



Department of **Education**

Department of **Treasury**

WA Schools PPP Project

Independent Certifier Deed of Appointment

The State of Western Australia

and

Minister for Works

and

Minister for Education

and

EduWest Project Co Pty Ltd in its personal capacity and in its capacity as trustee for the EduWest Project Trust

and

North Projects Pty Ltd

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INDEPENDENT CERTIFIER DEED OF APPOINTMENT

This deed is made on 2015

between

The State of Western Australia

and

The Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902 (WA)* (**Minister for Works**)

and

The Minister for Education, a body corporate constituted under section 214 of the *Schools Education Act 1999 (WA)* (**Minister for Education**)

and

EduWest Project Co Pty Ltd ACN 608 027 434 in its personal capacity and in its capacity as trustee for the EduWest Project Trust (**Project Co**)

and

North Projects Pty Ltd ACN 082 851 161 (**Independent Certifier**)

and the parties agree as follows:

Recitals

- A. The State and Project Co entered into the Deed in connection with the Project.
- B. It is a condition of the Deed that the State and Project Co enter into this deed.
- C. The State and Project Co wish to appoint the Independent Certifier to perform the Independent Certifier Services on the terms and conditions set out in this deed and the State Project Documents.
- D. This is the "Independent Certifier Deed of Appointment" as referred to in the Deed.

The parties agree as set out in the operative part of this deed, in consideration of, among other things, the mutual promises contained in this deed.

Operative provisions

1 DEFINITIONS AND INTERPRETATION

1.1 General

Unless the context otherwise requires, or where defined in Section 1.2, capitalised terms in this deed have the meaning given to them in Clause 1 of the Deed.

1.2 Definitions

In this deed:

Term	Meaning
<i>Annexure</i>	means an Annexure to this deed.
<i>APRA</i>	means the Australian Prudential Regulation Authority.
<i>Client Parties</i>	means the State and Project Co.
<i>Deed</i>	means the document entitled "WA Schools PPP Project Project Deed" between the State, the Minister for Works, the Minister for Education and Project Co dated on or about the date of this deed.
<i>Fee</i>	means the amount payable to the Independent Certifier for the performance of the Independent Certifier Services in accordance with Section 1.6 and Annexure 3 (Payment Schedule) of this deed.
<i>Fee Paying Parties</i>	the State and Project Co.
<i>Independent Certifier's Obligations</i>	means all of the liabilities, obligations and requirements imposed or assumed by the Independent Certifier under this deed, express or implied, or arising from or in connection with this deed from time to time including the performance of the Independent Certifier's obligations as amended by any variation to the deed.
<i>Independent Certifier's Representative</i>	[Not disclosed]
<i>Independent Certifier Services</i>	means those services to be provided by the Independent Certifier in respect of the deed as listed in Annexure 2 (Independent Certifier Services) of this deed.
<i>Insurance Policies</i>	means the insurance policies described in Section 5.1.
<i>Key Personnel</i>	each of the Independent Certifier's personnel identified in Annexure 1 (Project Documents and Key Personnel).

Term	Meaning
Loss	<p>means:</p> <p>(a) any liability of any kind whatsoever, cost, expense, loss, personal injury (including illness), death or damage and includes direct and indirect, consequential or special damage, loss of use, loss of revenue; and</p> <p>(b) in respect of a Claim or Third Party Claim, includes amounts payable on the Claim or Third Party Claim and (whether or not the Claim or Third Party Claim is successful) legal costs and disbursements on a full indemnity basis,</p> <p>whether or not such liability, cost, expense, loss, personal injury, death or damage, Claim or Third Party Claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.</p>
Monitoring and Tests	<p>means any testing, monitoring, calibrating, assessing or evaluating (as applicable) required to be performed by Project Co under the Deed, including as set out in the Development Phase Plans and including all testing and monitoring to determine whether the Commercial Acceptance Criteria and any Additional Commercial Acceptance Tests have been satisfied or achieved, and Monitoring and Testing is to be construed accordingly.</p>
Payment Certificate	<p>means a written notice issued by a Fee Paying Party in accordance with Section 2(a)(i) or 2(a)(ii) of Annexure 3 (Payment Schedule), which sets out the amount which the Fee Paying Party considers is payable to the Independent Certifier in respect of a Payment Claim.</p>
Records	<p>means all records and information of any kind (including originals and copies of all accounts, financial statements, books, files, reports, records, correspondence, documents, drawings, diagrams, graphs, photographs, videos, computer models, design models and other materials) created for, or relating to, or used in connection with, the Project or the performance of the Independent Certifier's Obligations, whether or not containing Confidential Information, and however those records and information are held, stored or recorded.</p> <p>Records include:</p> <p>(a) all documentation and information relevant to the Works;</p> <p>(b) any electronic communication in any format;</p> <p>(c) the results of any Monitoring and Testing;</p> <p>(d) anything which is a "record" under the <i>State Records Act 2000</i> (WA); and</p> <p>(e) any Industrial Award, Deed or Order.</p>
Related Entity	<p>means a "related entity" as defined in the Corporations</p>

Term	Meaning
	Act.
<i>Relevant Period</i>	means, in respect of any Record: (a) a minimum of 7 years after the creation of the Record; and (b) any additional length of time required under any Law or by any government agency.
<i>Schedule of Rates</i>	means the schedule of rates in Section 7 of Annexure 3 (Payment Schedule).
<i>Scope of Work and Technical Criteria</i>	means the State's requirements for the Works, as set out in Schedule 26 (Design Brief) and Schedule 11 (Commercial Acceptance Criteria) of the Deed.
<i>Supplier</i>	has the meaning set out in Section 9(b).
<i>Term</i>	means one year from the last date of Commercial Acceptance.
<i>Third Party Claim</i>	means any Claim, demand, action, proceeding or suit of any nature, whether actual or threatened, initiated by a person other than the parties to this deed or a Related Entity of Project Co or the Independent Certifier, including any Claim by: (a) or with respect, to any person engaged, in or associated with, the performance of the Independent Certifier Services, for damages or workers' compensation payments or contribution to such payments; (b) any relevant authority or other person for any premium or levy associated with the performance of the Independent Certifier Services; or (c) any authority or other person for an indemnity for, or recovery of, workers' compensation benefits paid, or other costs and expenses incurred, under the <i>Workers' Compensation and Injury Management Act 1981</i> (WA) or like legislation and paid to, or with respect to, any person engaged in, or associated with, the performance of the Independent Certifier Services.

1.3 Interpretation

In this deed unless the context otherwise requires:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;
- (c) **(Deed, Schedule and clause references)**: a reference to:
- (i) a party, Clause, Schedule, Exhibit, or Annexure is a reference to a party, clause, Schedule, Exhibit or Annexure of or to this deed; and
 - (ii) a section is a reference to a section of this deed; and
 - (iii) a paragraph is a reference to a paragraph in the clause in which the reference appears;
- (d) **(Deed as amended)**: a reference to this deed or to any other deed, agreement, or instrument includes a reference to this deed or such other deed, agreement, or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a 'party' is to a party to this deed;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, a body politic, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trustee and a trust;
- (g) **(other persons)**: a reference to any party or person includes each of their legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (h) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (i) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";
- (k) **("or")**: the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) **(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;
- (m) **("\$")**: a reference to "\$", AUD or dollar is to Australian currency;
- (n) **(time)**: a reference to time is a reference to time in Perth, Australia;
- (o) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes communication by email;
- (p) **(rights)**: a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (q) **(obligations and liabilities)**: unless otherwise expressly specified in this deed, a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (r) **("may")**: the term "may", when used in the context of a power, right or remedy exercisable by the State, State Representative or Principal, as applicable, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;
- (s) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this deed which:
- (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or

- (ii) ceases to exist, this deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity; and
- (t) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision; and
- (u) **(Business Day)**: If the day on or by which any thing is to be done in accordance with this Deed is not a Business Day, that thing must be done on the next Business Day.

