) temporarily assume total or partial management and control of the whole or any part of the Works, the Services or the Facility;
- (f) access the Site; and
- (g) take such other steps as are necessary in the reasonable opinion of the State to deliver the Project and minimise the effect of the Step-in Event.

43.2 Suspension of Project Co's obligations

If the State has exercised its step-in rights in accordance with Clause 43.1, Project Co's obligations in accordance with the State Project Documents will be suspended (and a failure by Project Co to perform the suspended obligations will not constitute a breach of this Agreement by Project Co, an Event of Default or an Immediate Termination Event) for the affected period but only to the extent necessary to enable the State to exercise those step-in rights.

43.3 Payments

- (a) If the Step-in Event was caused by:
 - (i) a failure of Project Co to provide the Services in accordance with and to the standard specified in Schedule 13 (Services Specifications);
 - (ii) any other breach of a State Project Document by Project Co or a Project Co Associate; or
 - (iii) the negligent act or omission of Project Co or a Project Co Associate,then to the extent that the Step-in Event was so caused:
 - (iv) the Quarterly Services Payment will be Abated in accordance with Schedule 14 (Payment Schedule) (and the State Loan Payment reduced in accordance with Clause 36.3(e)), to the extent that Project Co is not providing the Services in accordance with Schedule 13 (Services Specifications); and
 - (v) Project Co must pay to the State any costs incurred by the State in providing the affected Services which are in excess of the amount of the savings received by that State as a consequence of the Abatement of the Quarterly Service Payment and reduction of the State Loan Payment pursuant to paragraph (iv) and all such amounts will be deducted from future Quarterly Services Payments and the State Loan Payment until all such amounts are recovered, unless all future Quarterly Services Payments and State Loan Payments are insufficient, in which case such amounts will be a debt due and payable by Project Co to the State.
- (b) Subject to paragraph (a), the State will continue to pay the Quarterly Services Payment and State Loan Payment during a Step-in Event notwithstanding that the Services affected by the Step-in Event are suspended or are being provided by the State, after deducting the amount of recurrent costs which are not in fact incurred by Project Co during the period, because those Services are suspended or are being provided by the State under this Clause 43.
- (c) The State will pay any third party costs incurred by Project Co that are not covered under the Quarterly Service Payment or State Loan Payment, or Claims

made against Project Co, as a direct result of any negligent acts or omissions of the State or a State Associate while the State exercises its rights under Clause 43.1, except if the exercise of such rights is the result of:

- (i) the negligent acts or omissions of Project Co or a Project Co Associate;
- (ii) a breach of any Project Document by Project Co or a Project Co Associate; or
- (iii) the Step-in Event was otherwise caused by any breach of a State Project Document by Project Co or a Project Co Associate.

43.4 Project Co to assist the State

Project Co must provide the State with all necessary assistance in a timely manner to enable it to exercise its step-in rights in accordance with Clause 43.1 effectively and expeditiously.

43.5 Power of attorney

Project Co irrevocably:

- (a) appoints the State, and the State's nominees from time to time, jointly and severally as Project Co's attorney with full power and authority to exercise the State's rights in accordance with this Clause 43; and
- (b) agrees to ratify and confirm whatever action is taken by the attorney appointed by Project Co.

43.6 Cessation of step-in rights

- (a) The State may, at any time, cease to exercise its rights in accordance with this Clause 43 on 5 Business Days notice to Project Co.
- (b) The State must cease to exercise its step-in rights on 5 Business Days notice to Project Co where the State has exercised its rights in accordance with:
 - (i) Clauses 43.1(a) (if the Emergency ceases) or 43.1(b) (and the Event of Default or Immediate Termination Event has been remedied or ceases); or
 - (ii) Clauses 43.1(c) or 43.1(d), and the relevant event is remedied or ceases.
- (c) If the State has ceased to exercise its step-in rights in accordance with this Clause 43.6, Project Co must immediately recommence performing any obligations suspended due to the exercise of such step-in rights.

44. Termination

44.1 Termination for convenience

Subject to Clause 44.5, the State may, at any time, terminate this Agreement at its convenience by giving Project Co not less than 20 Business Days notice.

44.2 Termination for Force Majeure

- (a) Subject to Clause 44.5 and paragraph (c), if a Force Majeure Termination Event occurs, either party may terminate this Agreement by giving notice to the other party.
- (b) The termination of this Agreement for a Force Majeure Termination Event will take effect upon the date stated in the notice given in accordance with paragraph (a).
- (c) Project Co may not terminate this Agreement for a Force Majeure Termination Event for the period Project Co is able to recover under any Insurances that it is required to procure in accordance with this Agreement for any Liability suffered as a consequence of the relevant Force Majeure Termination Event or would have been able to recover had it effected and maintained such Insurances in accordance with this Agreement.

44.3 Termination for Event of Default

- (a) Subject to the Finance Side Deed, the State may terminate this Agreement by giving Project Co a notice if any of the following events occurs:
 - (i) Project Co fails to remedy an Event of Default within the period set out in the Default Notice (as extended, if at all, in accordance with Clause 42.4); and
 - (ii) if an Event of Default is not capable of remedy, Project Co fails to diligently comply with any reasonable requirements of the State to overcome the consequences of the Event of Default within the time stated in the notice given by the State in accordance with Clause 42.1 (as extended in accordance with Clause 42.3).
- (b) Termination of this Agreement for an Event of Default will take effect upon the date stated in the notice given by the State in accordance with paragraph (a).

44.4 Termination for Immediate Termination Event

- (a) Subject to the Finance Side Deed, the State may terminate this Agreement immediately by notice and without granting Project Co any cure period if an Immediate Termination Event occurs.
- (b) Termination of this Agreement for an Immediate Termination Event will take effect upon the date stated in the notice given by the State to Project Co in accordance with paragraph (a).

44.5 Payments on termination

If this Agreement is terminated by the State the State must pay to Project Co:

- (a) in accordance with Clause 44.1 for termination for convenience, the Voluntary Termination Amount;
- (b) in accordance with Clause 44.2 for termination for a Force Majeure Termination Event, the Force Majeure Termination Amount; and
- (c) for an Event of Default or Immediate Termination Event, the Default Termination Amount,

in accordance with Schedule 10 (Termination Amounts).

44.6 Termination and Quarterly Service Payment

Upon termination under this Clause 44, the State's obligation to pay the Quarterly Service Payment will cease.

44.7 Power of attorney

Project Co irrevocably appoints the State and its nominees as notified from time to time, jointly and severally as Project Co's attorney with full power and authority to carry out Project Co's obligations in accordance with this Clause 44 to the extent that Project Co fails to comply with its obligations under this Clause 44.

44.8 Assistance

Project Co will use its reasonable endeavours to assist the State in the exercise of the State's rights in accordance with this Clause 44.

