

Execution version

# Queen Elizabeth II Medical Centre Car Parking Project

Project Number: BMW14583/10

## Independent Certifier Deed of Appointment

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

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

Rider Levett Bucknall WA Pty Ltd (ACN 067 958 418) (**Independent Certifier**)

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## Independent Certifier Deed of Appointment made on

### Parties

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

Capella Parking Pty Limited (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**)

Rider Levett Bucknall WA Pty Ltd (ACN 067 958 418) of Level 7, St Martin's Tower, 44 St Georges Terrace, Perth, WA, 6000 (**Independent Certifier**)

### Background

- A. On or about the date of this document, Project Co entered into the Project Agreement with the State in connection with the Project.
- B. The State Project Documents contemplate that the Independent Certifier will discharge certain functions, including those set out in Schedule 2 (Services).
- C. The Independent Certifier will perform its obligations in accordance with the terms and conditions of this document.

### Operative provisions

## 1. Definitions and interpretation

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### 1.1 General

Except as otherwise expressly provided in this document, expressions used in this document have the meanings given to them in the Project Agreement.

### 1.2 Definitions

In this document:

**Adjustment Formula** means the formula set out below and then rounded upwards or downwards to the nearest dollar:

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

where:

**Indexation Factor** = the quarterly CPI figure published immediately before the relevant 1 July divided by the 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 1 July (disregarding rounding (if any) applied to that amount at the previous 1 July).

**Commencement Date** means the later of the date of execution of:

- (a) this document by all parties; and
- (b) the Project Agreement by the State and Project Co.

**Contract Particulars** means the particulars set out in Schedule 1 (Contract Particulars).

**Default** means a breach of this document.

**Downstream Independent Certifier Services** means any services provided by the Independent Certifier under Clause 4.2(c).

**Expiry Date** means the date which is the earlier of:

- (a) the end of the Term; and
- (b) termination of this document in accordance with Clause 8 or otherwise at Law.

**Fee** means the sum of the Maximum Monthly Fee, the fee calculated in accordance with Clause 5.8 and the fee calculated in accordance with Clause 6.4.

**Independent Certifier's Associate** means any officers, agents, advisers, consultants, contractors, employees and invitees of the Independent Certifier.

**Independent Certifier's Representative** means the person named in the Contract Particulars or any other person appointed by the Independent Certifier with the approval of the State and Project Co from time to time to replace that person.

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

- (a) **(informs creditors)**: a corporation 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 a corporation;
- (c) **(execution)**: a distress, attachment or other execution is levied or enforced upon or against any assets of a corporation 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 a corporation 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 a corporation;
- (f) **(resolution)**: a resolution is passed for the administration or winding up of the corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;
- (g) **(arrangement or composition)**: a corporation 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) a corporation 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 corporation 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 corporation 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)**: a corporation has an execution levied against it by creditors, debenture holders or trustees or under a floating charge; or
- (j) **(insolvency)**: a corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts in accordance with any applicable Law.

**Insurances** means the policies of insurance effected by the Independent Certifier in accordance with Clause 7.

**Maximum Monthly Fee** means the amount payable to the Independent Certifier for the performance of the Services in connection with each Month in accordance with Schedule 3 (Payment Schedule).

**Month** means a calendar month.

**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.

**Quality Assurance System** means the quality assurance system prepared by the Independent Certifier in accordance with Clause 5.5.

**Quarter** means:

- (a) the period commencing on the Commencement Date and ending on the first Quarterly Date during the Term;
- (b) each 3 Month period commencing on a Quarterly Date; and
- (c) the period commencing on the last Quarterly Date during the Term and ending on the Expiry Date.

**Quarterly Date** means every 1 January, 1 April, 1 July and 1 October during the Term.

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

**Schedule of Rates** means the schedule of rates and prices set out in Schedule 3 (Payment Schedule) as adjusted from time to time in accordance with that Schedule.

**Services** means:

- (a) the functions identified in Schedule 2 (Services);
- (b) all functions conferred on the Independent Certifier in accordance with this document; and
- (c) all other things which the Independent Certifier must do to comply with its obligations in accordance with this document or which should have been reasonably anticipated by an experienced and expert professional provider of similar services as being necessary for the performance of those things or which are otherwise capable of inference from this document.

**Term** means the period commencing on the Commencement Date and ending on the later of:

- (a) the date that is 12 months after Stage 2B Completion; and
- (b) such later date as agreed between the parties.

**Transition Out Period** means the period of 3 Months prior to the end of the Term.

**Transition Out Plan** means a plan prepared by the Independent Certifier to meet its obligations in accordance with Clause 10 which is in a form reasonably agreed to by the State and Project Co.

**Upstream Independent Certifier Services** means the Services other than the Downstream Independent Certifier Services.

### 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 and Attachments;
- (m) **(Clauses)**: a reference to:
  - (i) a Clause is a reference to a Clause of this document; and
  - (ii) a paragraph is a reference to a paragraph in the Clause in which the reference appears;
- (n) **(defined meaning)**: where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (o) **(\$)**: a reference to "\$" is to Australian currency;
- (p) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (q) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (r) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this document or any part;
- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated; 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 thinks fit, unless this document provides otherwise.

#### **1.7 Several liability**

If a provision of this document binds the State and Project Co, that provision binds each of them severally and not jointly and severally.



## **1.8 Schedule 2**

The parties agree that Schedule 2 is indicative only and is not intended to be a complete description of the Services.

## **1.9 Indexation**

The Schedule of Rates is to be indexed under this document by multiplying the Original Amount by the Indexation Factor (in accordance with the Adjustment Formula).

## **2. Conditions precedent**

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### **2.1 Commencement**

The rights and obligations of the parties in accordance with this document commence on the Commencement Date and continue for the Term.

### **2.2 Failure to achieve Financial Close**

If the State and Project Co do not achieve Financial Close in accordance with the Project Agreement by the Conditions Precedent Deadline Date, then the State and Project Co may, at their option, terminate this document by notice in writing to the Independent Certifier and no party will have any liability to the other in connection with the termination.