1.4 Related matters

- (a) **(Provisions limiting or excluding liability)**: Any provision of this deed which seeks either expressly or by implication to limit or exclude any liability of a party is to be construed as doing so only to the extent permitted by Law.
- (b) **(Cost of performing obligations)**: Each party must perform its obligations in accordance with this deed at its own cost, unless expressly provided otherwise.
- (c) **(Standards)**: Unless agreed or notified in writing by the State, a reference to Australian standards, overseas standards or other similar reference documents in this deed is a reference to the edition last published prior to the preparation of the relevant documentation.
- (d) **(Day of event)**: Where time is to be reckoned by reference to a day or event, that day or the day of the event is excluded.
- (e) **(Month)**: Where time is to be counted in Months and the period commences on the 29th, 30th or 31st day of a Month and the Month at the end of the period does not have a 29th, 30th or 31st day (as applicable), then the period will end on the last day of that Month (for example, a period of 2 Months which begins on 31 July will end on 30 September; a period of 2 Months which begins 30 July will end on 30 September).
- (f) **(Deed composition)**: This deed comprises:
 - (i) Sections 1 to 11; and
 - (ii) Annexure 1 (Project Documents and Key Personnel) to Annexure 3 (Payment Schedule).

1.5 Ambiguity

- (a) If any party discovers any inconsistency, ambiguity or discrepancy in this deed, that party must promptly notify the other parties.
- (b) The State will, acting reasonably, direct the parties as to the interpretation to be followed by the parties in performing their obligations under this deed with respect to the Independent Certifier Services, provided that any direction must not be inconsistent with the Deed.

1.6 Payment

- (a) In consideration of the provision of the Independent Certifier Services under this deed, the Fee Paying Parties are severally liable to each pay the Independent Certifier [*Not disclosed*]% of the Fee.
- (b) The relevant Fee Paying Party must pay its proportion of the Fee calculated as set out in Annexure 3 (Payment Schedule) and otherwise in accordance with Annexure 3 (Payment Schedule).
- (c) Nothing in this deed makes any Fee Paying Party liable for any other Fee Paying Party's proportion of the Fee.
- (d) Unless expressly stated otherwise in this deed, the Fee is the Independent Certifier's sole entitlement to payment.

1.7 Liability of Project Co

- (a) Project Co is liable under this deed as trustee of the Project Trust and in Project Co's own right.
- (b) A reference to:

- (i) Project Co includes Project Co as trustee of the Project Trust and Project Co in its own right; and
- (ii) Project Co's property includes property owned by Project Co as trustee of the Project Trust and property owned by Project Co in its own right.

1.8 Project Trust warranties and representations

Project Co warrants and represents that:

- (a) **(trust power)**: Project Co has power as trustee of the Project Trust to execute this deed;
- (b) **(due performance)**: in executing this deed Project Co has properly performed its obligations to the Trust Beneficiaries;
- (c) **(trust action taken)**: all necessary action required by the Project Trust Deed to authorise Project Co's unconditional execution and delivery of, and compliance with its obligations under, this deed has been taken;
- (d) **(sole trustee)**: Project Co is the only trustee of the Project Trust;
- (e) **(no removal action)**: to the best of its knowledge and belief, no action has been taken to remove Project Co as trustee of the Project Trust or to appoint an additional trustee of the Project Trust;
- (f) **(right of indemnity)**:
 - (i) Project Co has a right to be fully indemnified out of the Trust Property;
 - (ii) Project Co has not released or disposed of its equitable lien over the Trust Property which secures that indemnity;
 - (iii) Project Co has not committed any breach of trust or done or omitted to do anything which has prejudiced or limited its rights of indemnity or equitable lien; and
 - (iv) the Trust Property is sufficient to satisfy that indemnity;
- (g) **(no trust default)**: Project Co has not defaulted in the performance and observance of its obligations as trustee of the Project Trust in any material respect;
- (h) **(no trust termination)**: to the best of its knowledge and belief, no action has been taken to terminate the Project Trust;
- (i) **(full trustee disclosure)**: Project Co has disclosed to the State full details of:
 - (i) the Project Trust and any other trust or fiduciary relationship affecting the Trust Property and, without limitation, has given to the State copies of any instruments creating or evidencing the Project Trust; and
 - (ii) its other trusteeships (if any);
- (j) **(trust duly constituted)**: the Project Trust is duly constituted and is not void, voidable or otherwise unenforceable; and
- (k) **(Trust Beneficiaries' rights)**: the rights of the Trust Beneficiaries in relation to, and their interest in, the Trust Property are subject to:
 - (i) the rights of the State in relation to, and its interest in, the Trust Property created by this document; and
 - (ii) any rights or interests in the Trust Property to which the State may from time to time be subrogated.

2 ACKNOWLEDGEMENTS AND RELIANCE

The Independent Certifier acknowledges and agrees that:

- (a) it has received a copy of the Deed and that it has read, and is familiar with, the terms of the Deed to the extent that it relates to the Independent Certifier Services;
- (b) its obligations under this deed with respect to the Independent Certifier Services extend to, and include, the obligations, functions, duties and services of the "Independent Certifier" as described in the Deed;
- (c) each of the Client Parties:

- (i) is relying on the skill and expertise of the Independent Certifier in performing its obligations under this deed; and
- (ii) may suffer Loss if the Independent Certifier does not perform its obligations in accordance with the requirements of this deed;
- (d) without limiting Sections 2(c) and 3.1(b), the Client Parties are entitled to and will rely on any certificate or other document signed or given by the Independent Certifier under this deed; and
- (e) it must perform the Independent Certifier Services in a manner which will not prevent, hinder, disrupt, delay or otherwise interfere with any work or services performed by any person, except where it is the unavoidable consequence of performing the Independent Certifier Services.

3 INDEPENDENT CERTIFIER'S OBLIGATIONS

3.1 Performance of the Independent Certifier Services

- (a) The Independent Certifier must perform the Independent Certifier Services in accordance with this deed and at the times specified in this deed and the Deed.
- (b) The Independent Certifier must, in performing the Independent Certifier Services:
 - (i) comply with all Laws, act honestly, diligently, reasonably and with the degree of professional care, knowledge, experience and skill which would be expected of an expert professional providing services similar to the Independent Certifier Services for projects similar to this project;
 - (ii) act independently and impartially of the Client Parties;
 - (iii) take into consideration all documents, information and material (whether written or oral) that any Client Party places before the Independent Certifier provided that it is relevant to the decision being made by the Independent Certifier at that time;
 - (iv) make a reasonable determination on any matter which it is required to make in respect of the Independent Certifier Services in any form the Independent Certifier so desires and stating the Independent Certifier's determination;
 - (v) not waive, act in a manner which waives or gives effect to any waiver of any terms or conditions of the Project Documents, or any amendments or variations to the Project Documents;
 - (vi) not act in a way which discharges or releases the respective obligations of the parties to the Project Documents, without the prior written consent of those parties, except as required in order to perform the Independent Certifier Services (such as certifying that Commercial Acceptance for a Stage has occurred); and
 - (vii) must not accept any role, perform any function or undertake any services in relation to the Project other than as set out in this deed.

