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Date / /

Development Agreement Mid-Coast Council - Forster Project

Mid-Coast Council
ABN 44 961 208 161

and

Enyoc Pty Ltd ACN 098 769 469 as trustee for the Graham Dong Family Trust ABN
41 606 503 623

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Development Agreement

Mid-Coast Council - Forster Project

Dated / /

Parties

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Contact	John Dougherty, Manager Property & Commercial Services
Short name	Council

Name	Enyoc Pty Ltd ACN 098 769 469 as trustee for the Graham Dong Family Trust ABN 41 606 503 623
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Facsimile	07 5591 3445
Email	coyne@aion.com.au
Contact	Coyne Graham
Short name	Developer

Background

- A. Council owns the Land.
- B. Under this Deed, the Developer agrees to provide the Development Services on the Land in accordance with the terms of this Deed.
- C. Council agrees to grant a call option to enable the Developer (or an Approved Nominee) to call for the transfer of the Developer Works Lot as contemplated in this Deed.

This Deed Witnesses

1. Interpretation

1.1 Definitions

The following terms have the following meanings unless the contrary intention appears:

Abandon means, where the Developer does not perform any part of the Council Activities or the Developer Activities Stage 1 for a continuous period of 60 days and Council has reasonably determined the Developer has formed the intention not to continue the Council Activities or the Developer Activities Stage 1, except due to a failure on the part of Council or Council's Associates to perform any of Council's obligations under this Deed or due to the occurrence of a Force Majeure Event.

Activities means all work, services, activities, things or tasks which the Developer is, or may be, required to do to comply with its obligations under this Deed, including the design and construction of the Works, or procuring a Contractor or Contractors to design and construct the Works, and anything incidental or ancillary thereto, and for the avoidance of doubt includes the Developer Activities.

Additional Works means those works specified in Schedule 7.

Application means an application for any Approval.

Approval means:

- (a) any Development Consent;
- (b) all other authorisations, consents, approvals, licences, leases, rulings, permits, permission, exemptions, filings, registrations, lodgements, variances, orders, certificates, judgments, determinations, decrees, decisions, publications, notices, notarisations, declarations or regulations by, from or with any Authority;
- (c) all requirements imposed under Law or by an Authority; and
- (d) any modification of anything referred to in paragraphs (a), (b) or (c) of this definition,

relating to, necessary for or required in connection with:

- (e) the Project Documents;
- (f) the Works;
- (g) the performance of the Activities;
- (h) the Land, during the period that the Works or Activities are required to be carried out or performed under this Deed; or
- (i) the subdivision of the Land (including any stratum subdivision).

Approved Nominee means a person or entity nominated by the Developer to be the registered proprietor of the Land who has been nominated and accepted in accordance with the terms of the Call Option Deed (Developer Works Lot).

Artistic Work has the meaning given to it in the *Copyright Act 1968* (Cth).

Associate means any Related Body Corporate of the Developer, or any officer, employee, agent, consultant, contractor, subcontractor or advisor of the Developer (including any

Contractor), and any employee, agent, consultant, contractor, subcontractor or advisor of a Contractor.

Attorney means each attorney appointed by the Developer under clause 49.1.

Australian Privacy Principles has the meaning given in the *Privacy Act 1988* (Cth).

Authority means the Consent Authority and any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency, entity, any public or private electricity, telecommunications, gas or other utility company or any other body having statutory rights in connection with the Land, the Works or the Activities, but excludes Council acting in its capacity as landowner.

Bank Guarantee has the meaning given to that term in clause 3.1.1.

Builder means the Contractor engaged by the Developer to build the Council Works, as approved in writing by Council in accordance with clause 21.3.

Buildability Problem means any problem, difficulty or complexity relating to:

- (a) the means, methods or techniques by which the Activities are to be carried out; or
- (b) the co-ordination or integration of the Activities.

Building Code means the *Code for the Tendering and Performance of Building Work 2016*, which can be downloaded from www.abcc.gov.au.

Business Day means a day other than:

- (a) a Saturday, Sunday or public holiday in Sydney; or
- (b) 27, 28, 29, 30 or 31 December.

Call Option Deed (Council Buyback) means the call option deed in the form attached to the Residual Land Contract.

Call Option Deed (Developer Works Lot) means the call option deed between Council (as grantor) and the Developer (as grantee) entered into on or about the date of this Deed entitling the Developer (or its nominee) to call for the acquisition of the Developer Works Lot during the call option period specified in that deed.

Call Option Period (Council Buyback) has the meaning given to the term 'Call Option Period' in the Call Option Deed (Council Buyback).

Call Option Period (Developer Works Lot) has the meaning given to that term 'Call Option Period' in the Call Option Deed (Developer Works Lot).

Certificate of Developer Works Stage 1 Completion means a certificate issued by the Independent Certifier certifying that Developer Works Stage 1 Completion has been achieved and setting out the date upon which Developer Works Stage 1 Completion was achieved.

Certificate of Early Access Completion means, in respect of the Council Works, a certificate issued by the Independent Certifier certifying that Early Access Completion has been achieved and setting out the date upon which Early Access Completion was achieved.

Certificate of Practical Completion means a certificate issued by the Independent Certifier certifying that Practical Completion has been reached and setting out the date upon which Practical Completion was reached.

Certificate of Warm Shell Practical Completion means a certificate issued by the Independent Certifier certifying that Warm Shell Practical Completion has been reached and setting out the date upon which Warm Shell Practical Completion was reached.

Change in Control means:

- (a) a change in the shareholding of the Developer resulting in the ultimate holding company of the Developer being directly or indirectly entitled to 50% or less of the shares of the Developer;
- (b) any other event such that a change occurs in the control of the Developer or any company which is a holding company or holding trust of the Developer or of any company with ultimate control of any Related Body Corporate of the Developer from that which existed at the date of this Deed (whether occurring at one time or through a series or succession of transactions); or
- (c) a change in the corporate structure of the Developer or any company which is a holding company of the Developer, which results in a person other than the shareholder of the Developer as at the date of this Deed:
 - (i) controlling the composition of the board of directors of the Developer;
 - (ii) controlling the voting power of the board of directors or any class of shareholder of the Developer or both; or
 - (iii) holding more than half of the issued share capital (either beneficially or otherwise) of the Developer.

For the purposes of this definition and clause 50.5, control has the meaning set out in section 50AA of the Corporations Act.

Change in Control Breach means a breach of clause 50.5.1.

