

Execution version

# Queen Elizabeth II Medical Centre Car Parking Project

Project Number: BMW14583/10

## Builder Side Deed

The State of Western Australia (**State**)

Capella Parking Pty Ltd (ACN 151 427 119) in its capacity as trustee of the Capella Parking Unit Trust (**Project Co**)

Probuild Constructions (Aust) Pty Ltd (ACN 095 250 945) (**Builder**)

## Contents

<b>1.</b>	<b>Definitions and interpretation.....</b>	<b>1</b>
1.1	General .....	1
1.2	Definitions .....	1
1.3	Interpretation.....	2
1.4	Provisions limiting or excluding Liability .....	3
1.5	Business Day.....	3
1.6	Consents.....	3
1.7	Order of precedence.....	3
1.8	Continuance of rights.....	3
1.9	State Project Documents .....	4
1.10	Commencement .....	4
1.11	Representations by Builder .....	4
<b>2.</b>	<b>Delegation.....</b>	<b>5</b>
2.1	Parties' representatives .....	5
2.2	Further State delegations .....	5
<b>3.</b>	<b>Acknowledgements, consents and undertakings .....</b>	<b>6</b>
3.1	Consent to State Deed of Charge .....	6
3.2	Acknowledgement of State's rights .....	6
3.3	Undertakings of the Builder .....	7
<b>4.</b>	<b>Right to remedy before termination of D&amp;C Subcontract.....</b>	<b>8</b>
4.1	The State's right to remedy .....	8
4.2	Builder's right to terminate.....	8
4.3	Early suspension of the Works .....	9
4.4	Builder's right to suspend without cause .....	10
<b>5.</b>	<b>Step-in by the State.....</b>	<b>10</b>
5.1	Step-in Right.....	10
5.2	Step-in by the State .....	11
5.3	Step-in by an Additional Obligor .....	11
5.4	Indemnity .....	12
<b>6.</b>	<b>Novation of rights and obligations.....</b>	<b>12</b>
6.1	Option .....	12
6.2	Novation.....	13
6.3	Novation of obligations .....	13
6.4	Novation of rights.....	13
6.5	Continuing obligations .....	13
6.6	Release.....	14
6.7	Amendments to D&C Subcontract .....	14
6.8	Novation to a Substitute Party other than the State .....	14
<b>7.</b>	<b>Amendments to D&amp;C Subcontract.....</b>	<b>15</b>
<b>8.</b>	<b>Restriction on dealings .....</b>	<b>15</b>
<b>9.</b>	<b>Confidentiality and publicity.....</b>	<b>15</b>
9.1	Confidentiality .....	15
9.2	Public announcements .....	16
<b>10.</b>	<b>Acknowledgment, release and indemnity .....</b>	<b>17</b>
10.1	No Liability .....	17
10.2	Release.....	17
<b>11.</b>	<b>Dispute resolution.....</b>	<b>17</b>

<b>12.</b>	<b>GST .....</b>	<b>17</b>
<b>13.</b>	<b>Notices .....</b>	<b>18</b>
<b>14.</b>	<b>General .....</b>	<b>20</b>
14.1	Relationship of parties .....	20
14.2	State's rights, duties, powers and functions .....	20
14.3	Reasonable endeavours.....	21
14.4	Entire Agreement.....	21
14.5	Counterparts .....	21
14.6	Governing law .....	21
14.7	No waiver.....	21
14.8	Variations and waiver .....	21
14.9	Amendments.....	21
14.10	Joint and several liability.....	22
14.11	Termination of this document .....	22
14.12	Indemnities .....	22
14.13	Clauses to survive termination .....	22
14.14	Costs and expenses .....	23
14.15	Further acts and documents .....	23
14.16	Trustee limitation of liability .....	23
14.17	No action against Project Co personally .....	23
	<b>Schedule 1 – Builder Statements.....</b>	<b>25</b>

## Builder Side Deed made on

**Parties**                      **The State of Western Australia (State)**

**Capella Parking Pty Ltd (ACN 151 427 119)** of Level 4, Podium Building, 120 Collins Street, Melbourne, Vic, 3000 in its capacity as trustee of the Capella Parking Unit Trust (**Project Co**)

**Probuild Construction (Aust) Pty Ltd (ACN 095 250 945)** of 230 Albert Road, South Melbourne, Vic 3205 (**Builder**)

### Background

- A.            The background to the Project is set out in the Project Agreement.
- B.            Project Co has, in accordance with the D&C Subcontract, subcontracted its obligations to undertake the Works to the Builder.
- C.            The parties have agreed that upon termination by the State of the Project Agreement, the State will have the option of exercising certain rights in relation to the D&C Subcontract on the terms stated in this document.

### Operative provisions

## 1. Definitions and interpretation

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### 1.1 General

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

### 1.2 Definitions

In this document:

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

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

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

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

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

**Novation Date** means:

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

**Project Agreement** means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - Project Agreement" between the State and Project Co dated on or about the date of this document.