3.2 Conflict of Interest

- (a) The Independent Certifier represents and warrants to the Client Parties that no conflict of interest exists or is likely to arise in the performance of the Independent Certifier Services and the discharge of its duties and functions under this deed.
- (b) If any conflict of interest or risk of conflict of interest arises during the Term, the Independent Certifier must:
 - (i) immediately notify the Client Parties in writing of that conflict or risk; and
 - (ii) take such action as directed by the State to avoid, prevent or mitigate a conflict of interest or risk of conflict of interest arising out of, or in connection with, the performance of the Independent Certifier Services.

3.3 Independent Certifier's Representative

The Independent Certifier must:

- (a) appoint an Independent Certifier's Representative to carry out all of the functions of the Independent Certifier in accordance with this deed;

- (b) ensure that the Independent Certifier's Representative:
 - (i) is engaged on a day to day basis in the performance of the Independent Certifier Services;
 - (ii) is available by telephone and email at all reasonable times during the Term; and
 - (iii) responds to all communications from the Client Parties with 24 hours;
- (c) procure that the Independent Certifier's Representative attends all meetings as requested by Project Co or the State for the duration of the Term; and
- (d) not, without the prior written consent of the Client Parties:
 - (i) remove the Independent Certifier's Representative; or
 - (ii) substitute another person as the Independent Certifier's Representative.

3.4 Key Personnel

- (a) The Independent Certifier acknowledges that the State and Project Co have engaged the Independent Certifier on the basis that the Key Personnel will be involved in the performance of the Independent Certifier Services.
- (b) The Independent Certifier must:
 - (i) ensure that the Key Personnel are employed or otherwise retained by the Independent Certifier to carry out the functions of the Independent Certifier assigned to them in Annexure 1 (Project Documents and Key Personnel); and
 - (ii) not, without the prior written consent of the Client Parties:
 - (A) remove any of the Key Personnel; or
 - (B) substitute another person for one or more of the Key Personnel.
- (c) Without limiting Section 3.4(b), if any of the Key Personnel cease to perform the Independent Certifier Services, the Independent Certifier must provide a replacement acceptable to the Client Parties at no additional cost to the Client Parties.
- (d) The Independent Certifier must procure that the relevant Key Personnel attend all meetings as requested by Project Co or the State for the duration of the Term.

3.5 Quality assurance and audit

- (a) The Independent Certifier must implement a quality assurance system complying with the requirements of ISO AS NZS 9001:2000 to ensure that the Independent Certifier Services comply with the requirements of this deed.
- (b) The Independent Certifier will not be relieved of any requirement to perform any obligation under this deed as a result of:
 - (i) its compliance with the quality assurance requirements of this deed; or
 - (ii) any acts or omissions of the Client Parties with respect to the quality assurance requirements of this deed, including any audit under Section 3.5(c).
- (c) The Independent Certifier must:
 - (i) at the request of any Client Party in respect of the performance of the Independent Certifier's Obligations, allow any audit of its quality assurance system under this deed by a third party;
 - (ii) give that third party access to premises occupied by the Independent Certifier where the Independent Certifier's Obligations are being performed;
 - (iii) permit that third party to inspect applicable information relevant to the quality assurance audit; and
 - (iv) fully cooperate with that third party in respect of the carrying out of the quality assurance audit.

3.6 Time requirements

- (a) If, at any time during the performance of the Independent Certifier Services, the Independent Certifier is of the opinion that it will not be able to perform the Independent Certifier Services within the time specified in this deed, the Deed, the Development Phase Program or the Development Phase Plans (or any combination of them), the Independent Certifier must provide notice of that opinion to the Client Parties.
- (b) The giving of notice by the Independent Certifier under this Section 3.6 does not constitute, nor will it be taken to constitute, any waiver by any party of any breach of this deed or the granting of any extension of time or other indulgence by any Client Party in respect of the performance of the Independent Certifier Services.
- (c) Where the Independent Certifier gives notice under clause 3.6(a), the Independent Certifier must promptly advise the Client Parties of the steps it intends to take to overcome the delay. If both Client Parties consider the steps to be unreasonable they may require the Independent Certifier to advise alternative steps which are to the reasonable satisfaction of both Client Parties.

3.7 Records, access and audit

- (a) The Independent Certifier must maintain for the Relevant Period a complete set of all Records in whatever form that relate to the performance of the Independent Certifier's Obligations.
- (b) Without limiting its obligations under Section 3.7(a), the Independent Certifier must comply with the requirements of the *State Records Act 2000 (WA)*, insofar as that Act applies to any of the Records.
- (c) At any time and from time to time during the Relevant Period, each Client Party has the right to inspect and audit the Records held and maintained by the Independent Certifier in accordance with this deed. Upon a Client Party's request, the Independent Certifier must make such Records available to that Client Party (including proper access to the Independent Certifier's Representative and the Key Personnel or, as the case may be, replacement key personnel, and facilities) to enable that Client Party to perform any inspection and audit of such Records.

3.8 Confidentiality and publicity

- (a) The Independent Certifier must keep confidential details of this deed, the Project Documents and all information and documents (including the Confidential Information) provided to, or by, the Independent Certifier in connection with the Independent Certifier Services and not provide, disclose, or use such information or documents except:
 - (i) to the extent necessary for the purpose of performing the Independent Certifier's Obligations under this deed, provided that the persons to whom the information is disclosed are bound by the confidentiality obligations imposed on the Independent Certifier under this Section 3.8;
 - (ii) as authorised in writing by the State and, if the information to be disclosed relates to Project Co, by Project Co;
 - (iii) as is required by a Law or to the extent required by a stock exchange, and no more; or
 - (iv) when required (and only to the extent required), to the Independent Certifier's professional advisers and the Independent Certifier must ensure that those professional advisers are bound by the confidentiality obligations imposed on the Independent Certifier under this Section 3.8.
- (b) The Independent Certifier must not make or publicise any announcements, advertisements or releases relating to this deed or the Project without the prior approval of the Client Parties, except to the extent that the Independent Certifier is required by Law to make a statement, in which case, the Independent Certifier must:
 - (i) first provide a draft of the proposed statement to the Client Parties; and

- (ii) make such changes as the Client Parties may reasonably require (having regard to the nature and content of the requirement of Law to make the statement).

3.9 Public disclosure of deed details

- (a) The State may publicly disclose the identity of the Independent Certifier, the value of this deed and this deed (other than information that the State considers is confidential or which would involve the disclosure of information that has a commercial value).
- (b) The Independent Certifier and Project Co acknowledge that this deed and the information held or compiled by the State in relation to this deed and the Independent Certifier's Obligations supplied under this deed are subject to the *Freedom of Information Act 1992 (WA)*.