## **3. Delegation**

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### **3.1 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.

### **3.2 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 Independent Certifier 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 3.2 will be deemed to be a direction of the State.

## **4. General obligations**

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### **4.1 Appointment**

- (a) The State and Project Co appoint the Independent Certifier in accordance with this document to perform the Services for the benefit of each of the State and Project Co.
- (b) The Independent Certifier accepts the appointment in paragraph (a).

### **4.2 Conflict of interest**

The Independent Certifier warrants that:

- (a) as at the date of this document, no conflict of interest arises out of its engagement by the State and Project Co in accordance with this document; and
- (b) if, during the term of this document, it becomes aware of the existence or possibility of a conflict of interest, it will:
  - (i) immediately notify the State and Project Co of that conflict of interest or possible conflict of interest; and
  - (ii) take such steps to avoid or mitigate the conflict of interest or possible conflict of interest as the State and Project Co may reasonably require.
- (c) The State and Project Co acknowledge that the Independent Certifier is entitled to act and may accept an appointment to act:
  - (i) as an independent certifier to Project Co and the Financiers (or any replacement financier) under the Financing Documents; and
  - (ii) as an independent certifier to Project Co and the Builder under the D&C Subcontract.

### **4.3 Upstream and Downstream Arrangements**

- (a) The State, Project Co and the Independent Certifier acknowledge and agree that the Services represent the paramount role of the Independent Certifier, with the intent that:
  - (i) to the extent that the Upstream Independent Certifier Services and Downstream Independent Certifier Services are equivalent in nature and extent, the Downstream Independent Certifier Services will be dischargeable by the exercise of the relevant Upstream Independent Certifier Services and deemed to be discharged by the exercise of the corresponding Upstream Independent Certifier Services subject only to any additional requirements under the Downstream Independent Certifier Services;
  - (ii) if there is any ambiguity, conflict, discrepancy or inconsistency between any Upstream Independent Certifier Services and any Downstream Independent Certifier Services, the Upstream Independent Certifier Services will prevail as between the State and Project Co;
  - (iii) neither the existence nor terms of the Downstream Independent Certifier Services nor the exercise, failure to exercise or manner of exercise of a Downstream Independent Certifier Service will be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of, an Upstream Independent Certifier Service;
  - (iv) neither:
    - A. the receipt by the Independent Certifier of any notice, claim, plan, program, report, manual, model or any other document or information, nor the giving of any notice, the making of any comment or any other act or omission by the Independent Certifier arising out of or in connection with a Downstream Independent Certifier Service; nor
    - B. the existence or performance of any function by, any consultation with, or any notice, report, certificate, comment or any other document or information provided to the Independent Certifier (in its capacity as provider of the Downstream Independent Certifier Services) by, any other

certifier, reviewer, engineer, adviser or other consultant engaged by any party other than the State;

will:

- C. give rise to any obligation on the part of the Independent Certifier to exercise (or exercise in a particular manner) any Upstream Independent Certifier Service;
- D. relieve Project Co from the giving of any notice, claim, plan, program, report, manual, model or any other document or information or the doing of any other thing in respect of a Service in order to give rise to any obligation on the part of the Independent Certifier to exercise that Upstream Independent Certifier Service; or
- E. be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of an Upstream Independent Certifier Service.

## 5. Performance and Fee

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### 5.1 Services

- (a) The Independent Certifier must perform the Services in accordance with this document for the Term.
- (b) In consideration of the Independent Certifier performing the Services and subject to Clause 6.4, the State and Project Co must pay to the Independent Certifier the Fee in accordance with Schedule 3 (Payment Schedule).

### 5.2 Performance

In performing the Services, the Independent Certifier must:

- (a) **(standard of care)**: exercise the standard of care, skill and diligence which would be expected of an expert professional provider of the Services experienced in providing services similar to the Services;
- (b) **(duty to act honestly and fairly)**: act honestly, professionally and independently of the State and Project Co and their respective contractors, suppliers and consultants;
- (c) **(no fraud)**: not engage in fraud, collusion or misleading or deceptive conduct;
- (d) **(Laws)**: comply with all Laws;
- (e) **(co-operate)**: co-operate with the State and Project Co and their contractors, suppliers and consultants;
- (f) **(co-ordinate)**: co-ordinate the Services with the work to be performed by the State and Project Co and their contractors, suppliers and consultants;
- (g) **(interference)**: avoid any unreasonable interference, disruption or delay to the work to be performed by the State and Project Co and their contractors, suppliers and consultants;
- (h) **(timely manner)**: act within the time limits stated in the relevant document and otherwise in a timely manner; and

- (i) **(personnel)**: provide sufficient numbers of experienced and competent personnel to perform its obligations in accordance with this document.

### **5.3 Reliance and knowledge**

- (a) The Independent Certifier agrees that the State and Project Co:
  - (i) are entitled to, and will, rely on:
    - A. the skill and expertise of the Independent Certifier in the performance of the Services; and
    - B. any certificate signed or given by the Independent Certifier in accordance with the State Project Documents; and
  - (ii) may suffer Liability if the Independent Certifier does not perform the Services in accordance with the requirements of this document.
- (b) The Independent Certifier warrants that:
  - (i) it has informed itself of the requirements (including time requirements) of the State Project Documents in so far as they relate to the Services;
  - (ii) it has informed itself of the nature of the work necessary for the performance of the Services; and
  - (iii) it has satisfied itself as to the sufficiency of the Fee having regard to the costs which it will incur in complying with its obligations in accordance with this document.

### **5.4 Right to enter, inspect and test**

- (a) During the Term, the Independent Certifier:
  - (i) may enter any Construction Area upon giving reasonable notice to Project Co (except in the case of an Emergency, in which case no notice will be required); and
  - (ii) may inspect or test, or require Project Co to inspect or test, any part of the Works upon giving reasonable notice to Project Co.
- (b) Project Co must assist the Independent Certifier to exercise its right to inspect and test the Works.