44.9 Novation of liabilities to the State

- (a) Where this Agreement terminates, and any Project Entity has any Debt outstanding, the State may elect to assume some or all of the rights and Liabilities under the Financing Documents that would otherwise have been the rights and liabilities of a Project Entity and to the extent the State so elects:
- (i) Project Co must ensure (and must procure that each other Project Entity ensure) that such rights and Liabilities are novated to the State;
 - (ii) the State agrees to meet all further obligations to those creditors on the same terms and conditions as contained in the Financing Documents; and
 - (iii) the amount of the Termination Amount which the State would otherwise be obliged to pay will be reduced by the amount of any Debt assumed by the State.
- (b) For the avoidance of doubt, the parties agree that in the circumstances contemplated in this Clause 44.9, the Termination Amount which the State would otherwise be obliged to pay will also be reduced by the amount of any costs of terminating the Financing Documents which would otherwise have been taken into account in determining the Termination Amount, but which are not incurred by reason of the novation.
- (c) Project Co must ensure that each Project Entity is permitted, under the terms of all Financing Documents, to procure the novation of its Debt obligations and rights pursuant to this Clause 44.9.

44.10 Waiver

If the State terminates this Agreement in accordance with its terms, then Project Co's only entitlement will be in connection with its rights (if any) in accordance with Clause 44.5.

45. Dispute resolution

45.1 Disputes

- (a) If a dispute arises between the parties in connection with any fact, matter or thing in connection with this Agreement (**Dispute**), including any dispute in connection with a determination of the Independent Certifier, the Dispute will be resolved in accordance with this Clause 45.

- (b) If there is a Dispute, then a party may deliver to the other party a notice of dispute which sets out the party's contentions including any relevant legal basis of claim (**Notice of Dispute**).
- (c) Despite the existence of a Dispute or the referral of the Dispute for resolution in accordance with this Clause 45 each party must continue to comply with its obligations in accordance with this Agreement.
- (d) Subject to Clause 45.4, the parties agree that unless and until a party has complied with the requirements of this Clause 45, a party may not commence any court proceedings in connection with any Dispute except if the party seeks urgent interlocutory, injunctive or declaratory relief.

45.2 Consideration by Management Team

If a Notice of Dispute has been delivered in accordance with Clause 45.1(b) the Management Team must, within 10 Business Days of the delivery of the Notice of Dispute, meet, give due consideration to the submissions by the parties in connection with the Dispute and attempt in good faith to:

- (a) assist the parties to resolve the Dispute; or
- (b) agree that the Dispute be referred to an Independent Expert in accordance with Clause 45.3.

45.3 Independent Expert

- (a) (**Referral to Independent Expert**): Disputes that arise between the parties in connection with Clauses 16 (other than if paragraph (d) applies), 25, 28.1(a), 36, 37, 45.2(b) and 49.4 and any other dispute agreed by the parties for referral to an Independent Expert or identified in this Agreement to be referred to an Independent Expert, will be referred to an Independent Expert for resolution in accordance with this Agreement.
- (b) (**Agreement**): If this Agreement expressly provides that a Dispute will be referred for determination by an Independent Expert, then Clause 45.2 will not apply and within 5 Business Days of the delivery of the Notice of Dispute in accordance with Clause 45.1(b) the parties must agree on an Independent Expert to determine the Dispute.
- (c) (**Abatement disputes**): If a Dispute (which is subsisting) on the calculation of any Quarterly Service Payment or State Loan Payment relates to the application of the Abatement Regime and any reductions to the Quarterly Service Payment or State Loan Payment consequent on that application, the parties must use reasonable endeavours to refer any such Dispute to an Independent Expert for resolution in accordance with clause 45.3(b) no later than the date three Months after the Quarterly Service Payment or amounts due under the State Loan Agreement related to the State Loan Payment to which the Dispute relates, have been paid.
- (d) (**Independent Expert**): For the purpose of paragraph (b) unless the Dispute is in connection with a determination by the Independent Certifier, the parties may appoint the Independent Certifier, or some other person, to act as the Independent Expert.
- (e) (**Failure to agree on Independent Expert**): If the parties fail to agree on the Independent Expert within the time referred to in paragraph (b), then:
 - (i) an Independent Expert will be nominated by the president of the institute or governing body for the technical or professional discipline the subject of the relevant Dispute having regard to any Independent

Experts proposed by the parties as notified in writing to the president and to the other party (which in the case of each party, must not exceed two proposed Independent Experts); or

- (ii) if there is no governing body for the technical or professional discipline the subject of the relevant Dispute, an Independent Expert will be nominated by the President of the Institute of Arbitrators and Mediators, Australia having regard to any Independent Experts proposed by the parties as notified in writing to the President and to the other party (which in the case of each party, must not exceed two proposed Independent Experts).
- (f) **(Agreement):** The agreed or nominated Independent Expert must execute an agreement with the parties within 10 Business Days after the agreement on, or nomination of, the Independent Expert in accordance with paragraphs (d) or (e) (as applicable).
- (g) **(Referral):** If the Independent Expert so agreed or nominated executes an agreement in accordance with paragraph (f), then the Dispute must be referred to that Independent Expert for determination.
- (h) **(New independent expert):** If the Independent Expert agreed or nominated does not, or either party does not, execute an agreement in accordance with paragraph (f), then the parties must agree or nominate another independent expert in accordance with this Clause 45.3 (but the parties will only have the opportunity to agree or nominate one further Independent Expert after the initial Independent Expert).
- (i) **(Basis for determination):** The Independent Expert will make its determination based upon:
 - (i) the Notice of Dispute;
 - (ii) the submissions provided by the parties which, unless the Independent Expert extends the time for delivery, must be delivered within 5 Business Days of the Independent Expert signing the agreement referred to in paragraph (f); and
 - (iii) any further information provided by the parties in accordance with any request by the Independent Expert for further submissions, documents or information from either or both parties.
- (j) **(Conference):** After the Dispute has been referred to the Independent Expert, the Independent Expert may call and conduct a conference, or any number of conferences, as the Independent Expert sees fit, between the parties, but will give the parties reasonable notice of the matters to be addressed at any such conference.
- (k) **(Representation):** The parties may be legally represented at any such conference.
- (l) **(Privacy):** All conferences will be held in private except to the extent that representatives of the Key Subcontractors will be permitted to attend on reasonable notice, where the Dispute may impact on their rights or liabilities under their Subcontracts.
- (m) **(Visit):** The Independent Expert may visit the Site or the Facility (as applicable), and the parties will facilitate the Independent Expert's access to any of those areas.

