

Queen Elizabeth II Medical Centre Car Parking Project

Project Number: BMW14583/10

Project Agreement

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**)

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Schedule 3 – Review Procedures

Schedule 4 – Change Compensation Principles

Schedule 5 – Design Development

Schedule 6 – Programming Requirements

Schedule 7 – Completion Criteria

Schedule 8 – Additional Works

Schedule 9 – Insurance

Schedule 10 – Agreed Parking Charges

Schedule 11 – Access and Parking Requirements

Schedule 12 – Revenue Share

Schedule 13 – Parking Bay Variations

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Schedule 15 – Termination Amounts

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Attachment 1 – Bid Design Documentation

Attachment 2 – Bid Works Program

Attachment 3 – Sub-Sublease

Attachment 4 – Bid Project Management Plan

Attachment 5 – Bid Operating Manual

Attachment 6 – Central Plant Area

Attachment 7 – Competing Car Park Bands

Project Agreement 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 of (**Project Co**)

Background

1. The State has conducted a public tender process and selected Project Co as the preferred tenderer for the Project.
2. This Agreement sets out the terms on which:
 - (a) Project Co agrees to:
 - (i) undertake and finance the Works; and
 - (ii) perform the Services; and
 - (iii) Handover the Works or the New Car Park (as applicable);
 - (b) the State agrees to grant Project Co the right to collect and retain the Parking Charges in connection with the New Car Park; and
 - (c) the risks associated with the Project are allocated as between the State and Project Co.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

Access and Parking Requirements means the terms and conditions that apply to the New Car Park and the At-Grade Car Park as set out in Schedule 11 (Access and Parking Requirements).

Actual Debt means the indebtedness of Project Co or Finance Co under the Financing Documents.

Additional Infrastructure means the infrastructure resulting from the works identified in Schedule 8 (Additional Works).

Additional Works means all works necessary for the design, construction, completion, commissioning and handback of the Additional Infrastructure including all Modifications and rectification of Defects.

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

Additional Works Completion Criteria means those criteria that are required to be satisfied to achieve Additional Works Completion as set out in Schedule 7 (Completion Criteria).

Additional Works Completion Date means the date stated in a certificate of Additional Works Completion issued by the Independent Certifier in accordance with Clause 11.1(b)(iv).

Additional Works Construction Area means that part of the Reserve identified and shown in Part A of Schedule 16 (Plans) on which the Additional Works are to be undertaken.

Agreed Parking Charges means, as at the Date of this Agreement, the charges stated in Schedule 10 (Agreed Parking Charges) in connection with the New Car Park and the At-Grade Car Parks as indexed in accordance with that Schedule.

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

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

Asset Maintenance Plan means the then current asset maintenance plan setting out the maintenance work for the New Car Park during the Operating Phase that forms part of the Operating Manual.

At-Grade Car Parking Bays has the meaning given to that term in the At-Grade Car Parks Management Agreement.

At-Grade Car Parks means the areas of land on which the At-Grade Car Parking Bays are situated from time to time in accordance with the At-Grade Car Parks Management Agreement.

At-Grade Car Parks Management Agreement means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - At-Grade Car Parks Management Agreement" between the Delegate and Project Co dated on or about the Date of this Agreement.

At-Grade Reconfiguration Completion means the stage when, in the reasonable opinion of the Independent Certifier:

- (a) the At-Grade Reconfiguration Completion Criteria have been satisfied;
- (b) the At-Grade Reconfiguration Works are complete except for Outstanding Items; and
- (c) Project Co has done everything which this Agreement requires Project Co to do as a condition precedent to At-Grade Reconfiguration Completion.

At-Grade Reconfiguration Completion Criteria means those criteria that are required to be satisfied to achieve At-Grade Reconfiguration Completion as set out in Schedule 7 (Completion Criteria).

At-Grade Reconfiguration Completion Date means the date stated in the certificate of At-Grade Reconfiguration Completion issued by the Independent Certifier in accordance with Clause 13.5.

[not disclosed]

At-Grade Reconfiguration Works means those Additional Works defined in Schedule 8 (Additional Works).

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

Authority means:

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

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

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

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

- (a) **(design)**: the New Car Park is functioning as designed;
- (b) **(performance)**: the operation, maintenance, repair and refurbishment works are performed using:
 - (i) reliable long-term and safe operating practices;
 - (ii) proper equipment, tools and procedures;
 - (iii) workmanship and materials which are Fit For Purpose; and
 - (iv) replacement parts that are new;
- (c) **(personnel)**: sufficient operation and maintenance personnel are available and are adequately experienced and trained to ensure compliance with this Agreement;
- (d) **(materials)**: adequate materials, resources and supplies are available to ensure compliance with the requirements of this Agreement under normal conditions and reasonably anticipated abnormal conditions; and
- (e) **(advancements)**: there is a commitment to continually meet advancements in technology and improve the standards and quality of the operation, maintenance, refurbishment and repair of the New Car Park and the manner in which they are carried out.

Bid Design Documentation means the schematic design and other documentation, drawings and sketch plans set out in Attachment 1.

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

Board means the Minister for Health incorporated as the board of the Sir Charles Gairdner Hospital under s7 of the *Hospitals and Health Services Act 1927* (WA) in its own capacity.

Builder means the person engaged by Project Co in accordance with the D&C Subcontract being, at the Date of this Agreement, Probuild Constructions (Aust) Pty Ltd or any other person who, in addition or substitution, is engaged by Project Co to undertake all, or substantially all of the Works.

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

Builder Side Deed means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - Builder Side Deed" between Project Co, the State and the Builder.

Business Day means any day other than:

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

Capella Parking Unit Trust means the trust constituted under the Capella Parking Unit Trust Deed.

Capella Parking Unit Trust Deed means the deed poll entitled "Trust Deed – Capella Parking Unit Trust" and dated 10 June 2011.

Car Parking Levy means any future levies, taxes, imposts, fees or charges levied or imposed by the State on:

- (a) parking bays at the New Car Park or the At-Grade Car Parks; or
- (b) the New Car Park or the At-Grade Car Parks,

for which Project Co or the Operator is liable to pay, but excluding any Tax on the overall net income of Project Co or the Operator.

Central Plant Area means the area shown on the plan set out in Attachment 6 with the coordinates specified in that Attachment.

Certificate of Completion means:

- (a) the certificate of Stage 1A Completion;
- (b) the certificate of Stage 1B Completion;
- (c) the certificate of Stage 2A Completion;
- (d) the certificate of Stage 2B Completion;
- (e) the certificate of At-Grade Reconfiguration Completion; and
- (f) each certificate of Additional Works Completion.

each issued by the Independent Certifier in accordance with Clause 13.5, or any one of these (as applicable).

Change Compensation Event means an event set out in Section 2 of Schedule 4 (Change Compensation Principles) which may give rise to the payment of compensation or the granting of any other form of relief by the State in accordance with Schedule 4 (Change Compensation Principles).

Change Compensation Principles means the principles set out in Section 6 of Schedule 4 (Change Compensation Principles).

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

Change in Contractual Quality Standard means a change in a Contractual Quality Standard after the Date of this Agreement but does not include a change in a Contractual Quality Standard which was not in effect at the Date of this Agreement but which:

- (a) has been published by the relevant body responsible for issuing the Quality Standard by way of a draft or of which public notice is given and is substantially the same as the Change in Contractual Quality Standard;
- (b) is contained or referred to in Schedule 17 (Design Requirements), the RFP or any Project Document; or
- (c) a party experienced and competent in undertaking works similar to the Works or performing services similar to the Services would have reasonably foreseen or anticipated prior to the Date of this Agreement.

Change in Law means:

- (a) a change:
 - (i) in, or repeal of, a Law or the enactment of a new Law;
 - (ii) in the interpretation or application of an existing Law, brought about by:
 - A. a change in, or repeal of, another Law; or
 - B. the enactment of a new Law;
- (b) a change in the way a Law is applied or interpreted as a result of a:
 - (i) binding decision of a court of competent jurisdiction which reverses, overrules or refuses to follow an earlier binding decision of a court of competent jurisdiction where that earlier decision exists at the Date of this Agreement; or
 - (ii) decision which is the first decision on the relevant issue;

but does not include:

- (a) a change to Parking Charges in accordance with the *Queen Elizabeth II Medical Centre Act 1966* (WA) and its subsidiary legislation;
- (b) a Modification;
- (c) a change in the way a Law is applied or is interpreted as a result of the failure of Project Co to comply with a Law or any Authorisation, or in response to an illegal act or omission of Project Co (including any breach of this Agreement by Project Co);
- (d) a change in Law which was not in force at the Date of this Agreement but which:
 - (i) had been published in the Government Gazette by way of bill, draft bill or draft statutory instrument or of which public notice is given and is substantially the same as the Change in Law;
 - (ii) is contained or referred to in Schedule 17 (Design Requirements), the RFP or any Project Document; or
 - (iii) a party experienced and competent in undertaking works similar to the Works or performing services similar to the Services would have

reasonably foreseen or anticipated prior to the Date of this Agreement; or

- (e) a change in the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the GST Law (or the introduction of a tax affecting companies generally).

Change in State Law means a Change in Law with respect to State Law.

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

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

Commercial Opportunities means each of the following permitted commercial opportunities which are specified in this Agreement and are to be delivered by Project Co in the Designated Commercial Areas in accordance with this Agreement:

- (a) a child care facility;
- (b) convenience retail opportunities;
- (c) essential daily services retail opportunities;
- (d) automated vending machines; and
- (e) a restaurant/café,

together with any future commercial activities undertaken by Project Co and approved by the State in accordance with Clause 20.

Common Terms Deed means the document entitled "Common Terms Deed - Queen Elizabeth II Medical Centre Car Parking Project" between Project Co, Finance Co, the Security Trustee, the Facility Agent and others dated on or about the Date of this Agreement.

[not disclosed]

[not disclosed]

[not disclosed]

Compensable Extension Event means each of the following events:

- (a) **(breach)**: breach by the State or the Delegate (in their capacity as a contracting party to the relevant State Project Documents) of any State Project Document to which they are a party;
- (b) **(act or omission)**: any act or omission of the State or the Delegate (in their capacity as a contracting party to the relevant State Project Documents) or any State Associate (excluding any State Reserve Contractors but without limiting Project Co's entitlement to claim relief for the event specified in paragraph (h)) that is not authorised or permitted in accordance with a State Project Document;

- (c) **(suspension)**: cessation or suspension or material variation of any part of the Works being undertaken (or a change in the way the Works are undertaken) because of:
 - (i) a government direction;
 - (ii) a court or tribunal order; or
 - (iii) a requirement of Law,
 in relation to a Heritage Claim or a Native Title Claim;
- (d) **(industrial action)**: industrial action (excluding any industrial action caused or motivated by opposition to projects being delivered by way of public private partnerships) but only to the extent that it directly affects the Works and the action results directly from an act or omission of the State or any State Associate (excluding any State Reserve Contractors other than State Construction Area Contractors);
- (e) **(change in Law)**: a:
 - (i) Project Specific Change in Law; or
 - (ii) General Change in Law;
- (f) **(delayed access)**: a failure by the State to give access to a Construction Area in accordance with this Agreement;
- (g) **(Modifications)**: a Modification directed by the State in accordance with Clause 17;
- (h) **(third party works on the Construction Area)**: any interference, disruption or delay to the Works caused by any State Associate, or any other third party approved, permitted or procured by the State, performing works or services on the Construction Area;
- (i) **(State step-in)**: a Step-in Event in accordance with Clause 28 that is not caused by an Immediate Termination Event or an event that is the subject of a State Cure Notice (as that term is defined in the Builder Side Deed, the Operator Side Deed and the FM Side Deed (as applicable) or Force Majeure Event;
- (j) **(Headlease)**: any breach, illegality or invalidity of the Headlease or the Sublease not caused or contributed to by Project Co or a Project Co Associate;
- (k) **(Contamination)**: remediation of Contamination for which the State is responsible to pay any costs of Project Co under Clauses 7.2A and 7.2B; and
- (l) **(Development Approval Conditions)**: a Planning Party requires a change, modification or variation which is inconsistent with or will necessitate a change to some or all of the Design Requirements in the course of Project Co seeking the consent or approval of a Planning Party to the satisfaction of a Development Approval Condition.

Completion means:

- (a) in connection with the Stage 1A Works, Stage 1A Completion;
- (b) in connection with the Stage 1B Works, Stage 1B Completion;
- (c) in connection with the Stage 2A Works, Stage 2A Completion;

- (d) in connection with the Stage 2B Works, Stage 2B Completion;
- (e) in connection with the Additional Works, Additional Works Completion; and
- (f) in connection with the At-Grade Reconfiguration Works, At-Grade Reconfiguration Completion.

Completion Criteria means:

- (a) in connection with Stage 1A Completion, the Stage 1A Completion Criteria;
- (b) in connection with Stage 1B Completion, the Stage 1B Completion Criteria;
- (c) in connection with Stage 2A Completion, the Stage 2A Completion Criteria;
- (d) in connection with Stage 2B Completion, the Stage 2B Completion Criteria;
- (e) in connection with the Additional Works, the Additional Works Completion Criteria; and
- (f) in connection with the At-Grade Reconfiguration Works, At-Grade Reconfiguration Completion Criteria.

Completion Date means:

- (a) in connection with the Stage 1A Works, the Stage 1A Completion Date;
- (b) in connection with the Stage 1B Works, the Stage 1B Completion Date;
- (c) in connection with the Stage 2A Works, the Stage 2A Completion Date;
- (d) in connection with the Stage 2B Works, the Stage 2B Completion Date;
- (e) in connection with the Additional Works, the Additional Works Completion Date; and
- (f) in connection with the At-Grade Reconfiguration Works, the At-Grade Reconfiguration Longstop Date.

Completion Plan means Project Co's plan for achieving Completion to be prepared in accordance with Clause 13.2.

Completion Tests means the completion tests that are required by the Independent Certifier or the State (as applicable) to be performed in accordance with this Agreement.

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

Condition Precedent Deadline Date has the meaning given to that term in Clause 2.5.

Connection Point means each point of connection of the Utilities specifically for the New Car Park, the At-Grade Car Parks or the Parking Equipment (as defined in the At-Grade Car Park Management Agreement) to the Utility provider's network.

Consortium Entity means:

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

Construction Areas means during the D&C Phase:

- (a) the Stage 1 Construction Area, in connection with the Stage 1A Works and Stage 1B Works; and
- (b) the Stage 2 Construction Area, in connection with the Stage 2A Works and Stage 2B Works,

including, in each case, the Additional Works Construction Areas relevant to that stage of the Works.

Construction Payment means the payment by the State to Project Co in respect of the Works being an amount equal to the amount specified in the Model Output Schedule and identified as the 'Construction Payment' (as adjusted in accordance with Clause **Error! Reference source not found.**).

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

Contractual Quality Standards means Quality Standards which Project Co is obliged to comply with under a State Project Document and which are not also a Law.

Control means:

- (a) control or influence of, or having the capacity to control or influence the composition of the board, or decision making, directly or indirectly, in relation to the financial and operating policies;
- (b) being in a position to cast, or control the casting of, more than 20% of the maximum number of votes that may be cast at a general meeting; or
- (c) having a relevant interest (as defined in Section 608 of the *Corporations Act 2001* (Cth)) in more than 20% of the securities (as defined in the *Corporations Act 2001* (Cth)),

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

Controller has the meaning given to that term in the *Corporations Act 2001* (Cth).

Cost means all capital or operating costs (as applicable) incurred or payable by Project Co which are or are likely to be increased from the relevant amounts (if any) assumed in the current Financial Model, excluding any costs referred to in Clause 15A.5.

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

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

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

CPI Multiplier means at any time and from time to time, the most recently published CPI index divided by the CPI index published for the quarter immediately preceding the date of Financial Close.

CSF Holding Trust Deed means the deed poll entitled "Trust deed – CSF QE2 Car Park Trust" dated 10 June 2011.

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

- (a) Bid Design Documentation;
- (b) Design Documentation;
- (c) Project Management Plan; and
- (d) Works Program.

D&C Phase means:

- (a) in connection with the Stage 1A Works, the period commencing on Financial Close and ending on the Stage 1A Completion Date;
- (b) in connection with the Stage 1B Works, the period commencing on the Stage 1A Completion Date and ending on the Stage 1B Completion Date;
- (c) in connection with the Stage 2A Works, the period commencing on the Stage 1B Completion Date and ending on Stage 2A Completion Date;
- (d) in connection with the Stage 2B Works, the period commencing on the Stage 2A Completion Date and ending on the Stage 2B Completion Date; and
- (e) in connection with the Works generally, the period commencing on Financial Close and ending on the Stage 2B Completion Date.

D&C Subcontract means the contract for the Works entered into between Project Co and the Builder dated on or about the Date of this Agreement and any other contract between Project Co and a Builder for the undertaking of the Works.

Date for Completion means:

- (a) in connection with the Stage 1A Works, the Date for Stage 1A Completion;
- (b) in connection with the Stage 1B Works, the Date for Stage 1B Completion;
- (c) in connection with the Stage 2A Works, the Date for Stage 2A Completion;
- (d) in connection with the Stage 2B Works, the Date for Stage 2B Completion;
- (e) in connection with the Additional Works (other than the At-Grade Reconfiguration Works), the date specified in Schedule 8 (Additional Works) for the relevant Additional Works; and
- (f) in connection with the At-Grade Reconfiguration Works, the At-Grade Reconfiguration Longstop Date.

[not disclosed]

[not disclosed]

[not disclosed]

[not disclosed]

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

[not disclosed]

Default Termination Amount means the payment calculated as such in Schedule 15 (Termination Amounts).

Defect means:

- (a) any component of the Works, the New Car Park or Additional Infrastructure which does not comply with the requirements of this Agreement; or
- (b) any defect, shrinkage, fault, or omission in the Works, the New Car Park or the Additional Infrastructure.

Defects Liability Period means a period referred to in Clause 11.2.

Delegate means the delegate from time to time appointed under the At-Grade Car Parks Management Agreement and includes any replacement delegate.

Designated Commercial Areas means:

- (a) in the case of the proposed child care facility, approximately 1,500m² net (comprising approximately 50% indoor space and 50% outdoor space) at the southern end of the 6th level of the New Car Park; and
- (b) in the case of the other Commercial Opportunities (excluding the child care facility) approximately 300m² of net retail space on the ground floor at the southern end of the New Car Park.

Design Departures Schedule means the schedule of departures to the Design Requirements which has been agreed by Project Co and the State as set out in Part C of Schedule 17 (Design Requirements).

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

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

Design Requirements means the requirements for the design of the New Car Park set out in:

- (a) Schedule 17 (Design Requirements);
- (b) the Bid Design Documentation;
- (c) all relevant Quality Standards and Laws; and
- (d) the remainder of this Agreement,

subject to Clause 1.3(e).

Development Approval means the letter from the Western Australian Planning Commission titled 'Application for Approval to Commence Development dated 15 October 2010 received 23 December 2010' addressed to the Department of Treasury and Finance.

Development Approval Condition means the conditions numbered 1-6 specified in the Development Approval.

Disclosed Information means:

- (a) the Information Reports;
- (b) all documents and information provided to Project Co prior to the Date of this Agreement that are not incorporated into this Agreement; and
- (c) all documents and information provided to Project Co after the Date of this Agreement.

Dispute has the meaning given to it in Clause 30.1.

Distribution means, without double counting, any:

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

Draw Stop has the meaning given to that term in Clause 39.22.

Draw Stop Remedy Period has the meaning given to that term in Clause 39.22(b).

Emergency means any event which:

- (a) requires a whole of system emergency health response;
- (b) poses a serious risk to health or safety or the Environment; or
- (c) results in the loss of the New Car Park or a substantial part of the New Car Park due to destruction or damage,

but excludes emergencies that would otherwise come within the operation of the *Emergency Management Act 2005* (WA).

Environment includes:

- (a) ecosystems and their constituent parts, including people and communities;
- (b) natural and physical resources;
- (c) land, soil, plants, habitats, water, atmosphere, climate, sands, odours and tastes;
- (d) the qualities and characteristics of locations, places and areas; and

- (e) the social, economic, aesthetic and cultural aspects of anything mentioned in paragraphs (a) to (d).

Environmental Incident means an incident in connection with the Project that poses a serious risk to the Environment.

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

EPIC means the proprietary set of web based software applications developed by the Operator that enables the management of all aspects of car parks, customers, finances and facilities as modified and updated from time to time and any similar such system developed by the Operator.

[not disclosed]

[not disclosed]

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

Equity Return means, at any time, the nominal pre-tax Distributions per annum which an Initial Equity Investor is projected to receive in accordance with the Financial Model (assuming no circumstance of early termination or extension).

Event of Default means **[not disclosed]**

- (a) **(fraud)**: Project Co or any Project Co Associate engages in fraud, collusion, misleading or deceptive conduct in performing their obligations in connection with the Project;
- (b) **(false representation)**: a representation or warranty given by Project Co in accordance with a State Project Document is found to be materially incorrect or misleading;
- (c) **(finance default)**: either:
- (i) any event that would cancel Project Co's or Finance Co's ability to obtain or continue to have available finance in accordance with the Financing Documents; or
 - (ii) a Continuing Draw Stop Event (as defined in Clause 39.22(f)) occurs or Project Co breaches its obligations under Clauses 39.22(a), 39.22(b) and 39.22(d);
- (d) **(Key Subcontractors)**: Project Co breaches an obligation in Clauses 5.8 or 5.9 in connection with Key Subcontractors;
- (e) **(assignment)**: Project Co breaches Clause 31.1 in relation to assignment, transfer or disposal of any of its obligations in accordance with the Project Documents;
- (f) **(Change in Control)**: a Change in Control of a Consortium Entity (other than Project Co) occurs without the consent of the State in accordance with Clause 31.6 (to the extent such consent is required in accordance with Clause 31.6);

- (g) **(Probity Event)**: Project Co fails to comply with its obligations in connection with a Probity Event in accordance with Clauses 32.5 to 32.10;
- (h) **(Change in Management)**: a Change in Management occurs and Clause 31.7 applies;
- (i) **(Completion)**: Project Co fails to achieve Completion by a Date for Completion;
- (j) **(breach)**: Project Co fails to remedy any breach of a State Project Document within 20 Business Days of the breach occurring (other than an Event of Default, Immediate Termination Event or a Service Failure);
- (k) **(notice of Gross Receipts)**: Project Co fails to provide the notice of Gross Receipts required to be provided in accordance with Clause 21.3;
- (l) **(Insolvency Event)**: an Insolvency Event occurs in relation to the Builder, the FM Subcontractor or the Operator whether or not Project Co is then in breach of a State Project Document. For the purposes of this paragraph (m), the Event of Default will be deemed to have been cured if the Builder, FM Subcontractor or Operator (as relevant) is replaced by a party approved by the State taking into account the considerations listed in Clause 31.6(f);
- (m) **[not disclosed]**
- (n) **(Parking Bay requirements)**: Project Co fails to comply with its obligation to make available the number of Parking Bays identified in the 'Project Co Activities' columns 1 and 4 of Schedule 19 (Parking Bay Requirements) on the dates specified in that Schedule.

Exempt Bays means the parking bays described in Clause 14.3.

Expected Date for At-Grade Reconfiguration Completion means 4 October 2011.

Expiry Date means the date on which the Term expires as stated in Clause 3.2.

Extension Event means each of the following events:

- (a) a Compensable Extension Event;
- (b) a Force Majeure Event;
- (c) lightning, hurricane, cyclone, earthquake, natural disaster, landslide, tsunami, or mudslide; and
- (d) fire or flood at or transgressing onto the Construction Areas or Operating Areas or explosion at the Construction Areas or Operating Areas caused by any of the events described in paragraph (c).

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

Facility Agent means, at any time, the person appointed as agent in accordance with the Common Terms Deed. At the Date of this Agreement, the Facility Agent is Australia and New Zealand Banking Group Limited (ACN 005 357 522).

Final Design Documents means all Design Documentation which is marked "for construction" and is reviewed or deemed to be reviewed by the State and the Independent Certifier in accordance with Schedule 3 (Review Procedures) as amended and updated in accordance with this Agreement.

Finance Co means Capella Parking Finance Co Pty Ltd.

Finance Side Deed means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - Finance Side Deed" between the State, the Delegate, Project Co, Finance Co, the Security Trustee and the Facility Agent.

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

Financial Close Adjustment Protocol means the closing protocol initialled for identification by the State, the Security Trustee and Project Co, a copy of which is set out in Schedule 2 (Financial Close Adjustment Protocol).

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

Financial Model means the financial model for the Project, including assumptions and information, data files, run specification files and output analysis routines used by or incorporated in the financial model, prepared by Project Co as initialled by the parties at Financial Close (as updated in accordance with Clause 34).

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

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

Financing Documents means:

- (a) the Common Terms Deed;
- (b) each Accession Deed Poll (as defined in the Common Terms Deed);
- (c) the Subscription Agreement;
- (d) the Loan Note Deed Poll (as defined in the Subscription Agreement);
- (e) any Account Bank Deed (as defined in the Common Terms Deed);
- (f) the Security Trust Deed;
- (g) the Financiers' Securities (as defined in the Finance Side Deed);
- (h) the Builder Consent Deed;
- (i) the Operator Consent Deed;
- (j) the FM Consent Deed;
- (k) each Swap Agreement (as defined in the Common Terms Deed);
- (l) the Financiers' Certifier Deed of Appointment between Project Co, the Security Trustee, the Facility Agent and the Financiers' Certifier (as defined in the Common Terms Deed);

- (m) any fee letters entered into in respect of the foregoing;
- (n) any document entered into in connection with a financial transaction approved by the State in accordance with Clause 22.1; and
- (o) any other documents which the parties agree is a Financing Document for the purposes of this Agreement.

Fit For Purpose means the New Car Park:

- (a) satisfies each of the purposes, objectives, functions, uses and requirements set out in or reasonably inferred from the Design Requirements;
- (b) is capable of enabling Project Co to perform the Services in accordance with Schedule 18 (Services Specifications); and
- (c) is in accordance with all other requirements of this Agreement,

as at the Completion Date, and continues to meet the requirements of paragraph (a) to (c) as at that date for the duration of the Term.

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

- (a) war, civil war or armed conflict;
- (b) nuclear, biological contamination, ionising radiation or contamination by radioactivity; or
- (c) a Utility Service Interruption upstream from the Connection Point,

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

Force Majeure Termination Amount means the payment calculated as such in Schedule 15 (Termination Amounts).

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

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

FM Side Deed means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - FM Side Deed" between Project Co, the State and the FM Subcontractor.

FM Subcontract means the contract for the performance of all or part of the Services entered into between Project Co and **[not disclosed]** dated on or about the Date of this Agreement and any other contract between Project Co and a FM Subcontractor for the performance of the Services.

FM Subcontractor means the person engaged by Project Co in accordance with the FM Subcontract being, at the Date of this Agreement **[not disclosed]** or any other person who in addition or substitution is engaged by Project Co to perform any of the Services.

General Change in Law means:

- (a) a Change in State Law; and

- (b) a Change in Law (other than a Change in State Law) which has effect during the Operations Phase,

in both cases which is not a Project Specific Change in Law.

Good Industry Practice means:

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

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

Gross Receipts has the meaning given to that term in Schedule 12 (Revenue Share).

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

Handover means the stage when Project Co has done everything that this Agreement requires to enable Project Co to handover the Works or the New Car Park (as applicable) in the required condition at the end of the Operating Phase or earlier termination of this Agreement.

Headlease means the lease of the Land that is to be granted by the Trust to the Board.

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

Immediate Termination Event means each of the following:

- (a) Project Co wholly or substantially abandons the Works or the New Car Park;
- (b) an Insolvency Event occurs in relation to Project Co, whether or not Project Co is then in breach of a State Project Document; or
- (c) a Change in Control of Project Co occurs without the consent of the State in accordance with Clause 31.6 (to the extent such consent is required in accordance with Clause 31.6).

Increased State Risk Allocation means any increase in the risks for the State in relation to the Project solely as a result of entry into the Prepaid Lease Structure.

Indemnified Persons means those persons described as such in Clause 23.6.

Independent Certifier means the entity appointed as the Independent Certifier in accordance with the Independent Certifier Deed of Appointment, as replaced (if at all) in accordance with Clause 5.6.

Independent Certifier Deed of Appointment means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project Independent Certifier Deed of Appointment" between the State, Project Co and the Independent Certifier dated on or about the Date of this Agreement.

Independent Expert means a person with suitable expertise and experience required to determine a Dispute having regard to the nature of the Dispute, appointed in accordance with Clause 30.

Indirect or Consequential Loss means any:

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

Information Reports means each of:

- (a) the geotechnical report titled "Geotechnical Investigation, New Children's Hospital (2 June 2010)" prepared by Coffey Geotechnics;
- (b) the environmental report titled 'Queen Elizabeth II Medical Centre Car Parking Project Environmental Preliminary Investigation' dated 20 October 2010 prepared by AECOM; and
- (c) the demand analysis titled 'Car Park Demand Assessment' dated 21 September 2010 prepared by SKM.

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 stayed, 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, withdrawn or dismissed 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)**: a corporation is taken to have failed to comply with a statutory demand within the meaning of Section 459F of the *Corporations Act 2001* (Cth);
- (i) **(execution levied against it)**: a corporation has an execution levied against it by creditors, debenture holders or trustees or under a floating charge which is not satisfied, withdrawn or dismissed within 10 Business Days; or
- (j) **(insolvency)**: 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.

Insurance Proceeds Account means the account established in accordance with Clause 24.10.

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

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

Key Subcontractor means:

- (a) the Builder;
- (b) the Operator; and
- (c) the FM Subcontractor,

and any replacement of them in accordance with this Agreement.

Key Subcontracts means:

- (a) the D&C Subcontract;
- (b) the Operator Subcontract; and
- (c) the FM Subcontract.

Known Utility Infrastructure means any Utility Infrastructure on a Construction Area of which Project Co is aware or ought reasonably to have been aware if Project Co had done those things which Project Co warrants that it has done under Clause 26.2 and taken actions of the kind that a prudent, competent and experienced contractor would have taken, and includes any Utility Infrastructure identified in the Information Reports.

Land means the Stage 1 Land and the Stage 2 Land.

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

- (a) **(water)**: ground water, ground water hydrology, the existence of any wells and the effects of any de-watering;
- (b) **(physical structures)**: physical and structural conditions above, upon and below the ground including any Utility Infrastructure, partially completed structures, Artefacts or in ground works;
- (c) **(vegetation)**: pastures, grasses or other vegetation on the Construction Areas or the Operating Areas;
- (d) **(topography)**: topography, ground surface and sub-surface conditions and geology including rock or other materials;
- (e) **(climate)**: climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand seasons, mud and other effects of climatic and weather conditions;
- (f) **(Contamination)**: any Contamination;

- (g) **(safety)**: any solid, liquid, gas, odour, heat, sound, vibration, radiation or substance which makes or may make the Environment:
 - (i) unsafe or unfit for habitation or occupation by persons or animals;
 - (ii) degraded in its capacity to support plant life;
 - (iii) contaminated; or
 - (iv) otherwise environmentally degraded,
 excluding any Contamination.
- (h) **(physical conditions)**: all other physical conditions and characteristics of or in the vicinity of the Construction Areas or the Operating Areas, on or below the surface which may affect Project Co's ability to perform its obligations in accordance with this Agreement; and
- (i) **(easements)**: all easements over or in connection with the Construction Areas or the Operating Areas,

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

Law means:

- (a) Commonwealth, Western Australia or local government legislation, including statutes ordinances, instruments, codes, requirements, regulations, by-laws and other subordinate legislation (but excluding Quality Standards);
- (b) Quality Standards which are enforceable under legislation or delegated legislation with which Project Co is legally obliged to comply;
- (c) common law; and
- (d) principles of equity.