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

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

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

### 1.3 Interpretation

In this document unless the context otherwise requires:

- (a) **(references)**: references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), 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 document;
- (e) **(other persons)**: a reference to any party or person includes each of their trustees, legal representatives, executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (f) **(Authority)**: a reference to any Authority, institute, association or body is:
  - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, a reference to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as applicable; and
  - (ii) if that Authority, institute, association or body ceases to exist, a reference to the organisation which serves substantially the same purposes or objectives as that Authority, institute, association or body;
- (g) **(this document)**: a reference to this document or to any other deed, agreement, document or instrument includes a reference to this document or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (h) **(Law)**: a reference to any Law or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for, that legislation, section or provision;
- (i) **(rights)**: a reference to a right includes any benefit, remedy, discretion, authority or power;
- (j) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (k) **(headings)**: headings are for convenience only and do not affect the interpretation of this document;

- (l) **(inclusive)**: a reference to this document includes all Schedules;
- (m) **(Clauses)**: a reference to:
  - (iii) a Clause is a reference to a Clause of this document unless otherwise stated; and
  - (iv) a paragraph is a reference to a paragraph in the Clause in which the reference appears;
- (n) **(defined meaning)**: where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (o) **(\$)**: a reference to "\$" is to Australian currency;
- (p) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (q) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (r) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this document or any part;
- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated; and
- (t) **(writing)**: references to a notice, request, Claim, consent, approval, record or report means that the notice, request, Claim, consent, approval, record or report must be in writing unless otherwise agreed by the parties or expressly stated in this document.

#### 1.4 Provisions limiting or excluding Liability

Any provision of this document which seeks either expressly or by implication to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.

#### 1.5 Business Day

If the day on or by which any thing is to be done in accordance with this document is not a Business Day, that thing must be done on the next Business Day.

#### 1.6 Consents

A consent or approval in accordance with this document from the State may be given or withheld, or may be given subject to such conditions (other than the payment of money), as the State considers fit, unless this document states otherwise.

#### 1.7 Order of precedence

To the extent of any inconsistency, ambiguity or discrepancy between this document and the D&C Subcontract, this document prevails to the extent of that inconsistency.

#### 1.8 Continuance of rights

- (a) This document does not affect the Liabilities, rights, powers or remedies of a party in accordance with any other Project Document.

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

## 1.9 State Project Documents

The Builder agrees that it has received a copy of the State Project Documents.

## 1.10 Commencement

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

## 1.11 Representations by Builder

The Builder represents and agrees that:

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

- (j) **(accounts):**
  - (i) its most recent consolidated and unconsolidated audited (if the requirement for auditing is applicable) accounts give a true and fair view of its and its subsidiaries' (as defined in the *Corporations Act 2001* (Cth)) **(Subsidiaries)** state of affairs as at the date to which they relate and the results of its and its Subsidiaries' operations for the accounting period ended on such date;
  - (ii) there has been no material change in its or its Subsidiaries' state of affairs since such date; and
  - (iii) such accounts have been prepared in accordance with the *Corporations Act 2001* (Cth) and accounting principles and practices generally accepted in Australia consistently applied, except to the extent of departures from such principles and practices disclosed in such accounts;
- (k) **(no default):**
  - (i) it is not in default in accordance with any Project Document to which it is a party; and
  - (ii) to the best of its knowledge and belief, nothing has occurred which would, with the giving of notice or lapse of time, constitute an event of default, cancellation, prepayment event (pursuant to a bona fide right to exercise prepayment) or similar event (whatever called) in accordance with any such Project Document,

and which would have a Material Adverse Effect;
- (l) **(no undisclosed agreement):** there are no documents or agreements in existence at the date of this document and there will not be any documents or agreements in the future which have not been or will not be disclosed to the State which to the best of its knowledge and belief, have the effect of varying any Project Document and, in respect of any Project Documents to which the State is not a party, performance of which would have a Material Adverse Effect;
- (m) **(no immunity):** neither it nor any of its assets enjoys any immunity from set off, suit or execution; and
- (n) **(own investigations):** in entering into the Project Documents to which it is a party it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State.

## 2. Delegation

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### 2.1 Parties' representatives

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

### 2.2 Further State delegations

- (a) The State may at any time delegate the exercise of any of its power or authority in accordance with this document to a person other than the State Representative and may terminate or vary that delegation.
- (b) In respect of any delegation in accordance with paragraph (a), the State will promptly notify Project Co and the Builder 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 2.2 will be deemed to be a direction of the State.