- (n) **(Timing):** The Independent Expert must make a determination in connection with the Dispute by the earliest of:
 - (i) within 10 Business Days after the last of the steps set out in paragraphs (a) to (m); or
 - (ii) within 30 Business Days after receipt of submissions in accordance with paragraph (i)(ii).
- (o) **(Not arbitrator):** The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.
- (p) **(Final and binding):** The determination of the Independent Expert will be final and binding on the parties, unless within 15 Business Days of the determination, a party notifies the other party that it intends to commence litigation to appeal the determination.
- (q) **(Mistake):** The Independent Expert may correct the determination by notice to the parties where its determination contains:
 - (i) a clerical mistake or an error arising from an accidental slip or omission; or
 - (ii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter.
- (r) **(Costs):** The cost of the Independent Expert will be borne equally by each of the parties to the Dispute unless the determination is made against the party who issued the Notice of Dispute, in which case the Independent Expert may determine that that party will bear all or a greater proportion of the Independent Expert's costs in connection with that Dispute.

45.4 Litigation

Either party may commence litigation in connection with a Dispute if and only if a Notice of Dispute has been delivered in accordance with Clause 45.1(b) and:

- (a) Clause 45.2 applies and within 20 Business Days after the delivery of the Notice of Dispute in accordance with Clause 45.1(b) the Management Team has not:
 - (i) resolved the Dispute; or
 - (ii) agreed that the Dispute be referred to an Independent Expert in accordance with Clause 45.3; or
- (b) the Dispute has been referred for determination by an Independent Expert in accordance with Clause 45.3 and:
 - (i) the agreed Independent Expert and any new Independent Expert agreed in accordance with Clause 45.3(h) or any of the parties did not execute an agreement in accordance with Clause 45.3(f);
 - (ii) the Independent Expert failed to make a determination in accordance with Clause 45.3, including within the time set out in Clause 45.3(n);
 - (iii) the Independent Expert made a determination and, within 15 Business Days of the determination, a party has notified the other party that it intends to commence litigation to appeal the determination; or

- (iv) either party has failed to comply with any of the requirements of this Clause 45.

45.5 Impact of application for adjudication under the Construction Contracts Act

The *Construction Contracts Act 2004* (WA) (**CCA**) will have the following impact on this Clause 45:

- (a) an application for adjudication under Part 3 of the CCA will not be considered a Notice of Dispute:
- (b) if a Dispute Notice is given in accordance with Clause 45.1 and the Dispute the subject of that Notice of Dispute is, or subsequently becomes, the subject of an application for adjudication under Part 3 of the CCA, the operation of Clause 45.1 will be stayed in relation to that Dispute until such time as the application is dismissed or determined under the CCA; and
- (c) if a determination is made pursuant to Part 3 of the CCA, this Clause 45 will have no application in relation to the Dispute the subject of that determination and either party may commence court proceedings relating to the Dispute in accordance with the CCA.

46. Assignment and ownership

46.1 Assignment by Project Entity

Except as expressly permitted in accordance with this Agreement, the Finance Side Deed or the State Deed of Charge, Project Co must not (and must ensure that no Project Entity does) assign, mortgage, novate, charge or otherwise encumber the Project Documents, without the prior consent of the State and on such terms and conditions as are determined by the State.

46.2 Financier's Securities

A Project Entity may, after execution of the Finance Side Deed, mortgage or charge its interest in accordance with the Project Documents to secure its obligations to any Financier (or the trustee or agent for any Financier) in accordance with the Financing Documents, if, and for so long as, the Financier (or the trustee or agent for any Financier) is a party to the Finance Side Deed.

46.3 Restrictions on sale, lease and parting with possession

Project Co must not (and must ensure that no Project Entity does):

- (a) create or allow to exist any Encumbrance over; or
- (b) lease, license, transfer, sell, dispose of, part with possession of, or otherwise deal with,

the whole or any part of the Site or the Facility, except as expressly permitted in accordance with this Agreement, the Finance Side Deed or the Financing Documents or as otherwise consented to by the State.

46.4 Assignment by the State

- (a) The State may not sell, transfer or assign or otherwise dispose of its interest in the Project Documents without the prior consent of Project Co.

- (b) Project Co must give its consent in accordance with paragraph (a) if:
 - (i) it has been provided with details of the proposed transferee and the terms and conditions of the proposed transfer;
 - (ii) the proposed transferee is a Government Agency (including any Minister) which is an agent of, or the obligations of which are supported by, the Crown in the right of the State of Western Australia; and
 - (iii) the proposed transferee has agreed to be bound by the relevant State Project Documents.

46.5 *[not disclosed]*

46.6 **Change in Control**

- (a) **(Prohibition):** Subject to paragraph (c), Project Co must ensure that there is no Change in Control of a Consortium Entity without the prior consent of the State which consent will not be unreasonably withheld.
- (b) **(Listed shares):** If a Change in Control of a Consortium Entity occurs due to the transfer of shares or other interests which are listed on a stock exchange, the consent of the State may be sought after the occurrence of the Change in Control, but if the consent of the State is not obtained, Project Co must procure that the Controller ceases to have the Control which resulted in the Change in Control within 60 Business Days after receiving notice in accordance with paragraph (a) that the State does not consent to the Change in Control.
- (c) *[not disclosed]*
- (d) **(Notice):** Any notice seeking the consent of the State to a Change in Control must include:
 - (i) the identity and address of each proposed Controller;
 - (ii) the extent and nature of the proposed Change in Control; and
 - (iii) all other information necessary for the State to determine:
 - A. whether to consent to the Change in Control of the Consortium Entity; or
 - B. the Probity Investigations (if any) the State wants to undertake.
- (e) **(State response):** The State must, within 10 Business Days, notify Project Co whether:
 - (i) the State consents to the proposed Change in Control of the Consortium Entity;
 - (ii) the State does not consent to the proposed Change in Control of the Consortium Entity (and the reasons for this); or
 - (iii) the State needs to conduct a Probity Investigation in connection with the Change in Control prior to making a determination whether or not to consent to the Change in Control.
- (f) **(Factors to consider):** It will be reasonable for the State to withhold consent to a Change in Control if:

- (i) the Controller is not solvent or reputable;
- (ii) the Change in Control is to take effect prior to Stage 2 Commercial Acceptance;
- (iii) the Controller has an interest which conflicts in a material way with the interests of the State;
- (iv) the Controller does not have a sufficient level of financial, managerial and technical capacity to deliver the Project;
- (v) the proposed change could lead to the occurrence of a Probity Event;
- (vi) the proposed change would increase the Liabilities of the State or State Associates;
- (vii) Project Co has not provided the State with full details for the proposed Change in Control or any further information requested by the State; or
- (viii) the Change in Control will negatively affect the ability of Project Co to perform its obligations.