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

Licence Fee means the fee of that name payable by Project Co to the Delegate in accordance with the At-Grade Car Parks Management Agreement.

LLI Holding Trust Deed means the deed poll entitled "Trust Deed – Lend Lease QE2 Car Park Trust" dated 9 June 2011.

MAE Events means the material adverse effect events identified in Clause 15.1.

Management of Construction Guidelines means the guidelines dated 13 August 2010 contained in volume 5 of the RFP.

[not disclosed]

Material Adverse Effect means a material adverse effect on:

- (a) the ability of Project Co or Finance Co to repay to the Financiers Actual Debt in accordance with the Financing Documents (without regard to any acceleration of the obligation to repay); or
- (b) Equity Return.

Minimum Number of New Car Park Bays means the number of Parking Bays in the New Car Park to be provided by Project Co to the State as specified in the 'Project Co Activities' column 4 of Schedule 19 (Parking Bay Requirements) on the Date for Completion specified in that Schedule.

Minimum Number of Parking Bays means the number of Parking Bays specified in column 5 of Schedule 19 (Parking Bay Requirements) on the dates in that Schedule.

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

Model Output Schedule means the summary sheet signed by the parties titled 'Model Output Schedule' of the Financial Model generated on Financial Close and attached in Appendix B to the Financial Close Adjustment Protocol as updated from time to time in accordance with this Agreement.

Modification means:

- (a) during the D&C Phase, any change to Schedule 17 (Design Requirements) including any addition, decrease, omission, deletion or removal to or from the Works which result from a change to Schedule 17 (Design Requirements); and
- (b) during the Operating Phase, any change to the New Car Park or the Services.

Modification Order means an order given by the State in accordance with Clause 17 which requires Project Co to proceed with a Modification.

Modification Quote has the meaning given in Clause 17.1(b)(i).

Month means a calendar month.

National Police Certificate means a certificate issued by WA Police that lists the disclosable criminal history of a person.

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

Net Incremental Costs means the amounts determined in accordance with Section 4.2(c) of Schedule 4 (Change Compensation Principles).

New Car Park means the Stage 1A New Car Park, the Stage 1B New Car Park, the Stage 2A New Car Park and the Stage 2B New Car Park and includes the footbridge shown on the spatial plan to be attached to the Sub-Sublease.

New Children's Hospital means the hospital known as the New Children's Hospital to be procured by the State and constructed on the Reserve.

New Children's Hospital Works means all work necessary for the design, construction, completion and commissioning of the New Children's Hospital.

New Children's Hospital Contractor means the person to be engaged by the State to perform the New Children's Hospital Works and all of its employees, subcontractors, consultants and agents engaged in the performance of the New Children's Hospital Works.

Operational Beds means all same day beds and multi-day beds available for use at a Reserve Hospital.

Operator means the person engaged by Project Co in accordance with the Operator Subcontract being, at the Date of this Agreement Ezipark Pty Ltd as trustee of the Ezipark Unit Trust or any other person who in addition or substitution is engaged by Project Co.

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

Operating Area means during the Operating Phase for:

- (a) the Stage 1A New Car Park and the Stage 1B New Car Park, the area the subject of the Sub-Sublease after Stage 1A Completion but prior to the Stage 2A Completion Date;
- (b) the Stage 2A New Car Park and the Stage 2B New Car Park, the area the subject of the Sub-Sublease after Stage 2A Completion; and
- (c) the At-Grade Car Parks, the areas for which Project Co is granted a licence in connection with the At-Grade Car Parks in accordance with the At-Grade Car Parks Management Agreement.

Operating Manual means the manual for the Operating Phase to be developed and updated by Project Co in accordance with this Agreement.

Operating Phase means:

- (a) in connection with the Stage 1A New Car Park, the period commencing on the Stage 1A Completion Date and ending on the Stage 1B Completion Date; and
- (b) in connection with the Stage 1B New Car Park, the period commencing on the Stage 1B Completion Date and ending on the Stage 2A Completion Date;
- (c) in connection with the Stage 2A New Car Park, the period commencing on the Stage 2A Completion Date and ending on the Stage 2B Completion Date;
- (d) in connection with the Stage 2B New Car Park, the period commencing on the Stage 2B Completion Date and ending on the Expiry Date;
- (e) in connection with the New Car Park generally, the period commencing on the Stage 1A Completion Date and ending on the Expiry Date; and
- (f) in connection with the At-Grade Car Parks, the period commencing on the date that Project Co is entitled to charge Users for use of the At-Grade Car Parks in accordance with Clause 21.2 and ending on the Expiry Date.

Operator Side Deed means the document entitled "Queen Elizabeth II Medical Centre Car Parking Project - Operator Side Deed" between Project Co, the State and the Operator.

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

Original Date for Completion means *[not disclosed]*

Outstanding Item means a minor Defect which in the opinion of the Independent Certifier:

- (a) does not prevent the New Car Park from being Fit For Purpose;

- (b) Project Co has reasonable grounds for not promptly rectifying; and
- (c) can be corrected without prejudicing the use of the New Car Park for the safe, efficient and continuous parking of vehicles.

Parking Bay means an area set aside and useable for Users to park a vehicle within the At-Grade Car Parks or the New Car Park.

Parking Charges means subject to Clause 21.2:

- (a) the charges that Project Co is entitled to impose in connection with the New Car Park as specified in the *Queen Elizabeth Medical Centre (Delegated Site) By-Laws 1986 (WA)* as amended from time to time (excluding fines and penalties imposed and collected by the Delegate); and
- (b) the charges that Project Co is entitled to impose in connection with the At-Grade Car Parking Bays in accordance with the At-Grade Car Parks Management Agreement (excluding fines and penalties imposed and collected by the Delegate).

Planned Operational Beds means:

- (a) prior to **[not disclosed]**, a total of **[not disclosed]** Operational Beds (inclusive of the mental health unit beds on the Reserve); and
- (b) on and from **[not disclosed]**, a total of **[not disclosed]** Operational Beds.

Planning Party means the Western Australian Planning Commission, the City of Subiaco, the City of Perth and the Commissioner of Main Roads.

[not disclosed]

Probity Event includes any event or thing which:

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

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

Project means:

- (a) undertaking and financing the Works;
- (b) the performance of the Services;

- (c) the undertaking of the Commercial Opportunities; and
- (d) Handover of the Works or the New Car Park (as applicable),

in accordance with this Agreement and the At-Grade Car Parks Management Agreement.

Project Co Associate means:

- (a) the Project Co Representative;
- (b) the Capella Parking Unit Trust;
- (c) Finance Co;
- (d) any Consortium Entity;
- (e) officers, agents, advisers, consultants, contractors and employees of Project Co, the Builder, the Operator, the FM Subcontractor and any other Subcontractor; and
- (f) any visitor to the Construction Areas or the Operating Areas invited onto the Construction Areas or the Operating Areas by Project Co or a Project Co Associate, excluding in each case any User.

but does not include Project Co or the Independent Certifier.

Project Co Representative means the person nominated as such in Schedule 1 (Contract Particulars), or such other person as may be appointed from time to time to replace that person in accordance with Clause 5.4.

Project Documents means:

- (a) this Agreement;
- (b) the At-Grade Car Parks Management Agreement;
- (c) the Sub-Sublease;
- (d) the Finance Side Deed;
- (e) the D&C Subcontract;
- (f) the Operator Subcontract;
- (g) the FM Subcontract;
- (h) the State Deed of Charge;
- (i) the Builder Side Deed;
- (j) the Operator Side Deed;
- (k) the FM Side Deed;
- (l) the Equity Documents;
- (m) the Financing Documents;
- (n) the Independent Certifier Deed of Appointment;
- (o) any other document the parties agree is a Project Document.

Project Management Plan means the project plan for the D&C Phase to be developed and updated by Project Co in accordance with this Agreement.

Project Specific Change in Law means:

- (a) a change:
 - (i) in, or repeal of, a State Law or the enactment of a new State Law;
 - (ii) in the interpretation or application of an existing State Law, brought about by:
 - A. a change in, or repeal of, another State Law; or
 - B. the enactment of a new State Law,

which specifically and only affects:

 - (iii) the Project or other privately financed projects similar to the Project which are implemented as public private partnerships; or
 - (iv) Project Co in its capacity as contractor for the Project under this Agreement;
- (b) a change in the way a State Law is applied or interpreted as a result of a:
 - (i) binding decision of a court of competent jurisdiction which reverses, overrules or refuse to follow an earlier binding decision of a court of competent jurisdiction where that earlier decision exists at the Date of this Agreement; or
 - (ii) decision which is the first decision on the relevant issue;

which specifically and only affects:

 - (iii) the Project and other privately financed projects similar to the Project which are implemented as public private partnerships; or
 - (iv) Project Co in its capacity as contractor for the Project under this Agreement;
- (c) the introduction of a Car Parking Levy; and
- (d) a change in the *Queen Elizabeth II Medical Centre Act 1966* (WA) and its subsidiary legislation that affects the At-Grade Car Parks (other than a change to Parking Charges),

but does not include:

- (e) a change to Parking Charges in accordance with the *Queen Elizabeth II Medical Centre Act 1966* (WA) and its subsidiary legislation;
- (f) a Modification;
- (g) a change in State Law solely on the basis that it has a greater effect on Project Co than other companies;
- (h) a change in the way a Law is applied or is interpreted as a result of the failure of Project Co to comply with a Law or any Authorisation, or in response to an illegal act or omission of Project Co (including any breach of this Agreement by Project Co);

- (i) a change in Law which was not in force at the Date of this Agreement but which:
 - (i) had been published in the Government Gazette prior to the Date of this Agreement by way of bill, draft bill or draft statutory instrument or of which public notice is given and is substantially the same as the Change in Law;
 - (ii) is contained or referred to in Schedule 17 (Design Requirements), the RFP or any Project Document; or
 - (iii) a party experienced and competent in undertaking works similar to the Works or performing services similar to the Services would have reasonably foreseen or anticipated prior to the Date of this Agreement;
- (j) a change in the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the GST Law (or the introduction of a tax affecting companies generally); or
- (k) the introduction of a carbon pollution reduction scheme, in what ever form.

Prolongation Costs has the meaning given to it in Section 4.2(a) of Schedule 4 (Change Compensation Principles).

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

- (a) the standards, policies, instructions and other procedures set out in, or otherwise expressly referred to in, Schedule 17 (Design Requirements) and Schedule 18 (Services Specifications);
- (b) the Building Code of Australia;
- (c) the relevant standards, codes and guides of Standards Australia and Standards New Zealand (or, where an Australian Standard or a New Zealand Standard does not exist, the relevant British standard or International standard);
- (d) the standards, codes and guides published by the National Occupational Health and Safety Commission;
- (e) the *Disability Discrimination Act 1992* (Cth);
- (f) Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites, ANZECC/MHNR;
- (g) all Environment Protection Authority (WA) publications and bulletins;
- (h) all standards, codes and guides published by the WorkCover Corporation of Western Australia and SafeWork WA;
- (i) State policies;
- (j) all requirements of Utility providers and Governmental Agencies; and
- (k) all other standards, codes, specifications and requirements relevant to the Works or the New Car Park that;
 - (i) are publicly available;
 - (ii) Project Co or a Project Co Associate is aware of (or ought reasonably to have been aware of) and has access to; or

- (iii) a contractor experienced in commercial car parking facilities could reasonably be expected to be aware of, and have access to,

as may be amended from time to time.

Quarter means:

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

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

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

- (a) the D&C Documents;
- (b) the Operating Manual;
- (c) the audited accounts referred to in Clause 33.1(e);
- (d) copies of all notices relating to Distributions;
- (e) all records related to the receipt of Gross Receipts including the notice provided by Project Co in accordance with Clause 21.3;
- (f) all records and information relating to the effects of a MAE Event;
- (g) all records in connection with the repayment of Actual Debt;
- (h) all records in connection with the receipt of Revenue;
- (i) National Police Certificates; and
- (j) books of account, computer print-outs, records, correspondence, invoices, instructions, plans, drawings, receipts and memoranda, whatever the form, including information stored by computer and other devices.

Refinancing means:

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

- (e) **(effect of restructure)**: any other step or arrangement that has an effect which is similar to any of the actions referred to in paragraphs (a) to (d) which has the effect of restructuring the financing arrangements as at the Date of this Agreement (including gearing),

and which will give rise to a Refinancing Loss or a Refinancing Gain. It does not include:

- (f) **(derivatives)**: the entry into of derivative transactions contemplated to be entered into on or before Financial Close by the Financing Documents;
- (g) **(derivatives termination or reversal)**: to the extent that any derivative transaction confers on a hedge counterparty a right to break a swap consequent on the hedge counterparty ceasing to be a finance party under the Financing Documents, the exercise of any such right;
- (h) **(syndication)**: the syndication or subscription of any debt in accordance with the Financing Documents that is contemplated at the date of Financial Close;
- (i) **(transfer)**: the transfer or sell down of any debt in an arm's length transaction at market value which does not change the commercial terms of the Financing Documents;
- (j) **(identity of Financiers)**: secondary disposals of investments or commitments of Financial Indebtedness in the ordinary course of a Financier's business which change the identity of Financiers but not the commercial terms of the Financing Documents; or
- (k) **(amendment or restatement)**: any amendment or restatement of any Financing Documents which is as a direct result of an amendment or waiver to cure or prevent any actual or potential event of default in accordance with any Financing Document.

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

Refinancing Gain means, in connection with any Refinancing Event, the net positive impact on pre-investor tax Distributions as a result of the Refinancing Event determined in accordance with the following:

- (a) the net positive difference (if any) between the sum of any pre-investor tax Distributions made in connection with the Refinancing Event or forecast to be made after the effective date of the Refinancing Event in accordance with the Financial Model updated in accordance with this Agreement to take account of the Refinancing Event and the sum of the pre-investor tax Distributions forecast to be made from that date in accordance with the Financial Model in the absence of the Refinancing Event;
- (b) the positive difference will be determined ignoring the impact of non-Refinancing impacts on Distributions such as revenues, costs, Taxes, reserves or levels of retained cash (other than revenue received, costs incurred or Taxes, reserves or levels of retained cash changed pursuant to a Refinancing) being different than forecast by the Financial Model;
- (c) such positive difference will be expressed as an aggregate amount as at the date of the Refinancing Event; and
- (d) in calculating the positive difference, timing differences will be taken into account by expressing relevant amounts in their net present value as of the date of the Refinancing Event using the pre-investor tax equity internal rate of return as set out in the Financial Model as the nominal discount rate.

For the purpose of calculating the Refinancing Gain: (i) it will be assumed that the terms of the Refinancing will only apply for the actual tenor of that Refinancing and not the balance of the Term, and (ii) the costs and expenses incurred by Project Co in connection with the Refinancing will be taken into account when calculating net present value of the Distributions.

Refinancing Loss means the net negative impact on pre-investor tax Distributions compared with those in the Financial Model in the period from Financial Close up to the Refinancing Event determined in accordance with the following:

- (a) the net negative difference (if any) between the sum of any pre-investor tax Distributions made in connection with any previous Refinancing Event and those forecast to be made after Financial Close in accordance with the Financial Model updated in accordance with this Agreement to take account of any previous Refinancing Events and the sum of the pre-investor tax Distributions forecast to be made from that date in accordance with the Financial Model in the absence of previous Refinancing Events;
- (b) the negative difference will be determined ignoring the impact of non-Refinancing impacts on Distributions such as revenues, costs, Taxes, reserves or levels of retained cash (other than revenue received, costs incurred or Taxes, reserves or levels of retained cash changed pursuant to a Refinancing) being different than forecast by the Financial Model;
- (c) such negative difference will be expressed as an aggregate amount for the period from Financial Close to the Refinancing Event; and
- (d) in calculating the negative difference, timing differences will be taken into account by expressing relevant amounts in their net present value as at the date of Financial Close using the pre-investor tax equity internal rate of return as set out in the Financial Model as the nominal discount rate.

For the purpose of calculating the Refinancing Loss, the cost and expenses incurred by Project Co in connection with the Refinancing will be taken into account when calculating net present value of the Distributions.

Related Person means:

- (a) a director or secretary of a Consortium Entity;
- (b) any officer or employee or agent of a Consortium Entity who:
 - (i) has the ability to exercise influence or control in relation to the Consortium Entity, or in matters relating to the Project;
 - (ii) works at the Construction Areas or the Operating Areas;
 - (iii) has access to confidential information concerning the Project;
- (c) an entity with Control over a Consortium Entity.

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

Reserve means the Queen Elizabeth II Medical Centre Reserve established in accordance with Section 6(1) of the *Queen Elizabeth Medical Centre Act 1966* (WA) and which includes the Construction Areas and the Operating Areas.

Reserve Hospital means at the Date of this Agreement the hospital known as the 'Sir Charles Gairdner Hospital' and the New Children's Hospital and after the Date of this

Agreement includes any other new hospital constructed on the Reserve (other than the New Children's Hospital).

Revenue means income that Project Co derives from the management of the New Car Park and the At-Grade Car Parks (including by the collection of Parking Charges), compensation paid by the State in accordance with this Agreement (to the extent that such compensation is of a revenue replacement nature), income derived from the Commercial Opportunities, the amounts referred to in Clause 24.10(e) and any other income that Project Co earns in accordance with this Agreement and the At-Grade Car Parks Management Agreement and includes Gross Receipts (as that term is defined in Schedule 12) but does not include interest earned on any Project Co bank account.

Revenue Compensation Amount means the amount calculated in accordance with Section 4.2(b) of Schedule 4 (Change Compensation Principles).

RFP means the request for proposal issued by the State on 4 October 2010.

Saving has the meaning given to it in the Change Compensation Principles, save that for the purposes of Clause 15A it means a saving of the capital costs and operating costs which would otherwise be required to be incurred or payable by Project Co which are or are likely to be decreased from the relevant amounts (if any) assumed in the current Financial Model.

Scheduled Refinancing means a Refinancing that occurs within 9 months prior to the date shown in the Financial Model as at the Date of this Agreement.

Security Trust Deed means the deed entitled "Security Trust Deed – Queen Elizabeth II Medical Centre Car Parking Project" between the Security Trustee, Project Co, Finance Co and others dated on or about the Date of this Agreement.

Security Trustee means, at any time, the person appointed as security trustee in accordance with the Security Trust Deed. At the Date of this Agreement, the Security Trustee is ANZ Fiduciary Services Pty Ltd (ACN 100 709 493).

Services means the services to be performed by Project Co in connection with the New Car Park and the At-Grade Car Parks in accordance with Schedule 18 (Services Specifications).

Service Failure means a failure by Project Co to provide Services in accordance with, and to the standards specified in, Schedule 18 (Services Specification) except to the extent that Project Co is relieved from the performance of the Service the subject of the failure in accordance with this Agreement.

Staff means persons who have been verified in writing by the State as a staff member for the purposes of parking in the New Car Park or At-Grade Car Parks.

Stage means each of:

- (a) Stage 1A, being the stage referable to the Stage 1A Works;
- (b) Stage 1B, being the stage referable to the Stage 1B Works;
- (c) Stage 2A, being the stage referable to the Stage 2A Works; and
- (d) Stage 2B, being the stage referable to the Stage 2B Works.

Stage 1A Completion means the stage when, in the reasonable opinion of the Independent Certifier:

- (a) the Stage 1A Completion Criteria have been satisfied;

- (b) the Stage 1A New Car Park is complete except for Outstanding Items;
- (c) Project Co has done everything which this Agreement requires Project Co to do as a condition precedent to Stage 1A Completion; and
- (d) all Additional Infrastructure that is required to be completed as part of Stage 1A Completion has been completed and handed back in accordance with Clause 11.

Stage 1B Completion means the stage when, in the reasonable opinion of the Independent Certifier:

- (a) the Stage 1B Completion Criteria have been satisfied;
- (b) the Stage 1B New Car Park is complete except for Outstanding Items;
- (c) Project Co has done everything which this Agreement requires Project Co to do as a condition precedent to Stage 1B Completion; and
- (d) all Additional Infrastructure that is required to be completed as part of Stage 1B Completion has been completed and handed back in accordance with Clause 11.

Stage 1A Completion Criteria means those criteria that are required to be satisfied to achieve Stage 1A Completion as set out in Schedule 7 (Completion Criteria).

Stage 1B Completion Criteria means those criteria that are required to be satisfied to achieve Stage 1B Completion as set out in Schedule 7 (Completion Criteria).

Stage 1A Completion Date means the date stated in the certificate of Stage 1A Completion issued by the Independent Certifier in accordance with Clause 13.5.

Stage 1B Completion Date means the date stated in the certificate of Stage 1B Completion issued by the Independent Certifier in accordance with Clause 13.5.

Stage 1 Construction Area means that part of the Reserve identified and shown outlined in red on the plan in Part B of Schedule 16 (Plans) on which the Stage 1A Works and Stage 1B Works are to be undertaken.

Stage 1A New Car Park means that part of the new multi-deck car parking facility comprising the Minimum Number of New Car Park Bays for Stage 1A Completion to be designed, constructed and commissioned by Project Co on the Stage 1 Construction Area.

Stage 1B New Car Park means that part of the new multi-deck car parking facility comprising the aggregate of the Minimum Number of New Car Park Bays for Stage 1A Completion and Stage 1B Completion to be designed, constructed and commissioned by Project Co on the Stage 1 Construction Area.

Stage 1 Land means the area of land shown outlined in red and identified in Part C of Schedule 16 (Plans) on which the Stage 1A New Car Park and Stage 1B New Car Park are to be situated.

Stage 1A Works means all work necessary for the design, construction, completion and commissioning of the Stage 1A New Car Park and the Additional Works that are required to be completed as part of the Stage 1A Works and including any Modifications.

Stage 1B Works means all work necessary for the design, construction, completion and commissioning of the Stage 1B New Car Park and the Additional Works that are required to be completed as part of the Stage 1B Works and including any Modifications.

Stage 2A Completion means the stage when, in the reasonable opinion of the Independent Certifier:

- (a) the Stage 2A Completion Criteria have been satisfied;
- (b) the Stage 2A New Car Park is complete except for Outstanding Items;
- (c) Project Co has done everything which this Agreement requires Project Co to do as a condition precedent to Stage 2A Completion; and
- (d) all Additional Infrastructure that is required to be completed as part of Stage 2A Completion has been completed and handed back in accordance with Clause 11.

Stage 2B Completion means the stage when, in the reasonable opinion of the Independent Certifier:

- (a) the Stage 2B Completion Criteria have been satisfied;
- (b) the New Car Park is complete except for Outstanding Items;
- (c) Project Co has done everything which this Agreement requires Project Co to do as a condition precedent to Stage 2B Completion; and
- (d) all Additional Infrastructure that is required to be completed as part of Stage 2B Completion has been completed and handed back in accordance with Clause 11.

Stage 2A Completion Criteria means those criteria that are required to be satisfied to achieve Stage 2A Completion as set out in Schedule 7 (Completion Criteria).

Stage 2B Completion Criteria means those criteria that are required to be satisfied to achieve Stage 2B Completion as set out in Schedule 7 (Completion Criteria).

Stage 2A Completion Date means the date stated in the certificate of Stage 2A Completion issued by the Independent Certifier in accordance with Clause 13.5.

Stage 2B Completion Date means the date stated in the certificate of Stage 2B Completion issued by the Independent Certifier in accordance with Clause 13.5.

Stage 2 Construction Area means that part of the Reserve identified and shown outlined in blue on the plan in Part B of Schedule 16 (Plans) on which the Stage 2A Works and Stage 2B Works are to be undertaken.

Stage 2 Land means the area of land shown outlined in blue and identified in Part B of Schedule 16 (Plans) on which the Stage 2A New Car Park and Stage 2B New Car Park are to be situated.

Stage 2A New Car Park means that part of the new multi-deck car parking facility comprising the aggregate of the Minimum Number of New Car Park Bays for Stage 1A Completion, Stage 1B Completion and Stage 2A Completion to be designed, constructed and commissioned by Project Co on the Stage 2 Construction Area.

Stage 2B New Car Park means that part of the new multi-deck car parking facility comprising the aggregate of the number of Minimum Number of New Car Park Bays for Stage 1A Completion, Stage 1B Completion, Stage 2A Completion and Stage 2B Completion to be designed, constructed and commissioned by Project Co on the Stage 2 Construction Area.

Stage 2A Works means all work necessary for the design, construction, completion and commissioning of the Stage 2A New Car Park and Additional Works that are required to be completed as part of the Stage 2A Works and including any Modifications.

Stage 2B Works means all work necessary for the design, construction, completion and commissioning of the Stage 2B New Car Park and Additional Works that are required to be completed as part of the Stage 2B Works and including any Modifications.

State means the Crown in right of the State of Western Australia and includes a Minister of the Crown in right of the State of Western Australia but excludes the State Associates.

State Associates means the State of Western Australia's departments, agencies, instrumentalities and agents, advisers, consultants, contractors and employees of any of those bodies, but does not include Project Co, Project Co's Associates, the Trust or the Independent Certifier.

State Construction Area Contractor means a State Reserve Contractor that is granted or permitted access to a Construction Area by the State to perform works on a Construction Area.

State Deed of Charge means the document entitled "Queen Elizabeth II Car Parking Facility - State Deed of Charge" between the State, Project Co and Finance Co.

State Law means:

- (a) statutes, ordinances, instruments, codes, requirements, regulations, by-laws and other subordinate legislation of the State;
- (b) delegated legislation of the State;
- (c) any Quality Standard, document or policy enforceable under legislation or delegated legislation of the State with which Project Co is legally obliged to comply;
- (d) local council law, including model local law, interim local law and subordinate local law; and
- (e) common law as applied in Western Australia; and
- (f) principles of equity as applied in Western Australia.

State Project Documents means:

- (a) this Agreement;
- (b) the At-Grade Car Parks Management Agreement;
- (c) the Sub-Sublease;
- (d) the Finance Side Deed;
- (e) the State Deed of Charge;
- (f) the Builder Side Deed;
- (g) the Operator Side Deed;
- (h) the FM Side Deed;
- (i) the Independent Certifier Deed of Appointment; and

(j) any other Project Document to which the State or the Delegate is a party.

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

State Reserve Contractor means the New Children's Hospital Contractor or any third party contractor engaged by the State to perform construction activities within the Reserve.

Step-In Event has the meaning given to it in Clause 28.1.

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

Subcontractor means any person to whom Project Co intends to, or does subcontract any part of the Project.

Sublease means the lease of the Land that is to be granted by the Board to the Minister for Finance for and on behalf of the Crown in right of the State of Western Australia.

Subscription Agreement means the document entitled "Loan Note Subscription Agreement - Queen Elizabeth II Medical Centre Car Parking Project" between Finance Co, the Facility Agent and others dated on or about the Date of this Agreement.

Sub-Sublease Refund Payment has the meaning given in Clause 5.7(e) of the Sub-Sublease.

Sub-Sublease means the lease of the Land that is to be granted by the Minister of Finance for and on behalf of the Crown in right of the State of Western Australia to Project Co, substantially in the form of Attachment 3.

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

Tax Invoice means the tax invoice to be provided by Project Co to the State in accordance with Clause **Error! Reference source not found.**, in the form attached to this Agreement in Schedule 21.

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

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

Total Rent has the meaning given to that term in the Sub-Sublease.

Trust means the Queen Elizabeth II Medical Centre Trust constituted in accordance with the *Queen Elizabeth Medical Centre Act 1966* (WA).

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

- (a) but becomes unavailable in the recognised international insurance market by a Reputable Insurer; or
- (b) in respect of which the insurance premium payable for insuring that risk with a Reputable Insurer is at such a level or the terms and conditions are such that the risk is not generally being insured against by private sector providers of facilities in Australia similar to the New Car Park,

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

User means any Staff or Visitor who uses the New Car Park or the At-Grade Car Parks for the purpose of parking a vehicle.

Utility means any utility service, including water, electricity, gas, telephone, drainage, sewerage, stormwater and communications services required to undertake the Works or perform the Services.

Utility Infrastructure means any part of the supply, distribution or reticulation network operated or managed by a utility, including poles, pipes, pipeline, cables, wires, conduits, tunnels, aqueduct, electrical installation, telecommunications plant, water channel, and railway and electronic communications systems required to undertake the Works or perform the Services but not including communications systems provided as part of the New Car Park as generally described in Schedule 17 (Design Requirements).

Utility Service Interruption means any one or more Utilities not being available (either at all or in the necessary quantity) for use for any reason other than because of:

- (a) an act, omission or lack of diligence of Project Co or any Project Co Associate;
- (b) a Dispute between Project Co and the relevant Utilities provider regardless of how or why that Dispute is initiated or by whom; or
- (c) a failure by Project Co to comply with its obligations under Clause 7.3.

Visitor means any person that is not Staff.

Voluntary Termination Amount means the payment calculated as such in accordance with Schedule 15 (Termination Amounts).

Works means the Stage 1A Works, the Stage 1B Works, the Stage 2A Works, the Stage 2B Works and the Additional Works or the relevant one of these (as applicable).

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

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) **(references)**: references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), a trust, a trustee or a partnership;
- (b) **(includes)**: the words "including", "includes" and "include" will be read as if followed by the words "without limitation";
- (c) **(or)**: the meaning of "or" will be that of the inclusive "or", that is meaning one, some or all of a number of possibilities;
- (d) **(party)**: a reference to a "party" is to a party to this Agreement;
- (e) **(other persons)**: a reference to any party or person includes each of their 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 Agreement):** a reference to this Agreement or to any other deed, agreement, document or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time.
- (h) **(Legislation):** a reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for that legislation, section or provision.
- (i) **(rights):** a reference to a right includes any benefit, remedy, discretion, authority or power;
- (j) **(singular):** words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (k) **(headings):** headings are for convenience only and do not affect the interpretation of this Agreement;
- (l) **(inclusive):** a reference to this Agreement includes all Schedules and Attachments;
- (m) **(Clauses):** a reference to:
- (i) a Clause, Schedule or Attachment is a reference to a Clause, Schedule or Attachment of or to this Agreement;
 - (ii) a paragraph or a sub-paragraph is a reference to a paragraph or sub-paragraph in the Clause in which the reference appears; and
 - (iii) a Section is a section of a Schedule;
- (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 Agreement or any part;

- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (t) **(remedy)**: the use of the word "remedy" or any form of it in this Agreement means that the event to be remedied must be cured or its effects overcome; and
- (u) **(writing)**: references to a notice, request, Claim, consent, approval, record or report means that the notice, request, Claim, consent, approval, record or report must be in writing unless otherwise agreed by the parties or expressly stated in this Agreement.