3.10 Document management

- (a) Without limiting Section 3.7:
 - (i) the State supplied project information, management and collaboration system must be used by the Independent Certifier to record all documents and written communications sent and received by the Independent Certifier in relation to this deed, the Works, the Independent Certifier Services and the Deed; and
 - (ii) the Independent Certifier must ensure that the Client Parties are provided with access to the State supplied project information, management and collaboration system required under Section 3.10(a)(i) at all times during the Term.
- (b) Without limiting Section 3.10(a), the Independent Certifier must ensure that a copy of each written communication between the Independent Certifier and the Client Parties, or third parties which relates to the performance of the Independent Certifier Services, is promptly given to the other parties, and in any event within 2 Business Days.

4 OBLIGATIONS OF THE CLIENT PARTIES

4.1 No interference or influence

The Client Parties must not interfere with, or attempt to influence or direct, the Independent Certifier in the performance of any of the Independent Certifier Services. Nothing in this Section 4.1 prevents a Client Party from providing written comments to the Independent Certifier, copied to the other Client Party, in respect of any aspect of the Project.

4.2 Cooperation

- (a) The Client Parties must:
 - (i) cooperate with the Independent Certifier;
 - (ii) provide the Independent Certifier with all information, documents and materials within its possession, custody or control reasonably requested by the Independent Certifier for the purpose of the performance of the Independent Certifier Services or required to be provided to the Independent Certifier under this deed or the Deed, at the times reasonably required by the Independent Certifier; and
 - (iii) provide the Independent Certifier with such support as is reasonable to facilitate the performance of the Independent Certifier Services in accordance with this deed.
- (b) Project Co must provide the Independent Certifier with the latest:
 - (i) Development Phase Program;
 - (ii) Design Deliverables;
 - (iii) Commercial Acceptance Plan;
 - (iv) Commercial Acceptance Report;
 - (v) FF&E Specification;

- (vi) Monthly Works Report;
 - (vii) any other Development Phase Plans;
 - (viii) results of all Monitoring and Tests conducted in accordance with the Development Phase Plans, including the results of Commercial Acceptance Tests; and
 - (ix) documents and information, including any other plans, required to be provided to the Independent Certifier in accordance with the Deed,
- as and when amended.

4.3 Right to enter, inspect, monitor and test

- (a) The Independent Certifier (and any person authorised by the Independent Certifier) for the purposes of performing the Independent Certifier Services may, at any time before the expiry of the Term, upon giving reasonable notice to the Client Parties, enter the Site and any other place where the Works or materials are being tested.
- (b) Project Co must give such assistance as is reasonably required by the Independent Certifier in respect of any inspection or certifying any testing under Section 4.3(a).

4.4 Client Parties to have no liability

- (a) Each party acknowledges that none of the Client Parties is liable, or may be taken to have assumed a liability, or to have become (on enforcement of any of their powers or otherwise) liable, for:
 - (i) the performance of any obligation of any other Client Party under this deed or the State Project Documents; or
 - (ii) any act or omission of the Independent Certifier or for any Claim or liability arising from the Independent Certifier's exercise of its functions, or failure to exercise its functions, under this deed.
- (b) Section 4.4(a) does not apply to relieve any party from any obligation arising under this deed.

4.5 Change to Independent Certifier Services and suspension of Independent Certifier Services

- (a) **(Change to Independent Certifier Services):** The Fee Paying Parties may, by written notice to the Independent Certifier, direct the Independent Certifier to make a change to the Independent Certifier Services (including an addition or omission) which is within the general scope of this deed. The Independent Certifier must comply with the direction, provided the increase or decrease in the Fee payable in relation to the change is agreed or determined in accordance with Section 4.5(b).
- (b) **(Change to Fee):** The increase or decrease in the Fee to be paid to the Independent Certifier due to a change to the Independent Certifier Services referred to in Section 4.5(a) is to be determined in accordance with the Schedule of Rates.
- (c) **(Change to Fee cannot be determined):** If the increase or decrease in the Fee cannot be determined by reference to the Schedule of Rates, it will be a reasonable amount agreed between the Independent Certifier and those Fee Paying Parties that are obliged to pay the additional Fee. If those parties are unable to agree, the matter will be referred for resolution in accordance with Section 8.
- (d) **(Suspension of Independent Certifier Services):** The Fee Paying Parties may jointly, by written notice to the Independent Certifier, direct the Independent Certifier to suspend any or all of the Independent Certifier Services for the period specified in that notice.

5 INSURANCE

5.1 Insurance Policies

- (a) **(Public Liability Policy):** The Independent Certifier must maintain a public liability policy. The public liability policy must:

- (i) cover liability for loss of, or damage to, property and the death or sickness of, or injury to, any person (other than liability which is required by Law to be insured under a workers' compensation policy of insurance);
 - (ii) to the extent commercially available from the insurance market from time to time:
 - (A) cover the Client Parties for claims against them arising out of, or in connection with, any negligent act or omission of the Independent Certifier or its directors, agents or employees, arising out of, or in connection with, the services required under this deed;
 - (B) provide that any breach of the conditions of the policy by an insured must not in any way prejudice or diminish any rights which the Client Parties have under the policy;
 - (C) provide that the insurance is primary with respect to the interests of the Client Parties and any other insurance and self-insurance arrangements maintained by the Client Parties is excess to, and not contributory with, the policy;
 - (D) include a cross liability endorsement that all agreements and endorsements, except limits of liability, must operate in the same manner as if there was a separate policy of insurance covering each party insured and a failure by any insured party to observe and fulfill the terms and conditions will not affect any other party; and
 - (E) provide that a notice of claim given to the insurer by an insured under the policy must be accepted by the insurer as a notice of claim given by the Client Parties where the Client Parties are also an insured;
 - (iii) be endorsed to cover:
 - (A) the use of unregistered motor vehicles and plant and equipment; and
 - (B) sudden and accidental pollution; and
 - (iv) be for an amount of \$[*Not disclosed*] in respect of any one occurrence and unlimited in the aggregate during any one 12 Month period of insurance.
- (b) **(Professional Indemnity Policy):** The Independent Certifier must maintain a professional indemnity policy. The professional indemnity policy must:
- (i) be for an amount of \$[*Not disclosed*] in respect of any one claim and \$[*Not disclosed*] in the aggregate during any one 12 Month period of insurance;
 - (ii) cover liability arising from any act, error or omission in connection with, or arising out of, the professional activities and duties under this deed;
 - (iii) cover claims in respect of this deed under the *Competition and Consumer Act 2010* (Cth), *Fair Trading Act 2010* (WA) and any similar legislation in any other State or Territory insofar as they relate to the provision of professional advice; and
 - (iv) include one full automatic reinstatement of the limit of liability in each 12 Month period of insurance.
- (c) **(Insurance of employees):** The Independent Certifier must insure against liability for death of, or injury to, natural persons employed or engaged by the Independent Certifier including liability by statute and at common law. This insurance cover must:
- (i) to the extent permitted by Law, be extended to indemnify the Client Parties for their statutory and common law liability to natural persons employed or engaged by the Independent Certifier; and
 - (ii) be for not less than \$[*Not disclosed*] common law liability in respect of any one event.