### **5.5 Quality assurance**

- (a) The Independent Certifier must:
  - (i) plan, develop and implement a quality assurance system which meets the requirements of the relevant AS/NZS ISO Standards as and when they are published; and
  - (ii) within 14 days of the date of this deed, provide the State Representative and Project Co's Representative with details of the Quality Assurance System which complies with paragraph (i) and which the Independent Certifier proposes to adopt.
- (b) The Independent Certifier must:

- (i) allow the State and Project Co or a third party appointed by the State and Project Co to audit its Quality Assurance System (**Audit**), at the request of the State or Project Co and at the cost of that party; and
  - (ii) fully co-operate with the State, Project Co or a third party in connection with carrying out of the Audit.
- (c) Without limiting paragraph (b), the Independent Certifier must, at all times:
  - (i) give to the State and Project Co or the third party appointed by the State and Project Co access to premises occupied by the Independent Certifier where the Services are being undertaken; and
  - (ii) permit the State and Project Co or the third party appointed by the State and Project Co to inspect applicable information relevant to the Audit.
- (d) The Independent Certifier will not be relieved of any obligations in accordance with this document as a result of:
  - (i) compliance with the requirements of this Clause 5.5; or
  - (ii) any acts or omissions of the State and Project Co in connection with the requirements of this Clause 5.5.

## **5.6 Non-complying services**

The Independent Certifier must at its cost:

- (a) unless directed otherwise by the State and Project Co, re-perform all Services which have not been performed in accordance with this document; and
- (b) take all steps reasonably necessary to:
  - (i) mitigate the effect on the State and Project Co of the failure to perform the Services in accordance with this document; and
  - (ii) put the State and Project Co (as closely as possible) in the positions in which they would have been had the Independent Certifier performed the Services in accordance with this document, including all such steps as may be reasonably directed by the State and Project Co in writing.

## **5.7 Suspension of Services**

The State and Project Co may, by joint notice to the Independent Certifier, instruct the Independent Certifier to suspend and, after a suspension has been instructed, to recommence, the performance of any or all of the Services.

## **5.8 Independent Expert**

- (a) The Independent Certifier must perform each obligation and discharge each function and duty of the Independent Expert where the Independent Certifier is appointed by the State and Project Co to be the Independent Expert or where the Independent Certifier is nominated as Independent Expert in accordance with Clause 30.3(d) of the Project Agreement, except if the Independent Certifier is:
  - (i) of the reasonable opinion that it would be inappropriate for the Independent Certifier to act as Independent Expert in light of the performance and nature of the Services; or
  - (ii) not reasonably capable of acting as Independent Expert.

- (b) Where the Independent Certifier acts as Independent Expert in accordance with paragraph (a):
  - (i) subject to paragraph (b)(iii), the Independent Certifier will be subject to all the requirements of the Independent Expert as set out in the Project Agreement and any agreement entered into with the State and Project Co under Clause 30.3(e) of the Project Agreement;
  - (ii) the Independent Certifier will be paid a fee for its determination in accordance with Schedule 3 (Payment Schedule) (such fee to be the costs of the Independent Expert contemplated by Clause 30.3(q) of the Project Agreement); and
  - (iii) where there is an inconsistency between the functions, obligations or requirements of the Independent Certifier and the Independent Expert under the Project Agreement, the functions, obligations or requirements of the Independent Expert will apply but only
    - A. to the extent of the inconsistency; and
    - B. in relation to the particular matter for which the Independent Certifier has been appointed or nominated (as appropriate) to act as Independent Expert.

## 5.9 Subcontracting

- (a) Subject to paragraph (b), the Independent Certifier may not subcontract the performance of any of the Services without the prior consent of the State and Project Co.
- (b) The Independent Certifier may employ or engage the following subcontractors to provide specialist advice to the Independent Certifier in the areas identified:
  - (i) Resource Co-ordination Partnership Pty Ltd (Trading as RCP) (ACN 010 285 757) – review of Works Program and any updates of it; and
  - (ii) Wood & Grieve Engineers Limited (ABN 97 137 999 609) – design review and completion inspections in respect of structural and civil engineering; electrical communications, security and lift; mechanical and hydraulics.
- (c) The Independent Certifier:
  - (i) is not relieved from any of its obligations and Liabilities in accordance with this document as a result of subcontracting any of those obligations or Liabilities;
  - (ii) 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 the Independent Certifier in accordance with this document is a breach or failure of the Independent Certifier; and
  - (iii) is entirely responsible for all Liabilities suffered or incurred by the State or Project Co in connection with any acts, omissions, defaults, negligence or termination of any subcontractors (and those of the employees and agents of any subcontractors) and any subcontracts.

## 6. Reporting, meetings and communications

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### 6.1 Communications

The Independent Certifier must ensure that a copy of each written communication between the Independent Certifier and the State or Project Co which relates to the Project is promptly given to the other party.

### 6.2 Management Team

The Independent Certifier must attend each meeting of the Management Team, if requested by one or more of the parties to the Project Agreement.

### 6.3 Progress reports

The Independent Certifier must submit a written report to the State and Project Co 2 Business Days before each meeting of the Management Team in accordance with Clause 5.5 (Management Team) of the Project Agreement containing details of:

- (a) **(compliance)**: Project Co's compliance and any non-compliances with the State Project Documents;
- (b) **(D&C Phase review)**: the results of any review of the construction of the Works in accordance with Clause 10.5 (Independent Certifier's review of construction) of the Project Agreement;
- (c) **(review of other documents)**: the review of any Submitted Documents in accordance with Schedule 3 (Review Procedures) of the Project Agreement;
- (d) **(notices)**: any notices given by the State or Project Co to the Independent Certifier and any notices issued by the Independent Certifier;
- (e) **(Certificates of Completion)**: any Certificates of Completion or other certificates issued or requested by Project Co or the State in relation to any of the Works;
- (f) **(cost forecasts)**: the forecast cost of the Services (including for the current and following Quarter), taking into account current expenditure, resourcing and future forecasts;
- (g) **(reports)**: notification of reports requested by the State or Project Co in accordance with Clause 6.4; and
- (h) **(other matters)**: such other matters in connection with the Services that the State and Project Co (acting jointly) reasonably request from time to time.