1.3 Related matters

- (a) **(Provisions limiting or excluding Liability)**: Any provision of this Agreement which seeks either expressly or by implication to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.
- (b) **(Project Co obligations)**: In complying with or accepting any obligation or risk in accordance with this Agreement, Project Co must procure that, to the extent applicable, Project Co's Associates are required to comply with or accept the relevant obligation or risk and not cause Project Co to breach its obligations in accordance with this Agreement.
- (c) **(Business Day)**: If the day on or by which any thing is to be done in accordance with this Agreement is not a Business Day, that thing must be done on the next Business Day.
- (d) **(Agreement composition)**:
 - (i) this Agreement comprises:
 - A. Clauses 1 to **Error! Reference source not found.**;
 - B. Schedule 1 to Schedule 22; and
 - C. Attachments 1 to 7.
 - (ii) Project Co agrees:
 - A. to the extent that an Attachment seeks to impose any obligations on the State, such obligations will not be legally binding on the State (unless a corresponding obligation is expressly imposed on the State or a State Associate in a Clause or a Schedule); and
 - B. Project Co is not entitled to make any Claim against the State or for any Liabilities incurred by Project Co in connection with a breach of an obligation imposed on the State in an Attachment unless such Liabilities are also incurred by Project Co as a consequence of a breach of a corresponding obligation imposed on the State in a Clause or a Schedule.
- (e) **(Order of precedence)**: The following order of precedence applies in the event of any inconsistency, ambiguity or discrepancy between the various documents comprising this Agreement:

- (i) Clauses 1 to **Error! Reference source not found.** and Schedule 17 (Design Requirements);
- (ii) Schedule 18 (Services Specifications);
- (iii) the Bid Design Documentation save where inconsistent with Schedule 17 (Design Requirements), in which case the Bid Design Documentation will only prevail over Schedule 17 (Design Requirements) if:
 - A. the ambiguity, discrepancy or inconsistency between the Bid Design Documentation and Schedule 17 (Design Requirements) is specifically identified in the Design Departures Schedule; or
 - B. if paragraph 1.3(e)(iii)A does not apply, to the extent that the Bid Design Documentation includes or comprises a higher, more stringent or greater standard, requirement or scope than that imposed by Schedule 17 (Design Requirements); and
- (iv) the remaining Schedules and Attachments,

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

(f) **(Ambiguous terms)**

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

- (iv) Project Co must comply with any direction issued by the State in accordance with this paragraph (f).

1.3A Definitions

Unless otherwise defined in this Agreement, capitalised terms have the meaning given to them in the At-Grade Car Parks Management Agreement.

1.4 Authorities

- (a) Project Co agrees that:
 - (i) the Trust and the person acting as Delegate have jurisdiction over the Reserve and may, from time to time and at any time, exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Project; and
 - (ii) except as otherwise expressly provided in this Agreement, Project Co bears the full risk of all occurrences of the kind referred to in paragraph (i) and will not be entitled to make any Claim against the State in connection with such occurrences.
- (b) Where the Trust or the Delegate gives a direction to Project Co in the exercise of their statutory functions or powers or otherwise exercises their statutory functions or powers (each a **Specified Delegate Action**) in a manner which is inconsistent with Project Co's rights under this Agreement (disregarding for this purpose, Clause 1.4 of this Agreement and Clause 1.4 of the At-Grade Car Parks Management Agreement), Project Co will, as soon as reasonably practicable after the earlier of:
 - (i) becoming aware of; or
 - (ii) having access to information such that Project Co, acting reasonably, should have been aware of,such Specified Delegate Action, notify the State (who will be deemed to have directed a Modification Order consistent with such exercise of statutory function or power unless the relevant Specified Delegate Action is immediately withdrawn).

1.5 Changes to indices

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

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

- (iv) if it is not, what other index should be used as a substitute index for the purpose of this Agreement,

and that determination is final and binds the parties.

2. Conditions Precedent

2.1 Commencement

- (a) Subject to paragraph (b), this Agreement will not commence unless and until each of the Conditions Precedent has been satisfied or waived in accordance with this Clause 2.
- (b) The following Clauses of this Agreement commence at the Date of this Agreement:
 - (i) Clause 1 (Definitions and interpretation);
 - (ii) this Clause 2;
 - (iii) Clause 5.6 (Independent Certifier);
 - (iv) Clause 8.2 (Occupational health, safety and rehabilitation);
 - (v) Clauses 23.6 (Indemnity for Project Co breach);
 - (vi) Clause 23.7 (Third party liability indemnity);
 - (vii) Clause 25 (Compliance with Laws);
 - (viii) Clause 26 (Representations and warranties);
 - (ix) Clause 30 (Dispute resolution);
 - (x) Clause 31 (Assignment and ownership);
 - (xi) Clause 35 (Confidentiality);
 - (xii) Clause 35.2 (Public announcements);
 - (xiii) Clause 37 (Notices); and
 - (xiv) Clause 39 (General).

2.2 Conditions Precedent

This Agreement is conditional on:

- (a) Project Co delivering to the State all of the following in a form and substance reasonably satisfactory to the State:
 - (i) **(Counterparty Details):** duly completed Counterparty Details;
 - (ii) **(legal opinion):** a legal opinion given for the benefit of the State from solicitors acting for each Consortium Entity as to:
 - A. the legal capacity and corporate power of that Consortium Entity to enter into and perform its obligations in accordance with the State Project Documents; and

- B. due execution of the Project Documents by the Consortium Entity;
- (iii) **(counterparts)**: original counterparts of all State Project Documents (other than this Agreement and the Sub-Sublease) and certified copies of all other Project Documents (other than this Agreement and the Sub-Sublease) all duly executed by all parties other than the State and the Delegate;
- (iv) **(Financing Documents and Equity Documents)**: certified copies of the Financing Documents and Equity Documents duly executed by all parties to them, and evidence that all conditions precedent to the Financing Documents and Equity Documents coming into force have been satisfied (or waived in accordance with their terms);
- (v) **(Financial Model)**: the Financial Model as varied from the Financial Model at the Date of this Agreement in accordance with the Financial Close Adjustment Protocols; and
- (vi) **(Insurances)**: copies of all Insurances required to be effected and maintained during the D&C Phase and a certificate from an insurance broker as to the currency of each policy in accordance with, and the compliance of each policy with the requirements of Clause 24 of this Agreement; and
- (b) the State:
 - (i) execution of the State Project Documents (other than the At-Grade Car Parks Management Agreement) by the State;
 - (ii) procuring that the Delegate executes the At-Grade Car Parks Management Agreement and the Finance Side Deed; and
 - (iii) procuring the execution of the collateral warranties in connection with the Information Reports,

referred to as the “**State Conditions Precedent**”.

2.3 Satisfaction of Conditions Precedent

- (a) Project Co must satisfy each Condition Precedent by the Condition Precedent Deadline Date (other than the State Conditions Precedents).
- (b) The State must satisfy each of the State Conditions Precedent by the Condition Precedent Deadline Date.
- (c) When the last of the Conditions Precedent to be satisfied or waived has been satisfied or waived, the State must confirm that all of the Conditions Precedent have been satisfied or waived and the date upon which the last of the Conditions Precedent was satisfied or waived by issuing a certificate to that effect.

2.4 Waiver of Conditions Precedent

A Condition Precedent is only waived if:

- (a) in connection with a Condition Precedent (other than a State Condition Precedent) the State gives notice of the waiver of the Condition Precedent to Project Co; and
- (b) in connection with a State Condition Precedent, Project Co gives notice of the waiver of the State Condition Precedent to the State.

2.5 Failure to satisfy Conditions Precedent

- (a) If a Condition Precedent has not been satisfied or waived by 2pm on the date that is 20 Business Days after the Date of this Agreement or such later date as the State may specify (**Condition Precedent Deadline Date**), then the State may terminate this Agreement by giving not less than 5 Business Days notice in writing to Project Co.
- (b) If this Agreement is terminated in accordance with paragraph (a) then:
 - (i) each of the other Project Documents will be taken to have been terminated at the time this Agreement is terminated; and
 - (ii) Project Co will not be entitled to bring any Claim against the State and the State will not be entitled to bring any Claim against Project Co arising out of or in connection with:
 - A. the failure of the Conditions Precedent to be satisfied;
 - B. the termination of this Agreement; or
 - C. the Project or the State Project Documents,except for any Claim arising in connection with the Clauses identified in Clause 2.1(b) other than a Claim that the Conditions Precedent have not been satisfied.

3. Term and tenure

3.1 Commencement date

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

3.2 Expiry Date

The Term will expire on:

- (a) the date specified as the 'Expiry Date' in the Model Outputs Schedule as varied in accordance with this Agreement; or
- (b) any earlier date on which this Agreement is terminated in accordance with Clause 29 or otherwise at law,

in each case the "**Expiry Date**".

3.3 Tenure arrangements during D&C

- (a) (**Access for Stage 1A Works and Stage 1B Works**): Commencing on Financial Close and ending on the Stage 1B Completion Date, the State will ensure that Project Co and Project Co's Associates are provided with access to the Stage 1 Construction Area to the fullest extent necessary to perform the Stage 1A Works and the Stage 1B Works.
- (b) (**Access for Stage 2A Works and Stage 2B Works**): Commencing on the Stage 1B Completion Date and ending on the Stage 2B Completion Date, the State will ensure that Project Co and Project Co's Associates are provided with access to the Stage 2 Construction Area to the fullest extent necessary to perform the Stage 2A Works and the Stage 2B Works.
- (c) (**Risk of obtaining access to additional land**): Project Co is solely responsible for obtaining access to and from any land outside the Stage 1 Construction Area

and the Stage 2 Construction Area to which access is required to carry out the Stage 1A Works, the Stage 1B Works, the Stage 2A Works and the Stage 2B Works.

- (d) **(Adequate access):** Subject to paragraphs (a) and (b), Project Co:
 - (i) agrees that the State and the State Associates make no representation, warranty or guarantee in connection with the adequacy of access to the Construction Areas or the Additional Works Construction Areas for the execution of the Works; and
 - (ii) accepts all risks associated with access and the adequacy of the access to the Construction Areas and the Additional Works Construction Areas to the extent such areas are outside of the Reserve.
- (e) **(No exclusive access):** Subject to Clauses 3.3(a) and 3.3(b), the State is not required to provide Project Co exclusive access to the Stage 1 Construction Area or the Stage 2 Construction Area, provided that:
 - (i) the State ensures that any State Associate or third party engaged by the State accessing such areas must comply with all reasonable requirements of Project Co in connection with such access; and
 - (ii) the State has complied with Clause 10.6(c).

3.4 Tenure arrangements during Operating Phase

Project Co agrees that the Sub-Sublease to be granted to Project Co in accordance with this Agreement is granted subject to and in accordance with a headlease between the Trust and the Board and a sublease between the Board and the Minister for Finance for and on behalf of the Crown in right of the State of Western Australia.

3.5 Grant of Sub-Sublease

- (a) **(Sub-Sublease Term):** Subject to Stage 1A Completion having occurred, the State will grant the Sub-Sublease to Project Co:
 - (i) for a term which will:
 - A. commence on the Stage 1A Completion Date; and
 - B. end on the Expiry Date; and
 - (ii) be on the terms and conditions set out in the Sub-Sublease.
- (b) **(Delivery):** Not later than 20 Business Days prior to the expected Stage 1A Completion Date, Project Co must prepare and deliver to the State three counterparts of the Sub-Sublease which:
 - (i) must include a sublease plan of the land on which the Stage 1A New Car Park is constructed prepared by a surveyor, as an annexure to the Sub-Sublease; and
 - (ii) are:
 - A. executed by Project Co; and
 - B. complete, except for those matters that the State is authorised to complete in accordance with paragraph (c).

- (c) **(Authority to complete):** Project Co authorises the State to complete the Sub-Sublease by inserting:
 - (i) the commencement date of the Sub-Sublease as determined in accordance with paragraph (a);
 - (ii) any other particulars necessary to complete the Sub-Sublease.
- (d) **(Execution):** The State, in accordance with paragraph (c), will complete the counterparts of the Sub-Sublease delivered by Project Co, execute each counterpart and return one of the completed and executed counterparts to Project Co.
- (e) **(Registration):** Project Co must register the Sub-Sublease with the Western Australian Land Information Authority (trading as Landgate).
- (f) **(Update of sublease plan):** The parties agree that the sublease plan attached to the Sub-Sublease in accordance with paragraph (b) will be replaced from time to time in accordance with the Sub-Sublease to reflect each Stage.

3.6 Permitted use

Project Co must not use or permit the use of the Construction Areas or the Operating Areas for any purpose other than as permitted in accordance with this Agreement, the Sub-Sublease or the At-Grade Car Parks Management Agreement.

4. General obligations

4.1 FFP Warranty

At the relevant Completion Date, Project Co represents and warrants that the New Car Park:

- (a) is Fit For Purpose; and
 - (b) will continue to be Fit For Purpose at all times throughout the Term,
- by reference to the standards existing at Completion.

4.2 Project Co takes all risks

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

4.3 Acts or omissions of Project Co

Without limiting Clause 4.4, if a State Project Document confers on Project Co a right to make a Claim against the State or State Associates, the amount of Project Co's Claim shall be reduced to the extent that the event for which Project Co is entitled to bring a Claim was caused or contributed to by any:

- (a) negligent act or omission of Project Co or a Project Co Associate; or
- (b) breach by Project Co of any State Project Document.

4.4 Mitigation by Project Co

- (a) In this Clause 4.4, "**Relevant Relief Event**" means the occurrence of any event which entitles Project Co to:
 - (i) an extension of time;
 - (ii) compensation;
 - (iii) relief from performance of any of its obligations in any State Project Document; or
 - (iv) relief for a MAE Event; or
 - (v) bring any other Claim against the State.
- (b) If a Relevant Relief Event occurs, Project Co must:
 - (i) Subject to Clause 4.4(b)(ii), use its best endeavours to mitigate the effects of the Relevant Relief Event but without any obligation to accelerate the Works; and
 - (ii) for this purpose, comply with all reasonable directions of the State concerning the Relevant Relief Event and its consequences.
- (c) The State's Liability in connection with Relevant Relief Events will be reduced to the extent Project Co fails to comply with its obligations set out in paragraph (b).

4.5 At-Grade Car Parks Management Agreement

Project Co must comply and ensure that Project Co's Associates comply with the At-Grade Car Parks Management Agreement.

5. Contract administration

5.1 Parties' representatives

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

5.2 State Representative

- (a) **(Directions):** The State Representative may:
 - (i) give directions and notices to be given by the State; and
 - (ii) receive all notices and documents to be received by the State, in connection with this Agreement.
- (b) **(Agent):** The State Representative will carry out all its functions in accordance with this Agreement as the agent of the State.
- (c) **(Compliance):** Project Co must comply with any direction by the State Representative given or purported to be given in accordance with this Agreement.
- (d) **(Oral directions):** The State Representative may give a direction orally but will as soon as practicable confirm that direction in writing.

- (e) **(Directions from other people):** Project Co must not accept or act upon directions from an employee or agent of the State other than the State Representative or a delegate of the State Representative appointed in accordance with Clause 5.3.
- (f) **(Vary or terminate delegation):** The State may vary or terminate any delegated power or authority of the State Representative but must promptly notify Project Co of any such variation or termination.
- (g) **(Replacement):** The State may at any time replace the State Representative, in which event the State will appoint another person as the State Representative and notify Project Co of that appointment.

5.3 Further State delegations

- (a) The State may at any time delegate the exercise of any power or authority of the State Representative in accordance with this Agreement to a person other than the State Representative and may terminate or vary that delegation.
- (b) In connection with any delegation in accordance with paragraph (a), the State will promptly notify Project Co of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and of any termination or variation to that delegation.
- (c) Any direction given by a State delegate in accordance with its delegation in accordance with this Clause 5.3 will be deemed to be a direction of the State Representative.

5.4 Project Co Representative

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

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

5.5 Management Team

- (a) **(Establishment):** The parties will establish a team consisting of:
 - (i) the State Representative and two other representatives of the State notified by the State to Project Co from time to time;
 - (ii) Project Co Representative and two other persons nominated by Project Co to the State from time to time (one of which shall be a representative of the Builder until the expiry of the final Defects Liability Period (as defined in the D&C Contract)); and
 - (iii) such other members as the parties may agree from time to time, (together the **Management Team**).
- (b) **(Chair of meetings):** The State Representative will chair Management Team meetings.
- (c) **(Appointment of delegates):** The members of the Management Team may, by notice to the other members of the Management Team, appoint a delegate to:
 - (i) attend any Management Team meetings in their absence; and
 - (ii) otherwise discharge their responsibilities in accordance with this Clause 5.5.
- (d) **(Functions):** The functions of the Management Team will be to:
 - (i) monitor the overall progress of the Project and compliance with this Agreement;
 - (ii) endeavour to resolve any matters referred to the Management Team by a party, including any Disputes referred to the Management Team in accordance with Clause 30;
 - (iii) review all progress reports provided by Project Co, its Subcontractors and the Independent Certifier; and

- (iv) discuss and consider any other issues in connection with the Project.
- (e) **(Meetings):** The Management Team must:
 - (i) meet Monthly during the D&C Phase and thereafter Quarterly (or as otherwise agreed by the parties); or
 - (ii) conduct its meetings in the manner agreed by its members from time to time.
- (f) **(Reporting at meetings):** Project Co must report to the Management Team at each Management Team meeting on:
 - (i) any issues arising out of the any reports, plans or manuals provided to the State in accordance with this Agreement;
 - (ii) the progress of the Works against, and compliance with, the Works Program;
 - (iii) whole of Reserve issues, including coordination of the Works with other contractors on the Reserve;
 - (iv) quality assurance and any safety issues identified in a safety report;
 - (v) any Modifications or proposed Modifications;
 - (vi) Service delivery issues and any other issues in connection with Schedule 18 (Services Specifications) including any issues arising from the quarterly report to be prepared in accordance with Section 4.2 of Schedule 18 (Services Specifications);
 - (vii) complaints and issues of public concern; and
 - (viii) any other issues notified by the State.
- (g) **(Minutes):** The State will take minutes of each Management Team meeting and distribute such minutes prior to the next Management Team meeting.
- (h) **(Other attendees):** The State may require that:
 - (i) the Independent Certifier attend any meeting of the Management Team; and
 - (ii) Project Co procure the attendance of senior representatives of any of the Builder, the Operator, the FM Subcontractor, a Financier or any of Project Co's Associates at any meeting of the Management Team and Project Co must comply with any such request, provided that the State has provided at least 5 Business Days prior notice to Project Co.

The Delegate may attend any meeting of the Management Team in accordance with Clause 5.1(c) of the At-Grade Car Parks Management Agreement.

- (i) **(Advisory only):** The role of the Management Team is advisory only and its decisions or recommendations are not binding on the parties.
- (j) **(Rights and obligations unaffected):** The parties' involvement in the Management Team does not affect their respective rights and obligations in accordance with this Agreement.

- (k) **(No restriction)**: The Management Team will not have any power to require any of the parties, a State Associate or a Project Co Associate to act or refrain from acting in any way.
- (l) **(No reliance or Claim)**: Neither the State nor Project Co will be entitled to make any Claim against any member of the Management Team in connection with anything which any such member does or fails to do in its capacity as a member of the Management Team.
- (m) **(Other meetings)**: If requested by the State, Project Co must ensure that appropriate personnel are available to attend meetings convened by the State in connection with construction activities on the Reserve including any meetings of the group referred to as the "Construction Coordination Group".

5.6 Independent Certifier

- (a) **(Project Co nominates 3 firms)**: Project Co must, prior to Financial Close, nominate 3 firms that have submitted tenders to Project Co from which the State will select the Independent Certifier, each of which must:
 - (i) **(expertise)**: have appropriate qualifications and experience;
 - (ii) **(no conflicts)**: have no interest or duty which may conflict with the role of the Independent Certifier in accordance with this Agreement;
 - (iii) **(execution)**: indicate its willingness to execute the Independent Certifier Deed of Appointment without substantial amendment;
 - (iv) **(insurance)**: have professional indemnity insurance in accordance with the requirements of the Independent Certifier Deed of Appointment; and
 - (v) **(information)**: provide such information in relation to fees and other matters as the State reasonably requires.
- (b) **(State selects)**: The State may select one of the firms nominated by Project Co in accordance with paragraph (a) to act jointly on behalf of the State and Project Co as the Independent Certifier.
- (c) **(Independent Certifier Deed of Appointment)**: Project Co and the State must enter into an Independent Certifier Deed of Appointment with the Independent Certifier selected by the State by Financial Close.
- (d) **(State refusal)**: If the State, acting reasonably, refuses to select one of the 3 firms nominated by Project Co within 5 Business Days of Project Co's nomination, Project Co must, within 5 Business Days of receiving notice from the State of that refusal, nominate 3 other firms in accordance with paragraph (a) and the process in paragraphs (b), (c) and (d) will apply again.
- (e) **(Role)**: The role, functions, rights and liabilities of the Independent Certifier and the parties' rights and obligations in connection with the Independent Certifier are set out in the Independent Certifier Deed of Appointment.
- (f) **(Final and binding)**: Except if:
 - (i) there is an express provision in this Agreement to the contrary; or
 - (ii) the Independent Certifier is acting as an Independent Expert in accordance with Clause 30.3,

determinations of the Independent Certifier will be final and binding on the State and Project Co.

- (g) **(No approval):** No certificate or notice given by, or other act or omission of, the Independent Certifier will:
 - (i) constitute an approval by the State of Project Co's performance of its obligations in accordance with the State Project Documents; or
 - (ii) prejudice any rights or powers of the State whether in accordance with the State Project Documents or otherwise according to Law.
- (h) **(Appointment and replacement):** If:
 - (i) the Independent Certifier Deed of Appointment is terminated in accordance with its terms; or
 - (ii) the Independent Certifier is, for any reason, not appointed or ceases to act as the Independent Certifier,

the State and Project Co must jointly engage another person to act as Independent Certifier on substantially the same terms as the Independent Certifier Deed of Appointment in accordance with the process set out in paragraphs (a) to (d).
- (i) **(Decisions of previous Independent Certifier):** The new Independent Certifier appointed in accordance with paragraph (h) is bound by the exercise of any functions performed or decisions made by the previous Independent Certifier which would have been binding on the previous Independent Certifier.

5.7 Subcontracting

Project Co:

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

5.8 Key Subcontractors

- (a) Project Co must employ or engage the Key Subcontractors in the positions stated in Schedule 1 (Contract Particulars).
- (b) Project Co must not replace the Key Subcontractors in their roles without the State's prior approval in accordance with paragraph (c).
- (c) If Project Co seeks to replace a Key Subcontractor, the State may not unreasonably withhold or delay its approval of a proposed replacement if in the case of the replacement of any Key Subcontractor:
 - (i) the Key Subcontractor has suffered an Insolvency Event;

- (ii) the Key Subcontractor has breached the terms and conditions of the relevant Key Subcontract; or
- (iii) the Key Subcontract has expired in accordance with its terms; and
- (iv) the replacement subcontractor;
 - A. is capable of performing Project Co's obligations in respect of the Works or the Services;
 - B. has demonstrated recent experience and good performance in delivery of works or services at a facility similar to the Project;
 - C. has sufficient financial capacity to perform the Works or the Services; and
 - D. is a fit and proper person.

5.9 Key Subcontracts

- (a) Project Co must seek the State's prior approval (which will not be unreasonably withheld) to the terms of any Key Subcontract and any amendment to any Key Subcontract.
- (b) Project Co must not at any time terminate, rescind, novate or assign any Key Subcontracts without the State's prior consent (which will not be unreasonably withheld).

5.10 Removal of personnel

- (a) The State may, acting reasonably following the occurrence of a Probity Event, direct Project Co to remove from any activity connected with the Project any individual employed or engaged by Project Co or any individual employed or engaged by a Subcontractor.
- (b) On receipt of a direction in accordance with paragraph (a), Project Co must take immediate steps to:
 - (i) remove or procure the removal of the individual from the activity in connection with the Project;
 - (ii) prevent or procure that the relevant individual does not have access to the Construction Areas, the Operating Areas, the New Car Park or confidential information; and
 - (iii) if necessary, appoint an alternative individual acceptable to the State.
- (c) Following removal in accordance with this Clause 5.10, the individual must not be employed or engaged in connection with activities in connection with the Project without the prior approval of the State.

5.11 Security of payment

- (a) This Clause will apply only to the extent that the *Construction Contracts Act 2004* (WA) (**CCA**) applies to any Subcontract.
- (b) Expressions defined or used in the CCA have the same meaning for the purposes of this Clause 5.11 (unless the context otherwise requires).

- (c) If the CCA applies to any Subcontract, Project Co must:
 - (i) within 2 Business Days of receiving any application or notice in accordance with the CCA, give a copy of that application or notice to the State; and
 - (ii) within 1 Business Day of receiving any notice of a Subcontractor's intention to suspend work under a Subcontract in accordance with the CCA, give a copy of that notice to the State.

6. Project management documents

6.1 General obligations

- (a) **(Submission):** Project Co must submit to the State and the Independent Certifier drafts of the Project Management Plan and Operating Manual for review in accordance with Schedule 3 (Review Procedures) by the times set out below:
 - (i) Project Management Plan – no later than 20 Business Days prior to commencement of construction at a Construction Area; or
 - (ii) Operating Manual – 30 Business Days prior to commencement of an Operating Phase.
- (b) **(Compliance):** The drafts of the Project Management Plan and Operating Manual submitted in accordance with paragraph (a) must be consistent with the bid Project Management Plan and bid Operating Manual set out in Attachment 4 (Bid Project Management Plan) and Attachment 5 (Bid Operating Manual).
- (c) **(Update):** Project Co must update the Project Management Plan and the Operating Manual:
 - (i) if reasonably requested by the State or the Independent Certifier to do so; and
 - (ii) as otherwise necessary to reflect any changes to the nature or status of the Works or Services being undertaken.
- (d) **(Submit revisions):** Project Co must submit any revisions, modifications or updated versions of the Project Management Plan and Operating Manual to the State and the Independent Certifier for review in accordance with Schedule 3 (Review Procedures).
- (e) **(Additional information):** Project Co must provide any additional information in connection with the Project Management Plan and Operating Manual reasonably requested by the State or the Independent Certifier.
- (f) **(Delivery):** Unless otherwise agreed in writing by the State, Project Co must deliver the Project in accordance with the Project Management Plan and the Operating Manual.

6.2 Works Program

- (a) Project Co must submit to the State and the Independent Certifier the Works Program for review by the times set out in and in accordance with the requirements of Schedule 6 (Programming Requirements).
- (b) The Works Program submitted in accordance with paragraph (a) must:

- (i) be consistent with the bid Works Program set out in Attachment 2; and
 - (ii) comply with the requirements for the Works Program set out in Schedule 6 (Programming Requirements).
- (c) Project Co must present each updated Works Program at the meetings of the management team convened in accordance with Clause 5.5. If required, the State may formally review the Works Program in accordance with Schedule 3 (Review Procedures).
- (d) Neither the State nor the Independent Certifier is required to use the Works Program for any purpose, including for the purpose of assessing any Claim made by Project Co, but may do so in its sole and absolute discretion.

6.3 Monthly reports

Project Co must give the State and the Independent Certifier Monthly reports during the D&C Phase on the progress of the Works being undertaken no later than 5 Business Days before each meeting of the management team convened in accordance with Clause 5.5.

6.4 Additional reports

Project Co must prepare and submit any other reports or information relating to the Project reasonably requested by the State or the Independent Certifier.

7. The Reserve

7.1 Condition of the Land

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

- (a) the Reserve;
- (b) the existence, location, condition or availability of any Utility Infrastructure; and
- (c) any Land Conditions.

7.2 Contamination

- (a) If Project Co discovers any Contamination in, on, over, under or emanating from the Construction Areas or the Operating Areas (whether or not Project Co has caused or contributed to that Contamination), it must notify the State as soon as practicable, but nevertheless within 5 Business Days after the discovery of the Contamination.
- (b) Each party must promptly provide the other party with a copy of any Environmental Notice served on it, and copies of all related correspondence (including correspondence received prior to and after the Environmental Notice).
- (c) Project Co must:
 - (i) remediate:
 - A. any Contamination in, on, or under the Construction Areas or the Operating Areas; or
 - B. any Contamination which has emanated or is emanating from the Construction Areas or the Operating Areas,

- in accordance with all Laws and any Environmental Notice; and
- (ii) comply with all requirements of any Governmental Agency in connection with any Contamination referred to in paragraph (i) or the remediation of such Contamination.
- (d) If Project Co believes in good faith, based on professional advice, that an Environmental Notice can and should be successfully challenged or appealed, Project Co must:
 - (i) promptly notify the State and give the State a copy of all information and advice it has received in support of this view;
 - (ii) if the Environmental Notice is addressed to the State, obtain the consent of the State prior to commencing any action to challenge or appeal the Environmental Notice on behalf of the State;
 - (iii) keep the State promptly and fully informed at all times of the progress of any action taken to challenge or appeal the Environmental Notice; and
 - (iv) notwithstanding any challenge or appeal, take all reasonable steps to contain the Contamination and continue to satisfy the requirements of the Environmental Notice until the Environmental Notice is stayed, quashed, overturned, set aside or revoked.

7.2A Project Co's entitlement to compensation for remediation

Project Co will be entitled to compensation from the State for remediation of Contamination in accordance with Clause 7.2B if and to the extent that:

- (a) Project Co has complied with its obligations under Clause 7.2;
- (b) the relevant Contamination:
 - (i) is caused directly by the State or a State Associate after the Date of this Agreement (except to the extent Project Co is required to manage or mitigate against the risk pursuant to this Agreement and did not do so or it was otherwise reasonably practical for Project Co to guard against the risk);
 - (ii) has migrated onto or into the Construction Areas or the Operating Areas after the Date of this Agreement from or through premises adjoining the Construction Areas or the Operating Areas after Financial Close (except to the extent Project Co is required to manage or mitigate against the risk and did not do so or a competent and experienced contractor, acting reasonably in the circumstances, would have taken preventative measures to prevent or minimise such migration); or
 - (iii) is Contamination in, on, under, or that has migrated from, the Central Plant Area and which has been disturbed, or is disturbed, by reason of the use or occupation of the Central Plant Area by Project Co or a Project Co Associate;
- (c) the Contamination, the consequential clean up works, or the legal obligation to execute the clean up works has not occurred as a result of and otherwise except to the extent contributed to by:
 - (i) any wilful or negligent act or omission on the part of Project Co or any Project Co Associate;

- (ii) any breach by Project Co of its obligations under any State Project Document; or
- (iii) any other act or omission of Project Co;
- (d) Project Co has provided to the State a notice prepared in accordance with Section 6 of Schedule 4 (Change Compensation Principles); and
- (e) Project Co has otherwise complied with the State's reasonable directions in relation to the relevant Contamination.

7.2B Compensation for remediation

Subject to Clause 7.2A, the State must pay to Project Co all actual costs reasonably and properly directly incurred by Project Co in cleaning up Contamination referred to in Clause 7.2A calculated in accordance with Schedule 4 (Change Compensation Principles).

7.3 Utilities

Project Co must:

- (a) **(enquires)**: make enquires as to the location of existing Utility Infrastructure and liaise with the owner of that Utility Infrastructure and the relevant Utility services provider in connection with the need for any potential relocation, protection or decommissioning of the Utility Infrastructure (as applicable);
- (b) **(Utility works)**: undertake, or procure that a Utility services provider undertakes, all necessary work in connection with Utility Infrastructure within the Construction Areas required to deliver the New Car Park;
- (c) **(notice)**: notify the State at least 14 days before any connection, disconnection or interference with existing Utility Infrastructure and liaise with the State as to how best to manage the disconnection or interference taking into account the nature and requirements of the Reserve;
- (d) **(supply)**: ensure the continuous supply of Utilities within the Construction Areas;
- (e) **(agreements)**: enter into all agreements with the State for the supply of Utilities (on terms to be reasonably agreed between Project Co and the State);
- (f) **(payment)**: pay for all Utilities consumed or used in undertaking the Works in accordance with the agreements entered into with the State or if no agreement is entered into, upon receipt of an invoice for Utility consumption from the State; and
- (g) **(indemnity)**: indemnify the State against any Claim or Liability in connection with:
 - (i) any damage or disruption to any Utility Infrastructure; or
 - (ii) the removal, relocation or carrying out of works to Utility Infrastructure,

in each case to the extent caused directly or indirectly by Project Co or a Project Co Associate.

7.4 Native Title Claims and Heritage Claims

- (a) As between the State and Project Co:

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

7.5 Artefacts

- (a) Any Artefacts discovered on or under the surface of the Construction Areas or the Operating Areas are the absolute property of the State.
- (b) If an Artefact is discovered in the Construction Areas or the Operating Areas or any part of them, then Project Co must:
 - (i) immediately notify the State of that discovery;
 - (ii) take every reasonable precaution to prevent Artefacts being damaged or removed until appropriate arrangements for dealing with, or removing, the Artefacts have been made;
 - (iii) continue to perform its obligations in accordance with this Agreement, except to the extent otherwise:
 - A. directed by the State;
 - B. ordered by a court or tribunal; or
 - C. required by Law;
 - (iv) comply with any direction of the State or State Associates in connection with any Artefact.