Change in Law means any of the following events occurring after the date of this Deed:

- (a) a change in or repeal of any existing Law;
- (b) the enactment or making of any new Law; or
- (c) a change in interpretation or enforcement of any Law.

Civic Precinct Side Deed means the deed in the form of Schedule 16 to be entered into between the Developer, each Relevant Contractor and Council.

Claim includes any, right, debt, cause of action, action, Liability, claim, entitlement, damages, proceeding, remedy, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent and whether at Law (including in tort, for negligence, or otherwise), in equity, under statute or contract or otherwise.

Common Area means those areas within the Land (including any development on the Land) which are proposed to be shared and controlled by the various ultimate stratum owners in accordance with the Building Management Statement (which as at the date of this deed are generally shown in the plan (as 'Common Shared Areas/Access') comprised in Schedule 3).

Common Area Works means those portions of the Developer Works which are undertaken or located on the Common Area.

Commonwealth Funding Agreement means the agreement for Commonwealth Funding between Council and the Commonwealth as represented by the Department of Infrastructure and Regional Development ABN 86 267 354 017 in connection with the Council Works.

Consent Authority means:

- (a) Council acting as a consent authority under the EP&A Act;
- (b) where applicable, the relevant joint regional planning panel; or
- (c) if an environmental planning instrument specifies a Minister or Authority (other than Council) or director General of the department of Planning or other director of a public authority (as defined in the EP&A Act as having the function to determine the Development Application or any other relevant Application, the Minister, Authority or director as the case may be; the Land & Environment Court of New South Wales.

Contamination has the same meaning as in the *Contaminated Land Management Act 1997* (NSW).

Contract Sum means the amount specified in Item 1 as adjusted in accordance with this Deed.

Contractor means each contractor or consultant engaged by the Developer for the carrying out of any part of the Activities and includes the Builder.

Contractor Side Deed means the deed in the form of Schedule 10 to be entered into between the Developer, the Builder and Council.

Contributions means each of:

- (a) contributions levied pursuant to section 94 of the *EP&A Act*, and
- (b) contributions levied under section 64 of the *Local Government Act 1993* (NSW) and sections 305 to 307 of the *Water Management Act 2000* (NSW).

Controller has the meaning it has in the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Costs means costs, Losses, expenses, Liabilities or damages.

Council Activities means that part of the Activities relating to the Council Works.

Council Initiated Variation means:

- (a) a Variation directed by Council under a Variation Order, other than a Variation Order issued under clause 34.2.2(a), 35.8.1 or 35.8.3; or
- (b) a Developer Works Stage 1 Variation directed by Council under clause 35.2.4(a) or 35.2.4(b).

Council's Associate means the Council's Representative and any other person responsible for the administration or management or implementation of the Works or the Activities or any aspect of it on behalf of Council and any employee, agent, consultant, contractor or advisor of Council as notified in writing by Council to the Developer, but excludes the Developer and any Associate of the Developer and excludes any statutory officer of Council.

Council Significant Common Area Issues means:

- (a) the exclusive access and occupation rights in favour of Council for the external area (south east corner) adjoining the visitor information centre and library;
- (b) the ability for Council to use (in its absolute discretion) the Common Area leading into the community lounge as generally shown in the plans in the Technical Documents;
- (c) the availability for public access to, and the appropriate landscaping (hard and soft) of, any part of the Land which, when developed in accordance with this Deed, falls outside the building curtilage of the Developer Works Stage 1 (as shown in the Development Consent (Primary)); and
- (d) the right of Council to install signage to appropriately identify the location and offerings of the Council Works (upon completion) at appropriate locations on the Land.

Council Significant Developer Works Criteria means, for each Council Significant Developer Works Issue, any criteria:

- (a) specified for that issue in Exhibit C; or
- (b) otherwise agreed in writing from time to time.

Council Significant Developer Works Issue means, with respect to the Developer Works (other than the Developer Works Stage 1), any of the following:

- (a) the design of the loading dock;
- (b) the ability of Council to use the loading dock shown in the Technical Documents – Developer Works; and
- (c) the works contained in any common area to be used by the public or Council.

Council Significant Developer Works Stage 1 Criteria means, for each Council Significant Developer Works Stage 1 Issue, any criteria:

- (a) specified for that issue in Exhibit B; or
- (b) otherwise agreed in writing from time to time.

Council Significant Developer Works Stage 1 Issue means, with respect to the Developer Works Stage 1, any of the following:

- (a) the curved podium floor over the civic plaza and the associated soft landscaping along the podium floor edge;
- (b) the façade to the civic plaza including the level of glass transparency;
- (c) the timber cladding to the building columns in the civic plaza;

- (d) the timber soffit ceiling and planting to the roof overhang of the civic plaza;
- (e) the public artwork to the outdoor spaces fronting Lake Street;
- (f) the hard and soft landscaping to the civic plaza and other external areas surrounding the Council Works, including built-in street furniture and feature exposed aggregate banding;
- (g) the design of the civic plaza including timber balustrade cladding, public lounge, skylights and decorative sun shading;
- (h) the soft landscaping to the stairway connecting the basement carpark to the civic plaza;
- (i) the lift access from the basement carpark to the civic plaza;
- (j) the design of the Common Area;
- (k) the design of any facilities that will be shared by Council and other Users;
- (l) the design of the connection between the civic plaza of the Developer Works Stage 1 and the external spaces (including urban design activation) of the Lake Street frontage to the Developer Works (other than the Developer Works Stage 1); and
- (m) the right of Council to install signage to appropriately identify the location and offerings of the Council Works (upon completion) at appropriate locations on the Land.

Council Works means that part of the Works described in the Council Works Specification and the Council Works Drawings (and, for the avoidance of doubt, does not include the Early Access Works).

Council Works Design Documents means the drawings, specifications and other information, samples, models, patterns and the like required by this Deed or otherwise created (and including, where the context so requires, those to be created by the Developer) for the construction of the Council Works or the carrying out of the Council Activities including documents which identify the schedule of finishes (detail, quality and specification) for the Council Works.

Council Works Drawings means the document or documents identified as such in Exhibit A to this Deed.

Council Works Lot means that part of the Land identified as Lots 1 and 2 in the Subdivision Concept Plan.

Council Works Specification means the document or documents identified as such in Exhibit A to this Deed.

Council's Representative means the person appointed as Council's Representative in accordance with clause 19 from time to time.

Date for Base Works PC means the relevant date so specified in Schedule 6 but if any extension of time for Base Works PC is determined in accordance with this Deed or allowed in any arbitration, litigation or other binding dispute resolution process, it means the date resulting therefrom.