### **3. Acknowledgements, consents and undertakings**

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#### **3.1 Consent to State Deed of Charge**

The Builder:

- (a) **(grant of security)**: consent to the grant of a fixed and floating charge in the form of the State Deed of Charge in favour of the State over all assets and undertakings of Project Co including Project Co's right, title and interest in the D&C Subcontract or to the assignment of Project Co's right title and interest in the D&C Subcontract to the State by way of security;
- (b) **(acknowledgement of rights)**: acknowledge, subject to the Finance Side Deed, the rights created in accordance with the State Deed of Charge including the appointment by Project Co of the State as attorney of Project Co to do, perform and exercise all things, acts and rights in accordance with the D&C Subcontract on behalf of and for the account of Project Co;
- (c) **(no duties)**: agree that nothing in the State Deed of Charge will cause the State to assume any Liabilities in accordance with the D&C Subcontract except as a result of or act or omission of the State in exercising rights or performing or failing to perform obligations in accordance with the D&C Subcontract as contemplated by this document;
- (d) **(no Default Event)**: acknowledges that the:
  - (i) State Deed of Charge does not; and
  - (ii) the exercise by the State of its rights in accordance with any of the State Deed of Charge will not,constitute a Default Event; and
- (e) **(notice of any other assignment)**: acknowledges with the exception of the securities created in accordance with the Finance Documents or as otherwise notified to the State, the Builder has not received notice of any other assignment or charge by Project Co of any right, title, interest in or benefit of Project Co in accordance with the D&C Subcontract.

#### **3.2 Acknowledgement of State's rights**

- (a) **(State's rights)**: the Builder acknowledges the State's rights in accordance with Clauses 8.2 (Occupational health, safety and rehabilitation), 10.4 (State's right to enter, inspect and test), 19 (Handover), 28 (Step-in by the State) and 29 (Termination) of the Project Agreement.
- (b) **(Facilitation of rights)**: The Builder must exercise its rights in accordance with the D&C Subcontract in a way which facilitates the effective exercise by the State of the rights referred to in paragraph (a) and will on reasonable notice permit the State to have access to, and take copies of, the records, reports, documents and other papers to which the State is entitled to have access in connection with the State's rights referred to in paragraph (a).
- (c) **(Continued performance)**: Subject to this agreement, if a Step-in Event has occurred and the State is exercising a right of step-in in accordance with Clause 28

(Step-in by the State) of the Project Agreement, the State may require the suspension or the continuation of performance by the Builder of its obligations in accordance with the D&C Subcontract. The Builder must comply with all reasonable directions of the State in connection with the performance or non-performance of the D&C Subcontract by the Builder.

- (d) **(State not liable):** Subject to Clause 5, any direction given by the State in accordance with paragraph (c) by the State will not be construed as an assumption by the State of any obligations of the Builder in accordance with the D&C Subcontract.
- (e) **(Probity Investigations):** Without limiting the previous paragraphs, the Builder acknowledges and agrees that:
  - (i) in accordance with Clause 32.8 (Consents required for Probity Investigations) of the Project Agreement, the State may require Project Co to conduct Probity Investigations of a Consortium Entity or a Related Person;
  - (ii) it will consent to the undertaking of a Probity Investigation in respect of it or procure the consent of a Related Person to a Probity Investigation;
  - (iii) it will not appoint and will ensure that no other person appoints a person to the position of a Related Person following an adverse Probity Investigation or while a Probity Investigation is being undertaken unless the prior consent of the State is obtained; and
  - (iv) it will remove any person from the position of a Related Person, if following the results of a Probity Investigation the State considers that it is not appropriate for that person to continue to be a Related Person.

### 3.3 Undertakings of the Builder

The Builder undertakes to the State that it must:

- (a) **(notification of Default Event):** notify the State of any Default Event promptly after it gives notice of that Default Event to Project Co in accordance with Clause 29.4A (Termination for Project Co Termination Event) of the D&C Subcontract;
- (b) **(documents in relation to Default Event):** give the State a copy of all documents issued by the Builder to Project Co in relation to a Default Event promptly after giving such documents to Project Co;
- (c) **(no amendment without consent):** not, without first obtaining the consent of the State:
  - (i) make or permit any amendment or replacement of or addition to;
  - (ii) subject to Clauses 4.2, 4.3 and 4.4 terminate, surrender, rescind, suspend or accept repudiation of;
  - (iii) permit the novation, assignment or substitution of any party's rights, obligations or interest in; or
  - (iv) allow any express waiver of its material rights and obligations in accordance with,

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

- (d) **(deed of accession)**: not novate, assign or substitute any of its rights, obligations or interest in the D&C Subcontract without first procuring that the proposed novatee, assignee or substitute executes a deed in favour of the State (in form and substance approved by the State) in accordance with which the novatee, assignee or substitute agrees to accept and be bound by this agreement as if it were the Builder;
- (e) **(attend meetings and inspections)**: when reasonably requested by the State:
  - (i) attend meetings with the State;
  - (ii) provide the State with:
    - A. access to the Construction Areas and the Additional Works Construction Area or any other place where materials are being prepared or stored on such terms and conditions in connection with occupational health and safety as the Builder considers reasonably necessary; and
    - B. any information, records or documents that the State reasonably requires in connection with undertaking the Works or compliance with the D&C Subcontract; and
  - (iii) permit the State or any nominee of the State to attend all tests and inspections to be carried out in connection with the Works in accordance with the D&C Subcontract; and
- (f) **(access to records)**: permit the State to inspect all documents of whatever nature prepared or kept by the Builder in relation to the Project other than internal working documents prepared by the Builder in the ordinary course of business and documents that are prepared for the dominant purpose of use, or obtaining material for use, in actual or potential legal proceedings.