46.7 Change in Management

- (a) An Event of Default will occur if a Change in Management of a Project Entity occurs and as a result the relevant Project Entity no longer has the same or better management skills available to it as it had prior to the Change in Management.
- (b) For the purpose of this Clause a "**Change in Management**" means a change in the senior employees of a Project Entity who carry out the management functions of that Project Entity or the management of any other entity that provides management functions to that Project Entity.

47. Business Activities

47.1 Restrictions on business

Project Co must not conduct any business other than the Project and the carrying out of its obligations and the exercise of its rights in accordance with the Project Documents without the State's prior consent.

47.2 Restrictions on acquisition of property and liabilities being incurred

Project Co must not acquire or hold any property or incur any Liability other than for the purposes of the Project without the State's prior consent.

47.3 Tax consolidation

Project Co must not engage in any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) without the State's prior consent.

47.4 Plant and FF&E

Project Co must ensure that all of its plant, systems, hardware, software and other assets and property comprised or used in the delivery of the Project will be either:

- (a) owned by Project Co; or

- (b) the subject of an agreement (such as a lease or hire purchase agreement):
 - (i) in accordance with which it has the right to acquire ownership of them for nominal cost at the end of the term of the agreement;
 - (ii) which enables it to meet its obligations under Clauses 11 and 26;
 - (iii) which includes a right for it to assign and novate its rights and obligations in accordance with the agreement to the State (or its nominee) prior to the end of the term of that agreement or on termination of this Agreement;
 - (iv) which will not terminate, be suspended or impose more onerous terms on Project Co or the State if the State was to exercise any of its rights in accordance with the Project Documents; and
 - (v) which allows security to be taken over it.

47.5 Notice of Probity Event

Project Co must give notice to the State immediately upon becoming aware that a Probity Event has occurred or is likely to occur.

47.6 Meeting

Upon receipt of a notice in accordance with Clause 47.5 or otherwise upon the occurrence of a Probity Event:

- (a) the State and Project Co must meet within 10 Business Days to agree to a course of action that will remedy the Probity Event (including conducting a Probity Investigation); and
- (b) Project Co must take all necessary steps in accordance with any agreement in accordance with paragraph (a) to remedy the Probity Event.

47.7 Failure to agree

If the State and Project Co fail to meet or agree to a course of action in accordance with Clause 47.6, Project Co must take any action required by the State to remedy the Probity Event (including conducting a Probity Investigation).

47.8 Consents required for Probity Investigation

Project Co must procure all relevant consents from any persons in connection with which the State requires Probity Investigations to be conducted.

47.9 Costs of Probity Investigation

Project Co:

- (a) must bear the costs reasonably incurred by the State in carrying out the Probity Investigation; and
- (b) will not be liable for any other Probity Investigation required by the State.

47.10 No appointment without consent

Project Co must not appoint any Project Co Associate to a role in connection with the Project if the State forms the view acting reasonably that such an appointment will lead to a Probity Event.

48. Project Information

- (a) **(Make available to State):** Project Co must upon receipt of a request from the State, make the Records available to the State within 2 Business Days of receiving the State's request.
- (b) **(Financial information):** To the extent the Records comprise financial information, Project Co must prepare all Records in accordance with established accounting practices and procedures.
- (c) **(Legal professional privilege):** The requirement in paragraph (a) does not apply to Records which are the subject of legal professional privilege.
- (d) **(Audit):** The State and any auditor appointed by the State may audit any Records requested by the State and Project Co must provide (and must ensure that each Project Entity provides) all reasonable assistance to facilitate such audit.
- (e) **(Accounts audit):** Project Co must (and must ensure that each Project Entity does) have its accounts audited annually on both an unconsolidated basis and on a consolidated basis (to the extent that that a Project Entity is part of a consolidated entity, within the meaning of the *Corporations Act 2001* (Cth)).
- (f) **(Audited financial statements):** As soon as practicable (and in any event not later than when required under the Corporations Act to be provided to the Australian Securities and Investment Commission) after the close of each financial year, Project Co must give to the State certified copies of the consolidated (if applicable) and unconsolidated audited statements of financial position and statement of financial performance of each Project Entity for the previous financial year, and if requested by the State, the Builder (during the D&C Phase) and the FM Subcontractor (during the Operating Phase) for the previous financial year.
- (g) **(Cashflow and profit and loss statements):** Not later than 30 days after the end of each Quarter, Project Co must give to the State certified copies of each Project Entity's cashflow and profit and loss statements.
- (h) **(Maintenance of Records):** Project Co must (and must ensure that each Project Entity does):
 - (i) maintain all Records:
 - A. for a period of not less than 7 years from the date that the Record was created;
 - B. in a manner which ensures the availability and continuous integrity of all Records; and
 - (ii) maintain all Records otherwise as required by the *State Records Act 2000* (WA) and all other applicable Laws or Quality Standards.

49. Model Variation Events

49.1 Status of the Financial Model

The State must not be adversely affected by any discrepancies, errors or omissions in the Financial Model, or by the fact that it may not reflect the actual financial performance or the projected performance or budgets of the Project or Project Co.

49.2 Varying the Financial Model

The Financial Model will be varied in accordance with this Clause 49, on the occurrence of any of the following events (each a **Model Variation Event**):

- (a) a Refinancing;
- (b) a Change Compensation Event; and
- (c) any other event that Project Co and the State (acting reasonably) agree to be a Model Variation Event.

49.3 Principles for variations to Financial Model

If a Model Variation Event occurs, the Financial Model will be varied by only taking into account the amounts agreed between the State and Project Co, or as determined in accordance with Clause 45.

49.4 Procedures for variations to Financial Model

- (a) Any variation to the Financial Model to take account of a Model Variation Event must be made as follows:
 - (i) Project Co must propose the variation by notice to the State giving full details of the assumptions and calculations used;
 - (ii) the State will review the varied Financial Model in accordance with Schedule 3 (Review Procedures); and
 - (iii) any Dispute about the variation will be referred to an Independent Expert for resolution in accordance with Clause 45.3; and
- (b) once the variation to the Financial Model is agreed or is determined, Project Co must amend the Financial Model accordingly.

49.5 Access to information

Project Co must provide (and must ensure that each Project Entity provides) the State and any nominee of the State with full access to electronic copies of the calculations required to vary the Financial Model for a Model Variation Event, including reasonable access to any financial modeller including the financial modeller of any Project Co Associate with the ability to access that information, and relevant passwords or other access information.

49.6 Auditing the Financial Model

- (a) The State may at any time appoint a model auditor to audit the Financial Model and:
 - (i) the results of the audit will be disclosed to both the State and Project Co; and
 - (ii) to the extent any discrepancies, errors or omissions are revealed in the audit by the State, subject to Clause 45, Project Co must promptly correct the Financial Model.
- (b) If an audit by the State results in a correction to the Financial Model, Project Co must pay the reasonable costs of the State in conducting the audit, but if not, the State will bear the costs of the audit.