### 6.4 Reports requested by one party

- (a) The State or Project Co may request the Independent Certifier to prepare a report which is not otherwise required by the State Project Documents.
- (b) The Independent Certifier must prepare the additional report requested in paragraph (a), except if the Independent Certifier is:
  - (i) of the reasonable opinion that it would be inappropriate to prepare the report in light of the performance and nature of the Services; or
  - (ii) not reasonably capable of preparing the report.
- (c) The cost of additional reports prepared in accordance with this Clause 6.4 will be paid to the Independent Certifier in accordance with Schedule 3 (Payment Schedule).

## 7. Insurance

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### 7.1 Insurances

From the Commencement Date, the Independent Certifier must effect and maintain or cause to be effected and maintained each of the Insurances:

- (a) specified in Schedule 4 (Insurance) for the periods specified therein; and
- (b) as a prudent service provider would obtain and maintain when undertaking work of a similar nature to the Services.

### 7.2 General insurance requirements

The Independent Certifier 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 and Project Co or any State Associate or Project Co Associate insured in accordance with 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 Project Document by the State and Project Co or any negligent act or omission by the State or Project Co or any State Associate or Project Co Associate;
- (c) **(premiums)**: punctually pay all premiums and other amounts payable in connection with the Insurances effected by it, and give the State and Project Co copies of receipts for payment of premiums if and when requested by either the State or Project Co;
- (d) **(no alteration)**: not materially alter, extend or discontinue or cancel any Insurance, or allow any Insurance to lapse, without the prior approval of both the State and Project Co;
- (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 recovery)**: do everything reasonably required by the State and Project Co or any State Associate or Project Co Associate in whose name an Insurance policy is effected and maintained to enable the State and Project Co or any State Associate or Project Co 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)**: ensure that the terms of the Insurances do not require the State and Project Co to exhaust any indemnities referred to in this document as a condition precedent to the insurer considering or responding to any claim; and



- (k) **(notify):** promptly notify the State and Project Co of any occurrence that may give rise to a claim in connection with the Project in accordance with any Insurance, except in relation to any employers' liability and workers' compensation insurance.

### 7.3 Terms of Insurances

The Independent Certifier will ensure that each of the Insurances it is responsible for effecting and maintaining in accordance with this document:

- (a) contains terms, if relevant and to the extent legally permissible, to the effect that:
- (i) the insurer:
- A. 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;
- B. in the case of Insurances in accordance with which the State and Project Co are also entitled to cover, agrees that the interests of the insured include the entire assets and undertaking of the Project and the At-Grade Car Parks and the New Car Park;
- C. 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 number of deductibles or the overall limit of indemnity;
- D. no reduction in limits or coverage affecting the Project or the At-Grade Car Parks and the New Car Park 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 Project Co;
- (b) take proper account of the nature and objectives of the Project and the New Car Park and the At-Grade Car Parks, the responsibilities and entitlements of the various insureds in connection with this document and are on terms otherwise acceptable to the State (whose acceptance will not unreasonably be withheld).

### 7.4 Insurances primary

- (a) Except for the professional indemnity insurance referred to in Schedule 4 (Insurance), the Insurances are primary and not secondary to the indemnities referred to in this document.
- (b) The State and Project Co are 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 document or generally.
- (c) The Independent Certifier is not relieved from and remains fully responsible for its obligations in accordance with this document 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.

### 7.5 Evidence of Insurance

- (a) The Independent Certifier must give the State and Project Co:

- (i) certified copies of certificates of currency and renewal certificates, as soon as it receives them from the insurer of the relevant Insurance; and
  - (ii) evidence satisfactory to the State and Project Co that the Insurances continue to be maintained in accordance with this document, whenever reasonably requested by the State and Project Co.
- (b) The Independent Certifier will, every 12 Months, provide the State and Project Co with a report as to each Insurance policy it is required to effect and maintain including claims and other material events with respect to each Insurance policy as at the date of the report and during the previous 12 Months.

## 7.6 Insurances

- (a) The State and Project Co may (but are not obliged to) procure or effect and maintain the relevant Insurances and pay the premium:
  - (i) if the Independent Certifier fails to provide evidence satisfactory to the State and Project Co within 10 days of a request in accordance with Clause 7.5; or
  - (ii) in the event of any default by the Independent Certifier in obtaining or maintaining Insurances in accordance with this Clause 7 or if any Insurance that the Independent Certifier is responsible for effecting and maintaining in accordance with this document becomes void or voidable.
- (b) The costs reasonably incurred by the State and Project Co in connection with taking such action will be recoverable from the Independent Certifier as a debt due and payable from the Independent Certifier to the State and Project Co.

## 8. Default

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### 8.1 Notice of Default

If a Default occurs, the State and Project Co may give the Independent Certifier a joint notice (**Default Notice**) which contains:

- (a) details of the Default;
- (b) if the Default is capable of being remedied, a date by which the Independent Certifier must remedy the Default; and
- (c) if the Default is not capable of being remedied, a date by which the Independent Certifier must comply with any reasonable requirements of the State and Project Co in connection with that Default.

### 8.2 Compliance

If the State and Project Co give a Default Notice to the Independent Certifier, then:

- (a) the Independent Certifier must comply with the Default Notice; and
- (b) unless the relevant Default is a failure to pay money:
  - (i) the Independent Certifier must give the State and Project Co a program to either remedy the Default or comply with any reasonable requirements of the State and Project Co in accordance with the terms of the Default Notice which will specify steps to address the underlying cause of the Default and to avoid similar Defaults 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, the Independent Certifier must implement and comply with the remedy program.

### **8.3 Requests for extensions to remedy period**

- (a) If the Independent Certifier considers, in good faith, that the time stated in a Default Notice is not reasonable, it must immediately notify the State and Project Co of that belief, the reasons for that belief and the time which it believes is reasonably required to remedy the Default or comply with any reasonable requirements of the State and Project Co.
- (b) The Independent Certifier may give a notice in accordance with paragraph (a), even if the Independent Certifier has previously given one or more such notices.