## **4. Right to remedy before termination of D&C Subcontract**

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### **4.1 The State's right to remedy**

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

### **4.2 Builder's right to terminate**

Subject to Clause 4.3, the Builder may only terminate, rescind, accept the repudiation of or suspend the performance of any or all of its obligations in accordance with the D&C Subcontract if:

- (a) the Builder has given a notice to the State that complies with the requirements of Schedule 1 (Builder Statements) (**Default Event Notice**);

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

### 4.3 Early suspension of the Works

- (a) If:
    - (i) the Builder, but for the operation of Clause 4.2, would have a right to suspend the Works in accordance with the D&C Subcontract; and
    - (ii) the Builder has issued a State Cure Notice in connection with the Default Event or a notice to the State stating that the Financiers and Project Co have formally advised the Builder that they do not intend to cure the Default Event,
- and either:

- (iii) the State has not undertaken to pay to the Builder the amounts stated in the Default Event Notice that gave rise to the Builder's right to suspend within 10 Business Days of the earlier of receipt of the State Cure Notice or the notice stating that the Financiers and Project Co have formally advised the Builder that they do not intend to cure the Default Event;
  - (iv) the State has undertaken to pay the pay the Builder such amounts for a stated period and that period has expired without being extended by the State on terms reasonably acceptable to the Builder; or
  - (v) the Default Event has not otherwise been remedied,
- then the Builder may suspend the performance of the Works.

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

#### 4.4 Builder's right to suspend without cause

If no Default Event is subsisting, the Builder may not suspend the performance of the Works in accordance with the D&C Subcontract unless Project Co is entitled to suspend its corresponding obligations in connection with the Works in accordance with the Project Agreement.

### 5. Step-in by the State

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#### 5.1 Step-in Right

- (a) Upon receipt of a State Cure Notice or if the State is entitled to exercise any of the rights referred to in Clause 3.2(a), the State may:
  - (i) appoint a Receiver over Project Co, any or all of its assets (including the D&C Subcontract), or any or all of the shares in Project Co;
  - (ii) itself enter into possession of any or all of the assets or any or all of the shares in Project Co;
  - (iii) take such other action as it is permitted by Law in accordance with the terms of the Project Documents; or
  - (iv) by notice to the Builder (**Additional Obligor Step-in Notice**), procure that an Additional Obligor assumes jointly and severally with Project Co all of Project Co's rights and obligations in accordance with the D&C Subcontract.
- (b) Any action taken by the State in accordance with paragraph (a) is an exercise of a **"Step-in Right"** for the purposes of this agreement.
- (c) The **"Step-In Period"** is the period commencing on the date on which the Builder receives notice of the exercise of any Step-in Right and ending on the earlier of:
  - (i) the Additional Obligor Step-Out Date;
  - (ii) the date on which the Builder terminates the D&C Subcontract;
  - (iii) the date of any transfer in accordance with Clause 6;
  - (iv) the date which the State has notified the Builder that the State will cease to exercise its Step-in Rights; and

- (v) any other date on which the State ceases to continue to exercise its Step-in Rights.
- (d) The Builder agrees that the exercise by the State of a Step-in Right will not of itself contravene, or constitute a Default Event in accordance with the D&C Subcontract or entitle the Builder to exercise any right (including termination) in accordance with it.

## 5.2 Step-in by the State

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

## 5.3 Step-in by an Additional Obligor

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

- (a) **(Assumption Date):** the Additional Obligor will become a party to the D&C Subcontract on the date on which the Additional Obligor Step-in Notice is given to the Builder or such later date as the Builder and the State may agree **(Assumption Date)**;
- (b) **(rights and obligations of Additional Obligor):** during the Step-in Period:
  - (i) the Additional Obligor will be jointly and severally:
    - A. entitled with Project Co to exercise the rights, powers and discretions of Project Co in accordance with the D&C Subcontract (excluding any accrued rights of Project Co for any damage, loss, cost, charge, expense, outgoing or payment to the extent that the rights arose prior to the Assumption Date) **(Project Co's Rights)**; and
    - B. liable with Project Co for the performance or non-performance of all Project Co's obligations in accordance with the D&C Subcontract arising on or after the Assumption Date except as released in accordance with paragraph (e);
  - (ii) as between Project Co, the Builder and the Additional Obligor, only the Additional Obligor is authorised to deal with the Builder and to exercise Project Co's Rights;
  - (iii) Project Co agrees that it will be legally bound by all the acts and omissions of the Additional Obligor;
  - (iv) the Additional Obligor will be bound by any earlier decision, directions, approvals or consents given or made prior to the Assumption Date;
  - (v) Clause 13 will apply to the Builder and the Additional Obligor as if the address, facsimile number and email address of the Additional Obligor were set out in Clause 13 in addition to those of Project Co; and