Date for Early Access Completion means the relevant date so specified in Schedule 6 but if any extension of time for Early Access Completion is determined in accordance with this

Deed or allowed in any arbitration, litigation or other binding dispute resolution process, it means the date resulting therefrom.

Date for Practical Completion means the relevant date so specified in Schedule 6, but if any extension of time for Practical Completion is determined in accordance with this Deed or allowed in any arbitration, litigation or other binding dispute resolution process, it means the date resulting therefrom.

Date for Warm Shell Practical Completion means the relevant date so specified in Schedule 6 but if any extension of time for Warm Shell Practical Completion is determined in accordance with this Deed or allowed in any arbitration, litigation or other binding dispute resolution process, it means the date resulting therefrom.

Date of Base Works PC has meaning for that term set out in clause 18.11.

Date of Early Access Completion means:

- (a) the date stated in the Certificate of Early Access Completion as the date upon which Early Access Completion was reached; or
- (b) where another date is determined in any arbitration, litigation or other binding dispute resolution process as the date upon which Early Access Completion was reached, that other date.

Date of Practical Completion means:

- (a) the date stated in the Certificate of Practical Completion as the date upon which Practical Completion was reached; or
- (b) where another date is determined in any arbitration, litigation or other binding dispute resolution process as the date upon which Practical Completion was reached, that other date.

Date of Warm Shell Practical Completion means:

- (a) the date stated in the Certificate of Warm Shell Practical Completion as the date upon which Warm Shell Practical Completion was reached; or
- (b) where another date is determined in any arbitration, litigation or other binding dispute resolution process as the date upon which Warm Shell Practical Completion was reached, that other date.

Deed means the contractual relationship between the parties constituted by this deed and all schedules, annexures and exhibits, including the Technical Documents but excluding the Information Documents.

Deed of Guarantee means a deed in the form set out in Schedule 12.

Default Amount means:

- (a) if:
 - (i) this Deed is terminated due to a Developer Default; and
 - (ii) as at the date of termination, legal title to the Developer Works Lot has not been transferred to the Developer (or Approved Nominee) in accordance with the Residual Land Contract,

the aggregate sum of:

- (iii) an amount equivalent to X where:

X = \$6,000,000 less the market value of the unimproved Land (i.e. excluding the value of any structures and improvements on the Land) as at the date of termination (as determined by a qualified valuer jointly appointed by the Developer and Council (and any failure to reach agreement on the appointment will be resolved in accordance with the dispute resolution provisions of clause 54)),

(noting that X = 0 in the event that is a negative number); and

- (iv) any additional costs, Losses, expenses, Liabilities or damages suffered or incurred by Council, arising out of, or in any way in connection with, the termination (or the events or circumstances connected with the termination) of this Deed, as if the Developer had repudiated this Deed and Council elected to treat this Deed as at an end and elected to recover damages; or

- (b) if:

- (i) this Deed is terminated due to a Developer Default; and
- (ii) as at the date of termination, legal title to the Developer Works Lot has been transferred to the Developer or Approved Nominee in accordance with the Residual Land Contract,

the aggregate sum of:

- (iii) any portion of the Purchase Price that remains to be paid as at the date of termination by the Developer to Council under the Residual Land Contract (after accounting for any set off that has occurred for the purposes of clause 36); and
- (iv) any additional costs, Losses, expenses, Liabilities or damages suffered or incurred by Council, arising out of, or in any way in connection with, the termination (or the events or circumstances connected with the termination) of this Deed, as if the Developer had repudiated this Deed and Council elected to treat this Deed as at an end and elected to recover damages.

Defect means:

- (a) any defect, deficiency, fault, error or omission in or from the Council Activities or the Council Works, or any other aspect of the Council Activities or the Council Works that does not comply with the requirements of this Deed; or
- (b) any Developer Works Stage 1 Defect:
 - (i) which prevents the Council Works or the Common Area from being reasonably capable of being used for their intended purposes, as stated in or reasonably inferable from this Deed;
 - (ii) the rectification of which will prejudice the convenient use of the Council Works or the Common Area by the Users or others; or

- (iii) causes any legal impediment or significant physical impediment to the use of the Council Works or the Common Area by the Users or others.

Defects Liability Period means the period commencing on the Date of Practical Completion and expiring on the date that is 12 months after the Date of Practical Completion, as extended under clause 34.6.

Design Documents means:

- (a) Council Works Design Documents; and
- (b) Developer Works Design Documents.

Design Issue means:

- (a) any:
 - (i) error in or omission from; or
 - (ii) ambiguity, inadequacy, discrepancy, inconsistency, incompleteness, lack of integration, lack of co-ordination or lack of detail in or between,

the Technical Documents or any other document or documents comprising this Deed and includes any non-compliance with any Law; or
- (b) any part of the Technical Documents or any other document or documents comprising this Deed that requires further development, co-ordination or refinement prior to commencement of the construction of that part of the Works to which that design or document relates.

Design Development Program means the program for design development in the period between months four and nine after the Proceed Date.

Developer Activities means all work, services, activities, things or tasks which the Developer is, or may be, required to do to:

- (a) comply with its obligations under this Deed relating to the Developer Works; or
- (b) for the design and construction of the Developer Works, or procuring a Contractor or Contractors to design and construct the Developer Works, and anything incidental or ancillary thereto.

Developer Activities Stage 1 means that part of the Developer Activities relating to the Developer Works Stage 1, including all work, services, activities, things or tasks which the Developer is, or may be, required to do to:

- (a) comply with its obligations under this Deed relating to the Developer Works Stage 1; or
- (b) for the design and construction of the Developer Works Stage 1, or procuring a Contractor or Contractors to design and construct the Developer Works Stage 1, and anything incidental or ancillary thereto,

and includes the Third Party Agreement Activities.

Developer Change in Control Notice means a notice given by the Developer to Council under clause 50.5.2.

Developer Default means an event so described in clause 43.1.

Developer Rejection Right arises if the proposed Developer Works Stage 1 Variation:

- (a) would result in the Developer being in breach of this Deed;
- (b) is likely to substantially increase the cost of the Developer Works Stage 1;
- (c) is likely to materially adversely affect the Developer Works Stage 1;
- (d) would reduce the net lettable area of the Developer Works Stage 1;
- (e) cannot be practically achieved;
- (f) would result in a delay to achieving Developer Works Stage 1 Completion of more than 1 month; or
- (g) would put the Developer in breach of any Law or Approval or any sales contract or lease that has been entered into in respect of the Developer Works Stage 1.