### **8.4 When extensions to be given**

If the Independent Certifier gives a notice in accordance with Clause 8.3(a) and the Independent Certifier is and has been diligently pursuing:

- (a) the remediation of the Default; or
- (b) compliance with any reasonable requirements of the State and Project Co in connection with a Default that is not capable of remedy,

then the time stated in the Default Notice will be extended by such period as the State and Project Co determine is reasonably required to enable the Independent Certifier to either remedy the Default or comply with any reasonable requirements of the State and Project Co.

## **9. Termination**

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### **9.1 Termination for convenience**

The State and Project Co may, at any time, terminate this document at their convenience by jointly giving the Independent Certifier not less than 20 Business Days notice.

### **9.2 Termination for Default**

- (a) The State and Project Co may terminate this document by jointly giving the Independent Certifier a notice if any of the following events occurs:
  - (i) the Independent Certifier fails to remedy a Default within the period set out in the Default Notice (as extended, if at all, in accordance with Clause 8.4); or
  - (ii) if a Default is not capable of remedy, the Independent Certifier fails to diligently comply with any reasonable requirements of the State and Project Co to overcome the consequences of, or compensate the State and Project Co for that Default within the time stated in the notice given by the State in accordance with Clause 8.1 (as extended in accordance with Clause 8.4).
- (b) Termination of this document for a Default will take effect upon the date stated in the notice given by the State and Project Co in accordance with paragraph (a).

### **9.3 Termination for Insolvency Event**

The State and Project Co may terminate this document by jointly giving the Independent Certifier a notice if an Insolvency Event occurs, whether or not the Independent Certifier is then in breach of this document.

## 9.4 Payments on termination

- (a) If this document is terminated by the State and Project Co in accordance with Clause 9.1, the State and Project Co must each pay the Independent Certifier one half of:
  - (i) the proportion of the Fee for Services performed up to the date of the termination; and
  - (ii) a reasonable amount for any unavoidable liabilities incurred by the Independent Certifier as a consequence of the termination, except to the extent the Independent Certifier fails to mitigate such liabilities.
- (b) The State and Project Co must pay the Independent Certifier the relevant amount in accordance with paragraph (a) within 20 Business Days of termination.
- (c) The Independent Certifier will not be entitled to bring any Claim against either the State or Project Co in connection with the termination of this document.

## 9.5 Termination without prejudice

Termination of the appointment of the Independent Certifier will be without prejudice to any other rights which the State and Project Co may have in connection with any breach of the terms of this document which occurred prior to the date of termination.

## 10. Transition

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### 10.1 Transition Out Period

- (a) During the Transition Out Period, the Independent Certifier must:
  - (i) provide the Services required in accordance with, and otherwise comply with, the Transition Out Plan; and
  - (ii) without being limited by paragraph (a)(i), cooperate and consult with the State and Project Co and do all such tasks and things as may be reasonably necessary to ensure:
    - A. the smooth transition to the State and Project Co of the Independent Certifier's responsibilities for the monitoring of Project Co's performance of the Works or the Services; and
    - B. the final completion of all the Services and the full discharge of all of the Independent Certifier's obligations in accordance with this document.
- (b) For the purposes of paragraph (a), the Independent Certifier must:
  - (i) **(draft Transition Out Plan)**: prepare a draft of the Transition Out Plan and provide it to the State and Project Co by no later than 30 Business Days before the commencement of the Transition Out Period which takes into account all relevant considerations which have arisen during the Term;
  - (ii) **(review)**: provide all drafts of the Transition Out Plan to the State and Project Co for review and consult with the State and Project Co as required in relation to the drafts;
  - (iii) **(update Transition Out Plan)**: review and, if necessary, update the Transition Out Plan and make all amendments as may be reasonably

required by the State and Project Co to any draft of the Transition Out Plan; and

- (iv) **(finalise Transition Out Plan)**: finalise, to the reasonable satisfaction of the State and Project Co, the Transition Out Plan by no later than 20 Business Days before the commencement of the Transition Out Period.
- (c) The Independent Certifier must review the Transition Out Plan at least once every 2 Months during the Transition Out Period. The State and Project Co may require the Independent Certifier, by notice, to make reasonable amendments to the Transition Out Plan during the Transition Out Period, if reasonably necessary to achieve the objectives stated in paragraph (a)(ii).

## 10.2 Delivery of documents

- (a) Upon completion of the Services, or upon the termination of the appointment of the Independent Certifier, the Independent Certifier:
  - (i) must deliver up to the State and Project Co or to such other person as the State and Project Co may direct, all books, records, drawings, specifications and other documentation in the possession, custody or control of the Independent Certifier relating to the Services (**Services Records**); and
  - (ii) agrees that the State and Project Co have the right to use all Services Records for the purposes of the Project.
- (b) Notwithstanding paragraph (a), the Independent Certifier may retain a copy of all Services Records.

## 10.3 Reasonable assistance

Prior to completion of the Services, or upon the termination of the appointment of the Independent Certifier, the Independent Certifier must provide full assistance to the State and Project Co and any successor to the Independent Certifier appointed to enable such successor to be in a position to perform the Services with effect from the appointment date of the successor.

# 11. Confidentiality and publicity

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## 11.1 Confidentiality

- (a) **(Confidentiality obligations)**: Subject to paragraphs (b) and (c), Project Co and the Independent Certifier 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 State Associates keep confidential, the State Project Documents, all Records and all Disclosed Information.
- (b) **(Permitted disclosure)**: Project Co and the Independent Certifier 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:
- (i) 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); or
  - (ii) Subject to paragraph (d), any prospective financier or equity investor in the Project.
- (d) **(No disclosure):** Project Co must not disclose any Confidential Information to any prospective financier or equity investor in the Project until, if required by the State, the State has carried out any Probity Investigations in connection with the relevant entities.
- (e) **(State may disclose):** The State may at any time disclose the 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 the 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).