7.6 General Environment provisions

Project Co must ensure that in delivering the Project:

- (a) it complies with all Laws and other requirements of this Agreement for the protection of the Environment;
- (b) it does not cause an Environmental Incident;
- (c) it immediately notifies the State as soon as it becomes aware of:

- (i) any non-compliance with the requirements of this Clause 7.6;
- (ii) any Environmental Incident; or
- (iii) the receipt of any notice, order or communication received from an authority for the protection of the Environment.

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

8.1 Signage

Project Co may erect or permit to be erected on the Construction Areas or the Operating Areas during the Term only those signs:

- (a) required by Law;
- (b) provided for in Schedule 17 (Design Requirements); or
- (c) provided for in Schedule 18 (Services Specifications) and Schedule 20 (Commercial Opportunities),

unless otherwise approved by the State (acting in its absolute discretion).

8.2 Occupational health, safety and rehabilitation

- (a) **(OHS Laws):** In this Clause 8.2, "**OHS Laws**" means all statutes, regulations and other subordinate legislation in force or that come into force during the Term in the State of Western Australia and the Commonwealth in connection with occupational health and safety including the *Occupational Safety and Health Act 1984* (WA) and the *Occupational Safety and Health Regulations 1996* (WA) and any occupational health and safety accreditation scheme established or to be established in connection with the *Building and Construction Industry Improvement Act 2005* (Cth).
- (b) **(Health and safety):** Project Co must ensure the health and safety of all persons present on or entering the Construction Areas or the Operating Areas.
- (c) **(Comply with OHS Laws):** Project Co must, upon the reasonable request of the State or the Independent Certifier, demonstrate compliance with OHS Laws.
- (d) **(Cooperation and notice):** Project Co must:
 - (i) cooperate with any other contractors or other persons engaged in or associated with the business of the State in order to maintain uniform health and safety practices; and
 - (ii) cooperate with the State to enable the State to comply with its obligations in accordance with all relevant OHS Laws,

provided that during the D&C Phase, the State acknowledges the Builder's health and safety policies must be complied with by any party referred to in paragraph (d)(i).

- (e) **(Ultimately responsible):** Project Co accepts that it is ultimately responsible for:
 - (i) the control and management of the Construction Areas or the Operating Areas for the purposes of delivering the Project and discharging the duties imposed by the OHS Laws (except for the At-Grade Car Parks); and

- (ii) all health and safety at the Construction Areas or the Operating Areas (except for the At-Grade Car Parks),

from the Date of this Agreement and that it cannot delegate or assign this responsibility to a third party without the consent of the State.

8.3 Occupational health and safety incident reports

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

8.4 Industrial issues

Except as expressly provided in Clause 12 and Clause 15, Project Co is solely responsible for the management of all industrial matters in connection with delivering the Project including the conduct of all proceedings, conferences, negotiations and dealings with unions and union representatives.

9. Design

9.1 Design obligations

Project Co must design the New Car Park and the Additional Infrastructure:

- (a) in accordance with the Design Requirements; and
- (b) so that the New Car Park and Additional Infrastructure, when constructed in accordance with the Final Design Documents will satisfy the FFP Warranty.

9.2 Preparation of Design Documentation

- (a) **(Purpose):** Project Co agrees that:
 - (i) Project Co must comply with the Design Development Process in developing the Design Documentation;
 - (ii) the purpose of the Design Development Process is to develop, refine and finalise the Bid Design Documentation such that Final Design Documents are created in accordance with this Agreement; and
 - (iii) the conduct of the Design Development Process itself does not constitute a Modification or otherwise enable Project Co to make any Claim against the State or any State Associate for any Liabilities incurred by Project Co in connection with the conduct of the Design Development Process.
- (b) **(Good Industry Practice):** Project Co must conduct the Design Development Process in accordance with Good Industry Practice.
- (c) **(Initial Design Meeting):** No later than 10 Business Days after Financial Close, Project Co must co-ordinate and attend an initial design meeting with the State to assist in the effective commencement and management of the early stages of the Design Development Process.
- (d) **(Submission of Design Documentation):** Project Co must submit the Design Documentation to the State and the Independent Certifier in accordance with the requirements of Schedule 5 (Design Development) and Schedule 3 (Review Procedures).

- (e) **(Form of Design Documentation):** Project Co must ensure that the Design Documentation contains and identifies the following information (unless otherwise agreed by the State):
 - (i) if the Design Documentation is a drawing:
 - A. a drawing number; and
 - B. a revision number;
 - (ii) if the Design Documentation is a document other than a drawing, a revision number or other equivalent coding system that readily differentiates the documentation from previous or subsequent versions; and
 - (iii) any other information reasonably requested by the State.
- (f) **(Amendments):** Project Co must highlight all amendments to the Bid Design Documentation and the Design Documentation and in doing so show all changes to the Bid Design Documentation and any earlier versions of the Design Documentation submitted in accordance with Schedule 3 (Review Procedures).
- (g) **(Review):** The State and the Independent Certifier will review the Design Documentation submitted or resubmitted by Project Co in accordance with this Clause 9.2 in accordance with Schedule 3 (Review Procedures).
- (h) **(Project Co's risk):** Despite any opinion of the Independent Certifier or the State that the Design Documentation does not comply with the Design Requirements or that the New Car Park will not satisfy the FFP Warranty, Project Co may proceed with the relevant Works on the basis of that Design Documentation at its own cost and risk (including the risk that a Certificate of Completion may not be issued) if Project Co has:
 - (i) first referred the dispute for resolution in accordance with Clause 30; and
 - (ii) given 2 Business Days notice to the State and Independent Certifier of its intention to proceed with the relevant Works and the reasons for this, despite the opinion of the Independent Certifier.

9.3 Not to proceed

Project Co must ensure that construction of any package of the Works does not commence unless:

- (a) Project Co has submitted all Design Documentation relating to the relevant package of Works to the State and the Independent Certifier in accordance with Schedule 3 (Review Procedures);
- (b) the Independent Certifier has been given the number of days in Schedule 3 (Review Procedures) to review and comment on the Design Documentation; and
- (c) if the State or the Independent Certifier rejects or provides comments on the Design Documentation in accordance with Schedule 3 (Review Procedures), Project Co has complied with its obligations in Schedule 3 (Review Procedures) in connection with such comments.

9.4 Changes to Design Documentation

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

10. Construction

10.1 Works

- (a) Project Co must not commence the Works until the draft Project Management Plan submitted in accordance with Clause 6.1(a) is approved or deemed to be approved in accordance with Schedule 3 (Review Procedures).
- (b) Project Co must undertake the Works in accordance with:
 - (i) the Design Requirements;
 - (ii) the Final Design Documents;
 - (iii) the Project Management Plan;
 - (iv) any Modification Order;
 - (v) the requirements of the State Project Documents; and
 - (vi) Best Construction Practices.

10.2 Security, interference, obstruction and nuisance

- (a) Project Co must, in undertaking the Works:
 - (i) **(tidy)**: keep the Construction Areas tidy and free of refuse;
 - (ii) **(secure)**: keep the Construction Areas secure and safe and free from all unauthorised access;
 - (iii) **(nuisance)**: prevent nuisance, noise, dust, air pollution, odour, vibration and any disturbance to areas adjacent to the Construction Areas from exceeding reasonable levels in accordance with the Management of Construction Guidelines having regard to the nature of the Reserve as a medical precinct;
 - (iv) **(protect)**: take all measures necessary to protect and ensure the safety of other people and property in accordance with Best Construction Practices; and
 - (v) **(interference)**: avoid or minimise unreasonable interference with:
 - A. the passage of people and vehicles around the Construction Areas;
 - B. the operations or activities carried out in the vicinity of the Construction Areas; and
 - (vi) **(damage)**: take all measures to protect property outside of the Construction Areas that may be affected by the Works and to the extent that Project Co or a Project Co Associate causes damage to

property outside of the Construction Areas, promptly rectify that damage.

- (b) If in the reasonable opinion of the State or 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, Project Co must comply with any reasonable direction of the State or the Independent Certifier to:
 - (i) stop or change the manner of undertaking the Works; and
 - (ii) amend the Project Management Plan.

10.3 Parking Bay requirements

- (a) Project Co agrees that during the D&C Phase parts of the Reserve will be operated as a car park (**D&C Phase Car Park**). Project Co must ensure that the minimal possible disruption is caused to the operations of the D&C Phase Car Park.
- (b) Without limiting paragraph (a), Project Co must ensure that it manages the Works such that:
 - (i) no less than the number of Parking Bays specified in the 'Project Co Activities' column 1 of Schedule 19 (Parking Bay Requirements) are made available to the State on the date specified in that Schedule; and
 - (ii) no more than the number of Parking Bays specified in the 'Project Co Activities' column 1 of Schedule 19 (Parking Bay Requirements) are taken away from the State on the date specified in that Schedule.
- (c) The State is not required to provide to Project Co any more than the number of Parking Bays specified in column 3 of Schedule 19 (Parking Bay Requirements) and this Agreement does not apply to any parking bays in excess of the number specified.

10.4 State's right to enter, inspect and test

- (a) (**Right of entry**): During the D&C Phase, the State or any nominee of the State:
 - (i) may enter any Construction Area upon giving reasonable notice to Project Co; 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,provided that it complies with all reasonable requirements of Project Co in connection with such access.
- (b) (**Rectification**): If any inspection or testing of the Works reveals that any part of the Works will not comply with the requirements of the Final Design Documents (or if no Final Design Documents exist for the relevant Works, the Design Requirements), Project Co must rectify the non-compliance and must notify the State promptly when the non-compliance has been rectified prior to Completion.

- (c) **(Project Co to assist):** If reasonably requested by the State, Project Co must assist the State to exercise its right to inspect and test the Works.
- (d) **(Costs of inspection or testing):** Subject to paragraph (e), the State will bear the costs reasonably incurred of any inspection or test conducted in accordance with paragraph (a).
- (e) **(Project Co must bear costs):** Project Co must bear the costs of the inspection and testing if the inspection or test:
 - (i) reveals any material non-compliance;
 - (ii) is a Completion Test or is an inspection or test required to be carried out in connection with a Completion Test; or
 - (iii) was otherwise required by this Agreement to be carried out by Project Co or should have been carried out by Project Co in accordance with Best Construction Practices.

10.5 Independent Certifier's review of construction

- (a) **(Review by Independent Certifier):** Project Co agrees that, in accordance with the Independent Certifier Deed of Appointment and if requested by the State, the Independent Certifier may:
 - (i) review the construction of the Works to ensure that the Works are being undertaken in accordance with the Works Program and the other requirements of this Agreement; or
 - (ii) review the Works to ensure that the Works Program accurately reflects the actual progress of the Works.
- (b) **(Notice of non-compliance):** If the Independent Certifier believes that Project Co is not undertaking the Works in accordance with the Works Program and the other requirements of this Agreement, the Independent Certifier may, in accordance with the Independent Certifier Deed of Appointment, give notice to the State and Project Co of its opinion together with its reasons for forming that opinion.
- (c) **(Project Co's response):** Within 5 Business Days of receipt of the Independent Certifier's notice in accordance with paragraph (b) Project Co must:
 - (i) notify the State and the Independent Certifier of any matters in connection with which it disagrees with the Independent Certifier's opinion together with its reasons for doing so (**Explanation**); and
 - (ii) to the extent it does not disagree, provide a plan and a program for the rectification of any non-compliance (**Rectification Plan**).
- (d) **(Notice by Independent Certifier):** 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.
- (e) **(Compliance):** If the Independent Certifier notifies the State and Project Co that, in its opinion, a Rectification Plan satisfactorily addresses its concerns, Project Co must comply with the Rectification Plan.
- (f) **(Explanation):** 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.

- (g) **(Project Co's risk):** Despite any opinion of the Independent Certifier in accordance with paragraph (d) that the Explanation or the Rectification Plan does not satisfactorily address its concerns, Project Co may proceed with construction of the Works or implementation of the Rectification Plan at its own cost and risk (including the risk that a Certificate of Completion may not be issued) if Project Co has:
 - (i) first referred the relevant dispute for resolution in accordance with Clause 30; and
 - (ii) given 2 Business Days notice to the State and Independent Certifier of its intention to proceed with the relevant Works or implementation of the Rectification Plan (as applicable) and the reasons for this.

10.6 Other works

- (a) Project Co must:
 - (i) co-operate with the New Children's Hospital Contractor;
 - (ii) carefully co-ordinate and, if applicable, interface the Works with the New Children's Hospital Works;
 - (iii) carry out the Works so as to avoid interfering with, disrupting or delaying the New Children's Hospital Works; and
 - (iv) upon being given reasonable notice by the Project Director, participate in the design development process and commissioning process for the proposed car park at the New Children's Hospital.
- (b) Project Co acknowledges that during the Term the State may procure other construction projects within the Reserve. Project Co must:
 - (i) undertake the Project so as to minimise interference with the performance of such other construction projects;
 - (ii) cooperate with other contractors within the Reserve;
 - (iii) comply with any directions of the State in connection with activities within the Reserve that affect the Construction Areas.
- (c) The State must use its reasonable endeavours to ensure that any State Associate granted or permitted access by the State to the Construction Areas:
 - (i) permits Project Co to carry out the Works;
 - (ii) cooperates with Project Co; and
 - (iii) carefully coordinates and, if applicable, interfaces with the Works.

11. Additional Works

11.1 Additional Works Completion

- (a) Project Co must fully consult with all owners of Additional Infrastructure so as to ensure that:

- (i) Project Co identifies the usual requirements of owners for works in the nature of the relevant Additional Works; and
 - (ii) each item of Additional Infrastructure is completed in accordance with this Agreement.
- (b) Additional Works Completion will not be achieved until:
 - (i) the Additional Works have been completed in accordance with the State Project Documents subject only to minor Defects which:
 - A. do not prevent the Additional Infrastructure from being Fit For Purpose;
 - B. the Independent Certifier has determined that Project Co has reasonable grounds for not promptly rectifying; and
 - C. can be corrected without prejudicing the use of the relevant Additional Infrastructure or the New Car Park for the safe, efficient and continuous parking of vehicles or use by Users;
 - (ii) Project Co has issued a notice to the State, the Independent Certifier and the relevant owner of the Additional Infrastructure which:
 - A. states that it considers that the Additional Infrastructure has been completed in accordance with the State Project Documents; and
 - B. lists any minor Defects of the kind referred to in paragraph (b)(i);
 - (iii) Project Co, the Independent Certifier and the owner of the Additional Infrastructure (unless the relevant owner has declined an offer to do so having been given at least 5 Business Days notice) have jointly inspected the Additional Infrastructure at a time to be agreed (or in the absence of agreement determined by the Independent Certifier) which will be no more than 5 Business Days after receipt of Project Co's notice in accordance with paragraph (b)(ii); and
 - (iv) following the joint inspection in accordance with paragraph (b)(iii), the Independent Certifier has issued to the State, the owner of the Additional Infrastructure and Project Co a notice confirming that the Additional Infrastructure has been completed subject only to minor Defects of the kind referred to in paragraph (b)(i).
- (c) Upon receipt of a notice from the Independent Certifier in accordance with paragraph (b)(iv), Project Co must:
 - (i) notify the owner of the Additional Infrastructure of the date upon which Additional Works Completion will occur (which date must not be fewer than 5 Business Days from the notice in accordance with this paragraph (c)(i));
 - (ii) continue to maintain and repair the Additional Infrastructure until Additional Works Completion is achieved; and
 - (iii) provide the State and the relevant owner of Additional Infrastructure with all such assistance as may be reasonably required in relation to achieving Additional Works Completion.

- (d) Project Co must achieve Additional Works Completion by the date specified in Schedule 8 (Additional Works) for the relevant Additional Works.

11.2 Defects Liability Period for Additional Works

Each item of Additional Infrastructure has:

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

11.3 Correction of Defects in Additional Works

- (a) Project Co must correct all Defects in connection with the Additional Works or the Additional Infrastructure of which Project Co becomes aware, or which are notified to Project Co, during the relevant Defects Liability Period.
- (b) Project Co must give notice to the State and the Independent Certifier that a Defect has been corrected promptly after the correction of that Defect.
- (c) Without limiting paragraph (a), to the extent that Project Co reasonably considers that the Defect the subject of any notice in accordance with paragraph (a) was caused by any breach of any State Project Document by the State or a State Associate (excluding any State Reserve Contractors other than State Construction Area Contractors) or a wrongful act or omission of the State, a State Associate (excluding any State Reserve Contractors other than State Construction Area Contractors) or any owner of Additional Infrastructure then the costs reasonably incurred in correcting that Defect will be a debt due and payable to Project Co within 40 Business Days or such other time as agreed between the parties, except to the extent that:
 - (i) the Defect was caused or contributed to by Project Co or Project Co's Associates; or
 - (ii) insurance proceeds, damages or other compensation is received by Project Co or any Project Co Associate in connection with the Defect (or would have been received by Project Co but for the act or omission of Project Co).

12. Time

12.1 Dates for Completion

Project Co must:

- (a) regularly, expeditiously and diligently progress the undertaking of the Works; and
- (b) achieve Completion by the Dates for Completion.

12.2 Delays to achieving Completion

If Project Co reasonably forms the view that it will be delayed, or is likely to be delayed, in achieving Completion, Project Co must within 10 Business Days from the earlier of the date that Project Co became aware, or ought reasonably to have become aware, give the State and the Independent Certifier a notice stating:

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

12.2A Delays to achieving Completion of the At-Grade Reconfiguration Works

If At-Grade Reconfiguration Works Completion has not been achieved by the Expected Date for At-Grade Reconfiguration Completion, then Project Co must within 10 Business Days of that date give the State and the Independent Certifier a notice stating:

- (a) the details of why At-Grade Reconfiguration Works Completion has not occurred and the new expected At-Grade Reconfiguration Works Completion Date; and
- (b) the steps Project Co proposes to take to achieve At-Grade Reconfiguration Works Completion as soon as reasonably practicable.

12.3 Form of extension of time claim

If Project Co will be delayed, or is likely to be delayed, in achieving Completion by an Extension Event, Project Co's notice submitted in accordance with Clause 12.2 or Clause 12.2A must set out:

- (a) **(particulars)**: detailed particulars and evidence of the Extension Event causing the delay;
- (b) **(consequences)**: detailed particulars of the consequences or the likely consequences of the Extension Event including details of how Project Co will be delayed, or is likely to be delayed, by the Extension Event;
- (c) **(days claimed)**: Project Co's estimate of the total number of days of extension of time claimed to the relevant Date for Completion;
- (d) **(costs payable)**: if Project Co believes the Extension Event is a Compensable Extension Event, details of the Prolongation Costs and the Revenue Compensation Amount claimed and calculated in accordance with Clause 12.9; and
- (e) **(other information)**: such other information reasonably requested by the State.

12.4 Submission of updated extension of time claim

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

- (a) within 10 Business Days of the expiry of the extension granted by the State in accordance with Clause 12.6; and
- (b) containing the information required by Clause 12.3.

12.5 Conditions precedent to extension

- (a) Project Co will only be entitled to an extension of time if:

- (i) **(delay)**: Project Co has been, or is likely to be, delayed by an Extension Event in a manner which will delay, or is likely to delay, Completion;
 - (ii) **(no acceleration)**: Project Co has not been given an instruction to accelerate the execution of the Works if acceleration to overcome the delay is reasonably achievable;
 - (iii) **(notice)**: Project Co submits a notice to the State in accordance with Clause 12.3 within 10 Business Days from the date Project Co became aware, or ought reasonably to have become aware that it will be delayed or is likely to be delayed in achieving Completion of a stage by an Extension Event;
 - (iv) **(critical path)**: the delay affects an activity on the critical path (for the relevant stage) contained and shown in the then current Works Program;
 - (v) **(compliance)**: Project Co has complied with all of its obligations in accordance with Schedule 3 (Review Procedures) and Schedule 6 (Programming Requirements) (other than non-material non-compliances with Schedule 6) in connection with the Works Program relevant to the Claim for an extension of time; and
 - (vi) **(Development Approval Conditions)**: in relation to the Compensable Extension Event specified in paragraph (I) (Development Approval Conditions) of that definition, Project Co has:
 - A. complied with its obligations under this Agreement as they relate to Schedule 17 (Design Requirements); and
 - B. promptly and efficiently managed the process of achieving satisfaction of each of the Development Approval Conditions with the relevant Planning Party.
- (b) In determining any extension of time, the Independent Certifier:
- (i) may 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) must take into account all relevant evidence presented by the parties and may have regard to but will not be bound by the Works Program.

12.6 Extension of time

If Project Co has satisfied the requirements set out in Clauses 12.3 and 12.5, the Independent Certifier will extend the relevant Date for Completion by a reasonable period and notify Project Co of the extension granted.

12.7 Concurrent delays

If Project Co has made a Claim for an extension of time in accordance with this Clause 12, and the delay has been contributed to by an event other than the Extension Event, Project Co's entitlement to an extension of time to the relevant Date for Completion will be reduced for the period of the delay attributable to such other events.

12.8 Unilateral extensions

- (a) Subject to paragraph (b), where the State considers that any act or omission of the State or a State Associate will, or is likely to, delay Project Co in a manner that will prevent Project Co from achieving Completion, whether or not Project Co has made, or is entitled to make, a claim for an extension of time, the State may by notice to Project Co, unilaterally extend any Date for Completion, whether or not Project Co has made, or is entitled to make, a Claim for an extension of time in accordance with this Clause 12.
- (b) The State is not required to exercise the State's discretion in accordance with paragraph (a) for the benefit of Project Co or at all.
- (c) The exercise or failure to exercise the State's discretion in accordance with this Clause 12.8 is not capable of being the subject of a Dispute in accordance with Clause 30 or otherwise subject to review.
- (d) The State's discretion in accordance with paragraph (a) must not be used if the Independent Certifier would otherwise be required to extend a Date for Completion in accordance with Clause 12.6.

12.9 Compensable Extension Events

Subject to Clause 12.10, to the extent that the delay is caused by a Compensable Extension Event for which Project Co is granted an extension of time in accordance with Clause 12.6, the State will compensate Project Co for:

- (a) Prolongation Costs, calculated in accordance with Schedule 4 (Change Compensation Principles); and
- (b) the Revenue Compensation Amount, calculated in accordance with Schedule 4 (Change Compensation Principles).

12.10 Development Approval Conditions

- (a) In relation to the Compensable Extension Event specified in paragraph (l) (Development Approval Conditions) of that definition, Project Co will be entitled to Claim compensation from the State calculated in accordance with Schedule 4 (Change Compensation Principles), provided that Project Co will not be entitled to Claim compensation for any additional costs associated with:
 - (i) the full and complete management process to clear the Development Approval Conditions;
 - (ii) the preparation of one or more submissions, architectural and technical drawings, material boards or other design documentation required by the relevant Planning Party;
 - (iii) revisions to Design Documentation required by a Planning Party;
 - (iv) all consumables and third party costs incurred by Project Co arising from or in connection with the Development Approval Conditions process; or
 - (v) arranging, preparing for and attending meetings, presentations, workshops or inspections required by a Planning Party,

except to the extent that the additional costs incurred as a result of paragraphs (a)(i) to (a)(v) above arise from a direction by a Planning Party in connection with a Development Approval Condition that is inconsistent with the Design Requirements.

- (b) Notwithstanding Development Approval Condition number five in the Development Approval, the State acknowledges and agrees that it is responsible for the implementation of landscaping works under the landscape management plan that are required to be carried out outside of Project Co's leased area under the Sub-Sublease. Project Co is required to implement the landscape management plan in relation to the land within its leased area.

12.11 Acceleration

- (a) If the Works are delayed, the State may direct Project Co to give the State a notice prepared in accordance with Section 6 of Schedule 4 (Change Compensation Principles) within 10 Business Days which states:
 - (i) the Net Incremental Costs of accelerating the Works and whether the acceleration is likely to result in Completion being achieved by the Date for Completion; or
 - (ii) that acceleration is not reasonably achievable.
- (b) Project Co must calculate its Net Incremental Costs in accordance with the principles set out in Schedule 4 (Change Compensation Principles).
- (c) Following receipt of Project Co's notice the State and Project Co must meet to agree the contents of the notice and provided that acceleration is reasonably achievable, the State may direct Project Co to accelerate the Works in accordance with Project Co's notice and Project Co must comply with the State's direction, but only to the extent that Project Co would, but for the direction, have been granted an extension of time to the relevant Date for Completion in accordance with Clause 12.6.
- (d) If the State directs Project Co to accelerate the Works and Project Co would, but for the direction, have been granted an extension of time to the relevant Date for Completion for the delay in accordance with Clause 12.6, the State will pay Project Co the Net Incremental Costs directly attributable to accelerating the Works calculated and agreed in accordance with paragraph (c).
- (e) If, as a result of any direction to accelerate the Works, Project Co achieves Completion before the Date for Completion, Project Co must pay to the State the Revenue it receives each day from Completion to the Date for Completion up to an amount equal to the costs paid by the State to Project Co for accelerating the Works in accordance with paragraph (c).

13. Completion

13.1 Notice before Completion

- (a) Project Co must give to the State and the Independent Certifier notice 30 Business Days prior to each date upon which it reasonably expects to achieve Completion.
- (b) If after Project Co gives the State a notice in accordance with paragraph (a) the expected Completion Date changes, Project Co must notify the State as soon as possible of the revised date.

13.2 Completion Plan

- (a) At the same time as Project Co notifies the State of the date on which it reasonably expects to achieve Completion in accordance with Clause 13.1(a), Project Co must submit to the State and the Independent Certifier a draft Completion Plan for review in accordance with Schedule 3 (Review Procedures).

- (b) The draft Completion Plan must:
 - (i) be consistent with the bid Completion Plan that forms part of the bid Project Management Plan set out in Attachment 4 (Bid Project Management Plan);
 - (ii) detail Project Co's methodology for achieving Completion including:
 - A. the activities required to be undertaken to achieve Completion and the timing of these activities;
 - B. each of the Completion Criteria;
 - C. how Project Co intends to satisfy the Completion Criteria and the Completion Tests to be undertaken to demonstrate the Completion Criteria;
 - D. Project Co's methodology for undertaking the Completion Tests;
 - E. the procedure for reporting the results of Completion Tests;
 - F. the party who will be undertaking the Completion Tests;
 - G. attendees at the Completion Tests; and
 - H. the methodology for re-tests should a Completion Test be failed.
- (c) The State or the Independent Certifier may require Project Co to include additional Completion Tests in the Completion Plan if the State reasonably considers or the Independent Certifier considers that the Completion Tests proposed by Project Co are not sufficient to demonstrate that the Completion Criteria are satisfied.

13.3 Completion Report

- (a) Project Co must submit to the State and the Independent Certifier (for review in accordance with Schedule 3 (Review Procedures)) a draft report in connection with Completion 10 Business Days prior to the date on which it anticipates reaching Completion.
- (b) Project Co must ensure the report:
 - (i) includes details of how and when Project Co satisfied each of the Completion Criteria that have been satisfied at that time;
 - (ii) identifies any Completion Criteria that remain outstanding and Project Co's strategy for satisfying such outstanding Completion Criteria including the proposed timing for satisfying such Completion Criteria; and
 - (iii) otherwise assists the Independent Certifier in determining whether the Completion Criteria have been satisfied,

(Completion Report).

- (c) Project Co must:
 - (i) update the draft Completion Report to take into account feedback provided by the State and the Independent Certifier in accordance with Schedule 3 (Review Procedures); and
 - (ii) otherwise take into account and comply with any directions reasonably given by the State and the Independent Certifier in connection with preparing for Completion.

13.4 Notice of Completion

- (a) When Project Co is of the reasonable opinion that it has achieved Completion, Project Co must provide the following information to the State and the Independent Certifier:
 - (i) notice of its opinion that it has achieved Completion; and
 - (ii) a final Completion Report.
- (b) Project Co may not submit the information to the State and the Independent Certifier in accordance with paragraph (a) until a date which is 10 Business Days after the submission of the relevant draft Completion Report in accordance with Clause 13.2.

13.5 Independent Certifier to make determination

- (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.
- (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.
- (c) The Independent Certifier may in its sole and absolute discretion issue a Certificate of Completion if Completion has been achieved notwithstanding that Project Co has not issued a notice in accordance with Clause 13.4(a).
- (d) The issue of a Certificate of Completion in accordance with this Clause does not constitute evidence that Project Co has satisfied the FFP Warranty.

13.6 Outstanding Items

- (a) The Independent Certifier may issue a Certificate of Completion with an attached list of Outstanding Items which Project Co must rectify within a reasonable period of time as determined by the Independent Certifier.
- (b) Project Co must submit to the State and the Independent Certifier for review in accordance with Schedule 3 (Review Procedures), a program for the completion of the Outstanding Items within 5 Business Days after the issue of a Certificate of Completion which attaches a list of Outstanding Items.
- (c) Project Co must complete any Outstanding Items in accordance with the program as reviewed and amended in accordance with Schedule 3 (Review Procedures) to the reasonable satisfaction of the Independent Certifier.
- (d) Project Co must correct all Defects in connection with the Works or the New Car Park which Project Co becomes aware of or which are notified to Project Co.

13.7 Delivery of Parking Bays before Completion

- (a) At any time prior to Completion, Project Co may submit a notice to the State which notifies the State that Project Co is able to make a number of Parking Bays available to Users. The notice must state:
 - (i) the number of Parking Bays to be made available for use; and
 - (ii) the date on which the Parking Bays will be available for use.
- (b) The State may in its absolute discretion notify Project Co whether it accepts Project Co's offer within 15 Business Days of receiving Project Co's notice.
- (c) If the State accepts Project Co's offer to open a number of Parking Bays prior to Completion:
 - (i) the State, Project Co and the Independent Certifier must negotiate in good faith the Completion Criteria that are required to be satisfied for the Parking Bays to be made available;
 - (ii) Project Co is entitled to collect and retain the Revenue earned from the Parking Bays that are made available from the date that the Parking Bays are open to Users;
 - (iii) Project Co must make a number of Parking Bays available to Users in accordance with the offer;
 - (iv) on and from the date that the Parking Bays are open to Users, Project Co must deliver the Services, to the extent applicable to the Parking Bays and where it is reasonable in the State's opinion to do so, Schedule 18 (Services Specifications) will apply to the delivery of those Services; and
 - (v) Project Co is not otherwise relieved from its obligations in connection with achieving Completion.
- (d) If, in accordance with this Clause 13.7, a number of Parking Bays are made available to Users prior to Completion:
 - (i) the opening of those Parking Bays does not constitute Completion for the purpose of this Agreement; and
 - (ii) the Parking Charges received in connection with those Parking Bays is Revenue for the purpose of Clause 21.3 and Schedule 12 (Revenue Share).

14. Operations

14.1 Services

- (a) Project Co must perform the Services throughout the Operating Phase so that:
 - (i) the performance standards stated in Schedule 18 (Services Specifications) are met;
 - (ii) the terms and conditions stated in Schedule 11 (Access and Parking Requirements) are complied with; and
 - (iii) the New Car Park complies at all times with the FFP Warranty.

- (b) If Project Co fails to perform the Services in accordance with Schedule 18 (Services Specifications) then Appendix A of Schedule 18 (Services Specifications) will apply to that failure.