Developer Works means:

- (a) the works set out or otherwise described in Exhibits B and C (or the documents listed or referred to in Exhibits B and C) as amended by any Variations or Council Works Stage 1 Variations directed or permitted under this Deed; and
- (b) any other part of the Works that are not part of the Council Works,

and, for the avoidance of doubt, includes the Developer Works Stage 1.

Developer Works Design Documents means the drawings, specifications and other information, samples, models, patterns and the like required by this Deed or otherwise created (and including, where the context so requires, those to be created by the Developer) for the construction of the Developer Works or the carrying out of the Developer Activities (including, for the avoidance of doubt, the Developer Works Stage 1 Design Documents).

Developer Works Lot means that part of the Land that is identified as Lot 3 in the Subdivision Concept Plan.

Developer Works Stage 1 means the portion of the Developer Works set out or described in Exhibit B (or the documents listed or referred to in Exhibit B) as amended by any Variations or Council Works Stage 1 Variations directed or permitted under this Deed and includes the Third Party Agreement Works, the Additional Works and the Common Area Works.

Developer Works Stage 1 Defect means any defect, deficiency, fault, error or omission in or from the Developer Activities Stage 1 or the Developer Works Stage 1, or any other aspect of the Developer Activities Stage 1 or the Developer Works Stage 1 that does not comply with the requirements of this Deed.

Developer Works Stage 1 Design Documents means the drawings, specifications and other information, samples, models, patterns and the like required by this Deed or otherwise created (and including, where the context so requires, those to be created by the Developer) for the construction of the Developer Works Stage 1 or the carrying out of the Developer Activities Stage 1.

Developer Works Stage 1 Completion means that stage in the performance of the Activities when:

- (a) the Developer Works Stage 1 are complete, except for minor Developer Works Stage 1 Defects:
 - (iv) which do not prevent the Developer Works Stage 1, the Council Works or the Common Area from being reasonably capable of being used for their intended purposes, as stated in or reasonably inferable from this Deed;
 - (v) which the Independent Certifier determines the Developer has reasonable grounds for not promptly rectifying;
 - (vi) the rectification of which will not prejudice the convenient use of the Developer Works Stage 1, the Council Works or the Common Area by the Users or others;
 - (vii) the immediate making good of which is not practicable; and
 - (viii) which do not cause any legal or physical impediment to the use of the Developer Works Stage 1, the Council Works or the Common Area by the Users or others; and
- (b) practical completion has been achieved under the contract between the Developer and the Contractor for the design and construction of the Developer Works Stage 1.

Developer Works Stage 1 Variation means a variation, addition or deletion to any part of the Developer Activities Stage 1, the Developer Works Stage 1 or the Technical Documents (in so far as the Technical Documents relates to the Developer Activities Stage 1 or the Developer Works Stage 1), including:

- (a) increases or decreases in, or omissions from, the Developer Activities Stage 1 or the Developer Works Stage 1;
- (b) changes in the character or quality of any material or work which are beyond design development;
- (c) changes in the levels, lines, positions or dimensions of the Developer Works Stage 1; or
- (d) changes to the requirements of the Technical Documents (in so far as the Technical Documents relates to the Developer Activities Stage 1 or the Developer Works Stage 1),

but does not include any variations to the Technical Documents arising from design development and, for the avoidance of doubt, does not include any Variation.

Developer's Material has the meaning given to it in clause 52.2.2.

Developer's Representative means the person appointed by the Developer in accordance with clause 20.1.

Development Application means an Application for the issue of a Development Consent.

Development Application (Primary) means an Application for the issue of the Development Consent (Primary).

Development Consent means development consent issued under Part 4 of the EP&A Act, as modified from time to time.

Development Consent (Primary) means a Development Consent for both the Council Works and the Developer Works and for the subdivision of the Land to create the Council Works Lot.

Development Services means the carrying out the Council Activities and otherwise procuring the design and construction of the Council Works.

Direction includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

Dispute means any dispute, difference of opinion or disagreement between Council (or the Council's Representative) and the Developer, arising out of or in connection with the Activities, the Works or this Deed including any question regarding its formation, existence, validity, interpretation, performance, breach or termination. For the avoidance of doubt, any dispute, difference of opinion or disagreement between Council (or the Council's Representative) and the Developer concerning the manner in which Council, the Council's Representative, has exercised an absolute discretion reserved to it under this Deed will not be a **Dispute**.

Dispute Representative means:

- (a) in the case of the Developer, Coyne Graham or such other person as the Developer directs in writing; and
- (b) in the case of Council, the General Manager of Council, or such other person who is notified by Council to the Developer from time to time.

Draft Works Program has the meaning given to that term in clause 31.2.

Early Access Completion means that stage in the performance of the Activities when:

- (a) the Council Works and the Developer Works Stage 1 are sufficiently complete to enable Council and any Separate Contractor to commence the Early Access Works without interruption or interference from the Activities;
- (b) the Council Works can be securely locked;
- (c) there is no impediment to Council and any Separate Contractor accessing the Council Works or the Developer Works Stage 1 for the purpose of carrying out and completing the Early Access Works; and
- (d) the Developer has done, or procured any relevant Contractor to have done, everything which this Deed requires be done as a condition precedent to Early Access Completion, including those things listed in Item 12.

Early Access Works means the works identified in Item 7.

Emergency means an occurrence of events or circumstances (or both) which present a risk of material harm to the public or other persons, the Works, the Land or any adjoining property or the Environment.

Encumbrance means any:

- (a) security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power or title retention or flawed deposit arrangement;

- (b) right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off;
- (c) right that a person (other than the owner) has to remove something from land (known as a profit à prendre), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or
- (d) third party right or interest or any right arising as a consequence of the enforcement of a judgment,

or any agreement to create any of them or allow them to exist.

Enforcement Costs includes costs, charges and expenses incurred in connection with a breach or default, including court costs, legal fees and other enforcement costs relating to the breach or default and costs of rectifying the breach or default, including those incurred in connection with advisers.

Environment means components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) any organic or inorganic matter and any living organism; and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a) to (d) inclusive.

Environmental Law means any Law concerning the Environment and includes Laws concerning:

- (a) the carrying out of uses, works or development or the subdivision of land;
- (b) emissions of substances into the atmosphere, water and land;
- (c) pollution and Contamination of the atmosphere, water and land; and
- (d) production, use, handling, storage, transportation and disposal of:
 - (i) waste;
 - (ii) hazardous substances;
 - (iii) dangerous goods; and
 - (iv) threatened, endangered and other flora and fauna species;

whether made or in force before, on or after the date of this Deed.