49.7 Custody of the Financial Model

The Financial Model will be held in escrow from the date of Financial Close for the Term by the Western Australia State Solicitor's Office on the basis that it will be released to both parties for the purposes of:

- (a) varying the Financial Model on the occurrence of Model Variation Events;
- (b) the calculation of Termination Amounts;
- (c) the determination of any Disputes under this Clause 49 by an Independent Expert; and
- (d) the State exercising its audit rights under Clause 49.6.

50. Confidentiality

50.1 Confidential Information

- (a) **(Confidentiality obligations):** Project Co must and must ensure that Project Co's Associates and any prospective financier or equity investor keep confidential:
 - (i) subject to paragraphs (b) and (c), the State Project Documents, all Records, all and all Disclosed Information; and
 - (ii) all Prisoner Information,
(together **Confidential Information**).
- (b) **(Permitted disclosure):** Project Co is not obliged to keep confidential any information:
 - (i) which is in the public domain through no default of Project Co; 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 Project Co is a party.
- (c) **(Disclosure to Project Co's Associates):** Without limiting Project Co's obligations in accordance with paragraph (a), Project Co may disclose Confidential Information to:
 - (i) Project Co's Associates to the extent necessary for the purpose of undertaking the Project; or
 - (ii) subject to paragraph (d), any prospective financier or equity investor of the Project.
- (d) **(No disclosure):** Project Co 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):** Subject to paragraph (f), 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 purpose of the Project;
 - (iii) in accordance with all Laws;
 - (iv) in the course of official duties by the Minister for Corrective Services of Western Australia, the Minister for Works of Western Australia, the Premier of Western Australia, the Treasurer of Western Australia, DCS, the Department of Treasury of Western Australia or the Department of 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 Australia Department of Corrective Services and the Department of Treasury of Western Australia; and
 - (ix) in accordance with the *Freedom of Information Act 1992 (WA)*, the *Ombudsman Act 1976 (Cth)* or the *Parliamentary Commissioner Act 1971 (WA)*.
- (f) **(State will not disclose):** The State will not disclose or publish:
- (i) the Financial Model; or
 - (ii) the terms of any Project Documents designated as confidential by the parties in Schedule 16 (Confidential Provisions),
- without the prior written consent of Project Co except:
- (iii) to any State department or Minister provided that such Confidential Information is not further disclosed other than in accordance with this paragraph (f);
 - (iv) to any State Associate, but only to the extent necessary for the purpose of the Project and provided that such information is not further disclosed other than in accordance with this paragraph (f);
 - (v) to satisfy the requirements of parliamentary accountability and parliamentary disclosure obligations;
 - (vi) where required by the Director General, Chief Executive Officer or the Commissioner of the Department of Corrective Services where required to do so to exercise the duties of his office provided that such information is not further disclosed other than in accordance with this paragraph (f);
 - (vii) in accordance with all Laws and its obligations under Laws; or

- (viii) to the extent the State believes it is necessary to disclose the information in a value for money analysis of the Project.
- (g) (**Government websites**): Subject to paragraph (f), 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 Government Agency may be published on any Western Australian government internet website.

50.2 Public announcements

Project Co must not make any public disclosures, announcements or statements in relation to the Project without the State's prior consent (which will not be unreasonably withheld).

51. Intellectual Property

51.1 Definitions

For the purposes of this Clause 51:

- (a) "**Contract Material**" means:
 - (i) the D&C Documents and the Operating Plans, Reports and Manuals; and
 - (ii) all other programs, documents, materials or information prepared by or for or on behalf of Project Co; and
- (b) "**Moral Rights**" has the meaning given to it in the *Copyright Act 1968* (Cth).

51.2 Intellectual property licence

- (a) Project Co:
 - (i) grants to the State and any nominee of the State;
 - (ii) must ensure that the person legally entitled to do so, grants to the State and any nominee of the State; and
 - (iii) must do all things reasonably necessary to give effect to the grant to the State and any nominee of the State of,

in respect of:
 - (iv) all Intellectual Property Rights (other than Intellectual Property Rights referred to in paragraph (v) in or used in the Contract Material) (whether owned by Project Co or not), a non-exclusive, royalty-free, irrevocable and transferable licence (to arise immediately upon the creation of any relevant material and including a right to sub-license) to use, exercise, reproduce, communicate, adapt and modify all the Intellectual Property Rights; and
 - (v) all Intellectual Property Rights in respect of proprietary computer software (other than the source code) of the FM Subcontractor or a Related Body Corporate of the FM Subcontractor in or used in the Contract Material, a non-exclusive, royalty-free, irrevocable and transferable licence (to arise immediately upon the creation of any relevant material and including a right to sub-license) to use, exercise, reproduce, communicate, adapt and modify all the Intellectual Property Rights,

for any purpose in connection with the Project at the Site.

- (b) Notwithstanding the terms of this Clause 51.2, to the extent that any item of Contract Material is commercially available off-the-shelf third party software (and is not proprietary computer software of the FM Subcontractor or a Related Body Corporate of the FM Subcontractor), Project Co must:
 - (i) if Project Co is legally able to do so, licence that item of Contract Material to the State and the State Associates on the terms of the licence granted to Project Co by the third party licensor; or
 - (ii) if Project Co is not legally able to licence that item of Contract Material to the State without the consent of the licensor, use all reasonable endeavours to procure the consent of the licensor to grant such a licence to the State and the State Associates.
- (c) If Project Co is, or reasonably considers it will be, after having used its reasonable endeavours, unable to grant to the State the rights required in accordance with paragraph (b), it must promptly notify the State of that failure and the State and Project Co will negotiate in good faith with respect to Project Co obtaining for the State's benefit, such rights or arrangements as the State reasonably requires.
- (d) If Project Co and the State are unable to obtain such rights for the State, Project Co will continue to work with the State in order to allow the State to use or take full benefit of the third party software.
- (e) Project Co undertakes to the State that the computer software described in Clause 51.2(a)(v) above will at all times:
 - (i) be able to be maintained in reasonable working order without requiring access to the source code for that computer software;
 - (ii) include all necessary tools to enable configuration, engineering, maintenance and enhancement in respect of that computer software, or the integration of that computer software with other computer software, without requiring access to the source code;
 - (iii) be based on published open standards and architecture which are able to be utilised by third parties without the requirement for a licence or without a need to pay compensation to the FM Subcontractor or any of its Related Bodies Corporate;
 - (iv) be based on published open standards and architecture which are supported by third party manufacturers of equipment in the nature of that being supplied by the FM Subcontractor in connection with the Project; and
 - (v) without limiting the foregoing, be readily capable of being reconfigured, adapted or applied to any modification of the Facility, refurbishment of the Facility, or increase in the number of Prisoners at the Facility which is reasonably foreseeable as at the Date of this Agreement (having regard to the nature and location of the Facility) and which occurs either during or after the Term, without requiring access to the source code for that computer software.