14.2 Access and Parking Requirements

- (a) Project Co must comply with Schedule 11 (Access and Parking Requirements) in operating and managing the New Car Park and the At-Grade Car Parks in accordance with this Agreement and the At-Grade Car Parks Management Agreement.
- (b) Project Co must not amend the terms and conditions stated in Schedule 11 (Access and Parking Requirements) without the State's prior consent (which consent must not be unreasonably withheld).
- (c) Project Co agrees that any account established by Project Co in accordance with Schedule 11 (Access and Parking Requirements) for the purpose of administering Staff parking arrangements will not be subject to an establishment fee.
- (d) The State has the sole right to determine how many and which Staff are entitled to Staff access passes entitling them to park in the areas of the New Car Park and/or At-Grade Car Parks allocated to Staff, and the category of such passes (subject to availability). To the extent that Project Co can show that there is excess car parking capacity on the Reserve during peak periods, the State will not unreasonably refuse to issue additional parking permits to the New Car Park and the At-Grade Car Parks; and
- (e) Project Co must deactivate access passes upon notification.

14.3 Exempt Bays

- (a) Subject to Clause 0, Project Co agrees that during the Term the State may utilise up to 150 parking bays in aggregate across the Reserve for its own purposes and that Project Co is not entitled to impose Parking Charges in connection with these parking bays (**Exempt Bays**).
- (b) The parties acknowledge that the Exempt Bays will not be located in the New Car Park or the At-Grade Car Parks.

14.4 Utilities during Operating Phase

- (a) Project Co must:
 - (i) ensure the continuous supply of Utilities within the Operating Areas (excluding the Operating Areas in connection with At-Grade Car Parks);
 - (ii) enter into all agreements with the State for the supply of Utilities during the Operating Phase (on terms to be reasonably agreed between Project Co and the State); and
 - (iii) pay for all Utilities consumed in the New Car Park during the Operating Phase in accordance with the agreements entered into with the State or if no agreement is entered into, upon receipt of an invoice for Utility consumption from the State.
- (b) The State must procure the maintenance of the Utility Infrastructure on the Reserve upstream of the Connection Points until the point at which that Utility Infrastructure is owned by a utility company that is not a State Associate.

14.5 National Police Certificates

Project Co must obtain a National Police Certificate for all persons engaged in delivering the Services and, if requested, provide a copy of the National Police Certificate to the State.

15. MAE Events

15.1 MAE Events

Each of the following events is a MAE Event:

- (a) **(Artefacts and Native Title)**: subject to Clauses 7.4 and 7.5, cessation, suspension or material variation of any part of the undertaking of the Works (or a change in the way the Works or Services are undertaken) because of:
 - (i) a government direction;
 - (ii) a court or tribunal order; or
 - (iii) a requirement of Law,in relation to a Heritage Claim or a Native Title Claim;
- (b) **(industrial action)**: industrial action (excluding any industrial action caused or motivated by opposition to projects being delivered by way of public private partnerships) but only to the extent that it directly affects the New Car Park or the At-Grade Car Parks and the action results directly from an act or omission of the State, or any State Associate (excluding any State Reserve Contractors other than State Construction Area Contractors);
- (c) **(Change in Law)**: a Project Specific Change in Law;
- (d) **(State Modification)**: a Modification directed by the State in accordance with Clause 17;

[not disclosed]

[not disclosed]

- (e) **(Change in Car Parking Charges)**: Project Co is required to decrease Parking Charges to a level that is below the required threshold in Clause 21.4 **Error! Reference source not found.** or increase Parking Charges above the Agreed Parking Charges;
- (f) **[not disclosed]**
- (g) **(Delegate)**: the Delegate breaches or varies the terms of the At-Grade Car Parks Management Agreement;
- (h) **(changes to the Access and Parking Requirements)**: any change to the Access and Parking Requirements made at the request of the State;
- (i) **(Headlease)**: any breach, illegality or invalidity of the Headlease or the Sublease not caused or contributed to by Project Co or a Project Co Associate;
- (j) **(State breach)**: a breach by the State or the Delegate (in their capacity as a contracting party to the relevant State Project Documents) of any State Project Document to which they are a party; and
- (k) **(malicious damage)**: a reckless, unlawful or malicious act or omission by:

- (i) the State or any State Associate (excluding any State Reserve Contractors other than State Construction Area Contractors) when acting in respect of this Project; or
- (ii) the Trust or the Delegate in relation to Utility Infrastructure on the Reserve,

and which is not caused by any act or omission of Project Co or a Project Co Associate; and

[not disclosed]

15.2 Minimum Number of Parking Bays

Project Co is not entitled to claim relief for the MAE Event described in Clause 15.1 **Error! Reference source not found.** to the extent that the reason that the number of Parking Bays is less than 80% of the Minimum Number Parking Bays is because:

- (a) Project Co has failed to achieve Additional Works Completion of the At-Grade Reconfiguration Works by the required date; or
- (b) the construction area required by Project Co to undertake the Works is greater than forecast and as a result the State is not able to make available the number of Parking Bays specified in the 'State Activities' column of Schedule 19 (Parking Bay Requirements). Project Co must obtain the prior consent of the State to any proposed increase in the construction area required.

15.3 **[not disclosed]**

15.4 MAE Events that are also Extension Events

Project Co is not entitled to relief in accordance with this Clause 15 for the MAE Events described in Clause 15.1 (a), (b), (c), (d), **Error! Reference source not found.**, (h) or (j) unless that event occurs during the Operating Phase.

15.5 Notification of MAE Events

- (a) If a MAE Event occurs and this has had, has started to have, or will have a Material Adverse Effect, then Project Co may provide the State with notice of that fact, including:
 - (i) details of the MAE Event and when it occurred;
 - (ii) information concerning the effects of the MAE Event on the New Car Park or the At-Grade Car Parks (as applicable); and
 - (iii) the nature and extent of the Material Adverse Effect accompanied by sufficient evidence to demonstrate the Material Adverse Effect.
- (b) The notice provided by Project Co in accordance with paragraph (a) must:
 - (i) be prepared in accordance with Schedule 4 (Change Compensation Principles); and
 - (ii) propose Project Co's options for addressing the MAE Event and the Material Adverse Effect, which options must include (as alternatives):
 - A. the payment of compensation by the State;

- B. to the extent it is reasonably able to do so, restructuring of the Financing Documents or Equity Documents; and
 - C. subject to the Financiers' approval, varying the Term.
- (c) In considering how to address the effects of the MAE Event, the State may select any of the options proposed by Project Co or a combination of them.

15.6 Time limit

A notice given in accordance with Clause 15.5 will only be valid if given before or within 3 Months after the occurrence of the MAE Event has started to have a Material Adverse Effect.

15.7 Occurrence of MAE Events

No later than 20 Business Days after the State has received the notice in accordance with Clause 15.5, the parties must meet to agree:

- (a) whether or not the notice is valid; and
- (b) whether or not the MAE Event has occurred and has had, started to have or will have a Material Adverse Effect.

15.8 Good faith negotiations

No later than 20 Business Days after it has been agreed or determined that Clause 15.7 has been satisfied, the parties must negotiate in good faith to agree on a method of redress which will achieve the objectives referred to in Clause 15.9 taking into account the options described in Project Co's notice given in accordance with Clause 15.5.

15.9 Objectives of negotiations

- (a) Subject to paragraph (b) and Clause **Error! Reference source not found.**, the objective of the methods of redress will be to enable:
 - (i) Project Co or Finance Co to repay Actual Debt on the dates on which such amounts are due to be paid or repaid in accordance with the Financing Documents (without regard to any acceleration of the obligation to repay or any Refinancing); and
 - (ii) Project Co to pay to the Equity Investors the Equity Return stated in the Financial Model.
- (b) If, prior to the occurrence of the MAE Event:
 - (i) Project Co or Finance Co was not able to pay or repay Actual Debt on the due dates for payment (without regard to any acceleration of the obligation to repay); or
 - (ii) Project Co was not able to pay to the Equity Investors the Equity Return stated in the Financial Model, or was able to pay to the Equity Investors more than the Equity Return stated in the Financial Model,

then the objectives of the negotiations will be to enable them to have an equivalent ability to do so as it had prior to the MAE Event.

15.10 State contribution

If and to the extent that the redress agreed or determined to be appropriate involves the making of a financial contribution by the State, the amount of that contribution is to be determined net of moneys due and payable by Project Co to the State in accordance with the State Project Documents and will be due and payable by the State to Project Co within 40 Business Days after such financial contribution is agreed or determined.

15.11 Release

Project Co unconditionally and irrevocably releases the State from any obligation to make any payment to Project Co to enable it to pay the Equity Return stated in the Financial Model:

- (a) if an Event of Default is subsisting (other than an Event of Default directly caused by any MAE Event) and Project Co is not complying with its obligations in accordance with this Agreement in connection with that Event of Default; or
- (b) if an Immediate Termination Event is subsisting (other than an Immediate Termination Event directly caused by any MAE Event).

15.12 Disputes

If the State and Project Co do not reach agreement on:

- (a) a method of redress so as to achieve the objectives referred to in Clause 15.9; or
- (b) each of the matters set out in Clause 15.7,

within 60 Business Days of the date that the State received a notice in accordance with Clause 15.5(a), then either party may refer the matter to dispute in accordance with Clause 30.

15.13 *[not disclosed]*

15A General Change in Law

15A.1 Project Co's general entitlement to compensation

- (a) Where a General Change in Law occurs, Project Co is:
 - (i) entitled to compensation of the amount of the net Cost to Project Co; and
 - (ii) required to pay to the State any net Savings accrued by Project Co, as a consequence of that General Change in Law and in accordance with this Clause 15A.
- (b) For the purposes of this Clause 15A:
 - (i) net Costs will arise as a consequence of a General Change in Law where the Costs exceed the Savings in respect of that General Change in Law;
 - (ii) net Savings will arise as a consequence of a General Change in Law where the Savings exceed the Costs in respect of that General Change in Law;

- (iii) where net capital Costs or net capital Savings are required to be calculated, only capital Costs and capital Savings will be included in the calculation; and
- (iv) where net operating Costs or net operating Savings are required to be calculated, only operating Costs and operating Savings will be included in the calculation.

15A.2 Notification of General Change in Law

- (a) Project Co must notify the State within 5 Business Days of becoming aware of any actual or impending General Change in Law.
- (b) If Project Co will accrue a net Saving or incur a net Cost as a consequence of the General Change in Law, Project Co must within 30 Business Days of the General Change in Law being introduced submit a notice that complies with the requirements of Section 6 of Schedule 4 (Change Compensation Principles).

15A.3 State options on receipt of notice

On receipt of a notice pursuant to Clause 15A.2(b), the State will compensate Project Co for the Net Incremental Costs incurred directly as a result of the General Change in Law in accordance with Clause 15A.4.

15A.4 Compensation for General Change in Law

- (a) If a General Change in Law occurs during the Term and the General Change in Law has had or will have an effect on the capital or operating costs of delivering the project in accordance with this Agreement or the At-Grade Car Parks Management Agreement, then Project Co:
 - (i) is entitled to compensation of its net Costs; and
 - (ii) must pay to the State any accrued net Savings,
 in accordance with this Clause 15A.4 and the following thresholds and percentages (on the basis that such thresholds are cumulative):

[table not disclosed]

- (b) The threshold numbers set out in the table above shall be adjusted each year, on the anniversary of the Date of this Agreement, by multiplying the relevant number by the then applicable CPI Multiplier.

15A.5 No entitlement to compensation

- (a) Project Co is not entitled to compensation under this Clause 15A for any:
 - (i) change in the price of goods or services if the change occurred under a contract made, without prior written approval of the State, by or on behalf of Project Co which allows for the price to change if there is a General Change in Law; or
 - (ii) change in the cost of Financial Indebtedness obtained by any Project Co Entity, as a result of a General Change in Law affecting the person providing that Financial Indebtedness.
- (b) Project Co will absorb all other effects of a General Change in Law which are not compensated pursuant to this Clause 15A (or Clause 17 where applicable).

15A.6 Change in Contractual Quality Standard

- (a) If a Change in a Contractual Quality Standard occurs, as soon as reasonably practicable and in any event before Project Co commences to comply with the relevant Contractual Quality Standard, Project Co may notify the State that the Change in Contractual Quality Standard has occurred.
- (b) If Project Co gives the State a notice under Clause 15A.6(a), then:
 - (i) Project Co must provide the State with detailed information concerning the effects of the Change in Contractual Quality Standard on the Works, Services, New Car Park or At-Grade Car Parks, as applicable;
 - (ii) Project Co must engage in good faith discussions with the State as to how any adverse effects of the Change in Contractual Quality Standard may be avoided or mitigated, including providing the State with such further information concerning the Change in Contractual Quality Standard as the State may reasonably require;
 - (iii) within 20 Business Days after the conclusion of the discussions and provision of any information referred to in Clause 15A.6(ii), the State must notify Project Co whether Project Co must comply with the Change in Contractual Quality Standard in whole or part; and
 - (iv) to the extent the State requires Project Co to comply with the Change in Contractual Quality Standard, the Change in Contractual Quality Standard will be deemed to be a General Change in Law for the purposes of this Agreement and Project Co will be entitled to seek relevant relief and compensation in accordance with this Agreement (provided that the relief or compensation sought may be no greater than effects of the Change in Contractual Quality Standard identified by Project Co under this Clause 15.6A). To the extent that the State does not require Project Co to comply with a Change in Contractual Quality Standard, then Project Co will be relieved of all its obligations under the Project Documents to comply with that Contractual Quality Standard.

16. Project Specific Change in Law

16.1 Relief for Net Incremental Costs

- (a) If a Project Specific Change in Law occurs during the Term and the Project Specific Change in Law has had or will have an effect on the capital or operating costs of delivering the Project in accordance with this Agreement or the At-Grade Car Parks Management Agreement:
 - (i) Project Co may, within 30 Business Days of the Project Specific Change in Law being introduced, submit a notice that complies with the requirements of Section 6 of Schedule 4 (Change Compensation Principles); and
 - (ii) subject to paragraph (b), the State will compensate Project Co for the Net Incremental Costs incurred directly as a result of the Project Specific Change in Law calculated in accordance with Sections 5.2 and 5.3 of Schedule 4 (Change Compensation Principles). If the Project Specific Change in Law gives rise to a Saving, the amount of the Saving will be a debt due and payable by Project Co to the State within 20 Business Days or such other time agreed between the parties.

- (b) It is a condition precedent to Project Co's entitlement in accordance with paragraph (a) that:
 - (i) Project Co has submitted a notice in accordance with paragraph (a)(i);
 - (ii) neither Project Co nor any Project Co Associate has, by any act or omission, directly or indirectly caused the Project Specific Change in Law; and
 - (iii) Project Co is taking all reasonable steps to mitigate the effects of the Project Specific Change in Law.
- (c) If the State considers that a Project Specific Change in Law has occurred that has had or will have an effect on the cost of delivering the Project in accordance with this Agreement or the At-Grade Car Parks Management Agreement and Project Co has not submitted a notice in accordance with paragraph (a), the State may request Project Co to submit a notice that complies with the requirements of paragraph (a).

16.2 Other relief

- (a) If a Project Specific Change in Law gives rise to an Extension Event, any entitlement to an extension of time, the Revenue Compensation Amount and Prolongation Costs must be claimed in accordance with Clause 12. Project Co's entitlement to compensation in accordance with Clause 12 will be calculated in accordance with Section 5.2 and Section 5.3 of Schedule 4 (Change Compensation Principles).
- (b) If a Project Specific Change in Law gives rise to a MAE Event, any entitlement to relief for the MAE Event must be claimed in accordance with Clause 15. Project Co's entitlement to compensation in accordance with Clause 15 will be included and calculated in accordance with Section 5.2 and Section 5.3 of Schedule 4 (Change Compensation Principles).

17. Modifications

17.1 Modifications proposed by the State

- (a) **(Directing a Modification):** At any time, the State may give Project Co:
 - (i) a notice directing Project Co to undertake a Modification **(Modification Order)**; or
 - (ii) a request for Project Co to submit a Modification Quote for a proposed Modification, including any measurements, evidence of costs or other specific information that the State requires Project Co to include in its Modification Quote **(Modification Price Request)**,

(State Modification).
- (b) **(Submission of Modification Quote):** If the State issues a Modification Price Request, Project Co must submit a **"Modification Quote"** to the State:
 - (i) within 20 Business Days of receipt of the Modification Price Request; or
 - (ii) at such later time as agreed by the State (acting reasonably).

- (c) **(Contents of Modification Quote):** The Modification Quote must be prepared in accordance with Schedule 4 (Change Compensation Principles).
- (d) **(Extensions Event and MAE Event):** If a State Modification will give rise to an Extension Event or a MAE Event, any entitlement to an extension of time, Prolongation Costs, the Revenue Compensation Amount or relief in accordance with Clause 15 must be claimed in accordance with Clause 12 or Clause 15 (as applicable) and any Claim for such relief must not also be included in the Modification Quote or the costs of undertaking the Modification Order.
- (e) **(State response to Modification Quote):** Within 20 Business Days (or such longer period as the State reasonably requires, given the size and complexity of the proposed Modification) after receiving a Modification Quote, the State must:
 - (i) issue a Modification Order to Project Co directing Project Co to carry out the Modification on the terms set out in the Modification Quote;
 - (ii) notify Project Co that it does not agree with the Modification Quote;
 - (iii) notify Project Co that it does not wish to proceed with the proposed Modification or that it will undertake the proposed Modification itself; or
 - (iv) require Project Co to undertake a tender process in connection with the Modification in accordance with Section 7 of Schedule 4 (Change Compensation Principles).
- (f) **(Project Co to implement Modification):** If the State issues a Modification Order to Project Co in accordance with paragraphs (a) or (e), Project Co must implement the Modification in accordance with the Modification Order.
- (g) **(Failure to agree):** If the State informs Project Co that it does not agree with the Modification Quote in accordance with paragraph (e) and the parties are unable to agree on the terms for the Modification within 5 Business Days of the State's notice in accordance with paragraph (e) and:
 - (i) the terms that the parties are unable to agree relate to the amount payable for the Modification, the amount for the Modification will be determined by the Independent Certifier in accordance with the principles stated in Section 3 of Schedule 4 (Change Compensation Principles) and the State may at its election:
 - A. issue a Modification Order on the terms of the Modification Quote as varied by the Independent Certifier; or
 - B. inform Project Co that it does not wish to proceed with the Modification; or
 - (ii) the terms that the parties are unable to agree do not relate to the amount payable for the Modification, the State may issue a Modification Order on terms determined by the State acting reasonably and Project Co must implement the Modification in accordance with the Modification Order but may refer the matter to dispute resolution in accordance with Clause 30.
- (h) **(Payment for Modification):** If Project Co implements a Modification in accordance with a Modification Order, the State will pay Project Co the amount for implementing the Modification as set out in the Modification Order calculated in accordance with Schedule 4 (Change Compensation Principles). If the Modification Order gives rise to a Saving, Project Co will pay to the State the

amount of the Saving within 20 Business Days or such other time agreed between the parties.

- (i) **(Payment for Modification Quote):** Subject to paragraph (j), if Project Co is required to prepare a Modification Quote in accordance with paragraph (b) and the cost of doing so calculated in accordance with Section 3 of Schedule 4 (Change Compensation Principles) is more than \$5,000, the State will pay Project Co the cost of the preparation and submission of the Modification Quote:
 - (i) if the State does not issue a Modification Order, within 40 Business Days of receiving an invoice from Project Co for such cost provided that the relevant Modification Quote has been prepared and submitted in accordance with this Agreement; or
 - (ii) if the State does issue a Modification Order, as part of the amount payable by the State for the Modification.
- (j) **(No internal costs):** The State will not pay Project Co's internal costs (for example, labour and management time) of preparing a Modification Quote.

17.2 Modifications proposed by Project Co

- (a) Project Co may, for its convenience, request the State to direct a Modification by submitting a notice to the State which contains details of the proposed Modification and satisfies the requirements of Clause 17.1(a)(ii).
- (b) The State may, in its sole and absolute discretion, direct a Modification in accordance with Project Co's notice by issuing a Modification Order.
- (c) Project Co is not relieved from performing or observing its obligations in accordance with this Agreement as a result of the failure by the State to issue a Modification Order in connection with a Modification requested by Project Co.
- (d) To the extent that Project Co reasonably requires to undertake a Modification to the Works as a result of Project Co encountering:
 - (i) Utility Infrastructure on a Construction Area which is not Known Utility Infrastructure; or
 - (ii) physical structures, partially completed structures and in-ground works in the Central Plant Area,

then:

- (iii) Project Co may request the State to direct a Modification by submitting a notice to the State which contains details of the proposed Modification and satisfies the requirements of Clause 17.1(a)(ii); and
- (iv) on receipt of such request in accordance with Clause 17.2(d)(iii), the State will be deemed to have directed a Modification Order consistent with such request and will not withdraw that Modification Order.

17.3 Project Co Modification consented to by State

If the State issues a Modification Order in accordance with Clause 17.2:

- (a) Project Co will, subject to complying with any conditions in the Modification Order, carry out the Project Co Modification; and

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

17.4 Not to commence before issue

Project Co must not begin any work or incur any cost, and will not have any entitlement to make any Claim in connection with a Modification unless a Modification Order has been issued or deemed to be issued by the State in accordance with this Clause 17.

17.5 Updated documents

Project Co must submit to the State three paper copies, three electronic versions in .pdf format and three electronic versions in original format of the following documents following completion of any Modification (if and to the extent applicable given the nature of the Modification):

- (a) all final drawings, specifications, models, samples and calculations used to undertake the Modification; and
- (b) amended versions of any D&C Documents or the Operating Manual necessary to identify and incorporate the Modification.

17.6 Direction giving rise to a Modification

- (a) **(Direction):** If Project Co believes any direction by the State (other than a Modification Order) constitutes or involves a Modification, Project Co must:
 - (i) within 5 Business Days of receiving the direction, give notice to the State that it considers the direction constitutes or involves a Modification; and
 - (ii) within 5 Business Days of giving the notice in accordance with paragraph (a)(i), submit a Claim to the State which must include:
 - A. detailed particulars concerning the direction upon which the Claim is based and the reason why Project Co believes it constitutes a Modification;
 - B. Project Co's fixed price quote for the cost of implementing the direction as a Modification calculated in accordance with the principles in Section 3 of Schedule 4 (Change Compensation Principles); and
 - C. the period of any delay caused by the Modification in respect of which Project Co would be entitled to relief in accordance with Clause 12.
- (b) **(Condition precedent):** Project Co's compliance with paragraph (a) is a condition precedent to Project Co's entitlement to be paid for a direction which Project Co believes to be a Modification.
- (c) **(Confirmation):** Within 5 Business Days of the State receiving any notice from Project Co in accordance with paragraph (a), the State may:
 - (i) confirm that the direction is in fact a Modification by issuing a Modification Order;
 - (ii) vary the direction and confirm that the varied direction is a Modification by issuing a Modification Order;

- (iii) withdraw the direction, in which case Project Co must not comply with the direction and is not entitled to make any Claim against the State or any State Associate in respect of the direction; or
- (iv) inform Project Co that, in the State's view, the direction is not a Modification.
- (d) **(Dispute):** If Project Co disputes the State's view notified in accordance with paragraph (c)(iv) or the State does not issue a direction in accordance with paragraph (c), Project Co must continue to undertake the Works, perform the Services and deliver the Project (including the works or services the subject matter of any direction) but may refer the matter for resolution in accordance with Clause 30.
- (e) **(No commencement):** Project Co must not commence any work the subject of a direction which it believes constitutes a Modification until the State has acted in accordance with paragraphs (c)(i), (ii) or (iv).

18. Force Majeure

18.1 Notice

If Project Co is of the opinion that a Force Majeure Event has occurred that affects the Works, New Car Park and/or the At-Grade Car Parks Project Co must, no later than 10 Business Days after it forms that opinion, submit a notice to the State which must contain:

- (a) **(basis of Claim):** details of the Force Majeure Event including details of the basis on which Project Co has formed the opinion that the event constitutes a Force Majeure Event;
- (b) **(obligations affected):** details of the obligations affected by the Force Majeure Event and an estimate of the time (if any) during which Project Co will be unable to carry out the affected obligations;
- (c) **(action to be taken):** details of the action that Project Co has taken and proposes to take to avoid or minimise the consequences of the Force Majeure Event;
- (d) **(Cost estimate):** an estimate of the Costs that Project Co would incur to remedy the impact of the Force Majeure Event were it able to do so;
- (e) **(Insurance):** details of all insurance moneys on which Project Co may be able to rely in making good any damage caused by the Force Majeure Event; and
- (f) **(payments):** if the Force Majeure Event has occurred during the Operating Phase, details of the calculation of any payment claimed in accordance with Clause 18.5.

To the extent that such information is not available at the relevant time, it must be provided by Project Co as soon as reasonably practicable after it becomes so available.

18.2 Meeting

Within 5 Business Days of the date of the notice submitted in accordance with Clause 18.1, the parties must meet to seek to agree on:

- (a) whether the event set out in the notice is a Force Majeure Event;
- (b) what obligations (if any) will be affected by the Force Majeure Event;

- (c) whether the Force Majeure Event is an Extension Event; and
- (d) the steps to be taken to overcome the effects of the Force Majeure Event.

18.3 Actions

Project Co must:

- (a) promptly after the occurrence of a Force Majeure Event, take and continue to take proper and reasonable steps to overcome the effects of the Force Majeure Event;
- (b) continue to perform its obligations in accordance with this Agreement and the At-Grade Car Parks Management Agreement that are unaffected by the Force Majeure Event; and
- (c) keep the State updated as to the status of the effects of the Force Majeure Event and Project Co's actions in connection with the Force Majeure Event.

18.4 Obligations suspended

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

18.5 Force Majeure Events

- (a) To the extent that:
 - (i) Project Co's obligations are suspended in accordance with Clause 18.4 due to the occurrence of a Force Majeure Event; and
 - (ii) as a direct result of the Force Majeure Event, the Revenue received by Project Co is deferred (if Completion has not been achieved) or reduced (if Completion has been achieved) (or both) to such an extent that Project Co is not able to repay the scheduled minimum repayments of principal and interest in accordance with its Actual Debt obligations,

then the State will pay Project Co the minimum amount necessary to enable Project Co to pay:

 - (iii) scheduled repayments of principal and interest in connection with its Actual Debt obligations; and
 - (iv) such fixed costs that the FM Subcontractor and the Operator continue to properly incur in respect of any affected obligations (notwithstanding the suspension) and which Project Co can demonstrate could not reasonably have been avoided or mitigated taking into account the circumstances at the time.

- (b) If Project Co is entitled to compensation in accordance with paragraph (a), Project Co must include in its notice submitted in accordance with Clause 18.1 sufficient information in connection with the Claim to enable the State to verify the nature and extent of the Claim.
- (c) If the Force Majeure Event is a Utility Service Interruption, Project Co will have no Claim against the State and the State will have no obligation to make any payment in accordance with paragraph (a), to the extent that the Utility Service Interruption is insured or is required to be insured under this Agreement.

19. Handover

19.1 Handover Condition

For the purpose of this Clause 19, "**Handover Condition**" means the required condition of the Works or the New Car Park (as applicable) upon the Expiry Date, which:

- (a) if Handover is to occur during the D&C Phase, is the condition that the Works and the Construction Areas would be in if Project Co had complied with all of its obligations in connection with the Works and the Construction Areas in accordance with this Agreement as at that date; or
- (b) if Handover is to occur during the Operating Phase, is the condition that:
 - (i) the New Car Park and the Operating Areas (other than the Operating Areas in connection with the At-Grade Car Parks) would be in as at that date:
 - A. if the Asset Maintenance Plan had been fully implemented;
 - B. if all scheduled and unscheduled maintenance had been completed; and
 - C. if Project Co satisfied all relevant obligations in accordance with this Agreement; and
 - (ii) the New Car Park must be in so that it has a residual life of five years after the Expiry Date without any major maintenance or refurbishment work, other than routine maintenance that Project Co would have had to carry out under this Agreement if the Expiry Date were extended by 5 years.

19.2 Obligations approaching end of Operating Phase

- (a) **(Independent certifier):** No later than 12 months before the inspections to be undertaken in accordance with paragraph (b), Project Co and the State must meet to determine the identity of an independent certifier to be appointed jointly by Project Co and the State in accordance with Clause 5.6 to carry out the tasks identified in this Clause 19.
- (b) **(Joint inspection):** Project Co, the State and the Independent Certifier appointed in accordance with paragraph (a) must carry out joint inspections of the Works or the New Car Park (as applicable):
 - (i) at least:
 - A. 3 years (but no earlier than 4 years) before the expected expiry of the Operating Phase; and

- B. every 3 Months after that initial inspection until the end of the Operating Phase; or
 - (ii) if this Agreement is to be terminated prior to the expiry of the Operating Phase, such shorter period before the date of termination as is required by the State,
- (each a “**Condition Review Date**”).
- (c) **(Program to achieve proper Handover):** Following each inspection in accordance with paragraph (b), the Independent Certifier must give to the State and Project Co a written report (**Outstanding Matters Report**) specifying:
- (i) whether the Works (excluding the Additional Works), the Construction Areas the Operating Areas (other than the Operating Areas in connection with the At-Grade Car Parks) or the New Car Park (as applicable), will as at the Expiry Date be in a condition which satisfies the Handover Condition;
 - (ii) the works to be undertaken or services to be performed to enable the Works (excluding the Additional Works) or the New Car Park to meet the Handover Condition on the Expiry Date and a program for undertaking such works or services (**Final Refurbishment Works**); and
 - (iii) an estimate of the total costs of carrying out those works (including an appropriate margin for risks and contingencies) determined in accordance with Best Construction Practices or Best Operating Practices (as applicable).
- (d) **(Disputing Outstanding Matters Report):** If Project Co or the State do not agree with any aspect of the Outstanding Matters Report:
- (i) either party may give details of such objections to the other party and the Independent Certifier within 10 Business Days of receipt of the report; and
 - (ii) the parties will discuss in good faith to reach agreement on:
 - A. the scope and cost of the Final Refurbishment Works; and
 - B. a program for carrying out the Final Refurbishment Works.
- (e) **(No agreement reached):** If the parties cannot reach agreement on the relevant aspects of the Outstanding Matters Report within a further 10 Business Days of the date on which the objections are provided in accordance with paragraph (d), the matters may be referred by either party for resolution by an Independent Expert in accordance with Clause 30.
- (f) **(Update of Works Program or Asset Maintenance Plan):** Within 1 Month of the delivery of each Outstanding Matters Report, the Works Program or the Asset Maintenance Plan (as applicable) must be amended by Project Co to include the Final Refurbishment Works Project Co is required to undertake in accordance with the then current Outstanding Matters Report. The updated Works Program or Asset Maintenance Plan will be submitted to the State for review in accordance with Schedule 3 (Review Procedures). The State may reasonably refuse to approve the updated Asset Maintenance Plan if the Final Refurbishment Works are scheduled to be completed later than 3 Months before the end of the Term.
- (g) **[not disclosed]**

- (h) **[not disclosed]**
- (i) **(Interest on Handover Escrow Account):** Interest earned on money standing to the credit of the Handover Escrow Account will be deposited into the Handover Escrow Account and Project Co will be entitled, on request, to receive copies of the statements of account for the Handover Escrow Account.
- (j) **(Excess amounts in Handover Escrow Account):** If at any time the works that were not executed in accordance with the program agreed or resolved in accordance with paragraphs (c) or (e) are completed (as agreed or resolved in accordance with paragraphs (c) or (e)) then the amount of the Handover Escrow Account referable to those completed works will be a debt due and payable from the State to Project Co, within 20 Business Days or such other time agreed between the parties.
- (k) **(Payments from Handover Escrow Account):** The State may draw on the Handover Escrow Account:
 - (i) to fund the completion of any Final Refurbishment Works in accordance with paragraph (m) or reimburse the State's costs of undertaking any Final Refurbishment Works;
 - (ii) to pay Project Co any amount due and payable in accordance with paragraph (j);
 - (iii) to pay Project Co the costs of undertaking the Final Refurbishment Works provided that the balance of the Handover Escrow Account will not be less than the estimate of the total costs of the Final Refurbishment Works outstanding at that time; and
 - (iv) no later than 20 Business Days after completion of all Final Refurbishment Works, to pay the balance of the Handover Escrow Account to Project Co.
- (l) **(Money remaining in Handover Escrow Account):** If after:
 - (i) the State has recovered the amounts (if any) owing in accordance with paragraph (k)(i); and
 - (ii) any set-off or deduction by the State in accordance with Clause 39.2,
 there is any money remaining in the Handover Escrow Account, then such money must be paid by the State to Project Co within 20 Business Days or such other time agreed between the parties.
- (m) **(Completion of Final Refurbishment Works by the State):** If Project Co fails to undertake any Final Refurbishment Works when required to do so in accordance with this Clause 19, the State may undertake and complete those Final Refurbishment Works.
- (n) **(State election):** The State may, by giving Project Co reasonable prior notice, relieve Project Co from its obligation to implement any Final Refurbishment Works.