5.2 General

- (a) The Independent Certifier must, at its own cost and expense, as a minimum, effect and maintain the Insurance Policies set out in Section 5.1:
 - (i) on the terms and conditions set out in Section 5.1 and otherwise on terms acceptable to the Client Parties, acting reasonably; and
 - (ii) from insurers with a credit rating of A- or better with Standard and Poors, which either:
 - (A) carry on business in Australia and are authorised by APRA; or
 - (B) if overseas insurers, cover claims lodged and determined in the jurisdiction of Australia. Any limitations regarding this requirement must be notified to, and agreed to by, the Client Parties.
- (b) The Client Parties must not unreasonably withhold or delay their approval of an insurer or the terms and conditions of the Insurance Policies.
- (c) Without limiting Section 5.2(a), the Independent Certifier must:
 - (i) pay all premiums and all deductibles applicable to the Insurance Policies when due; and
 - (ii) promptly reinstate any insurance required under this Section 5 if it lapses or if cover is exhausted.
- (d) For the purposes of the Insurance Policies, the State includes the Crown in the right of the State, any Parliament, department, agency or instrumentality of the State of Western Australia, any Minister (including the State), whether body corporate or otherwise, and their officers, employees, consultants, contractors, agents, and personnel.
- (e) To the extent appropriate, the Insurance Policies must state they are governed by the laws of Western Australia and that each insurer irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia.
- (f) The effecting and maintaining of insurance by the Independent Certifier does not, in any way, affect or limit the liabilities or obligations of the Independent Certifier under this deed.

5.3 Term

- (a) The Insurance Policies must come into effect on or before the commencement of the Independent Certifier's Obligations under this deed or before the Independent Certifier first comes onto Site, whichever is the earlier.
- (b) Subject to Section 5.3(c), the Insurance Policies must be maintained until the Independent Certifier has fully complied with and discharged all the Independent Certifier's Obligations or the end of the Term or any extension of the Term, whichever is the later.
- (c) If the wording of any Insurance Policy required by this Section 5 is constructed on a claims-made basis, the insurance must be renewed or otherwise maintained without interruption for a period of 7 years after the expiration or termination of this deed.

5.4 Approval of the proposed terms and conditions of the Insurance Policies

- (a) The proposed terms and conditions of the Insurance Policies must be provided by the Independent Certifier to the Client Parties for approval:
 - (i) at least 5 Business Days before the date of execution of this deed (or such other period as may be agreed to by the Client Parties); and
 - (ii) within 28 days of the date set for each annual renewal with respect to the Independent Certifier Services.

5.5 Proof of Insurance Policies

Whenever requested in writing by the Client Parties, the Independent Certifier must produce to the Client Parties copies of the Insurance Policies or insurance broker's evidence of cover document (that contains the entirety of the wording including any relevant schedules and endorsements) evidencing the insurance effected and maintained.

5.6 Failure to produce proof of Insurance Policies

- (a) If, after being requested in writing by the Client Parties to do so, the Independent Certifier fails to produce evidence of compliance with its insurance obligations under this Section 5 to the satisfaction and approval of the Client Parties within 10 Business Days of the request, then the Client Parties may:
- (i) exercise their rights under Section 7; or
 - (ii) refuse payment of any amount due to the Independent Certifier until evidence of insurance required by this Section 5 is produced to the Client Parties.
- (b) The rights given to the Client Parties by this Section 5.6 are in addition to any other rights the Client Parties may have.

5.7 Independent Certifier's further obligations

- (a) The Independent Certifier must not do or omit to do any act that would be grounds for an insurer to refuse to pay a claim made under any of the Insurance Policies.
- (b) The Independent Certifier must give the Client Parties notice of cancellation, non-renewal or a material alteration of any of the Insurance Policies within 3 Business Days of receiving such notice from an insurer.

5.8 Insurance Policies primary

- (a) The Insurance Policies are primary and not secondary to the indemnities referred to in this deed. However, the Client Parties are not obliged to make a claim or institute proceedings against any insurer under the Insurance Policies before enforcing any of its rights or remedies under the indemnities referred to in this deed, or generally.
- (b) The parties acknowledge that if a claim is made under an Insurance Policy by a Client Party, it is their intention that the insurer cannot require the Client Party to exhaust any indemnities referred to in this deed before the insurer considers or meets the relevant claim.
- (c) The Independent Certifier acknowledges that regardless of whether the Insurance Policies respond or not, and regardless of the reason why the Insurance Policies respond or fail to respond, the Independent Certifier is not released (in whole or in part), from any of its obligations under the indemnities referred to in this deed, or generally.

6 LIABILITY AND INDEMNITIES

6.1 References to Independent Certifier

For the purposes of this Section 6, any act, error or omission caused by the Independent Certifier's officers, directors, employees or contractors is deemed to be an act, error or omission of the Independent Certifier.

6.2 General indemnity

Subject to Section 6.4A, the Independent Certifier indemnifies the Client Parties jointly and severally against any Loss, Claim or Third Party Claim suffered or incurred by or made against the Client Parties arising out of, or in connection with, and to the extent caused by any act, error or omission by the Independent Certifier or its officers, directors, employees or contractors in breach of this deed or any negligent, wrongful, reckless or unlawful act or omission, in connection with the provision of the Independent Certifier Services under this deed.

6.3 Exclusion

Each of the Client Parties, separately, are not entitled to recover Loss under the indemnity in Section 6.2 to the extent that party has caused or contributed to the Loss.

6.4 Benefit of indemnities

In Section 6.2, "State", as a Client Party, includes the Crown in the right of the State of Western Australia, any Parliament, department, agency or instrumentality of the State of Western Australia, any Minister (including the State), whether body corporate or otherwise, and their officers, employees, consultants, contractors, agents, and personnel.

6.4A Limitation of Liability

- (a) The liability of the Independent Certifier under this deed is limited to \$[*Not disclosed*] for any one event or in the aggregate.
- (b) The limitation of liability in Section 6.4A(a) does not apply to any Loss:
 - (i) in respect of:
 - (A) fraud, willful misconduct (including default) and criminal conduct of the Independent Certifier or its officers, directors, employees or contractors;
 - (B) personal injury or death;
 - (C) any liability that cannot be limited or excluded by Law;
 - (D) third party claims for Intellectual Property Rights infringements by the Independent Certifier or its officers, directors, employees or contractors; and
 - (E) breach of Section 3.8; or
 - (ii) to the extent that payments are received pursuant to insurance policies to be effected by the Independent Certifier in Section 5.1 or would have been received but for a failure to diligently pursue a claim under the Insurance Policies or a failure to effect and maintain the Insurance Policies required under this deed,

in which cases the Independent Certifier's liability in respect of each such event will be unlimited.

7 TERMINATION AND CONSEQUENCES**7.1 Termination for breach**

The Fee Paying Parties may jointly terminate this deed immediately by written notice to the Independent Certifier if:

- (a) the Independent Certifier is in material breach of the terms of this deed and the breach is, in the reasonable opinion of the Fee Paying Parties, not remediable;
- (b) the Independent Certifier is in material breach of the terms of this deed and the breach is, in the reasonable opinion of the Fee Paying Parties, remediable and such breach has not been remedied within 10 Business Days after service by a Fee Paying Party of a notice specifying the breach and requiring it to be remedied;
- (c) the Independent Certifier fails to provide proof of the Insurance Policies under Section 5.6;
- (d) an Insolvency Event occurs; or
- (e) there is a Change in Control of the Independent Certifier without the consent of the Client Parties under Section 11.8(b)(i).

7.2 Termination for convenience

The Fee Paying Parties may, in their absolute discretion for any reason whatsoever, serve on the Independent Certifier a notice of termination of this deed and the appointment of the Independent Certifier, on a date specified in the notice, being not less than 10 Business Days after the date of issue of the notice.

7.3 Termination of Deed

If it has not been terminated earlier, this deed terminates on the date of termination of the Deed.