51.3 Moral rights

- (a) Project Co must procure that it is given or has the benefit of a consent from every individual involved in the delivery of the Project who has or may have any rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed and rights of a similar nature conferred by statute that may exist, or may come to exist, anywhere in the world (**Moral Rights**) relating to the Project or anything else provided by Project Co as part of or in connection with the Project (**Copyright Works**).
- (b) Project Co warrants that each consent referred to in paragraph (a):
 - (i) allows the State and any nominee of the State to do any act or omission (whether before or after the date of the consent) in connection with the exercise by State of its rights of ownership or use of the Copyright Works, which may (but for the consent) infringe the individual's Moral Rights; and
 - (ii) satisfies the requirements for consent set out in the *Copyright Act 1968* (Cth).
- (c) If requested by the State, Project Co must provide to the State copies of the consents referred to in this Clause 51.3 as soon as practicable and in any case within 30 Business Days of receipt of a request from the State.

51.4 Project Co acknowledgements

Project Co agrees that:

- (a) it will not breach any Intellectual Property Rights or Moral Rights of any person in delivering the Project;
- (b) it owns or has a licence in all Intellectual Property Rights in the Contract Material and, except if the provisions of a licence of third party software to which Clause 51.2 refers prohibit it from doing so, is able to grant the assignments and licences contemplated by this Agreement;
- (c) neither the State or any sub-licensee of the State or a State Associate is liable to pay any third party any licence or other fee in connection with the use of the Contract Material licensed to the State in accordance with Clause 51.2; and
- (d) the use of the Contract Material licensed or sublicensed to the State in accordance with Clause 51.2, in accordance with this Agreement and the terms of the relevant licence will not infringe any Intellectual Property Rights or Moral Rights or breach any Laws.

52. Notices

52.1 General Notices

- (a) (**Form of notices**): Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this Agreement (in this Clause 52.1, "**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 in Schedule 1 (Contract Particulars) (or as otherwise notified by that party to each other party from time to time).
- (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 stated in Schedule 1 (Contract Particulars); 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 9.00am 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 52.1. 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 Agreement:
 - 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.

52.2 Notice of Claims

Except if this Agreement expressly sets out the timeframes for the delivery of notices, the State will not be liable upon any Claim by Project Co in connection with this Agreement or the Project unless Project Co gives the State:

- (a) a notice in which Project Co states that it intends to submit a Claim and the event on which the Claim will be based and which must be given to the State no later than 15 Business Days from the earlier of when Project Co first became aware or ought reasonably to have become aware of the events on which the Claim is based; and
- (b) a Claim within 20 Business Days of giving notice in accordance with paragraph (a), which must include:
 - (i) detailed particulars concerning the events on which the Claim is based;
 - (ii) the legal basis for the Claim whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;
 - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
 - (iv) details of the amount claimed and how it has been calculated.

52.3 Continuing events

If the events upon which the Claim in accordance with Clause 52.2(b) is based or the consequences of the events are continuing, Project Co must continue to give information required by Clause 52.2(b) every 20 Business Days after the Claim in accordance with Clause 52.2(b) was submitted, until 21 Business Days after the events or consequences have ceased.

53. Taxes

53.1 GST

- (a) **(Construction)**: In this Clause 53.1:
 - (i) words and expressions which are not defined in this Agreement 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);
 - (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; and
 - (iv) the terms GST and input tax credit include payments made under or in accordance with the *State Entities (Payments) Act 1999* (WA).
- (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 Agreement. 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 Agreement 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 Agreement 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);
 - (ii) Project Co 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) Project Co will notify the State of the amount determined by the valuer within 15 days of the end of the Month in which this Agreement is entered.
- (e) **(Payment of GST):**
- (i) Subject to paragraph (d)(i), if GST is payable on any supply made by a party (Supplier) under or in connection with this Agreement, 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 paragraph (i) in addition to and at the same time that the consideration for the supply is to be provided in accordance with this Agreement.
- (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 connection with 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 connection with 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) In the case of a supply to which paragraph (d) applies, the Supplier must issue an Invoice or adjustment note within 20 days of the end of the Month in which this Agreement is entered consistent with the valuation referred to in paragraph (d)(ii).
- (iii) The recipient can withhold payment of any amount payable in accordance with this Clause 53.1 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 Agreement, the amount payable by the recipient in accordance with this Clause 53.1 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 Agreement 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 connection with 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.
- (j) **(WPW Payments):** The agreement between the parties for the procurement of the Western Power Works by Project Co and the payment for the Western Power Works by the State as set out in Clause 7.5A, is an agreement in accordance with Subdivision 153B of the GST Law
- (k) **(Completion Payment):** Notwithstanding any other provision of this Clause 53.1:
 - (i) consistent with Clause 21A.3 that neither the Securitised Licence Structure nor the State Loan Agreement creates an Increased State Risk Allocation the parties agree that the State will not bear any net costs (including without limitation, funding costs arising from timing differences) in respect of GST payable on any taxable supply to which the Completion Payment relates;
 - (ii) the parties will use their reasonable endeavours to obtain and implement an agreement by the Commissioner to offset, in the parties' running balance accounts, Project Co's liability to pay GST on a taxable supply to which the Completion Payment relates and the State's entitlement to input tax credits for a creditable acquisition to which the Completion Payment relates. The setting off by the Commissioner of the amounts in the parties' running balance accounts will be taken to satisfy any obligation of the State to pay to Project Co an amount in respect of GST on the relevant taxable supply (whether or not the amount set-off is equal to the whole of that GST);
 - (iii) Project Co must, on or before the Completion Payment Date, issue the State a tax invoice for any taxable supply to which the Completion Payment relates;
 - (iv) the State is not obliged to make a payment to Project Co in respect of GST pursuant to Clause 53.1(e) in respect of a supply to which the Completion Payment relates on the Completion Payment Date until it has (acting reasonably and in accordance with Clause 53.1(k)(ii) and

Clause 53.1(k)(v)) received the benefit of an input tax credit for such GST (by the input tax credit being offset against a GST or other tax liability of the State, credited to the State's running balance account, being refunded to the State or a combination of the above);