19.3 Handover

Upon the Expiry Date Project Co must:

- (a) **(conditions):** handover the Works or the New Car Park (as applicable) and the Construction Areas and the Operating Areas (other than the Operating Areas in connection with the At-Grade Car Parks) (including all rights, title and interest in

them) to the State or its nominee free from any encumbrances and in a state and condition which complies with the Handover Condition;

- (b) **(transfer)**: transfer to the State or its nominee all rights, title and interest in plant and equipment required to allow the State or its nominee to operate, maintain and repair the Works or the New Car Park (as applicable) to the standards required in accordance with this Agreement free from any encumbrances;
- (c) **(manuals)**: deliver to the State or its nominee all manuals, records, plans and other information under the control of Project Co which are relevant to the design, construction, operation, maintenance or repair of the Works or the New Car Park (as applicable);
- (d) **(novation)**: procure the novation to the State or its nominee of:
 - (i) such contracts for works or services to which it, the Builder, the Operator or the FM Subcontractor is a party as they relate to the Works, the Services or the New Car Park as the State may nominate; and
 - (ii) any leases, subleases and licences agreed to by the State;
- (e) **(Intellectual Property Rights)**: to the extent that it is reasonably practicable to do so, grant or procure the grant to the State or its nominee of such Intellectual Property Rights as will enable the State or its nominee to be in a position to design, construct, operate, maintain and repair the Works or the New Car Park (as applicable) at the performance standards stated in this Agreement;
- (f) **(Insurances)**: pay to the State or its nominee any insurance proceeds from any Insurances for the reinstatement or replacement of the Works or the New Car Park (as applicable) to the extent not already reinstated or replaced, and assign to the State any rights available to Project Co under the Insurances;
- (g) **(Insurance Proceeds Account)**: must pay to the State or its nominee the balance of the Insurance Proceeds Account as of that date;
- (h) **(Authorisations)**: must do all acts and things necessary to enable the State (or its nominee) to have transferred or obtained all Authorisations necessary for the operation, maintenance and repair of the Works or the New Car Park (as applicable); and
- (i) **(operations)**: do all other acts and things to enable the State (or its nominee) to be in a position to deliver the Project at the standards stated in this Agreement, with minimum disruption.

19.4 Assistance in securing continuity

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

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

20. Commercial opportunities

20.1 Commercial opportunities

- (a) **(Grant of rights):** Subject to paragraphs (b) to (f), the State grants to Project Co the exclusive right to pursue and exploit the Commercial Opportunities within the Designated Commercial Areas in accordance with this Clause 20.1. For the avoidance of doubt, this Clause 20.1(a) does not restrict or prevent the State or the State's Associates from pursuing commercial opportunities on any area of the Reserve which is outside of the Designated Commercial Areas.
- (b) **(Consent of the State):** The prior consent of the State must be obtained for any other commercial activities proposed by Project Co after the Date of this Agreement and the subleasing or licensing arrangements proposed in relation to those other commercial activities.
- (c) **(Subleases or licences):** Project Co may pursue the Commercial Opportunities through subleases or licences with third parties (the terms of such documents to be approved by the State pursuant to Clause 20.2). Project Co must ensure that the subleasing or licensing arrangements:
 - (i) allow Project Co to terminate the arrangements at the same time that this Agreement is terminated;
 - (ii) commence no earlier than Stage 2B Completion;
 - (iii) do not allow for any further subleasing or licensing without State approval;
 - (iv) require the maintenance of public and product liability, professional indemnity (if relevant) and workers compensation insurance with adequate cover for liability in connection with the proposed use of the Commercial Opportunities, and any other insurance that a prudent operator of similar commercial activities to the Commercial Opportunities would effect and maintain;
 - (v) require compliance with the By-Laws to the extent relevant; and
 - (vi) otherwise comply with the requirements of this Agreement including all signage requirements set out in Schedule 20 and, other than as expressly set out in any sublease or licence approved by the State pursuant to Clause 20.2, each other requirement set out in Schedule 20.
- (d) **(Designated Commercial Areas):** Project Co must ensure that the Commercial Opportunities are only performed within the Designated Commercial Areas.
- (e) **(Termination):** Upon termination of this Agreement, the State may elect to either take a novation or terminate the subleases or licences entered into by Project Co in connection with the Commercial Opportunities.
- (f) **(Sole use):** Project Co must not use, and must ensure that no other person uses, any area within the Designated Commercial Areas to operate a business other than a business for the Commercial Opportunities.
- (g) **(Restrictions):** Project Co must ensure that the Commercial Opportunities to be undertaken in the New Car Park:
 - (i) do not provide for the sale of alcohol, cigarettes or other tobacco products;

- (ii) are not operated by nationally branded fast food chains; or
 - (iii) do not include retail offerings or activities that are inappropriate for a medical campus or are inconsistent with the requirements of the *Queen Elizabeth II Medical Centre Act 1966* (WA) or its subsidiary legislation.
- (h) **(Risk):** Project Co acknowledges and agrees that it accepts all occupancy and revenue risk associated with the Commercial Opportunities, and Project Co is not entitled to make any Claim and the State will not incur any Liability in connection with or arising from the Commercial Opportunities.
- (i) **(Change in use):** Project Co must obtain the prior written approval of the State for any proposed change in use to the Commercial Opportunities during the Operating Phase which, subject to paragraph (j), may be given or withheld in its absolute discretion.
- (j) **(Reasonableness test):** On and from the 10th anniversary of Stage 2B Completion, the State's consent may not be unreasonably withheld to any change in use to the Commercial Opportunities. It will be reasonable for the State to withhold its consent if the consent of the Trust is not able to be obtained by the State having used reasonable endeavours.
- (k) **(Provision):** Project Co must ensure that each of the Commercial Opportunities referred to in Schedule 20 is provided by no later than the date 180 days after the Date for Stage 2B Completion and continues to be provided throughout the Term subject to:
 - (i) Clause 20.1(j); and
 - (ii) short, temporary breaks to accommodate any changeover of tenants.
- (l) **(Uncommercial opportunities):** Project Co is relieved of its obligation under paragraph (k) if Project Co can demonstrate to the State's reasonable satisfaction that it has diligently pursued procuring a tenant to provide a Commercial Opportunity but due to business issues generally affecting businesses similar in nature to the affected Commercial Opportunity (and, for the avoidance of doubt, not due to the design, construction, operation or maintenance of the New Car Park) the Commercial Opportunity is not commercially viable.
- (m) **(Periodic demonstration):** If Project Co is not procuring a Commercial Opportunity in reliance on Clause 20.1(l), then Project Co must:
 - (i) continue to diligently pursue procuring a tenant to provide that Commercial Opportunity, having regard to the applicable business conditions;
 - (ii) for so long as the Commercial Opportunity is not being provided, demonstrate to the State's reasonable satisfaction every 6 months from the date referred to in paragraph (k) that the requirements of paragraph (l) continue to be satisfied; and
 - (iii) commence provision of the Commercial Opportunity within 3 months of the Commercial Opportunity becoming commercially viable.

20.2 State approval process for subleases or licenses

- (a) Prior to entering into any subleases or licences to pursue Commercial Opportunities with third parties, Project Co must provide copies of the proposed sublease or licence to the State for approval.

- (b) The State must notify Project Co whether the State approves or (acting reasonably) does not approve the terms of any sublease or licence provided under Clause 20.2(a) within 25 Business Days of the State's receipt of that sublease or licence under Clause 20.2(a).
- (c) Without limitation to Clause 20.2(b), where the State notifies Project Co that it does not approve the terms of any sublease or licence provided under Clause 20.2(a), it must identify which specific terms are not approved and provide a brief explanation as to why those terms were not acceptable to the State.

21. Revenue

21.1 Retention of Revenue

In consideration of Project Co entering into this Agreement, Project Co is entitled to collect and retain all Revenue in accordance with this Agreement and the At-Grade Car Parks Management Agreement. For the avoidance of doubt, Project Co is not entitled to collect and retain any Revenue derived from any additional parking bays made available by the State over and above the Minimum Number of Parking Bays.

21.2 Parking Charges

- (a) Subject to Clause 13.7, from the Stage 1A Completion Date, Project Co is entitled to charge the Parking Charges in connection with use of the New Car Park by Users.
- (b) In accordance with the At-Grade Car Parks Management Agreement, Project Co will be entitled to charge Users for use of the At-Grade Car Parking Bays from the later of:
 - (i) the Stage 1A Completion Date; and
 - (ii) 10 October 2012.
- (c) At any time during the Term, if the Parking Charges that Project Co is entitled to collect and retain are varied from the Agreed Parking Charges, Clause 21.4 will apply to that variation.
- (d) Except in accordance with this Agreement, Project Co is not entitled to increase or decrease the Parking Charges.

21.3 Share of Revenue

- (a) Not later than 15 Business Days after the end of each Financial Year, Project Co must provide to the State a notice certifying the Gross Receipts received by Project Co as defined and calculated in accordance with Schedule 12 (Revenue Share) for the previous Financial Year or part thereof. Project Co must procure that the notice is signed by Project Co's auditor as a true and accurate record of the Gross Receipts for that period.
- (b) Within 25 Business Days of the end of each Financial Year, Project Co must pay to the State the share of Revenue calculated in accordance with Section 2 of Schedule 12 (Revenue Share) (**Revenue Share Amount**) (if any) for the previous Financial Year or part thereof.
- (c) If the State exercises its right in accordance with Clause 33.1(d) to audit the notice provided in accordance with paragraph (a) and the audit establishes that Gross Receipts for a Financial Year have been wrongly stated then:

- (i) any amount that would have been owing by Project Co to the State based on the correct Gross Receipt figures will be a debt due and payable by Project Co to the State within 20 Business Days or such other time agreed between the parties; or
- (ii) any amount paid by Project Co in excess of which should have been paid to the State based on the correct Gross Receipt figures will be a debt due and payable to Project Co within 20 Business Days or such other time agreed between the parties.
- (d) Project Co and the State acknowledge that the Revenue Share Amount at all times remains the property of the State.

21.4 Increases and material decreases to Parking Charges

[not disclosed]

21.5 Minor decreases to Parking Charges

[not disclosed]

21.6 Variations to the number of Parking Bays

- (a) The State or, in respect of the At-Grade Car Parks, the Delegate, may at any time after the Stage 1A Completion Date upon giving reasonable notice to Project Co:
 - (i) make available to Project Co less than the Minimum Number of Parking Bays;
 - (ii) provide Parking Bays to Project Co in different locations; and/or
 - (iii) re-allocate Parking Bays between Staff and Visitors,
 (each a '**Parking Bay Variation**').
- (b) Subject to paragraphs (c) and (e) and the At-Grade Car Parks Management Agreement, if the State or the Delegate (as applicable) exercises its right in accordance with paragraph (a) or there has been a variation to the number of Parking Bays in accordance with Clause 28.8, Schedule 13 (Parking Bay Variations) will apply and the State will pay to Project Co an amount calculated in accordance with Schedule 13 (Parking Bay Variations).
- (c) In relation to variations to the At-Grade Parking Bays, Schedule 13 (Parking Bay Variations) does not apply:
 - (i) if the reason that the number of At-Grade Car Parking Bays is less than the number of At-Grade Car Parking Bays specified in column 3 of Schedule 19 on the date specified in the 'Date' column of Schedule 19 is:
 - A. routine planned maintenance in connection with the At-Grade Car Parking Bays and Project Co has been given not less than 5 Business Days prior notice of the routine planned maintenance provided that the unavailability of each At-Grade Car Parking Bay is for no longer than 4 Business Days;
 - B. reactive maintenance in connection with the At-Grade Car Parking Bays (whether or not the State has given any

notice) provided that the unavailability of each At-Grade Car Parking Bay is for no longer than 4 Business Days;

C. the At-Grade Car Parking Bays are being used by the State or the Delegate for the purposes of performing minor works on any part of the Reserve provided that the unavailability of each At-Grade Car Parking Bay is for no longer than 4 Business Days;

D. access by third parties with relevant access rights (such as Utility service providers) consistent with their rights of access provided that the unavailability of each At-Grade Car Parking Bay is for no longer than 4 Business Days;

(ii) to the extent that the reason that the State or Delegate (as applicable) has failed to make available the number of At-Grade Parking Bays specified in column 3 of Schedule 19 on the dates in that Schedule is a failure by Project Co to achieve Additional Works Completion in relation to the At-Grade Reconfiguration Works by the At-Grade Reconfiguration Longstop Date; or

(iii) to the extent that the construction area for the Works is greater than forecast and as a result the State is unable to make available the number of At-Grade Parking Bays specified in column 3 of Schedule 19 on the dates in that Schedule. Project Co must obtain the prior consent of the State to any proposed increase in the construction area required.

(d) If paragraph (c) applies, Project Co is entitled to Claim relief for the variation to the number of Parking Bays in accordance with Clause 15.1 **Error! Reference source not found.**

(e) If a Parking Bay Variation directed by the State or the Delegate under paragraph (a):

[not disclosed]

the State may, at the time that the Parking Variation is notified to Project Co, elect to compensate Project Co for the Parking Bay Variation by way of an adjustment to the Term as an alternative to paying Project Co any financial compensation payable for the Parking Bay Variation calculated in accordance with Schedule 13 (Parking Bay Variations).

(f) If the State elects to compensate Project Co for a Parking Bay Variation by way of an adjustment to the Term in accordance with paragraph (e), the Parking Bay Variation is deemed to be a Model Variation Event. For the purpose of the Model Variation Event, the amount that would have been payable by the State for the Parking Bay Variation in accordance with Schedule 13 (Parking Bay Variations) but for the State's election to compensate Project Co by way of an adjustment to the Term, will be the amount used for the purpose of calculating the adjustment to the Term.

(g) Project Co agrees to reasonably consider any request by the State to compensate Project Co for a Parking Bay Variation by way of an adjustment to the Term in circumstances where the criteria in paragraph (e) are not met.

(h) If the criteria in paragraph (e) for an adjustment to the Term are not met, the State may nevertheless require that Project Co is compensated for the Parking Bay Variation by a combination of an adjustment to the Term for the portion of the Parking Bay Variation that satisfies the criteria in paragraph (e) and by

financial compensation calculated in accordance with Schedule 13 (Parking Bay Variations) for the balance of the Parking Bay Variation.

21.7 Direct Invoice Parking Bays

- (a) From Stage 1A Completion, in respect of:
 - (i) the eleven Parking Bays for Staff in the area on the Reserve known as the 'Rose Garden' and shown on a plan attached in Part A of Schedule 16 (Plans); and
 - (ii) the seven Parking Bays for Staff in the area on the Reserve known as 'Car Park 12/ Verdun Street' and shown on a plan attached in Part A of Schedule 16 (Plans),

(together the **Direct Invoice Parking Bays**), Project Co is entitled to submit to the North Metro Area Health Service Central Administration (with a copy to the State) an invoice at the end of each Month for use of the Direct Invoice Parking Bays by Staff.
- (b) The amount of the invoice submitted by Project Co in accordance with paragraph (a) will be for an amount equal to the full daily rate specified for the Staff Parking Charges in Schedule 10 for each Direct Invoice Parking Bay on each Business Day.
- (c) Subject to Project Co complying with paragraph (b), the State will ensure that the North Metro Area Health Service pays the invoice sent by Project Co under paragraph (a) in a timely manner.

22. Refinancings

22.1 Consent to new financing arrangements

- (a) Project Co must not (and must ensure that Finance Co does not) enter into or implement any Refinancing without the prior written consent of the State, which will be given or withheld within 20 Business Days of receipt of the information provided by Project Co in accordance with Clause 22.2(a) and will not be unreasonably withheld or delayed.
- (b) Subject to Clause **Error! Reference source not found.**, it will be reasonable for the State to withhold such consent if:
 - (i) **(risks and liabilities)**: the effect of the Refinancing would be an increase or adverse change in the profile of the risks or liabilities of the State in accordance with any State Project Document without adequate compensation to the State;
 - (ii) **(not arm's length)**: the terms and conditions of the Refinancing are not on arm's length commercial terms or are not in accordance with market practice at the time;
 - (iii) **(more onerous)**: the terms and conditions of the Refinancing (taken as a whole) are materially more onerous or disadvantageous to Project Co or Finance Co than the terms and conditions in accordance with the existing Financing Documents and the State considers Project Co or Finance Co will be unable to adequately service and repay the Financial Indebtedness assumed under the transactions or that such Financial Indebtedness will adversely impact on Project Co's or Finance Co's ability to perform its obligations in accordance with the Project Documents;

- (iv) **(other purposes)**: the Financial Indebtedness assumed under the transactions will not be used solely for the Project; or
- (v) **(failure to comply)**: Project Co or Finance Co failed to comply with this Clause 22.

(c) **[not disclosed]**

22.2 Details of new Refinancing

- (a) Project Co must (and must procure that Finance Co) promptly (and at least 30 Business Days prior to a Refinancing) provide the State with full details of any Refinancing, including:
 - (i) a copy of the proposed financial model relating to it;
 - (ii) the basis for the assumptions used in the proposed financial model (which must be consistent with those used in the Financial Model, except to the extent directly arising from the transactions);
 - (iii) a comparison with any refinancing assumed within the Financial Model; and
 - (iv) a certificate in terms acceptable to the State from the auditors of such financial model.
- (b) The proposed financial model must show, amongst other things, the material changes to Project Co's or Finance Co's obligations to its Financiers and any anticipated Refinancing Gain or Refinancing Losses. The proposed financial model may only make changes from the Financial Model to the extent directly arising from the Refinancing.
- (c) Project Co agrees (and must procure that Finance Co agrees) that the State will have unrestricted rights of audit of any financial model and documentation, including formulae and calculations used in connection with a Refinancing.

22.3 Documents

- (a) Project Co must not (and must ensure that Finance Co does not) execute or amend any document in connection with a Refinancing (including by amending a Financing Document) without the prior consent of the State (which consent will not be unreasonably withheld or delayed).
- (b) Project Co must, within 5 Business Days of the execution of any Financing Document in connection with a Refinancing, deliver to the State a certified true copy of each amended and amending Financing Document.
- (c) Project Co must not (and must ensure that Finance Co does not) execute any Refinancing until the new Financiers have executed a deed with the State substantially in the form of the Finance Side Deed and the existing Financiers have executed any document reasonably requested by the State to terminate their rights in accordance with the then current Finance Side Deed.

22.4 Costs of new Refinancing

Project Co must pay the State its costs (including any legal or financial advisers fees incurred by the State) reasonably incurred in connection with a Refinancing.

22.5 Sharing of Refinancing Gains

- (a) The State and Project Co will share in any Refinancing Gains arising as a result of a Refinancing in the following order:
 - (i) Project Co is entitled to 100% of any Refinancing Gains until the sum of any Refinancing Losses from previous Refinancings have been recovered; then
 - (ii) the State will be entitled to 50% of any remaining Refinancing Gain.
- (b) The State may, taking into account the nature and timing of the Refinancing Gain, elect to receive its share of Refinancing Gain as a direct payment (to the extent Project Co receives its Refinancing Gain as a direct payment).
- (c) Project Co must (and must ensure that Finance Co does) provide the State with all information concerning the Refinancing and Distributions that the State may require in order to calculate the Refinancing Gain and Refinancing Losses.

23. Risk and Liability

23.1 Risk of loss or damage

Project Co bears the risk of loss or damage to:

- (a) subject to paragraph (b), the Works during the D&C Phase;
- (b) the Additional Works from Financial Close until the date of Additional Works Completion;
- (c) the New Car Park during the Operating Phase; and
- (d) unfixed plant and equipment (whether on or off the Construction Areas or the Operating Areas) which are:
 - (i) provided by the State to Project Co;
 - (ii) brought onto a Construction Area or Operating Area by a Subcontractor; or
 - (iii) used or to be used in delivering the Project,

in accordance with this Clause 23.

23.2 State election to reinstate

Within 60 Business Days of any loss or damage to a material portion of the Works or a material portion of the New Car Park (as applicable) (or such longer period as the State reasonably requires in order to assess the situation and form its intention), the State must notify Project Co whether it requires Project Co:

- (a) to repair or rebuild the Works or the New Car Park; or
- (b) not to repair or rebuild the Works or the New Car Park,

for which Project Co retains the risk of loss or damage in accordance with Clause 23.1.

23.3 Reinstatement

- (a) If the State notifies Project Co that it requires Project Co to repair or rebuild the Works or the New Car Park in accordance with Clause 23.2(a), Project Co must:
- (i) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work;
 - (ii) promptly consult with the State and carry out such steps as are necessary to ensure the prompt repair and reinstatement of the loss or damage so that:
 - A. the Works or the New Car Park comply with the requirements of the State Project Documents;
 - B. to the greatest extent possible, Project Co continues to comply with its obligations in accordance with the State Project Documents; and
 - C. the State is fully informed of the progress of the repair and reinstatement activities;
 - (iii) subject to paragraph (a)(iv), bear the cost of repairing or rebuilding the Works or the New Car Park (as applicable); and
 - (iv) if the event which gave rise to the loss or damage is a Force Majeure Event and the State requires Project Co to repair or reinstate the Works or the New Car Park, submit a notice to the State which includes:
 - A. the costs that Project Co would incur if it were to repair or reinstate the Works or the New Car Park; and
 - B. Project Co's proposal as to how it will meet the costs referred to in paragraph (iv)(A) which must include:
 - 1) arranging for additional funding in accordance with the Financing Documents or from other sources (if permitted in accordance with the Financing Documents);
 - 2) utilising any standby facility that may be available to Project Co; and
 - 3) the State contributing to the costs of repair and reinstatement.
- (b) Within 20 Business Days of receiving Project Co's notice (or such longer period agreed between the parties), the parties must meet and agree on how the Works or New Car Park will be repaired or reinstated, taking into account Project Co's notice under paragraph (a) (iv).
- (c) If the parties are unable to agree on how the Works or New Car Park will be repaired or reinstated, the State must notify Project Co that it no longer requires Project Co to repair or reinstate the Works or the New Car Park and the provisions of Clause 23.4 will apply.

23.4 Consequences of not repairing or rebuilding

If the State notifies Project Co not to repair or rebuild the Works or the New Car Park (as applicable) in accordance with Clause 23.2(b), and the loss or damage:

- (a) does not result in the loss of or damage to the whole of the Works or the New Car Park, the notice of the State in accordance with Clause 23.2(b) will be deemed to be a Modification to omit the relevant part of the Works or the New Car Park from the Project and the State must issue a Modification Order; or
- (b) results in the loss of or damage to the whole of the Works or the New Car Park or the loss of the use of the whole of the Works or the New Car Park and was caused by:
 - (i) an Event of Default or Immediate Termination Event then this Agreement will be terminated for default in accordance with Clause 29.4;
 - (ii) a Force Majeure Event, then the State must immediately terminate this Agreement by notice to Project Co and:
 - A. this Agreement will terminate on the date stated in the State's notice; and
 - B. the State will pay to Project Co the Force Majeure Termination Amount; or
 - (iii) otherwise, then this Agreement will be terminated for convenience in accordance with Clause 29.1.

23.5 Damage to third party property

- (a) Project Co must avoid interference with, or obstruction or damage to, any property in the vicinity of the Construction Areas or the Operating Areas arising out of or in connection with delivering the Project.
- (b) If any loss of or damage to real or personal property of third parties occurs in connection with delivering the Project, Project Co must:
 - (i) promptly repair such loss or damage;
 - (ii) reasonably compensate the affected person for that loss or damage (if Project Co has a legal liability to do so and as agreed with the affected person).

23.6 Indemnity for Project Co breach

- (a) Project Co indemnifies the State, the State of Western Australia's agencies and instrumentalities and employees and officers of any of those bodies (**Indemnified Persons**) against any Liability incurred (excluding prospective or contingent liabilities that have not crystallised) in connection with any breach by Project Co or any Project Co Associate of a Project Document.
- (b) Where the relevant breach is a failure to achieve Completion by the Date for Completion and if:
 - (i) Project Co provides at least 6 calendar months prior written notice that it has formed the opinion that it is likely to fail to achieve Completion by the relevant Date for Completion and the reasons for such likely failure, the steps Project Co is taking to mitigate the effect of the failure and the forecast new relevant Date of Completion; and
 - (ii) the State agrees with that opinion (acting reasonably),

the State acknowledges that Project Co's Liability under Clause 23.6(a) will be fully and finally satisfied by Project Co having paid to the Delegate (when due) the Licence Fee from the Services Commencement Date.

23.7 Third party liability indemnity

Project Co indemnifies the State and the Indemnified Persons against:

- (a) any loss of or damage to property of the State or Indemnified Persons other than the Works or the New Car Park (as applicable) which is subject to the regime set out in Clauses 23.1 to 23.5; and
- (b) any Liability incurred by the Indemnified Persons in connection with any loss of or damage to third party property or injury to, disease or death of a person in each case arising from or in connection with:
 - (i) delivering the Project; or
 - (ii) the use or occupation of the Construction Areas or the Operating Areas by Project Co or Project Co's Associates,

provided that Project Co's Liability to indemnify the Indemnified Persons will be reduced to the extent that any such damage, injury, death or disease or Liability arises due to:

- (iii) a fraudulent, negligent, unlawful or wilful act or omission of the State or the Indemnified Persons; or
- (iv) a breach by the State of a State Project Document.

23.8 Application of Civil Liability Act

- (a) **(Interpretation):** In this Clause 23.8 only, "**Legislation**" means Part 1F of the *Civil Liability Act 2002* (WA) and any equivalent statutory provision in any other state or territory.
- (b) **(Legislation excluded):** The operation of the Legislation is excluded in relation to all and any rights, obligations and Liabilities arising out of or in connection with this Agreement in delivering the Project whether such rights, obligations or Liabilities are sought to be enforced as a breach of contract or Claim in tort (including negligence), in equity or otherwise at Law.
- (c) **(Agreement specifies Liabilities):** Without limiting the generality of paragraph (a), it is further agreed that the rights, obligations and Liabilities of the parties (including those relating to proportionate liability) are as stated in this Agreement and not otherwise whether such rights, obligations and Liabilities are sought to be enforced as a breach of contract or Claim in tort (including negligence), in equity or otherwise at Law.
- (d) **(Subcontracts):** Project Co must:
 - (i) include a term in each Subcontract that excludes the application of the Legislation in relation to all and any rights, obligations or Liabilities of either party in accordance with each Subcontract, whether such rights, obligations or Liabilities are sought to be enforced by a Claim in contract, tort (including negligence), in equity or otherwise at Law; and
 - (ii) require each Subcontractor to include, in any further contract that it enters into with a third party for the undertaking of the Works, the performance of the Services or delivery of the Project, a term that

excludes the application of the Legislation in relation to all and any rights, obligations or Liabilities of either party in accordance with each further contract whether such rights, obligations or Liabilities are sought to be enforced by a Claim in contract, tort (including negligence), in equity or otherwise at Law.

- (e) **(Insurance):** Project Co must ensure that all Insurances required by this Agreement which cover third party Liability:
 - (i) cover Project Co for potential Liability to the State assumed by reason of the exclusion of the Legislation; and
 - (ii) do not exclude cover for any potential Liability Project Co may have to the State in accordance with or by reason of this Agreement.

23.9 Liability for Indirect or Consequential Loss

- (a) Despite any provision of this Agreement, neither the State nor any of the State Associates has any Liability to Project Co or any Project Co Associate, nor will Project Co or any Project Co Associate be entitled to make any Claim, in respect of Indirect or Consequential Loss incurred or sustained by Project Co or any Project Co Associate as a result of any act or omission of the State (whether negligent or otherwise) or as a result of a breach of a State Project Document by the State.
- (b) Subject to any express provision of this Agreement to the contrary, except to the extent that economic loss is insured or required to be covered in any insurance policy held by Project Co or a Consortium Entity in compliance with this Agreement, neither Project Co nor any Project Co Associate has any Liability to the State or any State Associate, nor will the State or any State Associate be entitled to make any Claim, in respect of any Indirect or Consequential Loss.
- (c) Without creating any Liability not otherwise set out in this Agreement, the following do not constitute Indirect or Consequential Loss:
 - (i) Liability arising from criminal acts or fraud on the part of Project Co or any other Project Co Associate or the State or any State Associate;
 - (ii) Liability arising from wilful misconduct under any Project Document on the part of Project Co or any Project Co Associate or the State or any State Associate;
 - (iii) Liability incurred in connection with any loss of or damage to third party property or injury to, disease or death of a person;
 - (iv) Liability to the extent of which, by Law, the parties cannot limit or exclude;
 - (v) the costs incurred by the State in rectifying a Defect for which Project Co is liable under this Agreement;
 - (vi) amounts payable under Clause 21.3 or Clause 22;
 - (vii) any amounts payable by Project Co under Schedule 4 (Change Compensation Principles) or Schedule 15 (Termination Amounts); or
 - (viii) any other amounts expressly payable to Project Co under the Project Documents, including any Revenue.

24. Insurance

24.1 D&C Phase Insurances

As a condition precedent to Financial Close in connection with the D&C Phase, Project Co must effect and maintain or cause to be effected and maintained each of the Insurances:

- (a) stated in Part A of Schedule 9 (Insurance); and
- (b) as a prudent owner and operator would obtain and maintain when undertaking work of a similar nature to the Works.

24.2 Operating Phase Insurances

From the Completion Date, Project Co must effect and maintain or cause to be effected and maintained each of the Insurances:

- (a) stated in Part B of Schedule 9 (Insurance); and
- (b) as a prudent owner and operator would obtain and maintain for the operation and maintenance of facilities of a similar nature to the New Car Park.

24.3 General insurance requirements

Project Co must:

- (a) **(Reputable Insurers)**: ensure that all Insurances are effected by Reputable Insurers;
- (b) **(deductibles)**: pay all deductibles payable in connection with any of the Insurances including if the claim is made by the State or any State Associates insured under the Insurance except to the extent that the insured risk for which the deductible is to be paid has occurred as a consequence of any breach of a State Project Document by the State or any negligent act or omission by the State or any State Associate;
- (c) **(premiums)**: punctually pay all premiums and other amounts payable in connection with the Insurances effected by it, and give the State copies of receipts for payment of premiums if and when requested by the State;
- (d) **(no alteration)**: not alter, extend or discontinue or cancel any Insurance, or allow any Insurance to lapse, without the prior approval of the State;
- (e) **(do not prejudice)**: not do or permit, or omit to do, anything which prejudices any Insurance;
- (f) **(rectify)**: promptly rectify anything which might, if not rectified, prejudice any Insurance;
- (g) **(fully disclose)**: fully and promptly disclose all material information to all relevant insurers (and any persons acting on their behalf) relating to the Insurances (whether held solely or jointly with others) in all respects;
- (h) **(comply)**: comply at all times with the terms of each Insurance;
- (i) **(do everything to enable State recovery)**: do everything reasonably required by the State or any State Associate in whose name an Insurance policy is effected and maintained to enable the State or State Associate (as applicable) to claim, and to collect or recover, money due in accordance with or in connection with any Insurance policy;

- (j) **(indemnities secondary)**: ensure that the terms of the Insurances do not require the State to exhaust any indemnities referred to in this Agreement as a condition precedent to the insurer considering or responding to any Claim; and
- (k) **(notify)**: promptly notify the State of any occurrence that may give rise to a claim in connection with the Project under any Insurance, except in relation to any employers' liability, workers' compensation insurance and motor vehicle insurance.