- (vi) the Builder will owe its obligations in accordance with the D&C Subcontract to Project Co and the Additional Obligor jointly but the performance by the Builder in favour of either Project Co or the Additional Obligor will be a good discharge of the obligations in accordance with the D&C Subcontract;
- (c) **(no Liability)**: the Additional Obligor will have no Liability for remedying any Default Event arising prior to the Assumption Date;
- (d) **(Additional Obligor Step-Out Date)**: the Additional Obligor may at any time give the Builder not less than 30 days notice terminating the Additional Obligor's obligations in accordance with the D&C Subcontract (without affecting the continuation of Project Co's obligations or liabilities towards the Builder in accordance with the D&C Subcontract). Such notice must specify the date on which it takes effect (**Additional Obligor Step-Out Date**), which must be:
  - (i) the date 30 days after the date of the notice; or
  - (ii) if a Novation Notice has been given in accordance with Clause 6.1, the Novation Date; and
- (e) **(release)**: except for those obligations which have arisen during the Step-in Period including in respect of additional liabilities incurred by the Builder during the Step-in Period and the obligation of the Additional Obligor (jointly and severally with Project Co) to pay the Builder for:
  - (i) all work performed by the Builder under the D&C Subcontract up to the Additional Obligor Step-Out Date;
  - (ii) materials reasonably ordered by the Builder up to the date of the notice given under paragraph (d), to perform the Works; and
  - (iii) all Claims which the Builder is entitled to make under the D&C Subcontract arising from events and/or occurrences that arose during the Step-in Period,

on and from the Additional Obligor Step-Out Date, between the Builder and the Additional Obligor, each of the Additional Obligor and the Builder will be released from all obligations in accordance with the D&C Subcontract.

## 5.4 Indemnity

Project Co indemnifies the State and the State Associates against any Liability (including any Liability to a third party) the State or any State Associate suffers or incurs in connection with taking any action in accordance with Clause 5.2 or 5.3, except to the extent any Liability is caused or contributed to by a fraudulent, unlawful or negligent act or omission of the State or a State Associate.

## 6. Novation of rights and obligations

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### 6.1 Option

- (a) The State may require a novation of the D&C Subcontract upon the termination of the Project Agreement, by giving a notice (**Novation Notice**) to the Builder. The Novation Notice must specify the person to whom the State intends to novate the D&C Subcontract whether this be the State or another person (**Substitute Party**).
- (b) If the State issues a Novation Notice then the Builder must comply with this Clause 6 and until the Novation Date the Builder must continue to perform its obligations in accordance with the D&C Subcontract.

- (c) The Builder agrees that the giving of a Novation Notice by the State will not of itself contravene, or constitute a Default Event in accordance with the D&C Subcontract or entitle the Builder to exercise any right (including termination) in accordance with it.

## **6.2 Novation**

Subject to Clause 6.8, if the State issues a Novation Notice to the Builder, the parties agree to novate the D&C Subcontract to the Substitute Party identified in the Novation Notice.

## **6.3 Novation of obligations**

From the Novation Date, a Substitute Party must perform:

- (a) any obligation of Project Co to pay money to the Builder that arose before the Novation Date and which:
  - (i) is due and payable in accordance with the terms of the D&C Subcontract and has not been paid by Project Co; and
  - (ii) is not the subject of a bone fide Dispute in accordance with the D&C Subcontract; and
- (b) the obligations of Project Co in accordance with the D&C Subcontract which arise or relate to events occurring on or after the Novation Date.

## **6.4 Novation of rights**

- (a) Except for Project Co's rights under paragraph (b), the Substitute Party is entitled to all rights to which Project Co was entitled in accordance with the D&C Subcontract including all rights which arose prior to the Novation Date.
- (b) Project Co is entitled to rights which accrued prior to the Novation Date in connection with any Liability in accordance with the D&C Subcontract which is the subject of a dispute.