EP&A Act means the *Environmental Planning & Assessment Act 1979* (NSW).

Extension Event means:

- (a) an act or omission of Council or any Council's Associate, other than acts or omissions which are expressly permitted under or contemplated by this Deed;

- (b) a breach of this Deed or any Project Document by Council;
- (c) if the Developer has complied with its obligations under this Deed in relation to Separate Contractors and Early Access Works (including its obligations under clause 15.4), an act or omission of a Separate Contractor in relation to Early Access Works or any access to or use of the Land;
- (d) a Council Initiated Variation;
- (e) a Force Majeure Event; or
- (f) the discovery of a Relic in, on or under the Land which differs materially from any Relic which should reasonably have been anticipated by a reasonably competent and experienced contractor at the date of this Deed, if such a contractor had inspected:
 - (i) all written information made available by or on behalf of Council to the Developer for the purpose of tendering and in connection with this Deed, including the Information Documents;
 - (ii) all documents forming part of this Deed;
 - (iii) all information relevant to risk allocation under this Deed, including the Contract Sum and the Date for Practical Completion, which is reasonably obtainable by the making of reasonable enquiries; and
 - (iv) the Land and its near surrounds,
 and, for the avoidance of doubt, excludes any Relic in, on or under the Land or its near surrounds disclosed in, referred to in, or reasonably ascertainable from, the Information Documents;

Funding means any financial accommodation obtained by the Developer from either:

- (a) the Project Lender; or
- (b) any equity or other debt provider,

in respect of the Activities.

Extra Land means:

- (a) any land or buildings in addition to the Land, which is necessary or which the Developer may require for the purposes of carrying out the Activities or otherwise for the purposes of this Deed; and
- (b) any Third Party Agreement Land.

Final Council Works Design Document means a Council Works Design Document that has been submitted to Council in accordance with clause 25.2 and in respect of which the relevant period of time in clause 25.3.1(a) has expired and Council has not rejected the relevant Council Works Design Document.

Final Design Document means:

- (a) a Final Council Works Design Document;
- (b) a Final Developer Works Stage 1 Design Document; and

(c) a Final Developer Works Design Document.

Final Developer Works Design Document means a Developer Works Design Document (other than a Developer Works Stage 1 Design Document) that has been submitted to Council in accordance with clause 25.2 and in respect of which the relevant period of time in clause 25.4.2 has expired.

Final Developer Works Stage 1 Design Document means a Developer Works Stage 1 Design Document that has been submitted to Council in accordance with clause 25.2 and in respect of which the relevant period of time in clause 25.3.1(b) has expired and Council has not rejected the relevant Developer Works Stage 1 Design Document.

Final Payment Claim means a payment claim given by the Developer to Council under clause 36.13.

Final Payment Claim Reference Date means the date that is the later of:

- (a) 20 Business Days after the expiry of the last Defects Liability Period to expire; and
- (b) the date on which the Developer has provided the items required under clause 36.8.2 and complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7.

Financial Capacity Report means the evidence to be provided by the Developer to Council in accordance with clause 45.3.1.

Financial Capacity Termination Period means the period commencing from the date on which the Financial Capacity Report is provided by the Developer to Council in accordance with clause 45.3.1(a) and expiring 15 Business Days later (or on such later date as the parties may agree in writing).

Force Majeure Event means any one of the following events:

- (a) war (undeclared or declared), civil war or civil commotion;
- (b) demonstrations, insurrections or riots (not caused by the Developer or the Developer's Associates);
- (c) floods, earthquakes or substantial fires (not caused by the Developer or the Developer's Associates);
- (d) explosions (not caused by the Developer or the Developer's Associates) or acts of terrorism; or
- (e) acts of God or the public enemy or sabotage.

Good Industry Practice means the exercise of that degree of skill, professionalism, care, prudence, diligence and operating practice which would reasonably and ordinarily be expected from a skilled and experienced developer, contractor, manager, consultant, subcontractor or supplier engaged in the performance of work of a nature the same as, or substantially similar to, the Activities.

GST has the same meaning as in the GST Act.

GST Act is the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Law has the meaning given in the GST Act.

Guarantor means Coyne Anthony Graham

Home Building Act means the *Home Building Act 1989* (NSW).

Incomplete Design means any aspect or element of any design or other technical requirement set out in the Technical Documents that is incomplete or otherwise required amendment, augmentation or further development in order to enable the Developer to construct the Works in accordance with this Deed.

Independent Certifier means the person specified in Item 23, or such other person as may be agreed by Council and the Developer in accordance with clause 22.3 from time to time.

Independent Certifier Deed means the deed to be entered into by Council, the Developer and the Independent Certifier in respect of the Independent Certifier's functions under this Deed substantially in the form of Schedule 5.

Information Documents means all information or documents of whatever nature in connection with the Works or the Activities which is provided to the Developer or its Associates by or on behalf of Council, or otherwise obtained by or on behalf the Developer or its Associates prior to the date of this Deed and which are listed in Schedule 11.

Input Tax Credit has the meaning it has in the GST Act.

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (b) it has a Controller appointed, is in liquidation, in provisional liquidation, under administration or wound up or has had a Receiver appointed to any part of its property;
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by Council acting reasonably);
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days) or resolution passed for the winding up of that person; or
- (e) it is taken (under section 459(F)(1) of the Corporations Act) to have failed to comply with a statutory demand;
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or it makes a statement from which Council reasonably deduces it is so subject);
- (g) it is otherwise unable to pay its debts when they fall due;
- (h) as an individual, that person:
 - (i) commits an act of bankruptcy;
 - (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
 - (iii) is made bankrupt;
 - (iv) makes a proposal for a scheme of arrangement or a composition; or

- (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the *Bankruptcy Act 1966* (Cth) or like provision under the law governing the Contract; or
- (i) something having a substantially similar effect to paragraphs (a) to (h) of this definition happens in connection with that person under the law of any jurisdiction,

and **Insolvency Event** has a corresponding meaning.

Insurances means the insurances required to be effected and maintained under this Deed.

Intellectual Property Rights means all current and future registered and unregistered rights in respect of copyright, designs, circuit layouts, trade marks, know-how, confidential information, patents, inventions and discoveries and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organisation 1967 (as amended from time to time).