7.4 Termination of appointment of Independent Certifier

- (a) The appointment of the Independent Certifier will terminate on the date specified in the notice of termination under Sections 7.1 or 7.2, in accordance with Section 7.3 or the expiry of the Term, whichever is earlier.
- (b) The Fee Paying Parties will each be responsible for payment of its portion of the Fee for the Independent Certifier Services up to the date of termination in accordance with Section 7.6.

7.5 Delivery of documents

On the date of termination of the appointment of the Independent Certifier, the Independent Certifier:

- (a) must deliver to the Client Parties or their nominee, all books, Records, drawings, specifications and other documents in the possession, custody or control of the Independent Certifier relating to the Independent Certifier Services, this deed, the Project Documents and the Works; and
- (b) acknowledges and agrees that the Independent Certifier permits the Client Parties to use all those documents for the purposes of the Project Documents, the Works, the Project and any other related project.

7.6 Payment until date of termination

- (a) Subject to Section 7.6(b), if the appointment of the Independent Certifier is terminated under this deed, the Independent Certifier is only entitled to be paid the proportion of the Fee for the Independent Certifier Services performed up to the date of the termination.
- (b) If the appointment of the Independent Certifier is terminated under Sections 7.2 or 7.3, the Independent Certifier may recover:
 - (i) the proportion of the Fee performed up to the date of the termination from the Fee Paying Parties, determined in accordance with Section 1.6 (subject to Section 1.6(c)); and
 - (ii) its reasonable costs arising out of the termination from the Fee Paying Parties, determined in accordance with Section 1.6 as if those costs formed part of the Fee.

7.7 Termination without prejudice

Termination of this deed under this Section 7 will be without prejudice to:

- (a) any Claim which the Client Parties may have in respect of any breach of the terms of this deed which occurred;
- (b) any rights or liabilities of the parties under this deed which may have accrued; or
- (c) any determinations or opinions expressed by the Independent Certifier, before the date of termination.

8 DISPUTE RESOLUTION

8.1 Dispute

- (a) Each party may refer a dispute, despite any other provision, in accordance with this deed to dispute resolution in accordance with this Section 8.
- (b) If a matter is referred for determination in accordance with this Section 8:
 - (i) any dispute or difference of opinion arising between the parties in connection with that matter must be resolved in the same manner that disputes or differences of opinion are resolved when referred for expert determination under the Deed; and
 - (ii) the provisions of Clause 43 (Dispute Resolution procedure) of the Deed are incorporated into this deed but as if the only persons party to the Deed, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute; and
- (c) the only matters for expert determination in accordance with those provisions are the matters referred for expert determination in accordance this deed.
- (d) For the avoidance of doubt, any decision by the Independent Certifier in respect of the Works is final and binding on the Client Parties and cannot be the subject of a Dispute, except for manifest error.

9 GST

- (a) **(Amount payable):** Notwithstanding any other provision of this deed, any amount payable for a supply made under or in connection with this deed which is

calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any Input Tax Credits which that party is entitled to in connection with that cost, expense or other amount.

- (b) **(GST payable by Supplier):** If GST becomes payable on any Taxable Supply made by a party (**Supplier**) under or in connection with this deed:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this deed for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this deed or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided under this deed. The Recipient is not obliged to pay any amount in accordance with this Section 9(b) unless and until a Tax Invoice is received by the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.
- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under Section 9(b) in connection with that supply, the Supplier will provide a refund or credit to, or will be entitled to receive from, the Recipient (as appropriate) the amount of this variation. Where an adjustment event occurs in relation to a supply, and except where the Recipient is required to issue an adjustment note:
- (i) the Supplier will issue an adjustment note to the Recipient in connection with that supply within 14 days after becoming aware of that adjustment event occurring; and
 - (ii) no additional amount will be payable by the Recipient unless and until an adjustment note is received by the Recipient.
- (d) **(GST ceasing to be payable):** No amount is payable by a party in accordance with Section 9(b) or 9(c) to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier by the Commissioner of Taxation under the GST Law.
- (e) **(Revenue net of GST):** Any reference in this deed or any Project Document to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (f) **(Cost net of GST):** Any reference in this deed or any Project Document to cost, expense, liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (g) **(General obligation):** Each party agrees to do all things, including providing Tax Invoices and other documentation, that may be necessary or desirable to enable or assist the other party in determining its GST payable on any supply made by that other party in connection with this deed, or any Input Tax Credits, adjustments or refunds in relation to any amount of GST paid or payable in connection with any supply made in connection with this deed.
- (h) **(GST Groups):** For the purposes of this deed, a reference to GST payable on a Taxable Supply made by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member and a reference to an Input Tax Credit entitlement of a party includes any corresponding Input Tax Credit entitlement of the representative member of any GST group of which that party is a member.

10 NOTICES

All communications (including approvals, consents, directions, requirements, requests, Claims, notices, agreements and demands) in connection with this deed:

- (a) **(in writing)**: must be in writing;
- (b) **(addressed)**: must be addressed as set out below;

To the State:

The State of Western Australia

Attention: *[Not disclosed]*
 Address: *[Not disclosed]*
 Phone: *[Not disclosed]*
 Email: *[Not disclosed]*

To Project Co:

EduWest Project Co Pty Ltd in its personal capacity and in its capacity as trustee for the EduWest Project Trust

Attention: *[Not disclosed]*
 Address: *[Not disclosed]*
 Facsimile: *[Not disclosed]*
 Phone: *[Not disclosed]*
 Email: *[Not disclosed]*

To the Independent Certifier:

North Projects Pty Ltd

Attention: *[Not disclosed]*
 Address: *[Not disclosed]*
 Facsimile: *[Not disclosed]*
 Phone: *[Not disclosed]*
 Email: *[Not disclosed]*

- (c) **(signed)**: must be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out below; and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out below:
 - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
 - (ii) 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; and
 - (iii) in the case of email, the first to occur of:

- (A) receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
 - (B) the time that the communication enters an information system which is under the control of the addressee; or
 - (C) the time that the communication is first opened or read by the addressee,
- (iv) unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day.
- (v) the D&C Subcontractor and the Parent Guarantor of the D&C Subcontractor must ensure that, in connection with any communications in accordance with or in connection with this deed:
- (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.

11 GENERAL

11.1 Relationship of the parties

- (a) Nothing in this deed:
 - (i) **(no additional relationship)**: creates a partnership, joint venture, fiduciary, employment or agency relationship between the parties; or
 - (ii) **(no duty of good faith)**: imposes any duty of good faith on the State (unless otherwise expressly provided)
- (b) The Independent Certifier is an independent contractor. The Independent Certifier's Representative and the Key Personnel will not be deemed to be employees, agents, subcontractors or consultants of the Client Parties and each party must pay all costs associated with its employees.