## **6.5 Continuing obligations**

- (a) The Builder must perform its obligations in accordance with the D&C Subcontract in favour of the Substitute Party, including obligations which were incurred or which relate to events occurring before the Novation Date or which arise or relate to events occurring on or after the Novation Date.
- (b) The Builder will continue to be bound by the D&C Subcontract as if the Substitute Party was an original party to the agreement in place of Project Co.
- (c) If the Builder has exercised its right to suspend in accordance with Clause 4.2, Clause 4.3 or Clause 4.4 the Builder must recommence performance of the Works from the Novation Date or the date on which the cause of the suspension is remedied (which ever is the earlier).
- (d) The Builder:
  - (i) will have the benefit of any extensions of time granted to the Builder prior to the Novation Date; and
  - (ii) is not entitled to exercise any right of set off or counterclaim against the Substitute Party if, and to the extent that, such right arose prior to the Novation Date.



## 6.6 Release

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

## 6.7 Amendments to D&C Subcontract

The Builder and the Substitute Party will promptly negotiate in good faith any amendments to the D&C Subcontract which are necessary to reflect the termination of the Project Agreement.

## 6.8 Novation to a Substitute Party other than the State

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

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

## 7. Amendments to D&C Subcontract

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The Builder agrees with the State that they will not rescind (unless permitted in accordance with this agreement), grant or accept any waiver or discharge of the D&C Subcontract, or agree to or permit any variation, waiver or amendment to the terms of the D&C Subcontract without the prior consent of the State.

## 8. Restriction on dealings

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The Builder agrees with the State that it will not assign, mortgage, novate, charge, encumber or otherwise deal with its interest in the D&C Subcontract without the prior written consent of the State and without procuring that such transferee, assignee, mortgagee, novatee, chargee or other encumbrancee enters into a deed in which it agrees to be bound by the terms of this document.

## 9. Confidentiality and publicity

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### 9.1 Confidentiality

- (a) **(Confidentiality obligations):** Subject to paragraphs (b) and (c), Project Co and the Builder must keep confidential the State Project Documents, all Records and all Disclosed Information. Subject to paragraphs (e) and (f), the State must keep confidential, and must ensure that the State Associates keep confidential, the State Project Documents, all Records and all Disclosed Information.
- (b) **(Permitted disclosure):** Project Co and the Builder are not obliged to keep confidential any information:
  - (i) which is in the public domain through no default of any party; or
  - (ii) the disclosure of which is:
    - A. required by Law, including in accordance with the *Freedom of Information Act 1992* (WA);
    - B. required by a relevant stock exchange;
    - C. consented to by the State; or

- D. made to a court in the course of proceedings to which the disclosing person is a party.
- (c) **(Disclosure to Project Co's Associates):** Without limiting Project Co's obligations in accordance with paragraph (a), Project Co may disclose confidential information to Project Co's Associates to the extent necessary for the purpose of undertaking the Project provided that Project Co ensures that those Project Co's Associates comply with paragraph (a).
- (d) **(Disclosure to Builder's Associates):** Without limiting the Builder's obligations in accordance with paragraph (a), the Builder may disclose confidential information to the Builder's Associates to the extent necessary for the purpose of undertaking the Project provided that the Builder ensures that those Builder Associates comply with paragraph (a).
- (e) **(State may disclose):** The State may at any time disclose the Disclosed Information, the contents of the State Project Documents, any other Records and any other information in connection with the Project:
- (i) to any State department or Minister;
  - (ii) to any State Associate;
  - (iii) in accordance with all Laws;
  - (iv) in the course of official duties by the Minister for Health of Western Australia, the Minister for Finance of Western Australia, the Premier of Western Australia, the Trust, the Treasurer of Western Australia, the Department of Health of Western Australia or the Department of Treasury and Finance of Western Australia;
  - (v) to satisfy the requirements of parliamentary accountability;
  - (vi) to the Western Australian Auditor-General for the purposes of satisfying its statutory duties;
  - (vii) in accordance with policies of the Western Australian government;
  - (viii) in annual reports of Western Australia Department of Health and the Department of Treasury and Finance; and
  - (ix) in accordance with the *Freedom of Information Act 1992 (WA)* or the *Parliamentary Commissioners Act 1971 (WA)*.
- (f) **(Government websites):** The contents of the State Project Documents and any other document in connection with the Project which is authored or authorised by the State or a Governmental Agency may be published on any Western Australian government internet website, other than the Financial Model or the terms of any Project Document designated and agreed by the parties as confidential as specified in Schedule 22 of the Project Agreement (except with the prior written consent of Project Co).

## 9.2 Public announcements

Project Co and the Builder must not make any public disclosures, announcements or statements in relation to the Project or the State's or the State Associates' involvement in the Project without the State's prior consent (which will not be unreasonably withheld).

## **10. Acknowledgment, release and indemnity**

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### **10.1 No Liability**

Each of Project Co and the Builder agree that:

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

### **10.2 Release**

Subject to Clause 10.1(a)(i) and (ii), each of Project Co and the Builder releases the State and any party acting for or on behalf of the State (including any Additional Obligor) from any Liability in connection with the exercise by the State of its rights in accordance with this document.