IP Transfer Sum means the lesser of:

- (a) \$450,000; and
- (b) 50% of total sum of the actual costs incurred by the Developer (with evidence of such being provided to Council) for the preparation of the Design Documents,

However, if this Deed is terminated prior to the date that the Developer Works Lot is transferred to the Developer (or the Approved Nominee) then the IP Transfer Sum is \$0.

Item means an Item in Schedule 1.

Land means the whole of the land comprised in Lot 11 and Lot 12 in Deposited Plan 47987 and Lot 13 in Deposited Plan 47987.

Law means:

- (a) Commonwealth Legislation, including regulations, by-laws and other subordinate legislation;
- (b) State Legislation;
- (c) common law and equity;
- (d) Approvals; and
- (e) guidelines and policies of the Commonwealth, State governments and local governments and Authorities, with which the Developer is legally required to comply.

Legislation means in relation to the Commonwealth or the State, any act of parliament, any subordinate legislation, rules, regulation or by-laws or policy and any guidelines of the Commonwealth, the State, Council or other Authorities.

Liability means any liability or obligation (whether actual, contingent or prospective), including for any Loss, irrespective of when the acts, events or things giving rise to the liability or obligation occurred.

Lodgement Fee means \$101,363.00.

Loss means all damage, loss, cost and expense (including Enforcement Costs) of whatsoever nature or description.

Material includes:

- (a) building material;
- (b) rubble, waste or other debris;
- (c) spoil, overburden, soil, rocks or earth, whether clean or Contaminated; and
- (d) scrap metal or any buried material of any sort,

but does not include Relics.

Material Adverse Effect means a material adverse effect on the Developer's ability to comply with its obligations under this Deed.

Milestone means each and any milestone identified as a 'Milestone' in Schedule 6.

Milestone Date means:

- (a) in respect of each Milestone, the relevant date allocated to that Milestone in Schedule 6, but if any extension of time for the Milestone is determined in accordance with this Deed or allowed in any arbitration, litigation or other binding dispute resolution process, it means the date resulting therefrom;
- (b) in respect of the achievement of Early Access Completion, the Date for Early Access Completion;
- (c) in respect of the achievement of Base Works PC, the Date for Base Works PC; and
- (d) in respect of the achievement of Practical Completion, the Date for Practical Completion; and
- (e) in respect of the achievement of Warm Shell Practical Completion, the Date for Warm Shell Practical Completion

Moral Rights means any of the rights described in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended and revised from time to time), being 'droit moral' or other analogous rights arising under any statute (including the *Copyright Act 1968* (Cth)) or any other law (including any law outside Australia), that exist, or that may come to exist, anywhere in the world.

Native Title has the same meaning as in the *Native Title Act 1993* (Cth) or as otherwise recognised by Law from time to time.

Native Title Application means any claim or application recognised from time to time under any Law or future Law relating to Native Title, including any application under section 61 of the *Native Title Act 1993* (Cth) whether successful or not and includes the grant by a court of an injunction pending the court's decision regarding any application relating to any Native Title claim.

Occupation Certificate means a certificate referred to in section 109C(1)(c) of the EP&A Act.

Permitted Encumbrance means:

- (f) the Project Lender Security;
- (g) a lien arising by operation of Law securing money owing in respect of goods or services provided in the ordinary course of business where that money is duly paid on time or within any permitted payment terms;
- (h) an Encumbrance in favour of an Authority arising by operation of Law in the ordinary course of business where there is no default in payment of money owing in relation to that Encumbrance; or
- (i) an Encumbrance created or which exists with Council's prior written consent.

Personal Information has the meaning given in the *Privacy Act 1988* (Cth) and includes sensitive information and health information as defined under that Act.

Plant means plant and equipment used in connection with the Activities or which forms part of the Works (including any spare parts for such plant and equipment).

Pollution means a contaminant, dangerous, toxic or hazardous substance, petroleum or petroleum product, chemical, solid, special liquid, industrial or other waste regulated under Environmental Law and for the avoidance of doubt includes:

- (a) chemical or mineral substances (other than those naturally occurring in the land, water or atmosphere at background concentrations);
- (b) hydrocarbons;
- (c) mineralisation; and
- (d) asbestos,

but does not include buried objects or structures such as tanks, pipes, drums, fridges, building rubble and the like (except to the extent that those objects or structures are made of or contain material which is capable of causing Contamination).

Power includes any power, right, discretion, benefit, immunity, authority, remedy or privilege, whether express or implied, conferred on any person whether under this Deed, at Law or otherwise.

PPS Act means the *Personal Property Securities Act 2009* (Cth).

PPS Law means the PPS Act and the regulations made pursuant thereto.

Practical Completion means that stage in the performance of the Activities when:

- (a) the Council Works are complete, except for minor Defects:
 - (i) which do not prevent the Council Works from being reasonably capable of being used for their intended purpose, as stated in or reasonably inferable from this Deed;
 - (ii) which the Independent Certifier determines the Developer has reasonable grounds for not promptly rectifying;
 - (iii) the rectification of which will not prejudice the convenient use of the Council Works by the Users or others;
 - (iv) the immediate making good of which is not practicable; and

- (v) which do not cause any legal or physical impediment to the use of the Council Works by the Users or others;
- (b) those tests which this Deed requires be carried out and passed before Practical Completion is achieved, have been carried out and passed;
- (c) all documents and other information required by this Deed or reasonably requested by Council which, in the Independent Certifier's opinion, are necessary for the use, operation or maintenance of the Council Works have been supplied to Council and the Independent Certifier;
- (d) all temporary services which the Developer does not require use of for the carrying out of the Developer Activities have been disconnected;
- (e) the Developer has given Council a survey prepared by a registered surveyor showing that the Council Works (other than overhangs and encroachments agreed in writing by Council) are within the intended area for those works (as contemplated by this Deed);
- (f) all compliance reports required by Law or this Deed to be delivered to an Authority in relation to the Council Works have been delivered to the relevant Authority, Council and the Independent Certifier;
- (g) copies of all documents and Approvals issued by the relevant Authority acknowledging completion of the Council Works, and permitting occupation of the Council Works (including an Occupation Certificate) have been delivered to Council and the Independent Certifier;
- (h) copies of all other certificates, consents and Approvals required of any relevant Authority, whose certificate, consent or approval is required for the erection, use or occupancy of each part of the Council Works have been delivered to Council;
- (i) the Developer has removed all rubbish, debris, Plant (not forming part of the Council Works) and temporary works used in connection with the Council Works;
- (j) (not used);
- (k) all keys to the Council Works have been provided by the Developer to Council;
- (l) further to paragraph (b) above, all testing and commissioning of the Council Works or any part of the Council Works, as may be required by this Deed or necessary for the use, operation and maintenance of the Council Works or any part of the Council Works by Council or others, has been finalised and all testing and commissioning schedules have been signed off by the Independent Certifier;
- (m) further to paragraphs (b) and (l) above, the Developer has submitted to Council copies of all records of the required tests (including test results) that have been correctly and completely executed;
- (n) all Services and Plant (to the extent they either form part of the Council Works) and all other parts of the Council Works are operating under stable conditions and under all conditions of full and partial load, and the Developer has otherwise complied with clause 30.1.3;
- (o) the Developer has provided to Council certification that capacities and efficiencies of all Services, Plant and systems that form part of the Council Works satisfy the specified requirements of this Deed, and the Developer has otherwise complied with clause 30.1.3;