24.4 Terms of Insurances

Project Co will ensure that each of the Insurances it is responsible for effecting and maintaining or causing to be effected and maintained in accordance with this Agreement:

- (a) contains terms, if relevant and to the extent permitted by Law, 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 is also entitled to cover, agrees that the interests of the insured include the entire assets and undertaking of the Project and the New Car Park and waives any rights of subrogation which it may have against any insured party;
 - 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 deductibles or reducing the overall limit of indemnity; and
 - D. no reduction in limits or coverage (except in relation to products liability and professional indemnity insurances) affecting the Project or 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;
 - (b) take proper account of the nature and objectives of the Project and the New Car Park, the responsibilities and entitlements of the various insureds in connection with this Agreement and are on terms otherwise acceptable to the State (whose acceptance will not unreasonably be withheld).

24.5 Additional Insurance

- (a) If the State at any time reasonably requires Project Co to:
 - (i) arrange Insurance against a risk not specifically provided for or contemplated in accordance with Schedule 9 (Insurance); or
 - (ii) increase the extent of, or change the terms of, an existing Insurance from that set out in Schedule 9 (Insurance),

it may notify Project Co and request that Project Co give effect to its requirements.

- (b) Project Co must promptly inform the State of the amount of any additional premium payable in giving effect to the requirement of the State in accordance with paragraph (a) before it implements the requirement, and the State will advise Project Co whether it still requires Project Co to give effect to that requirement.
- (c) The cost of any additional premiums paid on any additional, increased or varied Insurances required by the State in accordance with paragraph (b) will be a debt due and payable by the State to Project Co within 20 Business Days or such other time agreed between the parties.

24.6 Insurances primary

- (a) Except for the professional indemnity insurance referred to in Schedule 9 (Insurance), the Insurances are primary and not secondary to the indemnities referred to in this Agreement.
- (b) The State is not obliged to make a Claim or institute proceedings against any insurer under the Insurances before enforcing any of its rights or remedies under the indemnities referred to in this Agreement or generally.
- (c) Project Co is not relieved from and remains fully responsible for its obligations in accordance with this Agreement regardless of whether the Insurances respond or fail to respond to any claim and regardless of the reason why any Insurance responds or fails to respond.

24.7 Evidence of Insurance

- (a) Project Co must give the State:
 - (i) certified copies of all policies, certificates of currency, renewal certificates and endorsement slips, as soon as it receives them from the insurer of the relevant Insurance; and
 - (ii) evidence satisfactory to the State that the Insurances continue to be maintained in accordance with this Agreement, whenever reasonably requested by the State.
- (b) During the Operating Phase, Project Co will, every 12 Months, provide the State 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.

24.8 State may effect Insurances

- (a) The State may (but is not obliged to) procure or effect and maintain the relevant Insurances and pay the premium:
 - (i) if Project Co fails to provide evidence satisfactory to the State within 10 days of a request in accordance with Clause 24.7; or
 - (ii) in the event of any default by Project Co in obtaining or maintaining Insurances in accordance with this Clause 24 or if any Insurance that Project Co is responsible for effecting and maintaining in accordance with this Agreement becomes void or voidable.
- (b) The costs reasonably incurred by the State in connection with taking such action will be recoverable from Project Co as a debt due and payable from Project Co to the State within 20 Business Days or such other time agreed between the parties.

24.9 Review of Operating Phase insurances

- (a) The State and Project Co will meet:
 - (i) 6 Months prior to any expected Completion Date; and
 - (ii) 6 Months prior to every 5th anniversary of Stage 2B Completion,
(each an **Insurance Review Commencement Date**) to review the minimum limits of liability, sub-limits of liability and deductibles for the Insurances required for the Operating Phase which must be effected and/or maintained during the ensuing 5 year period with a view to reaching agreement upon the limits, sub-limits and deductibles which will apply during that ensuing 5 year period.
- (b) To the extent that the State and Project Co are able to reach agreement within 2 Months after the Insurance Review Commencement Date on the limits, sub-limits and deductibles to apply during the ensuing 5 year period, Project Co must, from the commencement and for the duration of the relevant 5 year period, cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed.
- (c) To the extent that the State and Project Co are unable to reach agreement within 2 Months after the Insurance Review Commencement Date, then:
 - (i) those limits, sub-limits and deductibles which have not been agreed will be referred for dispute resolution in accordance with Clause 30; and
 - (ii) if the relevant limits, sub-limits and deductibles have not been agreed or resolved in accordance with the dispute resolution process before the commencement of the relevant 5 year period, then Project Co must, pending the outcome of the dispute resolution process, cause the then current levels of the relevant limits, sub-limits and deductibles to be adjusted in accordance with increases in the CPI from the date of the relevant limit, sub-limit or deductible was last reviewed or adjusted.
- (d) The State and Project Co agree that the limits, sub-limits and deductibles are to be agreed or resolved (as applicable) having regard to:
 - (i) the nature of the Project;
 - (ii) the Insurances which Project Co has effected, or caused to be effected, at that time and the risks covered in accordance with those insurances;
 - (iii) the risks sought to be insured;
 - (iv) the risks which a prudent insured would seek to insure;
 - (v) the terms on which insurance is available;
 - (vi) the commercial reasonableness of those terms;
 - (vii) the insurances and risk management practices generally applying in industry; and
 - (viii) any other factors which the State and Project Co may agree to be appropriate.

24.10 Insurance Proceeds Account

- (a) **(Establish account):** Project Co must:
 - (i) establish an account to be known as the “**Insurance Proceeds Account**”;
 - (ii) maintain that account in the name of Project Co with a financial institution nominated by Project Co and approved by the State (such approval not to be unreasonably withheld) or with a financial institution that is a party to the Finance Side Deed;
 - (iii) give details of that account to the State;
 - (iv) notify the financial institution referred to in paragraph (a)(ii) of the charge over the Insurance Proceeds Account in accordance with the State Deed of Charge and procure, and copy the State with, acknowledgement of the notice from the financial institution; and
 - (v) procure the agreement of the financial institution referred to in paragraph (a)(ii) not to exercise any right of set-off or combination of accounts in relation to the Insurance Proceeds Account.
- (b) **(Deposit insurance proceeds):** Project Co and the State must deposit all insurance moneys (to the extent not relating to loss of profits / business interruption insurance) received under the contract works policy and the industrial special risks policy into the Insurance Proceeds Account.
- (c) **(Application of moneys):** Subject to the Finance Side Deed, moneys in the Insurance Proceeds Account may only be applied towards the repair or reinstatement of the Project.
- (d) **(Records):** Project Co must give the State records of expenditure from the Insurance Proceeds Account within 45 days of such expenditure.
- (e) **(Surplus funds):** Any funds remaining in the Insurance Proceeds Account after application in accordance with paragraph (c) will be treated by Project Co as Revenue for the Project.

24.11 Uninsurable Risks

- (a) If a risk is an Uninsurable Risk then:
 - (i) Project Co must notify the State within 5 Business Days of becoming aware that the risk has become an Uninsurable Risk; and
 - (ii) the State must meet with Project Co within 5 Business Days after receipt of Project Co's notice to discuss the risk, including whether the risk is in fact an Uninsurable Risk.
- (b) If both parties agree (or if not, it is determined in accordance with Clause 30), that a risk is an Uninsurable Risk and that Uninsurable Risk occurs, the parties must meet further to discuss how the risk should be managed.
- (c) On the occurrence of an Uninsurable Risk, the State must (at the State's option) either:
 - (i) indemnify Project Co against any Liability in connection with the Uninsurable Risk, up to an amount equal to the insurance proceeds that would have been payable had the relevant risk not been an Uninsurable Risk, or, if the Insurance had never been available the

amount agreed by the parties to cover that loss or damage or if no agreement, determined under Clause 30.1; or

- (ii) where the occurrence of the Uninsurable Risk has resulted in the loss of the Works or the New Car Park or a substantial part of the Works or the New Car Park due to destruction or damage, immediately terminate this Agreement by notice to Project Co,

unless another arrangement has been agreed between the parties in accordance with Clause 24.11(b).

- (d) If the State elects to terminate this Agreement in accordance with Clause 24.11(c)(ii):
 - (i) this Agreement will terminate on the date stated in the State's notice; and
 - (ii) the State will pay to Project Co the Force Majeure Termination Amount.

24.12 Review of Uninsurable Risks and Force Majeure Events

Project Co must be vigilant in reviewing the insurance market generally, to ascertain whether an Uninsurable Risk or a Force Majeure Event have become insurable, and in any event must require its insurance brokers to test the market and determine whether, and if so what, insurance terms as to both premium and coverage are available in respect of that risk, from Reputable Insurers, at intervals of not more than 12 Months. If upon such review it is found that the risk is no longer uninsurable, then Project Co will promptly procure the insurance in respect of that risk in accordance with this Clause 24.

24.13 No representation

Nothing in this Clause 24 will be taken to imply that the Insurances (including any deductibles) are sufficient or appropriate. Project Co must make its own investigations in connection with these matters and is not entitled to make any Claim against the State based on the Insurances.

25. Compliance with Laws

25.1 Authorisations

Project Co must obtain and maintain all Authorisations in connection with the Project (including all conditions of such Authorisations).

25.2 Compliance with Laws

- (a) Project Co must comply with and ensure that all elements of the Project comply with:
 - (i) all applicable Laws; and
 - (ii) if applicable, the Code of Practice for the Building and Construction Industry in Western Australia.
- (b) Project Co must:
 - (i) give all notices and pay all fees and other amounts required to be paid in connection with delivering the Project; and

- (ii) give the State copies of all documents (including Authorisations and other notices) issued to it in connection with the Project by any Authority.
- (c) Project Co must provide all information and assistance reasonably required by the State in order for the State to discharge any obligation it has in accordance with any Law or Authorisation in connection with the Project.

26. Representations and warranties

26.1 Corporate representations

Project Co represents and agrees that:

- (a) **(Project Documents)**: the execution, delivery and performance of 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;
- (b) **(valid and legally binding)**: each Project Document to which it is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
- (c) **(not trustee)**: it is not the trustee or Responsible Entity (as that term is defined in the *Corporations Act 2001* (Cth)) of any trust nor does it hold any property subject to or impressed by any trust, other than the Capella Parking Unit Trust Deed;
- (d) **(no subsidiaries)**: it has no subsidiaries, other than Capella Parking Finance Co Pty Ltd;
- (e) **(no tax consolidation)**: it is not part of any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth), except with the consent of the State;
- (f) **(no other trade)**: it has not traded since its incorporation, other than for the purposes of entering into the Project Documents and delivering the Project and has no Liabilities other than those that have arisen in connection with entering into the Project Documents; and
- (g) **(no material financial change)**: there has been no material change in the financial condition of Project Co (since its incorporation), and the Equity Investors, the Builder, the Operator or the FM Subcontractor (since the date of their last audited accounts) which would prejudice the ability of Project Co to perform its obligations in accordance with the Project Documents.

26.2 Project Co's representations

Project Co represents and agrees that it:

- (a) **(informed itself)**: has informed itself as to the nature of the Project;
- (b) **(assessed risks)**: has assessed the risks which it is assuming in accordance with the State Project Documents;
- (c) **(Land Conditions)**: has examined the Construction Areas, the Operating Areas and their surroundings and has done everything possible to inform itself sufficiently as to access to those areas and the Land Conditions which may affect delivery of the Project;

- (d) **(own investigations)**: enters into this Agreement based on its own investigations, interpretations, deductions, information and determinations; and
- (e) **(resources and expertise)**: has the resources and expertise required to perform the obligations imposed on Project Co in accordance with this Agreement including to deliver the Project in accordance with this Agreement.

26.3 Disclosed Information

- (a) Project Co agrees that prior to the Date of this Agreement it has done everything that would be expected of a prudent, competent and experienced contractor, service provider and operator in assessing the risks that it is assuming in accordance with this Agreement, in particular:
 - (i) the nature of the Reserve as a medical precinct; and
 - (ii) the demand for new car parking facilities at the Reserve.
- (b) Project Co represents and agrees that it did not rely upon any Disclosed Information or any other information or the adequacy, accuracy, suitability or completeness of the Disclosed Information or any other information for the purposes of entering into this Agreement and the other State Project Documents.
- (c) Project Co agrees that:
 - (i) **(collateral warranty)**: it has the benefit of a collateral warranty from Sinclair Knight Merz Consulting Pty Ltd and Coffey Goetechnics in connection with certain Information Reports;
 - (ii) **(no representation)**: the State and State Associates have not made and make no representation, and give no warranty or guarantee in connection with any information, data and documents (including the Information Reports and other Disclosed Information) obtained by the State from investigations carried out by the State or on its behalf by independent consultants;
 - (iii) **(information only)**: the Disclosed Information is provided by the State for information purposes only;
 - (iv) **(other information)**: there may be other information which the State or a State Associate is aware of or has in its possession which may be relevant to the rights and obligations of the parties in accordance with this Agreement which may not have been provided to Project Co or to which no reference has been made;
 - (v) **(intellectual property)**: all Intellectual Property Rights in the Disclosed Information remain the property of the State;
 - (vi) **(no offer)**: the Disclosed Information does not form part of this Agreement or constitute an invitation, offer or recommendation by or on behalf of the State; and
 - (vii) **(third parties)**: if the Disclosed Information was prepared by third parties, the State is a mere conduit in connection with the information contained in that Disclosed Information.
- (d) Project Co will not make any Claim against the State for any Liabilities incurred or suffered by Project Co or any Project Co Associate in connection with:

- (i) any inadequacy, inaccuracy or incompleteness in any of the Disclosed Information;
- (ii) the provision of, or the purported reliance upon, or use of, the Disclosed Information by Project Co or any Project Co Associate; or
- (iii) a failure by the State or State Associate to provide any other information, data or documents to Project Co.

26.4 Repetition of representations and warranties

Each representation and warranty contained in this Agreement:

- (a) is made on the Date of this Agreement; and
- (b) the representations and warranties contained in Clauses 26.1 and 26.2(e) will be deemed to be repeated each day during the Term,

with reference to the facts and circumstances then subsisting.

26.5 Reliance on representations and warranties

Project Co agrees that the State has relied on the representations and warranties of Project Co set out in this Agreement in entering into this Agreement.

27. Default

27.1 Notice of Project Co default

- (a) Project Co must:
 - (i) promptly notify the State upon the occurrence of an Event of Default or other breach of this Agreement; and
 - (ii) immediately take steps to:
 - A. where possible, commence the remedy of; and
 - B. mitigate the effects of the Event of Default or other breach of this Agreement.
- (b) If an Event of Default occurs, the State may give Project Co a notice (**Default Notice**) which contains:
 - (i) details of the Event of Default;
 - (ii) if the Event of Default is capable of being remedied, a date by which Project Co must remedy the Event of Default; and
 - (iii) if the Event of Default is not capable of being remedied, a date by which Project Co must comply with any reasonable requirements of the State in connection with that Event of Default.

27.2 Project Co to comply with Default Notice and provide remedy program

If the State gives a Default Notice to Project Co, then:

- (a) Project Co must comply with the Default Notice;
- (b) unless the relevant Event of Default is a failure to pay money:

- (i) Project Co must give the State a program to either remedy the Event of Default or comply with any reasonable requirements of the State in accordance with the terms of the State's notice which will specify steps to address the underlying cause of the Event of Default and to avoid similar Events of Default occurring in the future;
 - (ii) the parties must consult to develop and agree the remedy program; and
 - (iii) following agreement or determination of the remedy program, Project Co must implement and comply with the remedy program; and
- (c) where the relevant Event of Default is a failure to pay money, Project Co must pay the relevant money within 5 Business Days.

27.3 Requests for extensions to remedy period

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

27.4 When extensions to be given

- (a) Subject to paragraph (b), if Project Co gives a notice in accordance with Clause 27.3(a) and Project Co is and has been diligently pursuing:
 - (i) the remediation of the Event of Default; or
 - (ii) compliance with any reasonable requirements of the State in connection with an Event of Default that is not capable of remedy,

then the time stated in the Default Notice will be extended by such period as the State determines is reasonably required to enable Project Co to either remedy the Event of Default or comply with any reasonable requirements of the State.
- (b) Project Co is not entitled to more than three extensions in connection with the same circumstances constituting an Event of Default.

27.5 Disputes

If Project Co considers that the time stated in the notice given by the State in accordance with Clause 27.4 is not reasonable or there is a failure to agree a remedy program as required by Clause 27.2(b) it:

- (a) may (provided that it is and has either been diligently pursuing the remediation of the Event of Default or compliance with any reasonable requirements of the State) refer the matter for resolution in accordance with Clause 30; and
- (b) whilst the matter is being determined, must continue to diligently pursue either the remediation of the Event of Default or compliance with any reasonable requirements of the State.

28. Step-in by the State

28.1 Right of Step-In

If:

- (a) an Emergency occurs;
- (b) an Immediate Termination Event occurs;
- (c) a State Cure Notice (as that term is defined in the relevant side deed) has been issued by the Builder, the Operator or the FM Subcontractor (as applicable);
- (d) the State or the Delegate is required by Law to act to discharge a statutory power or duty; or
- (e) a Force Majeure Event occurs,

(**Step-in Event**), the State or a nominee of the State may elect to:

- (f) temporarily assume total or partial management and control of the whole or any part of the Works, the Services or the New Car Park;
- (g) access the Construction Areas or the Operating Areas (other than the Operating Areas in connection with the At-Grade Car Parks); and
- (h) take such other steps as are necessary in the reasonable opinion of the State to deliver the Project and minimise the effect of the Step-in Event.

28.2 Suspension of Project Co's obligations

If the State or the Delegate has exercised its step-in rights in accordance with Clause 28.1 or the At-Grade Car Park Management Agreement, Project Co's obligations in accordance with the State Project Documents will be suspended (and the failure by Project Co to perform the suspended obligation will not constitute a breach of this Agreement by Project Co or an Event of Default) for the affected period but only to the extent necessary to enable the State or the Delegate to exercise those step-in rights.

28.3 Payments

Any Liability suffered or incurred by the State or any nominee of the State arising out of or in connection with the exercise by the State of its step-in rights in accordance with Clauses 28.1(a) (if the Emergency is caused by an Event of Default or Immediate Termination Event), 28.1(b) or 28.1(c), will be a debt due and payable from Project Co to the State within 20 Business Days or such other time as agreed between the parties.

28.4 Project Co to assist the State

Project Co must provide the State with all necessary assistance in a timely manner to enable it to exercise its step-in rights in accordance with Clause 28.1 effectively and expeditiously.

28.5 Acknowledgments

Project Co agrees that the State will have no Liability to Project Co, and Project Co will not be entitled to make any Claim against the State in connection with the exercise by the State of its rights in accordance with Clause 28.1 except:

- (a) if the State has acted fraudulently, in bad faith, with wilful misconduct or with gross negligence; or

- (b) to the extent that this Agreement expressly provides otherwise.

28.6 Power of attorney

Project Co irrevocably:

- (a) appoints the State, and the State's nominees from time to time, jointly and severally as Project Co's attorney with full power and authority to exercise the State's rights in accordance with this Clause 28; and
- (b) agrees to ratify and confirm whatever action is taken by the attorney appointed by Project Co.

28.7 Cessation of step-in rights

- (a) The State may, at any time, cease to exercise its rights in accordance with this Clause 28 on 5 Business Days notice to Project Co.
- (b) The State must cease to exercise its step-in rights on 5 Business Days notice to Project Co where the State has exercised its rights in accordance with:
 - (i) Clauses 28.1(a) (if the Emergency is caused by an Event of Default or Immediate Termination Event) or 28.1(b) and the Event of Default or Immediate Termination Event has been remedied; or
 - (ii) Clauses 28.1(c), 28.1(d) or 28.1(e), and the relevant event is remedied or ceases.
- (c) If the State has ceased to exercise its step-in rights in accordance with Clause 28, Project Co must immediately recommence performing any obligations suspended due to the exercise of such step-in rights.

28.8 Variation to number of Parking Bays

If a Step-in Event occurs of the type referred in Clause 28.1(a) (except if the Emergency is caused by an Event of Default or Immediate Termination Event) or Clause 28.1(d) and the number of Parking Bays available to Project Co is varied in the manner specified in Clause 21.6 then Project Co is entitled to submit a Claim for compensation in accordance with Clause 0 (Variations to the Number of Parking Bays).

29. Termination

29.1 Termination for convenience

Subject to Clause 29.5, the State may, at any time, terminate this Agreement at its convenience by giving Project Co not less than 60 Business Days notice.

29.2 Termination for Force Majeure

- (a) Subject to Clause 29.5 and paragraph (c), if a Force Majeure Termination Event occurs, then either party may terminate this Agreement by giving notice to the other party.
- (b) The termination of this Agreement for a Force Majeure Termination Event will take effect upon the date stated in the notice given in accordance with paragraph (a).
- (c) Project Co may not terminate this Agreement for a Force Majeure Termination Event for the period Project Co is able to recover under any Insurances that it is required to procure in accordance with this Agreement for any Liability suffered

as a consequence of the relevant Force Majeure Termination Event or would have been able to recover had it effected and maintained such Insurances in accordance with this Agreement.

29.3 Termination for Event of Default

- (a) Subject to the Finance Side Deed, the State may terminate this Agreement by giving Project Co a notice if any of the following events occurs:
 - (i) Project Co fails to remedy an Event of Default within the period set out in the Default Notice (as extended, if at all, in accordance with Clause 27.4); or
 - (ii) if an Event of Default is not capable of remedy, Project Co fails to diligently comply with any reasonable requirements of the State to overcome the consequences of the Event of Default within the time stated in the notice given by the State in accordance with Clause 27.1 (as extended in accordance with Clause 27.4).
- (b) Termination of this Agreement for an Event of Default will take effect upon the date stated in the notice given by the State in accordance with paragraph (a).

29.4 Termination for Immediate Termination Event

- (a) Subject to the Finance Side Deed, the State may terminate this Agreement immediately by notice and without granting Project Co any cure period if an Immediate Termination Event occurs.
- (b) Termination of this Agreement for an Immediate Termination Event will take effect upon the date stated in the notice given by the State to Project Co in accordance with paragraph (a).

29.5 Payments on termination

If this Agreement is terminated by the State in accordance with Clauses 29.1, 29.2, 29.3 or 29.4, the State must pay to Project Co:

- (a) for termination for convenience, the Voluntary Termination Amount;
- (b) for termination for a Force Majeure Termination Event, the Force Majeure Termination Amount; and
- (c) for termination for an Immediate Termination Event or Event of Default, the Default Termination Amount,

in accordance with Schedule 15 (Termination Amounts).

29.6 Power of attorney

Project Co irrevocably appoints the State and its nominees as notified from time to time, jointly and severally as Project Co's attorney with full power and authority to carry out Project Co's obligations in accordance with this Clause 29 to the extent that Project Co fails to comply with its obligations under this Clause 29.

29.7 Assistance

Project Co will use its best endeavours to assist the State in the exercise of the State's rights in accordance with this Clause 29.

29.8 Waiver

If the State terminates this Agreement in accordance with its terms, then Project Co's only entitlement will be in connection with its rights (if any) in accordance with Clause 29.5.

30. Dispute resolution

30.1 Disputes

- (a) If a dispute arises between the parties in connection with any fact, matter or thing in connection with this Agreement (**Dispute**), including any dispute in connection with a determination of the Independent Certifier, the Dispute will be resolved in accordance with this Clause 30.
- (b) If there is a Dispute, then a party may deliver to the other party a notice of dispute which sets out the party's contentions including any relevant legal basis of claim (**Notice of Dispute**).
- (c) Despite the existence of a Dispute or the referral of the Dispute for resolution in accordance with this Clause 30 each party must continue to comply with its obligations in accordance with this Agreement.
- (d) Subject to Clause 30.4, the parties agree that unless and until a party has complied with the requirements of this Clause 30, a party may not commence any court proceedings in connection with any Dispute except if the party seeks urgent interlocutory, injunctive or declaratory relief.
- (e) If there is a Dispute under this Agreement which also raises a Dispute as to the same matter under the At-Grade Car Parks Management Agreement the parties agree that that parties to the Dispute may be joined for the purpose of resolving the matter of the Dispute.

30.2 Consideration by Management Team

If a Notice of Dispute has been delivered in accordance with Clause 30.1(b), the Management Team must within 5 Business Days of the delivery of the Notice of Dispute meet, give due consideration to the submissions by the parties in connection with the Dispute and attempt in good faith to:

- (a) assist the parties to resolve the Dispute; or
- (b) agree that the Dispute be referred to an Independent Expert in accordance with Clause 30.3.

30.3 Independent Expert

- (a) (**Referral to Independent Expert**): Disputes that arise between the parties in connection with Clauses 12 (other than if paragraph (c) applies), 15, 18.5 19.2(e), 21, 22, 30.2(b) and 34.4 will be referred to an Independent Expert for resolution in accordance with this Agreement.
- (b) (**Agreement**): If this Agreement expressly provides that a Dispute will be referred for determination by an Independent Expert, then Clause 30.2 will not apply and within 5 Business Days of the delivery of the Notice of Dispute in accordance with Clause 30.1(b) the parties must agree on an Independent Expert to determine the Dispute.
- (c) (**Independent Expert**): For the purpose of paragraph (b) the parties may appoint the Independent Certifier, or some other person, to act as the Independent Expert.

- (d) **(Failure to agree on Independent Expert):** If the parties fail to agree on the Independent Expert within the time referred to in paragraph (b), then an Independent Expert will be nominated by the Chairperson of the Institute of Arbitrators and Mediators of Australia.
- (e) **(Agreement):** The agreed or nominated Independent Expert must execute an agreement with the parties within 10 Business Days after the agreement on, or nomination of, the Independent Expert in accordance with paragraphs (c) or (d) (as applicable).
- (f) **(Referral):** If the Independent Expert so agreed or nominated executes an agreement in accordance with paragraph (e), then the Dispute must be referred to that Independent Expert for determination.
- (g) **(New independent expert):** If the Independent Expert agreed or nominated does not, or either party does not, execute an agreement in accordance with paragraph (e), then the parties must agree or nominate another independent expert in accordance with this Clause 30.3 (but the parties will only have the opportunity to agree or nominate one further Independent Expert after the initial Independent Expert).
- (h) **(Basis for determination):** The Independent Expert will make its determination based upon:
 - (i) the Notice of Dispute;
 - (ii) the submissions provided by the parties which, unless the Independent Expert extends the time for delivery, must be delivered within 5 Business Days of the Independent Expert signing the agreement referred to in paragraph (e); and
 - (iii) any further information provided by the parties in accordance with any request by the Independent Expert for further submissions, documents or information from either or both parties.
- (i) **(Conference):** After the Dispute has been referred to the Independent Expert, the Independent Expert may call and conduct a conference, or any number of conferences, as the Independent Expert sees fit, between the parties, but will give the parties reasonable notice of the matters to be addressed at any such conference.
- (j) **(Representation):** The parties may be legally represented at any such conference.
- (k) **(Privacy):**
 - (i) Subject to paragraph (k)(ii), all conferences will be held in private.
 - (ii) Representatives of the Key Subcontractors will be permitted to attend all conferences, hearings, negotiations and other discussions between the parties in connection with the Dispute on reasonable notice, where the Dispute impacts upon the delivery of the Project.
- (l) **(Visit):** The Independent Expert may visit the Construction Areas, the Operating Areas or the New Car Park (as applicable), and the parties will facilitate the Independent Expert's access to any of those areas.
- (m) **(Timing):** The Independent Expert must make a determination in connection with the Dispute by the earliest of:

- (i) within 10 Business Days after the last of the steps set out in paragraphs (a) to (l); or
 - (ii) within 30 Business Days after receipt of submissions in accordance with paragraph (h)(ii).
- (n) **(Not arbitrator)**: The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.
- (o) **(Final and binding)**: The determination of the Independent Expert will be final and binding on the parties, unless within 15 Business Days of the determination, a party notifies the other party that it intends to commence litigation to appeal the determination.
- (p) **(Mistake)**: The Independent Expert may correct the determination by notice to the parties where its determination contains:
 - (i) a clerical mistake or an error arising from an accidental slip or omission; or
 - (ii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter.
- (q) **(Costs)**: The cost of the Independent Expert will be borne equally by each of the parties to the Dispute unless the determination is made against the party who issued the Notice of Dispute, in which case the Independent Expert may determine that that party will bear all or a greater proportion of the Independent Expert's costs in connection with that Dispute.

30.4 Litigation

Either party may commence litigation in connection with a Dispute if and only if a Notice of Dispute has been delivered in accordance with Clause 30.1(b) and:

- (a) Clause 30.2 applies and within 20 Business Days after the delivery of the Notice of Dispute in accordance with Clause 30.1(b) the Management Team has not:
 - (i) resolved the Dispute; or
 - (ii) agreed that the Dispute be referred to an Independent Expert in accordance with Clause 30.3;
- (b) the Dispute has been referred for determination by an Independent Expert in accordance with Clause 30.3 and:
 - (i) the agreed Independent Expert and any new Independent Expert agreed in accordance with Clause 30.3(g) did not execute an agreement in accordance with Clause 30.3(e);
 - (ii) the Independent Expert failed to make a determination in accordance with Clause 30.3, including within the time set out in Clause 30.3(m); or
 - (iii) the Independent Expert made a determination and, within 15 Business Days of the determination, a party has notified the other party that it intends to commence litigation to appeal the determination; or
 - (iv) either party has failed to comply with any of the requirements of this Clause 30.

31. Assignment and ownership

31.1 Assignment by Project Co

Except as expressly permitted in accordance with this Agreement, the Finance Side Deed or the State Deed of Charge, Project Co must not assign, mortgage, novate, charge or otherwise encumber the Project Documents, without the prior consent of the State and on such terms and conditions as are determined by the State.

31.2 Financier's Securities

Project Co may, after execution of the Finance Side Deed, mortgage or charge its interest in accordance with the Project Documents to secure its obligations to any Financier (or the trustee or agent for any Financier) in accordance with the Financing Documents, if, and for so long as, the Financier (or the trustee or agent for any Financier) is a party to the Finance Side Deed.

31.3 Restrictions on sale, lease and parting with possession

Project Co must not:

- (a) create or allow to exist any security interest over; or
- (b) lease, license, transfer, sell, dispose of, part with possession of, or otherwise deal with,

the whole or any part of the Construction Areas, Operating Areas or the New Car Park, except as expressly permitted in accordance with this Agreement, the Finance Side Deed or the Financing Documents and, in connection with access to those areas, the lease and licence rights permitted in accordance with the Sub-Sublease and the At-Grade Car Parks Management Agreement or as otherwise consented to by the State.

31.4 Assignment by the State

- (a) The State may not sell, transfer or assign or otherwise dispose of its interest in the Project Documents without the prior consent of Project Co.
- (b) Project Co must give its consent in accordance with paragraph (a) if:
 - (i) it has been provided with details of the proposed transferee and the terms and conditions of the proposed transfer;
 - (ii) the proposed transferee is a Governmental Agency (including any Minister) which is an agent of, or the obligations of which are supported by, the Crown in the right of the State of Western Australia; and
 - (iii) the proposed transferee has agreed to be bound by the relevant State Project Documents.