## **11. Dispute resolution**

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- (a) If a matter is referred for determination in accordance with this Clause 11:
  - (i) any dispute or difference of opinion arising between the parties in relation to that matter must be resolved in the same manner that disputes or differences of opinion referred for expert determination in accordance with the Project Agreement are resolved; and
  - (ii) accordingly, the provisions of Clause 30 (Dispute Resolution) of the Project Agreement are incorporated into this document but as if:
    - A. the only persons party to the Project Agreement, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute; and
    - B. the only matters for expert determination in accordance with those provisions are the matters referred for expert determination in accordance with this document.
- (b) Each party may refer a dispute, despite any other provision, in accordance with this document to dispute resolution in accordance with this Clause 11.

## **12. GST**

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- (a) **(Construction):** In this Clause 12:
  - (i) words and expressions which are not defined in this document but which have a defined meaning in the GST Law have the same meaning as in the GST Law and GST includes any payment made under or in accordance with the *State Entities (Payments) Act 1999* (WA);
  - (ii) GST Law has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and

- (iii) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.
- (b) **(Payment of GST):**
  - (i) If GST is payable on any supply made by a party (**Supplier**) under or in connection with this document, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.
  - (ii) The recipient will pay the amount referred to in Clause 12(b)(i) in addition to and at the same time that the consideration for the supply is to be provided in accordance with this document.
- (c) **(Tax invoices):**
  - (i) The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under Clause 12(b).
  - (ii) The recipient can withhold payment of any amount payable in accordance with this Clause 12 until the Supplier provides a tax invoice or an adjustment note, as appropriate.
- (d) **(Adjustment event):** If an adjustment event arises in connection with a taxable supply made by a Supplier in accordance with this document, the amount payable by the recipient in accordance with this Clause 12 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.
- (e) **(Reimbursements):** Where a party is required in accordance with this document to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
  - (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
  - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.
- (f) **(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 at the date of this document. The parties acknowledge that the Nominated Entity will be responsible for administering the obligations in accordance with this Clause 12 on behalf of the State.

## 13. Notices

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- (a) **(Form of notices):** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this document (in this Clause 13, "**Notices**"):
  - (i) must be in writing; and
  - (ii) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party.
- (b) **(Procedure for sending notices):** All Notices must be:

- (i) delivered or posted by prepaid post to the address; or
- (ii) sent by email in the form of a .pdf file letter (or such other form agreed by the State) to the email address,

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

**State:**

Name Bruce Costella

Address Strategic Projects, Department of Treasury and Finance, Governor Stirling Tower, 197 St Georges Terrace, PERTH WA 6000

Email bruce.costella@osp.wa.gov.au

Telephone 08 9222 9162

**Project Co:**

Name Nik Kemp

Address Level 4, Podium Building, 120 Collins Street, MELBOURNE VIC 3000

Email nik.kemp@capellacapital.com.au

Telephone 03 9667 5602

**Builder**

Name David Dodds

Address 49 Labouchere Road, SOUTH PERTH WA 6151

Email ddodds@probuild.com.au

Telephone 08 9368 1400

**(Date of receipt):** Subject to paragraph (c), a Notice is taken to be received by the addressee:

- (iii) 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;
- (iv) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient; and
- (v) in the case of delivery by hand, on delivery.

(c) **(Next Business Day):** If the communication is taken to be received on a day which is not a Business Day or after 5.00 pm, it is taken to be received at 9.00 am on the next Business Day.

(d) **(Notices sent by email):** With respect to Notices sent by email:

- (i) only the letter in .pdf format attached to the email and any attachments to such letter which are referred to in the letter, will form part of the communication in accordance with this Clause 13. Any text in the body of the email or the subject line will not form part of the Notice; and

- (ii) Project Co must ensure that, with respect to any communications in accordance with or in connection with this document:
  - A. its firewall and/or mail server (as applicable):
    - 1) allows messages of up to 14 MB to be received;
    - 2) does not trap any messages in the spam filter which have been sent from any State domain; and
    - 3) automatically sends a receipt notification to the sender upon receipt of a message; and
  - B. its systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

## 14. General

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### 14.1 Relationship of parties

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

### 14.2 State's rights, duties, powers and functions

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

### **14.3 Reasonable endeavours**

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

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

### **14.4 Entire Agreement**

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

### **14.5 Counterparts**

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

### **14.6 Governing law**

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

### **14.7 No waiver**

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

### **14.8 Variations and waiver**

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

### **14.9 Amendments**

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



#### **14.10 Joint and several liability**

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

#### **14.11 Termination of this document**

- (a) This agreement will terminate on the latest of:
  - (i) performance and satisfaction of all the obligations under the D&C Subcontract; and
  - (ii) the end of the Term,
- (b) The termination of this agreement does not affect the rights of any party which have accrued to that party before the date of termination.