## 11.2 Public announcements

Project Co and the Independent Certifier 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).

## **12. Liability and indemnity**

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### **12.1 Indemnity**

The Independent Certifier indemnifies the State and Project Co against any Liability incurred by them:

- (a) to the extent that Liability arises out of:
  - (i) any damage to or loss of property; or
  - (ii) death of or injury to any person,in connection with any wrongful act or omission of the Independent Certifier or its agents or consultants or subcontractors or any breach of this document; or
- (b) in connection with a breach of this document by the Independent Certifier, or any negligent act or omission of the Independent Certifier, (including any Claim brought against the State or Project Co by the other party and any Liability incurred by the State or Project Co to the other party),

in connection with this document.

### **12.2 Limitation of liability**

Subject to Clause 12.3, the Independent Certifier's liability in accordance with this document from all claims howsoever arising (including negligence and breach of statutory duty) will be limited in aggregate to the amount stated in the Contract Particulars or any higher amount for which the Independent Certifier has professional indemnity insurance of the type contemplated in Clause 7.1.

### **12.3 Exclusions**

The limitation of liability in Clause 12.2 does not apply to any claims in connection with the Independent Certifier's or the Independent Certifier's Associates':

- (a) fraudulent acts or omissions;
- (b) conduct, act or omission done or to be done which results from conscious or intentional indifference to any provision of this document or the rights or welfare of those who are or may be affected by that conduct, act or omission; or
- (c) negligent act or omission which the Independent Certifier knew, or ought reasonably to have been aware, would result in substantial Liabilities being incurred by the State or Project Co.

### **12.4 No Liability**

The State and Project Co will not be liable to each other for any act or omission by the Independent Certifier whether or not in accordance with or purportedly in accordance with this document, the State Project Documents or otherwise.

## **13. Dispute resolution**

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### **13.1 Process**

If a matter is referred for determination in accordance with this Clause 13:

- (a) 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

- (b) accordingly, the provisions of Clause 30 (Dispute Resolution) of the Project Agreement are incorporated into this document but as if:
  - (i) 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
  - (ii) the only matters for expert determination in accordance with those provisions are the matters referred for expert determination in accordance with this document.

## 13.2 Matters

Each party may refer any dispute in accordance with this document for resolution in accordance with this Clause 13.

## 14. GST

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### 14.1 GST

- (a) **(Construction):** In this Clause 14.1:
  - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law 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 14.1(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 14.1(b).
  - (ii) The recipient can withhold payment of any amount payable in accordance with this Clause 14.1 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 14.1 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.

- (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 on behalf of the State.

## 15. 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 15, "**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, Level 13, 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

Independent Certifier:

Name        Mark Bendotti

Address     Level 7, St Martin's Tower, 44 St Georges Terrace, Perth WA 6000

Email        mark.bendotti@au.rlb.com

Telephone   08 9421 1230

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

- (i)        in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia;
- (ii)       in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient; and
- (iii)      in the case of delivery by hand, on delivery.

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

(e)        **(Notices sent by email):** 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 15. Any text in the body of the email or the subject line will not form part of the Notice; and
- (ii)       Project Co and the Independent Certifier must ensure that, with respect to 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.

## 16. General

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### 16.1 Assignment and security

- (a) The Independent Certifier may not assign, novate or otherwise transfer any or its rights and obligations in accordance with this document without the consent of the State and Project Co.
- (b) Project Co may mortgage, charge or encumber its rights under this document pursuant to the Project Agreement and the Financing Documents.

### 16.2 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.

### 16.3 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 Independent Certifier 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).

### 16.4 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.

## **16.5 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.

## **16.6 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.

## **16.7 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.

## **16.8 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.

## **16.9 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.

## **16.10 Amendments**

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

## **16.11 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 Independent Certifier consists of more than one person, then the rights and Liabilities of the Independent Certifier in accordance with this document are joint and several as between those persons.

## 16.12 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 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.

## 16.13 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) any indemnity given in accordance with this document; or
  - (iii) any right or Liability arising on termination of this document.
- (b) Nothing in this Clause 16.13 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.

## 16.14 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.

## 16.15 Further acts and documents

Each party must sign, execute, deliver and do all such acts and things as may be reasonably be 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.

## **16.16 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 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 16.16 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 16.16(b)) 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 in which it is expressed to be a party.

## **16.17 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 16.17(a) will not apply to any obligation or liability of Project Co to the extent it is not satisfied because there is a reduction in the extent or an extinguishment of 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 - Contract Particulars**

### **1. Independent Certifier's Representative**

Name Mark Bendotti

Address Level 7, St Martin's Tower, 44 St Georges Terrace, Perth WA 6000

Email mark.bendotti@au.rlb.com

Telephone 08 9421 1230

### **2. Representatives**

State:

Name Bruce Costella

Address Strategic Projects, Department of Treasury and Finance, Governor Stirling Tower, Level 13, 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

### **3. Limitation on Independent Certifier's liability**

Limit: \$10,000,000

### **4. Dispute resolution**

State's representative for the purposes of executive negotiation:

Name Bruce Costella

Address Strategic Projects, Department of Treasury and Finance, Governor Stirling Tower, Level 13, 197 St Georges Terrace, PERTH WA 6000

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

Telephone 08 9222 9162

Project Co's representative for the purposes of executive negotiation:

Name Nik Kemp

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

Email nik.kemp@capellacapital.com.au

Telephone 03 9667 5602

Independent Certifier's representative for the purposes of executive negotiation:

Name Mark Bendotti

Address Level 7, St Martin's Tower, 44 St Georges Terrace, Perth WA 6000

Email mark.bendotti@au.rlb.com

Telephone 08 9421 1230



## Schedule 2 - Services

The Independent Certifier must discharge the functions which the State Project Documents contemplate will be discharged by the Independent Certifier. Without limiting the previous sentence, the Independent Certifier must discharge the following functions which the Project Agreement contemplates will be discharged by the Independent Certifier:

- 1 Clause 6.1(c): If the Independent Certifier considers it appropriate to do so, the Independent Certifier must request that Project Co update the Project Management Plan and Operating Manual.
- 2 Clause 6.2(a): The Independent Certifier must review the Works Program submitted by Project Co.
- 3 Clause 8.2(c): If the Independent Certifier considers it appropriate to do so, the Independent Certifier must request that Project Co demonstrate compliance with OHS Laws.
- 4 Clause 9.2(g): The Independent Certifier must review the Design Documentation submitted or resubmitted by Project Co.
- 5 Clause 10.2(b): If in the reasonable opinion of the Independent Certifier, the levels of nuisance or interference are not as set out in the Management of Construction Guidelines having regard to the nature of the Reserve as a medical precinct or are not in the interests of the safety of persons on the Construction Areas or any other areas adjacent to the Construction Areas, the Independent Certifier must issue a direction to Project Co to stop or change the manner of undertaking the Works; and amend the Project Management Plan.
- 6 Clause 10.5(a): If requested by the State, the Independent Certifier must (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 the Project Agreement and (ii) review the Works to ensure the Works Program accurately reflects the actual progress of the Works.
- 7 Clause 10.5(b): If the Independent Certifier believes that Project Co is not undertaking the Works in accordance with the Works Program and the other requirements of the Project Agreement, the Independent Certifier must give notice to the State and Project Co of its opinion together with its reasons for forming that opinion.
- 8 Clause 10.5(d): Within 7 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.
- 9 Clause 10.5(f): If the Independent Certifier notifies Project Co and the State that, in its opinion the Explanation is satisfactory and that the Works comply with the Works Program and the other requirements of this Agreement, the Independent Certifier will withdraw its notice of non-compliance as contemplated by Clause 10.5(f) of the Project Agreement.
- 10 Clause 11.1(b)(iii): The Independent Certifier must participate in a joint inspection of Additional Infrastructure with Project Co and (unless the relevant owner has declined an offer to do so having been given at least 5 Business Days notice) the owner of the Additional Infrastructure.
- 11 Clause 11.1(b)(iv): Following the joint inspection in accordance with Clause 11.1(b)(iii) of the Project Agreement, if the Additional Infrastructure has been completed in accordance with the State Project Documents subject only to minor Defects of the kind referred to in Clause 11.1(b)(i) of the Project Agreement, the Independent Certifier must issue to the State, the owner of the Additional Infrastructure and Project Co a notice to that effect.
- 12 Clause 12.2, 12.2A and 12.4: The Independent Certifier must take receipt of any notices or updated notices given or submitted to the Independent Certifier by Project Co in accordance with Clauses 12.2, 12.2A or 12.4.

- 13 Clause 12.5: In determining any extension of time, the Independent Certifier must (i) review the then current Works Program to determine whether Project Co has been or is likely to actually be delayed by the Extension Event and (ii) take into account all relevant evidence presented by the State and Project Co and may have regard to but will not be bound by the Works Program.
- 14 Clause 12.6: If Project Co has satisfied the requirements set out in Clauses 12.3 and 12.5 of the Project Agreement, the Independent Certifier must determine a reasonable period of extension of time to the relevant Date for Completion and notify Project Co of the extension granted.
- 15 Clause 12.7: In determining the reasonable period of extension of time for the purposes of Clause 12.6 of the Project Agreement, the Independent Certifier must reduce the extension of time for the period of the delay attributable to events other than the Extension Event.
- 16 Clause 13.2(c): The Independent Certifier must require Project Co to include additional Completion Tests in the Completion Plan if the Independent Certifier considers that the Completion Tests proposed by Project Co are not sufficient to demonstrate that the Completion Criteria are satisfied.
- 17 Clause 13.5(a): If Completion is achieved, the Independent Certifier must issue to Project Co the Certificate of Completion stating the date on which Project Co achieved Completion.
- 18 Clause 13.5(b) If Completion has not been achieved, the Independent Certifier must issue to Project Co and the State a notice containing details of the outstanding Completion Criteria that must be satisfied by Project Co as a condition precedent to achieving Completion.
- 19 Clause 13.6(a): The Independent Certifier must issue a Certificate of Completion with an attached list of Outstanding Items and specifying a reasonable period of time determined by the Independent Certifier within which Project Co must rectify the Outstanding Items.
- 20 Clause 13.6(c): The Independent Certifier must assess Project Co's rectification of Outstanding Items and state whether the Outstanding Items have been completed by Project Co to the Independent Certifier's reasonable satisfaction in accordance with the program for completion of Outstanding Items prepared by Project Co (as reviewed and amended in accordance with Schedule 3 of the Project Agreement).
- 21 Clause 13.7(c): If the State accepts Project Co's offer to open a number of Parking Bays prior to Completion, the Independent Certifier must negotiate in good faith with the State and Project Co the Completion Criteria that are required to be satisfied for the Parking Bays to be made available.
- 22 Clause 17.1(g)(i): If required as contemplated in Clause 17.1(g)(i) of the Project Agreement, the Independent Certifier must determine the amount of the Modification in accordance with the principles stated in Section 3 of Schedule 4 to the Project Agreement.
- 23 Schedule 3 (Review Procedures): The Independent Certifier must review Submitted Documents and provide any comments or, if appropriate, reject Submitted Documents (having regard to the matters identified in Section 4 of Schedule 3 to the Project Agreement) as contemplated in Schedule 3 of the Project Agreement, and must otherwise act as contemplated in Schedule 3 of the Project Agreement.
- 24 Schedule 6: The Independent Certifier must take receipt of the Works Program (and all revisions and updates of that Works Program) provided to the Independent Certifier in accordance with Schedule 6 of the Project Agreement and must, if the Independent Certifier considers that the Works Program should include additional details or information, request that such details or information are/is included in the Works Program.