31.5 Initial status of ownership

Project Co represents and warrants that, as at Financial Close, Project Co will be indirectly and beneficially owned and Controlled as set out below:

[not disclosed]

31.6 Change in Control

- (a) **[not disclosed]**
- (b) **[not disclosed]**
- (c) **(Consent not required):** The consent of the State in accordance with paragraph **Error! Reference source not found.** or paragraph (b) will not be required for:
 - (i) any sale, transfer or other disposal by Lend Lease Corporation Limited (or a Related Body Corporate of Lend Lease Corporation Limited) after Financial Close of its interest (whether directly or indirectly) in:
 - A. Project Co or the Capella Parking Unit Trust;
 - B. any company that holds shares in Project Co or the Capella Parking Unit Trust,to:
 - C. a Related Body Corporate of Lend Lease Corporation Limited; or
 - D. any fund, scheme, entity or trust which is substantially owned or managed by Lend Lease Corporation Limited or a Related Body Corporate of Lend Lease Corporation Limited.
- (d) **(Notice):** Any notice seeking the consent of the State to a Change in Control must include:
 - (i) the identity and address of each proposed Controller;
 - (ii) the extent and nature of the proposed Change in Control; and
 - (iii) all other information necessary for the State to determine:
 - A. whether to consent to the Change in Control of the Consortium Entity; or
 - B. the Probity Investigations (if any) the State wants to undertake.
- (e) **(State response):**

The State must, within 10 Business Days, notify Project Co whether:

 - (i) the State consents to the proposed Change in Control of the Consortium Entity;
 - (ii) the State does not consent to the proposed Change in Control of the Consortium Entity (and the reasons for this); or
 - (iii) the State needs to conduct a Probity Investigation in connection with the Change in Control prior to making a determination whether or not to consent to the Change in Control.
- (f) **(Factors to consider):**

It will be reasonable for the State to withhold consent to a Change in Control if:

- (i) the Controller is not solvent or reputable;
- (ii) there has been a Change in Control of the same entity within two years;
- (iii) the Controller has an interest which conflicts in a material way with the interests of the State;
- (iv) the Controller does not have a sufficient level of financial, managerial and technical capacity to deliver the Project;
- (v) the proposed change is against the public interest;
- (vi) the proposed change could lead to the occurrence of a Probity Event;
or
- (vii) the proposed change would increase the Liabilities of the State or State Associates.

31.7 Change in Management

- (a) An Event of Default will occur if a Change in Management of Project Co occurs and as a result Project Co no longer has the same or better management skills available to it as it had prior to the Change in Management.
- (b) For the purpose of this Clause a “**Change in Management**” means a change in the senior employees of Project Co who carry out the management functions of Project Co or the management of any other entity that provides management functions to Project Co.

31.8 *[not disclosed]*

32. Business Activities

32.1 Restrictions on business

Subject to Clause 20.1, Project Co must not conduct any business other than the Project and the carrying out of its obligations and the exercise of its rights in accordance with the Project Documents without the State's prior consent.

32.2 Restrictions on acquisition of property and liabilities being incurred

Project Co must not acquire or hold any property or incur any Liability other than for the purposes of the Project without the State's prior consent.

32.3 Tax consolidation

Project Co must not engage in any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) without the State's prior consent.

32.4 Plant and equipment

Project Co must ensure that all of its plant, systems, hardware, software and other assets and property comprised or used in the delivery of the Project will be either:

- (a) owned by Project Co; or
- (b) the subject of an agreement (such as a lease or hire purchase agreement):

- (i) in accordance with which it has the right to acquire ownership of them for nominal cost at the end of the term of the agreement;
- (ii) which includes a right for it to assign and novate its rights and obligations in accordance with the agreement to the State (or its nominee) prior to the end of the term of that agreement or on termination of this Agreement;
- (iii) which will not terminate, be suspended or impose more onerous terms on Project Co or the State if the State was to exercise any of its rights in accordance with the Project Documents; and
- (iv) which allows security to be taken over it.

32.5 Notice of Probity Event

Project Co must give notice to the State immediately upon becoming aware that a Probity Event has occurred or is likely to occur.

32.6 Meeting

Upon receipt of a notice in accordance with Clause 32.5 or otherwise upon the occurrence of a Probity Event:

- (a) the State and Project Co must meet within 10 Business Days to agree to a course of action that will remedy the Probity Event (including conducting a Probity Investigation); and
- (b) Project Co must take all necessary steps in accordance with any agreement in accordance with paragraph (a) to remedy the Probity Event.

32.7 Failure to agree

If the State and Project Co fail to meet or agree to a course of action in accordance with Clause 32.6, Project Co must take any action required by the State to remedy the Probity Event (including conducting a Probity Investigation).

32.8 Consents required for Probity Investigation

Project Co must procure all relevant consents from any persons in connection with which the State requires Probity Investigations to be conducted.

32.9 Costs of Probity Investigation

Project Co:

- (a) must bear the costs reasonably incurred by the State in carrying out the Probity Investigation; and
- (b) will not be liable for any other Probity Investigation required by the State.

32.10 No appointment without consent

Project Co must not appoint any Project Co Associate to a role in connection with the Project if the State forms the view acting reasonably that such an appointment will lead to a Probity Event.

33. Project Information

33.1 Records

- (a) **(Make available to State):** Project Co must upon receipt of a request from the State, make the Records available to the State within 2 Business Days of receiving the State's request.
- (b) **(Financial information):** To the extent the Records comprise financial information, Project Co must prepare all Records in accordance with established accounting practices and procedures.
- (c) **(Legal professional privilege):** The requirement in paragraph (a) does not apply to Records which are the subject of legal professional privilege.
- (d) **(Audit):** The State and any auditor appointed by the State may audit any Records requested by the State and Project Co must provide all reasonable assistance to facilitate such audit.
- (e) **(Accounts audit):** Project Co must have its accounts audited annually on both an unconsolidated basis and on a consolidated basis (to the extent that that Project Co is part of a consolidated entity, within the meaning of the *Corporations Act 2001* (Cth)).
- (f) **(Audited financial statements):** As soon as practicable (and in any event not later than 120 days) after the close of each Financial Year, Project Co must give to the State certified copies of the consolidated (if applicable) and unconsolidated audited statements of financial position and statement of financial performance of Project Co for the previous Financial Year, and if requested by the State, the Builder (during the D&C Phase), and the Operator and the FM Subcontractor (during the Operating Phase) for the previous Financial Year.
- (g) **(Cashflow and profit and loss statements):** Not later than 30 days after the end of each Quarter, Project Co must give to the State certified copies of its cashflow and profit and loss statements.
- (h) **(Maintenance of Records):** Project Co must maintain all Records for a period of not less than 7 years from the date that the Record was created.
- (i) **(State Records Act):** Project Co will comply with the *State Records Act 2000* (WA) to the extent that it applies to any Records.

34. Model Variation Events

34.1 Status of the Financial Model

The State must not be adversely affected by any discrepancies, errors or omissions in the Financial Model, or by the fact that it may not reflect the actual financial performance or the projected performance or budgets of the Project or Project Co.

34.2 Varying the Financial Model

The Financial Model will be varied in accordance with this Clause 34.2, on the occurrence of any of the following events (each a **"Model Variation Event"**):

- (a) a Refinancing;
- (b) a Change Compensation Event;

- (c) any other event that Project Co and the State agree to be a Model Variation Event; and
- (d) any event which the State reasonably agrees has resulted in, or is likely to result in, the amount of Actual Debt being different from the amount forecast in the then current Financial Model to be owing to the Financiers.

34.3 Principles for variations to Financial Model

If a Model Variation Event occurs, the Financial Model will be varied by only taking into account the amounts agreed between the State and Project Co, or as determined in accordance with Clause 30.

34.4 Procedures for variations to Financial Model

- (a) Any variation to the Financial Model to take account of a Model Variation Event must be made as follows:
 - (i) Project Co must propose the variation by notice to the State giving full details of the assumptions and calculations used;
 - (ii) the State will review the varied Financial Model in accordance with Schedule 3 (Review Procedures); and
 - (iii) any Dispute about the variation will be referred to an Independent Expert for resolution in accordance with Clause 30.3; and
- (b) once the variation to the Financial Model is agreed or is determined, Project Co must amend the Financial Model accordingly.

34.5 Access to information

Project Co must provide the State and any nominee of the State with full access to electronic copies of the calculations required to vary the Financial Model for a Model Variation Event, including reasonable access to Project Co's financial modeller or the financial modeller of any Project Co Associate with the ability to access that information, and relevant passwords or other access information.

34.6 Auditing the Financial Model

- (a) The State may at any time appoint a model auditor to audit the Financial Model and:
 - (i) the results of the audit will be disclosed to both the State and Project Co; and
 - (ii) to the extent any discrepancies, errors or omissions are revealed in the audit by the State, subject to Clause 30, Project Co must promptly correct the Financial Model.
- (b) If an audit by the State results in a material correction to the Financial Model, Project Co must pay the reasonable costs of the State in conducting the audit, but if not, the State will bear the costs of the audit.

35. Confidentiality

35.1 Obligations

- (a) **(Confidentiality obligations):** Subject to paragraphs (b) and (c), Project Co must ensure that Project Co's Associates and any prospective financier or equity

investor keep confidential the State Project Documents, all Records and all Disclosed Information (**Confidential Information**). Subject to paragraphs (e) and (f), the State must keep confidential, and must ensure that the State Associates keep confidential, the Confidential Information.

- (b) **(Permitted disclosure):** Project Co is not obliged to keep confidential any information:
 - (i) which is in the public domain through no default of Project Co; or
 - (ii) the disclosure of which is:
 - A. required by Law, including in accordance with the *Freedom of Information Act 1992 (WA)*;
 - B. required by a relevant stock exchange;
 - C. consented to by the State;
 - D. to the Delegate or a Delegate's Associate in accordance with the At-Grade Car Parks Management Agreement; or
 - E. made to a court in the course of proceedings to which Project Co is a party.
- (c) **(Disclosure to Project Co's Associates):** Without limiting Project Co's obligations in accordance with paragraph (a), Project Co may disclose Confidential Information to:
 - (i) Project Co's Associates to the extent necessary for the purpose of undertaking the Project; or
 - (ii) subject to paragraph (d), any prospective financier or equity investor of the Project.
- (d) **(No disclosure):** Project Co must not disclose any Confidential Information to any prospective financier or equity investor of the Project until, if required by the State, the State has carried out any Probity Investigations in connection with the relevant entities.
- (e) **(State may disclose):** The State may at any time disclose the Confidential Information and any other information in connection with the Project:
 - (i) to any State department or Minister;
 - (ii) to any State Associate to the extent necessary for the purpose of the Project;
 - (iii) in accordance with all Laws;
 - (iv) in the course of official duties by the Minister for 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), the *Ombudsman Act 1976* (Cth) or the *Parliamentary Commissioner 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 to by the parties as confidential as set out in Schedule 22 (except with the prior written consent of Project Co).

35.2 Public announcements

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

36. Intellectual Property

36.1 Definitions

For the purposes of this Clause 36:

- (a) **"Contract Material"** means:
 - (i) the D&C Documents and the Operating Manual; and
 - (ii) all other programs, documents, materials or information prepared by or for or on behalf of Project Co (for the avoidance of doubt, this material does not include EPIC); and
- (b) **"Moral Rights"** has the meaning given to it in the *Copyright Act 1968* (Cth).

36.2 Intellectual property licence

- (a) Project Co:
 - (i) grants to the State and any nominee of the State;
 - (ii) must ensure that the person legally entitled to do so, grants to the State and any nominee of the State; and
 - (iii) must do all things reasonably necessary to give effect to the grant to the State and any nominee of the State of,

a non-exclusive, royalty-free, irrevocable and transferable licence (to arise immediately upon the creation of any relevant material and including a right to sub-licence) to use, exercise, reproduce, communicate, adapt and modify all the Intellectual Property Rights in or used in the Contract Material (whether owned by Project Co or not) for any purpose in connection with the Project and any other project undertaken on or in the vicinity of the Reserve.
- (b) Notwithstanding the terms of this Clause 36.2, to the extent that any item of Contract Material is commercially available off-the-shelf third party software, Project Co must:

- (i) if Project Co is legally able to do so, licence that item of Contract Material to the State and the State Associates on the terms of the licence granted to Project Co by the third party licensor; or
- (ii) if Project Co is not legally able to licence that item of Contract Material to the State without the consent of the licensor, use all reasonable endeavours to procure the consent of the licensor to grant such a licence to the State and the State Associates.
- (c) If Project Co is, or reasonably considers it will be, after having used its reasonable endeavours, unable to grant to the State the rights required in accordance with Clause 36.2(b), it must promptly notify the State of that failure and the State and Project Co will negotiate in good faith with respect to Project Co obtaining for the State's benefit, such rights or arrangements as the State reasonably requires.
- (d) If Project Co and the State are unable to obtain such rights for the State, Project Co will continue to use its reasonable endeavours to work with the State in order to allow the State to use or take full benefit of the third party software.

36.3 Moral rights

- (a) Project Co warrants that it has been given or has the benefit of a consent from every individual involved in the delivery of the Project who has or may have in the future any rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed and rights of a similar nature conferred by statute that may exist, or may come to exist, anywhere in the world (**Moral Rights**) relating to the Project or anything else provided by Project Co as part of or in connection with the Project (**Copyright Works**).
- (b) Project Co warrants that each consent referred to in paragraph (a):
 - (i) allows the State and any nominee of the State to do any act or omission (whether before or after the date of the consent) in connection with the exercise by the State of its rights of ownership or use of the Copyright Works, which may (but for the consent) infringe the individual's Moral Rights; and
 - (ii) satisfies the requirements for consent set out in the *Copyright Act 1968* (Cth).
- (c) If requested by the State, Project Co must provide to the State copies of the consents referred to in this Clause 36.3 as soon as practicable and in any case within 30 Business Days of receipt of a request from the State.

36.4 Project Co acknowledgements

Project Co agrees that:

- (a) it will not breach any Intellectual Property Rights or Moral Rights of any person in delivering the Project;
- (b) it owns or has a licence in all Intellectual Property Rights in the Contract Material and, except if the provisions of a licence of third party software to which Clause 36.2 refers prohibit it from doing so, is able to grant the assignments and licences contemplated by this Agreement;
- (c) neither the State or any sub-licensee of the State or a State Associate is liable to pay any third party any licence or other fee in connection with the use of the Contract Material licensed to the State in accordance with Clause 36.2; and

- (d) the use by the State or the nominee of the State of the Contract Material licensed or sublicensed to the State in accordance with Clause 36.2, in accordance with this Agreement and the terms of the relevant licence will not infringe any Intellectual Property Rights or Moral Rights or breach any Laws.

37. Notices

37.1 General Notices

- (a) **(Form of notices):** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this Agreement (in this Clause 37.1, "**Notices**"):
 - (i) must be in writing; and
 - (ii) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party.
- (b) **(Procedure for sending notices):** All Notices must be:
 - (i) delivered or posted by prepaid post to the address; or
 - (ii) sent by email in the form of a .pdf file letter (or such other form agreed by the State) to the email address,of the addressee set out in Schedule 1 (Contract Particulars) (or as otherwise notified by that party to each other party from time to time).
- (c) **(Date of receipt):** Subject to paragraph (d), a Notice is taken to be received by the addressee:
 - (i) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia;
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient stated in Schedule 1 (Contract Particulars); and
 - (iii) in the case of delivery by hand, on delivery.
- (d) **(Next Business Day):** If the communication is taken to be received on a day which is not a Business Day or after 5.00 pm, it is taken to be received at 9.00am on the next Business Day.
- (e) **(Notices sent by email):** In connection with Notices sent by email:
 - (i) only the letter in .pdf format attached to the email and any attachments to such letter which are referred to in the letter, will form part of the communication in accordance with this Clause 37.1. Any text in the body of the email or the subject line will not form part of the Notice; and
 - (ii) Project Co must ensure that, in connection with any communications in accordance with or in connection with this Agreement:
 - A. its firewall and/or mail server (as applicable):

- 1) allows messages of up to 14 MB to be received;
 - 2) does not trap any messages in the spam filter which have been sent from any State domain; and
 - 3) automatically sends a receipt notification to the sender upon receipt of a message; and
- B. its systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

37.2 Notice of Claims

Except if this Agreement expressly sets out the timeframes for the delivery of notices, the State will not be liable upon any Claim by Project Co in connection with this Agreement or the Project unless Project Co gives the State:

- (a) a notice in which Project Co states that it intends to submit a Claim and the event on which the Claim will be based and which must be given to the State no later than 15 Business Days from the earlier of when Project Co first became aware or ought reasonably to have become aware of the events on which the Claim is based; and
- (b) a Claim within 20 Business Days of giving notice in accordance with paragraph (a), which must include:
 - (i) detailed particulars concerning the events on which the Claim is based;
 - (ii) the legal basis for the Claim whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;
 - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
 - (iv) details of the amount claimed and how it has been calculated.

37.3 Continuing events

If the events upon which the Claim in accordance with Clause 37.2(b) is based or the consequences of the events are continuing, Project Co must continue to give information required by Clause 37.2(b) every 20 Business Days after the Claim in accordance with Clause 37.2(b) was submitted, until 21 Business Days after the events or consequences have ceased.

38. Taxes

38.1 GST

- (a) **(Construction):** In this Clause 38.1:
 - (i) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law 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) **(Nominated entity):** The State confirms that the entity nominated to be responsible for the administration of the State's GST reporting obligations **(Nominated Entity)** is registered for GST as at the Date of this Agreement. The parties acknowledge that the Nominated Entity will be responsible for administering the obligations in accordance with this Clause on behalf of the State.
- (c) **(Additional amount):** Unless otherwise expressly stated, and except in connection with a supply to which Clause 38.1(d) applies, all prices or other sums payable or consideration to be provided in accordance with this Agreement are exclusive of GST.
- (d) **(Non-monetary consideration):** Subject to Clause 38.1(i), if some or all of the consideration for a taxable supply made by a party in connection with this Agreement is not expressed as an amount of money **(Non Monetary Consideration)** and also constitutes a taxable supply by the recipient, the parties agree that:
 - (i) the Non Monetary Consideration is GST inclusive and will not be increased on account of GST under Clause 38.1(e); and
 - (ii) Project Co will, after consultation with and the approval of the State (such approval not to be unreasonably withheld or delayed), instruct a suitably qualified professional valuer to determine, in accordance with the principles set out by the Commissioner of Taxation in GST Ruling GSTR 2001/6 or any replacement ruling, the GST inclusive market value of any Non Monetary Consideration provided by the supplier and the recipient; and
 - (iii) Project Co will notify the State of the amount determined by the valuer within 15 days of the end of the month in which this Agreement is entered.
- (e) **(Payment of GST):**
 - (i) Subject to Clause 38.1(d)(i), if GST is payable on any supply made by a party (Supplier) under or in connection with this Agreement, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.
 - (ii) The recipient will pay the amount referred to in Clause 38.1(e)(i) in addition to and at the same time that the consideration for the supply is to be provided in accordance with this Agreement.
- (f) **(Gross-up of non-monetary consideration supplies):** If, at any time a supplier has a GST liability for a tax period in connection with a taxable supply to which Clause 38.1(d) applies **(Non Monetary Consideration Supplies)** that exceeds the input tax credit to which the supplier is entitled in respect of its acquisition of the recipient's taxable supplies **(Acquisition)** for that tax period:
 - (i) the consideration for the Non Monetary Consideration Supplies is not GST inclusive and that consideration must be increased on account of GST under Clause 38.1(e);

- (ii) the recipient of the Non Monetary Consideration Supply must pay to the supplier the amount by which that consideration must be increased on account of GST under Clause 38.1(e) less the input tax credit (if any) to which the supplier is entitled in respect of the Acquisitions within 5 Business Days of being requested in writing by the supplier to do so; and
 - (iii) the parties will do all things required, including issuing new tax invoices and adjustments notes (if necessary) to give effect to this Clause 38.1(f).
- (g) **(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 38.1(e) or Clause 38.1(f).
 - (ii) In the case of a supply to which Clause 38.1(d) applies, the Supplier must issue a tax invoice or adjustment note within 20 days of the end of the month in which this Agreement is entered consistent with the valuation referred to in Clause 38.1(d)(ii).
 - (iii) The recipient can withhold payment of any amount payable in accordance with this Clause 38.1 until the Supplier provides a tax invoice or an adjustment note, as appropriate.
- (h) **(Adjustment event):** If an adjustment event arises in connection with a taxable supply made by a Supplier in accordance with this Agreement, the amount payable by the recipient in accordance with this Clause 38.1 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.
- (i) **(Reimbursements):** Where a party is required in accordance with this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
 - (i) the amount of the expense or outgoing less any input tax credits in 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.

38.2 General liability for Taxes

As between the State and Project Co:

- (a) the State bears the risk of, and must pay, all State Taxes assessed on or in connection with the Land or the Sub-Sublease (including any duty in connection with the registration, stamping, delivery or performance of the Sub-Sublease); and
- (b) subject to Clause 38.2(a), Project Co bears the risk of, and must pay, all Taxes incurred or imposed in connection with:
 - (i) the execution, stamping, delivery and performance of any Project Document and each transaction effected or made in accordance with or in connection with it;

- (ii) any amendment to, or any consent, approval, waiver, release, surrender or discharge of or in accordance with any Project Document;
- (iii) the Project,

except as provided in Clause 38.1.

39. General

39.1 Interest

- (a) If a party fails to pay any amount payable by that party to the other party within the time required in accordance with this Agreement, then it must pay interest on that amount in accordance with Clause 39.1(b).
- (b) Interest is:
 - (i) payable from the due date until payment is made before and, as an additional and independent obligation, after any judgment or other thing into which the Liability to pay the money payable becomes merged;
 - (ii) calculated on daily balances at the Default Rate; and
 - (iii) capitalised Monthly.
- (c) The amount calculated in accordance with paragraph (b) will be a party's sole entitlement to interest including damages for loss of use of, or the cost of borrowing, money.

39.2 Set-off

- (a) Without limiting or otherwise affecting the State's rights in accordance with any other provision of this Agreement or at Law, the State may deduct from any monies due and payable to Project Co in accordance with this Agreement any amount due and payable by Project Co to the State (whether in accordance with or relating to this Agreement or any other State Project Documents).
- (b) Project Co must make all payments to the State free from any set-off or counterclaim and without deduction or withholding for or on account of any present or future Tax, unless Project Co is compelled by Law to make such a deduction or withholding.
- (c) If Project Co is compelled by Law to make a deduction or withholding, it must:
 - (i) remit the deducted or withheld amount to the relevant Authority within the time required by Law; and
 - (ii) provide to the State all information and documentation relating to that deduction or withholding, including any information or documentation required to obtain a credit for or repayment of the deducted or withheld amount from an Authority.

39.3 Management of Construction Guidelines

In undertaking the Project, Project Co must comply with the document titled the "*QEII Medical Centre Management of Construction Guidelines*" dated 13 August 2010 as amended from time to time.

39.4 State review of Project Co performance

- (a) **(Review):** The State will from time to time during the Term review Project Co's performance in accordance with this Agreement and prepare a performance report in accordance with the Department of Treasury and Finance's requirements for reviewing the performance of contractors engaged by the State.
- (b) **(Performance report):** The State may provide the performance report to any Governmental Agency.
- (c) **(Liaise with Project Co):** In reviewing and reporting on Project Co's performance, the State will:
 - (i) liaise with Project Co;
 - (ii) notify Project Co of the form of the performance report including the criteria against which Project Co's performance will be assessed;
 - (iii) provide any other information or guidelines to Project Co relevant to the performance review and the preparation of the performance report; and
 - (iv) provide the proposed performance report to Project Co for its review.
- (d) **(Reasonable assistance):** Project Co:
 - (i) must provide all assistance reasonably required by the State in conducting a performance review and preparing a performance report in accordance with this Clause 39.4; and
 - (ii) may provide comments to the State on the proposed performance report.
- (e) **(Comments):** The State will:
 - (i) include any comments provided by Project Co in the completed performance report; or
 - (ii) respond to Project Co in respect of any comments Project Co has on the proposed performance report.

39.5 Priority Start – Building Policy

Project Co must comply and ensure that Project Co's Associates comply with the policy published by the Department of Training and Workforce Development titled "Priority Start – Building" dated 1 March 2010 as amended from time to time.

39.6 Relationship of the parties

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

39.7 State's rights, duties, powers and functions

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

39.8 Reasonable endeavours

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

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

39.9 Entire agreement

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

39.10 Counterparts

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

39.11 Governing law

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

39.12 No waiver

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

39.13 Variations and waivers

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

39.14 Amendments to Project Documents

- (a) This Agreement may only be varied by a deed executed by or on behalf of each party.
- (b) Subject to Clause 39.14(c), Project Co may not (and must ensure that Finance Co does not) without the prior consent of the State (which will not be unreasonably withheld or delayed) at any time:
 - (i) make or permit any amendment to, replacement of or waiver of a provision of;
 - (ii) terminate, surrender, rescind or accept repudiation of;
 - (iii) permit the novation, assignment or substitution of any counterparty's rights, obligation or interest in (other than in respect of any Equity Document, any novation, assignment or substitution of that Equity Document solely due to the sale, transfer or other disposal of equity interests which is permitted pursuant to Clause 31.6 and which does not change any commercial terms of the Equity Documents); or
 - (iv) enter into any agreement or arrangement other than a waiver which affects the operation or interpretation of,any provision of any Project Document to which the State is not a party (other than as a consequence of a Refinancing in which case Clause 22 applies).
- (c) In respect of the Financing Documents, Clause 39.14(b) does not restrict:
 - (i) any waiver necessary to cure or prevent any actual or potential event of default in accordance with any Financing Document provided that Project Co has given that State prior written notice of the waiver; or

- (ii) any other matter set out in paragraphs (f) to (k) of the definition of Refinancing.

39.15 Joint and several liability

If Project Co consists of more than one person, then the rights and obligations of Project Co in accordance with this Agreement are joint and several as between those persons.

39.16 Indemnities

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

39.17 Clauses to survive termination

- (a) All provisions of this Agreement which expressly or by implication from their nature are intended to survive termination, completion or expiration of this Agreement will survive such termination, completion or expiration, including any provision which is in connection with:
 - (i) the State's rights to set-off and to recover money;
 - (ii) confidentiality or privacy;
 - (iii) Intellectual Property Rights;
 - (iv) any obligation to make any Records available to the State;
 - (v) any indemnity, performance bond or other financial security given in accordance with this Agreement;
 - (vi) the State's rights in connection with Handover; or
 - (vii) any right or obligation arising on termination of this Agreement.
- (b) Nothing in this Clause 39.17 prevents any other provision of this Agreement, as a matter of interpretation, also surviving the termination of this Agreement.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this Agreement. All rights and obligations in accordance with this Agreement survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this Agreement.

39.18 Costs and expenses

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

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

39.19 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to each party) required by Law or reasonably requested by another party to give effect to this Agreement.

39.20 Trustee limitation of liability

- (a) Project Co enters into this Agreement 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 Agreement and each other Project Document to which it is expressed to be a party (whether that liability arises under a specific provision of this Agreement 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 39.20 applies despite any other provision of this Agreement or any other Project Document to which it is expressed to be a party (other than Clause 39.21(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 Agreement or any other Project Document which is expressed to be a party.

39.21 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 39.21(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 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.

39.22 Restriction of Funding

If Project Co's or Finance Co's ability to obtain finance in accordance with the Financing Documents is restricted (including as a consequence of the conditions precedent to drawing funds not being satisfied) (**Draw Stop**), then:

- (a) within 2 Business Days of Project Co first becoming aware of, or when Project Co ought to have become aware of, the occurrence of the Draw Stop, Project Co must notify the State of the occurrence of the Draw Stop and provide the State with full details of the circumstances relevant to the occurrence of that Draw Stop;
- (b) within 20 Business Days of Project Co or Finance Co first becoming aware of the occurrence of the Draw Stop, Project Co must:
 - (i) commence, and continue, to diligently pursue to remedy or otherwise overcome the Draw Stop (or where the Draw Stop applies to Finance Co, procure that Finance Co commences and continues to diligently pursue to remedy or otherwise overcome the Draw Stop); and
 - (ii) give to the State a sufficiently detailed plan which specifies
 - A. the actions which Project Co and or Finance Co (as relevant) propose to take to effect, such that Project Co's or Finance Co's ability to obtain finance in accordance with the Financing Documents is no longer adversely restricted (a **Draw Stop Remedy**); and
 - B. the time frame within which the Draw Stop Remedy will be effected, which time frame must not end later than 30 Business Days after Project Co or Finance Co first becomes aware of the occurrence of the Draw Stop (or such longer period as the State agrees in its absolute discretion) (a **Draw Stop Remedy Period**);
- (c) the parties must consult to develop and agree the remedy plan referred to in Clause 39.22(b)(ii);
- (d) following agreement or determination of the remedy plan, Project Co must implement and comply with (and, if the Draw Stop relates to Finance Co, must procure that Finance Co implements and complies with) that remedy plan;
- (e) if there is a failure to agree a remedy plan as required in accordance with Clause 39.22(c):
 - (i) Project Co may (provided that it has been diligently pursuing the remedy of, or to otherwise overcome the Draw Stop (or where the Draw Stop applies to Finance Co, procured that Finance Co commences and continues to diligently pursue to remedy or otherwise overcome the Draw Stop)) refer the matter for resolution in accordance with Clause 30; and
 - (ii) whilst the matter is being determined, Project Co must continue to diligently pursue to remedy or otherwise overcome the Draw Stop (or where the Draw Stop applies to Finance Co, procure that Finance Co commences and continues to diligently pursue to remedy or otherwise overcome the Draw Stop) in accordance with the remedy plan referred to in Clause 39.22(b); and
- (f) if at after the expiry of the Draw Stop Remedy Period for that Draw Stop, Project Co's or Finance Co's ability to obtain finance in accordance with the Financing Documents continues to be restricted, then that Draw Stop will become a "Continuing Draw Stop Event".

40. *[not disclosed]*

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 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:

Signature of Witness

Signature of Attorney

Name of Witness (print)

Name of Attorney (print)

Schedule 1 – Contract Particulars

Schedule 2 – Financial Close Adjustment Protocol

Schedule 3 - Review Procedures

Schedule 4 – Change Compensation Principles

Schedule 5 – Design Development

Schedule 6 – Programming Requirements

Schedule 7 - Completion Criteria

Schedule 8 – Additional Works

Schedule 9 – Insurance

Schedule 10 – Agreed Parking Charges

Schedule 11 – Access and Parking Requirements

Schedule 12 - Revenue Share

Schedule 13 - Parking Bay Variations

Schedule 14 - Variations to Parking Charges

Schedule 15 – Termination Amounts

Schedule 16 - Plans

Part A

Part B

Part C

Schedule 17 - Design Requirements

Schedule 18 – Services Specifications

Schedule 19 – Parking Bays Requirements

Schedule 20 – Commercial Opportunities

Schedule 21 – Tax Invoice

Schedule 22 – Confidential Information

Attachment 1 – Bid Design Documentation

The Bid Design Documentation is contained on the disc initialled by the parties on the Date of this Agreement

Attachment 2 - Bid Works Program

The following four works programs constitute the Bid Works Program. It is the intention of the parties that that the Bid Works Program will be updated in accordance with Clause 6.2 to include programming to interface with the Cancer Centre and the New Children's Hospital.

Attachment 3 – Sub-Sublease

Attachment 4 – Bid Project Management Plan

Attachment 5 – Bid Operating Manual

Attachment 6 – Central Plant Area

Attachment 7 – Competing Car Park Bands