- (p) the Developer has fully cleaned all finishes, fixtures, fittings and glass and has removed all labels (not intended to be permanent labels) in respect of the Council Works;
- (q) the Developer has provided to Council and all relevant Authorities:
 - (i) all fire rating certificates for the Council Works;
 - (ii) the fire safety list of essential current and proposed measures for the protection of people in the event of fire in respect of the Council Works; and
 - (iii) certification as required by any relevant Authority in respect of the Council Works;
- (r) a Certificate of Developer Works Stage 1 Completion has been issued;
- (s) the Stratum Documents have been executed by the parties and exchanged in accordance with clause 18; and
- (t) the Developer has done, or procured any relevant Contractor to have done, everything which this Deed requires be done as a condition precedent to Practical Completion, including those things listed in Item 11.

Practical Completion Payment Claim means a payment claim given by the Developer to Council under clause 36.11.

Practical Completion Payment Claim Reference Date means the date that is the later of:

- (a) 20 Business Days after the date on which the Certificate of Practical Completion is issued; and
- (b) the date on which the Developer has provided the items required under clause 36.8.1 and complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7.

Privacy Laws means any Law which relates to the privacy of information about individuals (including the *Privacy Act 1988* (Cth)) and with which the Developer must comply, including the Australian Privacy Principles, any applicable code of practice and any applicable State or Territory privacy legislation.

Proceed Date means the date that Council notifies the Developer in writing that Council has determined that the Developer has the capacity to fund the carrying out of the Activities in accordance with this Deed pursuant to clause 45.3.3.

Progress Payment Claim means a claim for payment under clause 36.4.1.

Progressive Payment Claim Reference Date means the date that is the later of:

- (a) the 5th Business Day of each month in which the Developer has achieved all Milestones in respect of which the relevant Milestone Date falls prior to the 5th Business Day of that month; and
- (b) the date on which the Developer has provided the items required under clause 36.8.3 and complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7,

until the issue of the Certificate of Practical Completion.

Project Documents means:

- (a) this Deed, including all Schedules, Annexures and Exhibits;
- (b) each Deed of Guarantee;
- (c) Call Option Deed (Developer Works Lot);
- (d) the Residual Land Contract; and
- (e) any other document agreed by Council and the Developer to be a Project Document.

Project Lender means the company (if any) nominated by the Developer to provide finance in respect of the Activities.

Project Objectives means the objectives listed in clause 2.1.

Purchase Price means the purchase price payable by the Purchaser under the Residual Land Contract.

Purchaser means the purchaser under the Residual Land Contract, being either the Developer or the Approved Nominee.

Quality Plan means a quality plan which contains, as a minimum:

- (a) a precise description of the scope of the quality plan in terms of the work covered;
- (b) the Developer's overall organisation structure, including names of the employees working in each position;
- (c) the proposed organisational structure for the management of the Activities (to the extent they relate to the Council Works or the Developer Works Stage 1), including the names of all employees working in each position and a clear definition of the responsibility and authority of each person;
- (d) the specific allocation of responsibility and authority for the engagement and control of Contractors and their subcontractors;
- (e) the dates by which, or the time within which, various plans for the Activities (to the extent they relate to the Council Works or the Developer Works Stage 1), including those for purchasing, inspecting and testing and surveillance of Contractors and their subcontractors, are to be prepared and implemented;
- (f) an index of the procedures, methods and work directions to be applied with cross-referencing to the appropriate quality system element procedures, where applicable;
- (g) an index of the inspection and test plans to be developed for the Activities (to the extent they relate to the Council Works or the Developer Works Stage 1);
- (h) the quality records to be submitted and to be maintained by the Developer, Contractors and their subcontractors (to the extent they relate to the Council Works or the Developer Works Stage 1);
- (i) a proposed method for making changes and modifications to the quality plan as the Activities (to the extent they relate to the Council Works or the Developer Works Stage 1) proceed; and
- (j) other measures necessary to meet the requirements of this Deed.

Receiver includes a receiver or receiver and manager.

Reference Date means each of the following:

- (a) each Progressive Payment Claim Reference Date;
- (b) the Practical Completion Payment Claim Reference Date; and
- (c) the Final Payment Claim Reference Date.

Related Body Corporate has the meaning it has in the Corporations Act.

Related Entity has the meaning it has in the Corporations Act.

Relevant Application has the meaning given in clause 7.1.1.

Relevant Community Facility Property has the meaning given in clause 41.1.2.

Relevant Developer Property has the meaning given in clause 41.1.1.

Relevant Contractor means each of the following Contractors:

- (a) the architect; and
- (b) the structural engineer,

contracted by the Developer to provide services in connection with the Council Activities and the Developer Activities Stage 1.

Relics means:

- (a) a relic within the meaning of the *Heritage Act 1977* (NSW); or
- (b) an Aboriginal object or an Aboriginal place within the meaning of the *National Parks and Wildlife Act 1974* (NSW).

Remediation means to:

- (a) remove, dispose, destroy, contain or treat Contamination;
- (b) eliminate or reduce any hazard arising from the Contamination;
- (c) monitor the levels of Contamination; or
- (d) validate that the Contamination has been removed, disposed of, destroyed, contained or treated.

Reputable Insurers means such insurance companies operating in Australia, or London nominated by the Developer and approved in writing by Council (acting reasonably) who are in the business of insuring the risks required to be covered under this Deed.

Residential Building Work means "residential building work" as that term is defined in the Home Building Act.

Residual Land Contract means the sale contract for the Developer Works Lot in the form attached to the Call Option Deed (Developer Works Lot).

RMS means Roads and Maritime Services, a New South Wales government agency established under s46 of the *Transport Administration Act 1988* (NSW).