- (v) Subject to Clause 53.1(k)(ix), if the State is denied an input tax credit by the Australian Tax Office, a Court or other appropriate Government Agency for all or part of the GST in respect of a Completion Payment, Project Co must reimburse the State for any relevant GST it has paid in excess of its input tax credit entitlement and indemnify the State for an amount equal to any penalty or interest as a result of claiming an input tax credit for the whole of the GST on that Completion Payment;
- (vi) if Clause 53.1(k)(v) applies, the State will cooperate with Project Co as reasonably required by Project Co to enable the State and Project Co to discuss with the Australian Tax Office the reasons for the denial of an input tax credit and will take reasonable steps, as reasonably directed by Project Co, to dispute the denial (provided that the obligation to dispute is not a condition precedent to the operation of Clause 53.1(k)(v)). Project Co indemnifies the State for its costs incurred in disputing any denial of an input tax credit;
- (vii) if as a result of Clause 53.1(k)(vi), the State's entitlement to an input tax credit is increased, the State will promptly pay to Project Co an amount equal to that increase together with any interest to which the State is entitled in relation to that amount;
- (viii) the State must take all reasonable steps to ensure it, the Nominated Entity (or the government entity which is treated as making the supplies and acquisitions under the State Project Documents for GST purposes) receives the benefit of the input tax credit from the Australian Taxation Office as quickly as possible, including:
 - A. claiming the input tax credit in the GST return or "Business Activity Statement" for the first tax period in which the input tax credit can be properly reported;
 - B. lodging the GST return or Business Activity Statement in which the input tax credit is reported no later than the due date for that GST return or Business Activity Statement;
 - C. forwarding any queries or correspondence from the Commissioner in respect of that Business Activity Statement (but only to the extent that the queries or correspondence relates to the relevant input tax credit) to Project Co; and
 - D. promptly informing Project Co of any delays or other related issues in respect of the input tax credit;
- (ix) the State acknowledges that Project Co has no obligation to make a payment under Clause 53.1(k)(v) to the extent that the State is denied an input tax credit by the Australian Tax Office, a Court or other appropriate Government Agency for the GST in respect of a Completion Payment because the State or the Nominated entity has not met its obligations under clause 53.1(k)(viii);
- (x) if at any time this Agreement is terminated, the obligation of the State to pay Project Co any amount in accordance with Clause 53.1(k)(iv) continues in full force and effect and is an obligation separate,

independent and additional to the State's obligation to make a termination payment in accordance with Clause 44.5. Notwithstanding the termination of this Agreement, the State is obliged to use reasonable endeavours to obtain the input tax credit and to pay to Project Co each amount in accordance with Clause 53.1(k)(iv); and

- (xi) if at any time this Agreement is terminated, the obligation of Project Co to pay the State any amount in accordance with Clause 53.1(k)(v) continues in full force and effect.

53.2 General liability for Taxes

As between the State and Project Co:

- (a) save to the extent caused by an act or omission of Project Co or a Project Co Associate, other than an act or omission in accordance with this Agreement:
 - (i) the State is responsible for and will pay any land tax assessed on or in relation to the Site under the *Land Tax Assessment Act 2002 (WA)* and the *Land Tax Act 2002 (WA)*; and
 - (ii) the State is responsible for and will pay all duty assessed under the *Duties Act 2008 (WA)* on any transfer, or agreement to transfer receivables, pursuant to the Receivables Purchase Deed or any document executed under it; and
- (b) Project Co bears the risk of, and must pay, all Taxes incurred or imposed in connection with:
 - (i) the execution, stamping, delivery and performance of any Project Document and each transaction effected or made in accordance with or in connection with it;
 - (ii) any amendment to, or any consent, approval, waiver, release, surrender or discharge of or in accordance with any Project Document;
 - (iii) the Project,

except as provided in Clause 53.1 and 53.2(a).

54. General

54.1 Interest

- (a) If a party fails to pay any amount payable by that party to the other party within the time required in accordance with this Agreement, then it must pay interest on that amount in accordance with paragraph (b).
- (b) Interest is:
 - (i) payable from the due date until payment is made before and, as an additional and independent obligation, after any judgment or other thing into which the Liability to pay the money payable becomes merged;
 - (ii) calculated on daily balances at the Default Rate; and
 - (iii) capitalised Monthly.

- (c) The amount calculated in accordance with paragraph (b) will be a party's sole entitlement to interest including damages for loss of use of, or the cost of borrowing, money.

54.2 Set-off

- (a) Without limiting or otherwise affecting the State's rights in accordance with any other provision of this Agreement or at Law, the State may deduct from any monies due and payable to Project Co (with the Quarterly Service Payment to be exhausted before the State Loan Payment is reduced) in accordance with this Agreement;
 - (i) any amount due and payable by Project Co to the State (whether in accordance with or relating to this Agreement or any other State Project Documents); or
 - (ii) any amount claimed by the State against Project Co (acting reasonably) arising out of or in connection with any State Project Document and in good faith.
- (b) If the State makes a deduction from any moneys due and payable to Project Co in accordance with paragraph (a)(ii) to the extent that it is subsequently determined that the State is not entitled to payment of those amounts, in addition to repayment of the amounts deducted, the State will pay Project Co interest at the Default Rate on such amount from the date of the relevant deduction.
- (c) Project Co must make all payments to the State free from any set-off or counterclaim and without deduction or withholding for or on account of any present or future Tax, unless Project Co is compelled by Law to make such a deduction or withholding.
- (d) If Project Co is compelled by Law to make a deduction or withholding, it must:
 - (i) remit the deducted or withheld amount to the relevant Authority within the time required by Law; and
 - (ii) provide to the State all information and documentation relating to that deduction or withholding, including any information or documentation required to obtain a credit for or repayment of the deducted or withheld amount from an Authority.

54.3 CADD protocols

To the extent that any Deliverable comprises Design Documentation, Project Co must prepare such documentation in accordance with the requirements and protocols for computer aided drafting and design (**CADD**) set out at the following website <http://www.bmw.wa.gov.au/CADD/index.html>.

54.4 Online contract management

- (a) If the State establishes an online contract administration system for the Project, the State may direct Project Co to submit all documentation created in accordance with this Agreement including the D&C Documents (or specific items of Design Documentation) in accordance with such system.
- (b) Project Co must comply with any direction given by the State in accordance with paragraph (a).

54.5 State review of Project Co performance

- (a) **(Review)**: The State will from time to time during the Term review Project Co's performance in accordance with this Agreement and prepare a performance report in accordance with the State's requirements for reviewing the performance of contractors engaged by the State.
- (b) **(Performance report)**: The State may provide the performance report to any Government Agency.
- (c) **(Liaise with Project Co)**: In reviewing and reporting on Project Co's performance, the State will:
 - (i) liaise with Project Co;
 - (ii) notify Project Co of the form of the performance report including the criteria against which Project Co's performance will be assessed;
 - (iii) provide any other information or guidelines to Project Co relevant to the performance review and the preparation of the performance report; and
 - (iv) provide the proposed performance report to Project Co for its review.
- (d) **(Reasonable assistance)**: Project Co:
 - (i) must provide all assistance reasonably required by the State in conducting a performance review and preparing a performance report in accordance with this Clause 54.5; and
 - (ii) may provide comments to the State on the proposed performance report.
- (e) **(Comments)**: The State will:
 - (i) include any comments provided by Project Co in the completed performance report; or
 - (ii) respond to Project Co in connection with any comments Project Co has on the proposed performance report.