#### **14.12 Indemnities**

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

#### **14.13 Clauses to survive termination**

- (a) All provisions of this document which expressly or by implication from their nature are intended to survive termination, completion or expiration of this document will survive such termination, completion or expiration, including any provision which is in connection with:
  - (i) the State's rights to set-off and to recover money;
  - (ii) confidentiality or privacy;
  - (iii) any indemnity given in accordance with this document; or
  - (iv) any right or Liability arising on termination of this document.
- (b) Nothing in this Clause 14.11 prevents any other provision of this document, as a matter of interpretation, also surviving the termination of this document.

- (c) No right or Liability of any party will merge on completion of any transaction in accordance with this document. All rights and Liabilities in accordance with this document survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this document.

#### **14.14 Costs and expenses**

Each party must:

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

#### **14.15 Further acts and documents**

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

#### **14.16 Trustee limitation of liability**

- (a) Project Co enters into this document and each other Project Document to which it is expressed to be a party only in its capacity as trustee of the Capella Parking Unit Trust and in no other capacity.
- (b) A liability arising under or in connection with this document and each other Project Document to which it is expressed to be a party (whether that liability arises under a specific provision of this document or any other Project Document which it is expressed to be a party, for breach of contract or otherwise) can be enforced against Project Co only to the extent to which it can be satisfied out of the property of the Capella Parking Unit Trust out of which Project Co is entitled to be indemnified for the liability.
- (c) The limitation of Project Co's liability under this Clause 14.16 applies despite any other provision of this document or any other Project Document to which it is expressed to be a party (other than Clause 14.16(a)) and extends to all liabilities and obligations of Project Co in relation to any representation, warranty, conduct, omission, agreement or transaction relating to this document or any other Project Document to which it is expressed to be a party.

#### **14.17 No action against Project Co personally**

- (a) The State may not:
  - (i) sue Project Co personally;

- (ii) seek the appointment of a liquidator, administrator, receiver or similar person to Project Co; or
  - (iii) provide in any liquidation, administration or arrangement of or affecting Project Co.
- (b) The provisions of Clause 14.17(a) will not apply to any obligation or liability of the Project Co to the extent it is not satisfied because there is a reduction in the extent or an extinguishment of the Project Co's indemnification out of the assets of the Capella Parking Unit Trust as a result of Project Co's fraud, wilful default, gross negligence or breach of trust.

## **Schedule 1 – Builder Statements**

### **1. Contents of Builder Statement**

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

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

### **2. Warranty of accuracy**

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

### **3. Verification of Builder Statements**

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

### **4. Builder Statements to be conclusive evidence**

- (a) Each of the State, Additional Obligor or Receiver (**Statement Beneficiary**) is entitled to rely on the Builder Statements for the purpose of determining the extent of the matters occurring prior to a Default Event which are required to be remedied and the requirements to effect the remedy of that Default Event by a Statement Beneficiary.
- (b) The Builder Statements will be conclusive evidence in favour of any Statement Beneficiary that the Builder has waived and abandoned all claims then known or

which ought reasonably to have been known to the Builder in connection with the D&C Subcontract prior to the date of the Default Event Notice.

- (c) Paragraphs (b) and (c) are without prejudice to the rights of the Builder to pursue any claims against Project Co following the end of the Step-in Period.
- (d) For the avoidance of doubt, a Builder Statement will not prevent any Statement Beneficiary from disputing the amount of any claim by the Builder or the existence of any default by Project Co in accordance with the D&C Subcontract. In the case of any such dispute:
  - (i) the relevant Statement Beneficiary must pay the amount (if any) not in dispute;
  - (ii) the dispute must be referred to expert determination in accordance with Clause 11;
  - (iii) upon resolution of the dispute, the parties must make payments as determined by the expert; and
  - (iv) during the period of dispute resolution, all parties must continue to perform their obligations in accordance with this document and the Project Documents.

**Executed** as a deed.

**Signed** for and on behalf of the State of Western Australia by the Honourable Charles Christian Porter MLA; Treasurer of the State of Western Australia in the presence of:

\_\_\_\_\_  
The Honourable Charles Christian Porter  
MLA

\_\_\_\_\_  
Witness Sign

\_\_\_\_\_  
Witness Print Full Name

\_\_\_\_\_  
Witness Print Address

\_\_\_\_\_  
Witness Print Occupation

**Signed by Probuild Constructions (Aust) Pty Ltd (ACN 095 250 945)** by the party's attorney pursuant to power of attorney dated who states that no notice of revocation of the power of attorney has been received in the presence of:

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Signature of Witness

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Name of Witness in full

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Signature of Attorney

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Name of Attorney in full

**Signed by Capella Parking Pty Ltd (ACN 151 427 119) in its capacity as trustee of the Capella Parking Unit Trust** by the party's attorney pursuant to power of attorney dated 10 June 2011 who states that no notice of revocation of the power of attorney has been received in the presence of:

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Signature of Witness

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Name of Witness in full

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Signature of Attorney

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Name of Attorney in full