11.2 State's rights, duties, powers and functions

- (a) **(Benefit of deed)**: The Independent Certifier acknowledges that the State enters into this deed for the benefit of other State Entities including the Government of Western Australia.
- (b) **(State's rights)**: Any right of the State may be exercised for the benefit of any other State Entity and any reference in this deed to the Loss of, or costs incurred by, the State includes direct Losses of, and direct costs incurred by, these State Entities.
- (c) **(State's own interests)**: Unless otherwise expressly provided for in this deed, nothing in this deed 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 this deed.
- (d) **(State's powers, functions or duties)**: Notwithstanding anything expressly provided or implied in this deed to the contrary, the parties expressly agree that the State:
 - (i) is not obliged to exercise any executive or statutory right or duty, or to influence, over-ride, interfere with or direct any other government party in

the proper exercise and performance of any of its executive or statutory rights or duties; and

- (ii) nothing expressly provided or implied in this deed 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 executive or statutory rights or duties.
- (e) **(No Claim)**: Subject to Section 11.2(f), the Independent Certifier will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (f) **(Liability for breach)**: Sections 11.2(c) to 11.2(e) do not limit any Liability of the State which the State would have had to the Independent Certifier in accordance with this deed as a result of a breach by the State of a term of this deed but for Sections 11.2(c) to 11.2(e).

11.3 Entire agreement

To the extent permitted by Law and in relation to their subject matter, this deed:

- (a) **(entire understanding)**: embodies the entire understanding of the parties and constitute the entire terms agreed by the parties; and
- (b) **(prior agreements)**: supersede any prior agreement of the parties.

11.4 Counterparts

This deed may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same deed.

11.5 Governing law and jurisdiction

- (a) **(Governing Law)**: This deed is governed by, and must be construed according to, the Laws of Western Australia, Australia.
- (b) **(Jurisdiction)**: Without limiting Section 8 each party irrevocably submits to the non-exclusive jurisdiction of the courts of Western Australia, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this deed.

11.6 Waiver

- (a) **(Writing)**: A waiver given by a party under this deed is only effective and binding on that party if it is given or confirmed by that party in writing.
- (b) **(No waiver)**: A failure to, a delay in or the partial exercise or enforcement of a right provided by Law or under this deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this deed.
- (c) **(No waiver of another breach)**: No waiver of a breach of a term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

11.7 Amendments to this deed

Except as otherwise expressly provided in this deed, this deed may only be varied by a deed executed by or on behalf of each party.

11.8 No dealing

- (a) The Independent Certifier may not assign, novate or otherwise transfer any of its rights or obligations under this deed except in accordance with an assignment, novation or transfer of the Deed in accordance with its relevant terms.
- (b) The Independent Certifier must not, without the prior approval of the Client Parties, and except on such terms and conditions as are determined by the Client Parties:
 - (i) permit a Change in Control of it;

- (ii) assign, transfer, mortgage, novate, charge or otherwise encumber this deed or any payment or other right, benefit, money or interest under, or in respect of, this deed; or
 - (iii) subcontract the performance of any of the Independent Certifier Services.
- (c) The Independent Certifier remains responsible for the performance of the Independent Certifier Services in accordance with this deed, despite any subcontracting, and the acts or omissions of any subcontractor will be deemed to be the acts or omissions of the Independent Certifier.

11.9 Joint and several liability

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

11.10 Indemnities

- (a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination or expiration of this deed.
- (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 deed.
- (c) A party must pay on demand any amount it must pay in accordance with an indemnity in this deed.
- (d) The State, the Independent Certifier and Project Co agree that:
 - (i) each indemnity or promise referred to in this deed 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 Section 11.10(d)(i) will not be required for any amendment to, or waiver of rights in accordance with this deed.

11.11 Survival of certain provisions

- (a) **(Surviving clauses):** All provisions of this deed which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this deed will survive the rescission, termination or expiration of this deed, including any provision in connection with:
 - (i) the State's rights to set-off and recover money;
 - (ii) confidentiality or privacy;
 - (iii) Intellectual Property Rights;
 - (iv) any obligation to make any records available to the State;
 - (v) any indemnity or financial security given under this deed;
 - (vi) any limitation on liability; and
 - (vii) any right or obligation arising on termination of this deed.
- (b) **(Interpretation):** No provision of this deed which is expressed to survive the termination of this deed will prevent any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.
- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction under this deed. All rights and obligations under this deed survive the execution and delivery of any transfer or other document which implements any transaction under this deed.

11.12 Expenses

Except as otherwise provided in this deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed.

11.13 Further acts and documents

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

11.14 Severance

If, at any time, a provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this deed; or
- (b) that provision under the Law of any other jurisdiction.

11.15 Proportionate liability

- (a) **(Excluded operation of Part 1F of the Civil Liability Act):** The operation of Part 1F (Proportionate liability) of the Civil Liability Act 2002 (WA) is excluded in relation to all and any rights of either party under this deed whether such rights are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights):** Without limiting Section 11.15(a), the rights of the parties (including those relating to proportionate liability) are as specified in this deed and not otherwise.

Executed as a deed

Executed by THE HONOURABLE DR MIKE NAHAN MLA Treasurer for the time being, on behalf of the State of Western Australia, and as delegate of the Minister for Works pursuant to section 5A of the *Public Works Act 1902 (WA)*, in the presence of:

Signature of Witness

The Hon. Dr Mike Nahan MLA

Witness name

Witness address

Witness occupation

THE COMMON SEAL of the MINISTER FOR EDUCATION was hereunto affixed in the presence of THE HON PETER CHARLES COLLIER MLC Minister for Education for the time being, in the presence of:

Signature of Witness

Hon Peter Charles Collier MLC

Witness name

Witness address

Witness occupation

Signed, sealed and delivered for and)
 on behalf of **EduWest Project Co Pty**)
Ltd (ACN 608 027 434) in its personal)
 capacity and as trustee for the EduWest)
 Project Trust by its attorneys pursuant to)
 power of attorney dated 18 September)
 2015 who each states that no notice of)
 revocation of the power of attorney has)
 been received in the presence of:

.....
 Witness

.....
 Attorney

.....
 Name of Witness (print)

.....
 Name of Attorney (print)

.....
 Witness

.....
 Attorney

.....
 Name of Witness (print)

.....
 Name of Attorney (print)

Signed, sealed and delivered by)
North Projects Pty Ltd under section)
127 of the *Corporations Act 2001* (Cth):)

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

Annexure 1 – Project Documents and Key Personnel

1 PROJECT DOCUMENTS

- (a) the Project Deed (including relevant Schedules and Annexures)
- (b) the D&C Subcontract

2 KEY PERSONNEL

[Not disclosed]	Independent Certifier
[Not disclosed]	Independent Certifier's Representative
[Not disclosed] (Ralph Beattie Bosworth Pty Ltd)	Certification Team Leader
North Projects Pty Ltd / Ralph Beattie Bosworth Pty Ltd	Certification team
North Projects Pty Ltd	Programming Lead
[Not disclosed] (Tracey Brunstrom & Hammond Pty Ltd)	Specialist consultant
[Not disclosed]	Specialist commissioning services

Annexure 2 – Independent Certifier Services

Without limiting its obligations under this Annexure 2 and its other obligations under this deed, the Independent Certifier's primary functions are to:

- (a) **(Commercial Acceptance Plan)**: review and comment on the Commercial Acceptance Plan, and any revisions of that plan, and certify that each of those plans:
- (i) it is appropriate for the Project;
 - (ii) will demonstrate that the Commercial Acceptance Criteria will be met; and
 - (iii) otherwise comply with the requirements of the Deed;
- and if it has identified any issues with, or made any comments on, the Commercial Acceptance Plan, or any revisions or updates of that plan, confirm that it is satisfied as to how the issues and comments are addressed by Project Co;
- (b) **(other Development Phase Plans)**: in addition to the Commercial Acceptance Plan, review and comment on any other Development Phase Plan (including any revision or update of that Development Phase Plan) where required to do so by the Deed, in accordance with the requirements of the Deed;
- (c) **(Design Development Process)**: undertake those tasks and functions assigned to it in connection with the Design Development Process, as required by the Deed;
- (d) **(Monitoring and Testing)**:
- (i) attend the performance of Monitoring and Testing by Project Co in accordance with a program agreed with the State and as otherwise reasonably required to perform its functions;
 - (ii) direct any additional Monitoring and Tests it considers appropriate; and
 - (iii) determine if:
 - (A) the whole or any part of the Works fails to pass any Monitoring and Testing required under the Deed; or
 - (B) the Monitoring and Testing shows results trending such that the performance of the Works indicated in the Design Requirements or the requirements of the Deed will not be met,
 and if the Independent Certifier deems necessary, review the details of any work, replacement, amendment, reconstruction, rectification and making good of any Defects undertaken by Project Co under Clauses 18.2 (Verge Works Commercial Acceptance) 20.8 (Commercial Acceptance Outstanding Items) and 22 (Defects) of the Deed;
- (e) **(Defects)**:
- (i) identify Defects and, if required under Clauses 18.2 (Verge Works Commercial Acceptance), 20.8 (Commercial Acceptance Outstanding Items) and 22 (Defects) of the Deed, determine the method and program for rectifying a Defect;
 - (ii) without limiting paragraph (e)(i) of this Annexure 2:
 - (A) at any time prior to Commercial Acceptance, identify, and notify the Client Parties of any issues in the Works or the Design Deliverables which may delay or prevent Project Co from achieving Commercial Acceptance by the Date for Commercial Acceptance for a Stage;
 - (B) recommend steps or remedial work to be undertaken by Project Co to overcome the issues identified by the Independent Certifier in accordance with paragraph (e)(ii)(A) of this Annexure 2 in order to achieve Commercial Acceptance by the Date for Commercial Acceptance for a Stage and notify the Client Parties of its recommendations; and
 - (iii) confirm that it is satisfied as to how steps have, or remedial work has, been undertaken by Project Co to overcome the issue, such that the

Independent Certifier is satisfied that the issue will no longer prevent Commercial Acceptance for a Stage from being achieved by the Date for Commercial Acceptance for that Stage;

- (f) **(review of construction):**
- (i) review the construction of the Works, including as requested by the State, to:
 - (A) ensure that the Works are being undertaken in accordance with the Development Phase Program and the other requirements of the Deed; and
 - (B) determine whether Commercial Acceptance will be achieved by the Date for Commercial Acceptance,and give notice to the State and Project Co of its opinion, together with its reasons for forming that opinion; and
 - (ii) review any Explanation or Remedy Implementation Plan submitted by Project Co, determine whether or not the relevant plan satisfactorily addresses its concerns and notify the State and Project Co of its reasons for forming that opinion;
- (g) **(Verge Works Commercial Acceptance):**
- (i) notify the Client Parties and the owner of the Verge Works Site in writing of its conclusion as to whether Verge Works Commercial Acceptance has been achieved, and if Verge Works Commercial Acceptance has not been achieved, the reason or reasons for its opinion that Verge Works Commercial Acceptance has not been achieved; and
 - (ii) if it determines Verge Works Commercial Acceptance has been achieved but there are Outstanding Items that Project Co needs to rectify:
 - (A) specify the reasonable period of time for rectifying those outstanding items; and
 - (B) certify when, in its reasonable opinion, each outstanding item has been completed by Project Co;
- (h) **(Commercial Acceptance Report and Commercial Acceptance):**
- (i) review and comment on the Commercial Acceptance Report (and any revision or update of that report) in accordance with the requirements of the Deed, including Schedule 12 (Review Procedures) of the Deed;
 - (ii) certify those matters set out in Schedule 11 (Commercial Acceptance Criteria) of the Deed that are specifically stated to be the responsibility of the Independent Certifier and, if those Commercial Acceptance Criteria have been satisfied, notify the Client Parties accordingly in accordance with the requirements of the Deed;
 - (iii) if it determines that any of the Commercial Acceptance Criteria that are specifically stated to be the responsibility of the Independent Certifier in Schedule 11 (Commercial Acceptance Criteria) of the Deed have not been successfully completed, advise the Client Parties of the reason or reasons for this determination; and
 - (iv) if the State issues a certificate of Commercial Acceptance with a list of Commercial Acceptance Outstanding Items that Project Co needs to rectify:
 - (A) consult with the State in determining the reasonable period of time for rectifying those Commercial Acceptance Outstanding Items; and
 - (B) in relation to those Commercial Acceptance Outstanding Items that the Independent Certifier is required to certify in accordance with Schedule 11 (Commercial Acceptance Criteria) of the Deed, certify when each of those Commercial Acceptance Outstanding Items has been completed by Project Co;

- (i) **(further Monitoring and Testing)**: if the requirements of the Commercial Acceptance Criteria for a Stage have not been achieved, then following the completion of any rework, repeat Monitoring and Testing or any other action that may be required to be undertaken by Project Co, the Independent Certifier must provide further certification under paragraphs (g)(i) or (h)(ii) of this Annexure 2 (as applicable). The Independent Certifier must continue to repeat this process and provide further certification until:
 - (i) it certifies, that those Commercial Acceptance Criteria for a Stage that the Independent Certifier is required to certify in accordance with Schedule 11 (Commercial Acceptance Criteria) of the Deed, have been achieved; or
 - (ii) the Client Parties otherwise agree;
- (j) **(Post Commercial Acceptance Testing)**:
 - (i) attend, take samples, make measurements and otherwise carry out any checks and investigations it reasonably requires in order to ensure that Project Co has successfully completed any Post Commercial Acceptance Tests;
 - (ii) direct any testing, monitoring, calibrating, assessing or evaluating (as applicable) required to be performed by Project Co under the Deed, including as set out in the Development Phase Plans and including all testing and monitoring to determine whether any Post Commercial Acceptance Tests have been successfully completed that it considers appropriate; and
 - (iii) continue to repeat the process described in paragraphs (j)(i) and (j)(ii) until Project Co has successfully completed any Post Commercial Acceptance Tests;
- (k) **(extension of time claims)**: where Project Co has submitted a Change Notice:
 - (i) determine Project Co's entitlement to an extension of time taking into account all relevant evidence presented by the State and Project Co and having regard to, but not being bound by, the Development Phase Program; and
 - (ii) where Project Co is entitled to an extension of time in accordance with the requirements of the Deed, extend the Date for Commercial Acceptance for a Stage by a reasonable period and notify Project Co and the State of the extension granted;
- (l) **(Commissioning Agent)**: provide a resource that is suitably qualified and experienced as a commissioning agent in implementing and assessing GBCA Green Star accreditation and commissioning.
- (m) **(general)**:
 - (i) do all things necessary to satisfy itself that Commercial Acceptance for a Stage has occurred, except that the Independent Certifier is not required to (but may) undertake its own Monitoring and Testing;
 - (ii) perform all of the tasks and functions that are, or may be (in accordance with the provisions of the Deed), assigned to it in the Deed; and
 - (iii) do all things to assist the State with determining whether the Commercial Acceptance Criteria for which the State is responsible for certifying under Schedule 11 (Commercial Acceptance Criteria) of the Deed have been satisfied.

Annexure 3 – Payment Schedule

[Not disclosed]