54.6 Priority Start – Building Policy

Project Co must comply and ensure that Project Co's Associates comply with the policy published by the Department of Training and Workforce Development titled "Priority Start – Building" dated 1 March 2010 as amended from time to time.

54.7 Relationship of the parties

- (a) No duty of good faith is implied on the State in connection with its relationship with Project Co.
- (b) Neither the State 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 State and Project Co.
- (c) Project Co must not act as or represent itself to be the servant or agent of the State.

54.8 State's rights, duties, powers and functions

- (a) **(State's own interests):** Unless this Agreement expressly provides otherwise, nothing in this Agreement 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 Agreement 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 Government Agency, or to influence, over-ride or direct any Government Agency in the proper exercise and performance of its legal duties and functions.
- (c) **(No fettering):** Nothing contained in this Agreement or contemplated by this Agreement 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 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 duties.
- (e) **(Liability for breach):** Paragraphs (a) to (d) do not limit any Liability of the State which the State would have had to Project Co 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).

54.9 Reasonable endeavours

If there is any statement in this Agreement 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 Government Agency; or
 - (ii) act in any other way that the State regards as not in the public interest.

54.10 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 Agreement.

54.11 Counterparts

This Agreement 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.

54.12 Governing law

This Agreement 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.

54.13 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 Agreement 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 Agreement.
- (b) No waiver by the State of a breach of any term of this Agreement will operate as a waiver of another breach of that term or of a breach of any other term of this Agreement.

54.14 Variations and waivers

No variation, modification or waiver of any provision in this Agreement, 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.

54.15 Amendments to Project Documents

- (a) This Agreement may only be varied by a deed executed by or on behalf of each party.
- (b) Subject to paragraph (c), Project Co may not at any time after the Date of this Agreement:
 - (i) make or permit any amendment to, replacement of or waiver of a provision of;
 - (ii) terminate, surrender, rescind or accept repudiation of;
 - (iii) permit the novation, assignment or substitution of any counterparty's rights, obligation or interest in; or
 - (iv) enter into any agreement or arrangement which affects the operation or interpretation of, any Project Document without the State's prior consent (which in connection with the Project Documents to which the State is not a party, will not be unreasonably withheld).
- (c) This Clause 54.15 does not apply to:
 - (i) any Refinancing which is to be dealt with in accordance with Clause 37; or
 - (ii) a transaction of the type referred to in Clause 46.6 which is to be dealt with in accordance with that Clause.

54.16 Joint and several liability

If Project Co consists of more than one person, then the rights and obligations of Project Co in accordance with this Agreement are joint and several as between those persons.

54.17 Indemnities

- (a) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination or expiration of this Agreement.
- (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 Agreement.
- (c) A party must pay on demand any amount it must pay in accordance with an indemnity in this Agreement.
- (d) The State and Project Co agree that:
 - (i) each indemnity or promise referred to in this Agreement 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.

54.18 Clauses to survive termination

- (a) All provisions of this Agreement which expressly or by implication from their nature are intended to survive termination, completion or expiration of this Agreement 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) Intellectual Property Rights;
 - (iv) any obligation to make any Records available to the State;
 - (v) any indemnity, performance bond or other financial security given in accordance with this Agreement;
 - (vi) the State's rights in connection with Handover; or
 - (vii) any right or obligation arising on termination of this Agreement (including the obligation to pay the applicable termination payment in accordance with Clause 44.5).
- (b) Nothing in this Clause 54.18 prevents any other provision of this Agreement, as a matter of interpretation, also surviving the termination of this Agreement.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this Agreement. All rights and obligations in accordance with this Agreement survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this Agreement.

54.19 Costs and expenses

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

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

54.20 Further acts and documents

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 Agreement.

54.21 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.

Executed 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

Executed 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 7 December 2012 in the presence of:

Signature of Witness

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

Print full name of Witness

Print name of Attorney

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 attorneys under Power of Attorney dated 7 December 2012 in the presence of:

Signature of Witness

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

Print full name of Witness

Print name of Attorney

Signature of Witness

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

Print full name of Witness

Print name of Attorney

Schedule 1 Contract Particulars

Schedule 2 Financial Close Adjustment Protocol

Schedule 3 Review Procedures

Schedule 4 Change Compensation Principles

Schedule 5 Design Development

Schedule 6 Programming Requirements

Schedule 7 Completion Criteria

Schedule 8 Off-Site Infrastructure Works

Schedule 9 Insurance

Schedule 10 Termination Amounts

Schedule 11 Site Plans

The Parties agree that the Schedule 11 (Site Plans) is located on a CD labelled ' Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4 ' and initialled by the parties.

Schedule 12 Design Specifications

The Parties agree that the Schedule 12 (Design Specifications) is located on a CD labelled ' Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4 ' and initialled by the parties.

Schedule 13 Services Specifications

Schedule 14 Payment Schedule

Schedule 15 Pro Forma Direct Deed

Schedule 16 Confidential Provisions

Schedule 17 FF&E List

The Parties agree that the Schedule 17 (FF&E List) is located on a CD labelled ' Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4 ' and initialled by the parties.

Schedule 18 D&C Plans and Reports

Schedule 19 Security Procedure

Schedule 20 Stage 2 Performance Bond

Schedule 21 Operating Phase Licence

Schedule 22 Design Departure Schedule

The Parties agree that the Schedule 22 (Design Departures Schedule) is located on a CD labelled 'Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4' and initialled by the parties.

Attachment 1 Bid Design Documentation

The Parties agree that the Attachment 1 (Bid Design Documentation) is located on a CD labelled 'Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4' and initialled by the parties.

Attachment 2 Bid Works Program

The Parties agree that the Attachment 2 (Bid Works Program) is located on a CD labelled 'Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4' and initialled by the parties.

Attachment 3 Bid D&C Documents

The Parties agree that the Attachment 3 (Bid D&C Documents) is located on a CD labelled ' Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4 ' and initialled by the parties.

Attachment 4 Bid Operating Plans, Reports and Manuals

The Parties agree that the Attachment 4 (Bid Operating Plans, Reports and Manuals) is located on a CD labelled ' Eastern Goldfields Regional Prison Project Project Documentation Schedules 11, 12, 17 + 22 Attachments 1-4 ' and initialled by the parties.

Attachment 5 Financial Model as at Date of this Agreement

The Parties agree that the Attachment 5 (Financial Model) is located on a CD labelled 'Eastern Goldfields Regional Prison Project Documentation - Financial Model' and initialled by the parties.