## **Schedule 3 - Payment Schedule**

### **1. Payment Claims**

The Independent Certifier must:

- (a) prepare and submit monthly to the State and Project Co for approval a payment claim setting out:
  - (i) a breakdown of the Services (in a form and including such information as the State and Project Co may require from time to time) actually carried out during the period for which payment is sought;
  - (ii) the part of the Maximum Monthly Fee then payable;
  - (iii) that part of the Fee relating to determinations made by the Independent Certifier (acting as Independent Expert as contemplated by Clause 5.8) during the period for which payment is sought, calculated in accordance with the Schedule of Rates in Table 2; and
  - (iv) that part of the Fee relating to the preparation of additional reports requested in accordance with Clause 6.4, calculated in accordance with the Schedule of Rates in Table 2;
- (b) provide to the State and Project Co all supporting documentation that they may reasonably require; and
- (c) allow the State and Project Co access to all records relating to the Services in order to check the accuracy of the payment claim.

### **2. Payment**

Within 30 days of the State and Project Co receiving a payment claim, the State and Project Co will, subject to Section 1 each pay the Independent Certifier one half of the Maximum Monthly Fee which the State and Project Co believe represents the contract value of the Services performed by the Independent Certifier during the period for which the payment claim is submitted.

### **3. Payment for acting as Independent Expert**

Where any part of a payment claim relates to a determination made by the Independent Certifier acting as Independent Expert as contemplated by Clause 5.8, the State and Project Co will:

- (a) unless (b) applies, each pay to the Independent Certifier one half of the amount payable in respect of the determination; or
- (b) pay to the Independent Certifier the amount payable in respect of the determination in accordance with the Independent Expert's determination of costs where the determination is made against the party who issued the Notice of Dispute and the Independent Expert determines that that party will bear all or a greater portion of the Independent Expert's costs in connection with the Dispute,

within 30 days of the State and Project Co receiving the relevant payment claim.

### **4. Payment for special reports**

Where any part of a payment claim relates to the preparation of reports by the Independent Certifier requested by the State or Project Co, the party that requested the additional report under Clause 6.4 will pay the Independent Certifier the amounts payable in respect of the

preparation of the report within 30 days of the State and Project Co receiving the relevant payment claim.

## **5. Maximum Monthly Fee**

The Maximum Monthly Fee payable each Month will be calculated in accordance with Table 1. The parties acknowledge that the Maximum Monthly Fee payable each Month has been determined on the basis of Stage 1A Completion, Stage 1B Completion, Stage 2A Completion and Stage 2B Completion occurring on their respective Dates for Completion. To the extent that the date of any of Stage 1A Completion, Stage 1B Completion, Stage 2A Completion and Stage 2B Completion differs from its Date for Completion, the Maximum Monthly Fee payable each Month will be adjusted to reflect the actual date of Stage 1A Completion, Stage 1B Completion, Stage 2A Completion and/or Stage 2B Completion (as appropriate), subject to the total Maximum Monthly Fee payable under this document not exceeding the total Maximum Monthly Fee set out in Table 1.

## **6. Adjustment of Schedule of Rates**

The amounts with respect to the rates and prices set out in the Schedule of Rates are to be indexed on each anniversary of Financial Close during the Term, after the first year of the Term, in accordance with Clause 1.9.

## **7. Agreement of amount payable**

- (a) Where the State and Project Co receive a payment claim from the Independent Certifier in accordance with Section 1 of this Schedule, the State and Project Co must, subject to Section 3 and 4 of this Schedule, agree the amount payable to the Independent Certifier:
  - (i) within 28 days of the State and Project Co receiving the payment claim; or
  - (ii) where the payment claim is made pursuant to the *Construction Contracts Act 2004* (WA), within such shorter period, as is provided in accordance with that Act for a payment schedule to be issued, less 2 Business Days.
- (b) If Project Co wishes to dispute any amount paid by the State and Project Co in accordance with this document, it must refer the dispute for resolution in accordance with the Project Agreement as if it were a dispute arising in accordance with the Project Agreement.

## **8. Set off**

Notwithstanding any other provision of this document, the State and Project Co may set off or deduct from any moneys payable to the Independent Certifier, in accordance with this document or otherwise, any amounts:

- (a) for which the Independent Certifier must reimburse the State and Project Co;
- (b) which the State and Project Co pay on the Independent Certifier's behalf; or
- (c) which are then due and payable by the Independent Certifier to the State and Project Co (whether or not such amounts are expressed to be a debt due from the Independent Certifier to the State and Project Co),

in connection with this document or arising in connection with the Services.

**9. Not evidence**

The payment of moneys to the Independent Certifier by the State and Project Co is not evidence of the value of the Services provided, an admission of Liability or evidence that the Services were executed properly but are paid on account only.

*[table not disclosed]*

## **Schedule 4 - Insurances**

### **1. Professional indemnity insurance**

Professional indemnity insurance with:

- (a) a limit of indemnity of not less than \$10,000,000 for any single claim and in the annual aggregate for any period of insurance in respect of legal liability arising from a breach of professional duty, whether owed in contract or otherwise, by reason of any negligent act, error or omission by the Independent Certifier or the Independent Certifier's Associates; and

- (b) a deductible of not more than \$400,000,

for a period of 7 years after the end of the Term.

### **2. Workers compensation insurance**

Workers compensation insurance in accordance with the requirements of Law until the Independent Certifier ceases to perform the Services.

### **3. Public liability insurance**

Public liability insurance with:

- (a) a limit of indemnity of not less than \$10,000,000 for any one claim in respect of legal liability for property damage, personal injury or death arising from the performance of the Services;

- (b) a limit of indemnity of not less than \$10,000,000 for any one claim and in the aggregate in respect of legal liability for products liability arising from the performance of the Services; and

- (c) a deductible of not more than \$10,000,

until the Independent Certifier ceases to perform the Services.

### **4. Other insurance**

Such other insurance as may reasonably be required by the State and Project Co for such period as may reasonably be required by the State and Project Co.

**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 Capella Parking Pty Limited (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



**Signed by Rider Levett Bucknall WA Pty Ltd  
(ACN 067 958 418)** in accordance with section 127  
of the *Corporations Act 2001* (Cth) by or in the  
presence of:

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Signature of Director

---

Name of Director in full

---

Signature of Secretary/other Director

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Name of Secretary/other Director in full