RMS Works Authorisation Deed means an agreement to be entered into between RMS and the Developer or Council, as a condition of RMS granting consent under s138 of the *Roads Act 1993* (NSW) in relation to the Works or any part of them.

Scheme has the meaning given to that term in clause 38.9.1.

Separate Contractors means any contractor or other person engaged or authorised by Council (other than the Developer or its Contractors) to perform the Early Access Works.

Services means services and public utilities, including water, gas, electricity, air conditioning, fire, telecommunications and electronic communication (including voice and data), drainage and sewerage.

Site Conditions means any physical conditions encountered in the execution of the Activities above, upon, under or over the surface of, or in the vicinity of, the Land or any Extra Land, and includes:

- (a) surface water, ground water, ground water hydrology and the effects of any de-watering;
- (b) physical and structural conditions, above, upon and below the Land or any Extra Land, including old footings, underground structures, buildings, improvements, partially completed structures or in-ground works;
- (c) topography of the Land, ground surface conditions and geology, including rock and sub-surface conditions or other materials encountered at the Land or any Extra Land;
- (d) climatic and weather conditions including rain, surface water run off and drainage, floods, water seepage, wind blown dust and sand, seasons and physical conditions that are a consequence of climatic and weather conditions;
- (e) all existing systems and Services, above or below ground level and all facilities with which such systems and Services are connected;
- (f) all improvements, including any artificial things, foundations, retaining walls and other structures installed by or on behalf of Council or others;
- (g) any Contamination, Pollution, or other rubbish, spoil or waste; and
- (h) underground strata forming part of the Land or any Extra Land.

SOP Act means the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Stage 1 means that stage of the development of the Land identified as 'Stage 1' in the Subdivision Concept Plan.

Stage 1A means that stage of the development of the Land identified as 'Stage 1A' in the Subdivision Concept Plan.

Stage 1B means that stage of the development of the Land identified as 'Stage 1B' in the Subdivision Concept Plan.

Stage 2 means that stage of the development of the Land identified as 'Stage 2' in the Subdivision Concept Plan.

Stage 3 means that stage of the development of the Land identified as 'Stage 3' in the Subdivision Concept Plan.

Stage 4 means that stage of the development of the Land identified as 'Stage 4' in the Subdivision Concept Plan.

Subdivision Certificate means a certificate issued under section 109J of the EP&A Act.

Subdivision Concept Plan means the draft plan of subdivision of the Land to create the Council Works Lot (or lots) as a parcel of land separate to the Land as set out in Schedule 14 as varied, updated or amended by agreement in writing between the Developer and Council from time to time.

Suitability means, in respect of Contaminated land, that having regard to the Contamination of the land and the Remediation or management measures taken in respect of that Contamination, the land can be used for a specified purpose without presenting an unacceptable risk to the health of the people on the land or adjoining land or to the Environment, assessed in accordance with EPA guidelines and the normal professional practice of site auditors accredited under the *Contaminated Land Management Act 1997* (NSW).

Sunset Date means, in respect of Practical Completion, the date specified in Item 15.

Supporting Documentation means:

- (a) a statutory declaration in the form of Schedule 8 by the Developer, or where the Developer is a corporation, by a representative of the Developer who is in a position to know the facts attested to, completed to a date not earlier than 2 Business Days prior to the date of its submission;
- (b) a duly completed Supporting Statement dated no earlier than the date of submission of the Supporting Statement; and
- (c) the reports and other information required to be prepared and submitted by the Developer under clause 37.2.

Supporting Documents means all documents and other material required by any Law to be lodged in support of an application for an Approval to enable it to be assessed by the relevant Authority.

Supporting Statement has the meaning given in section 13(9) of the SOP Act.

Sustainability Principles means the sustainability principles set out in Schedule 2 to the extent those principles are not inconsistent with the relevant parts of the Technical Documents.

Taxes means taxes, levies, imposts, charges and duties (including stamp and transaction duties) levied or imposed by Law or by any Authority together with any related interest, penalties, fines and expenses in connection with them, but does not include any tax on the net income or capital gain of a party.

Technical Documents means:

- (a) the Technical Documents – Council Works; and

- (b) the Technical Documents – Developer Works,

in each case as amended by any Variations or Developer Works Stage 1 Variations directed or permitted under this Deed.

Technical Documents – Council Works means:

- (a) the Council Works Specification; and
- (b) the Council Works Drawings.

Technical Documents – Developer Works means:

- (c) the documents set out or described in Exhibit B (or the documents listed or referred to in in Exhibit B); and
- (d) the documents set out or described in Exhibit C (or the documents listed or referred to in in Exhibit C).

Third Party means a party to a Third Party Agreement other than the Developer or Council.

Third Party Agreement includes any agreement between the Developer or Council and any Third Party, required to be entered into:

- (a) by any Authority; or
- (b) as a condition of any Approval,

in connection with the Works or the Activities, and includes any RMS Works Authorisation Deed.

Third Party Agreement Activities means all work, services, activities, things or tasks which the Developer is, or may be, required (including on behalf of Council) to do to:

- (a) comply with its obligations under this Deed relating to the Third Party Agreement Works (including under clause 59); or
- (b) for the design and construction of the Third Party Agreement Works, or procuring a Contractor or Contractors to design and construct the Third Party Agreement Works, and anything incidental or ancillary thereto.

Third Party Agreement Dispute Procedures means, in respect of any Third Party Agreement which is required by the relevant Authority to be entered into by Council, the dispute resolution procedures (if any) set out in that relevant Third Party Agreement.

Third Party Agreement Land means any land to which the Developer or Council is granted access pursuant to a Third Party Agreement.

Third Party Agreement Works means the works to be carried out by the Developer or Council under the Third Party Agreements.

Threatened Species Claim means a claim made or legal proceedings commenced in connection with the existence of a threatened species, population or ecological community or the habitat of a threatened species, population or ecological community as regulated by the *Threatened Species Conservation Act 1995* (NSW), the *National Parks and Wildlife Act 1974* (NSW) or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Trigger Date means the date identified in clause 45.1.1.

Users means any persons who from time to time use, or may use, any part of the Common Area or the Council Works, including Council's Associates, Council and its invitees and any member of the public generally.

Valid Tax Invoice is an invoice which complies with the GST Act relating to the production and form of tax invoices for GST purposes.

Variation means a variation, addition or deletion to any part of the Council Activities, the Council Works, the Common Area Works, the Additional Works or the Technical Documents (in so far as the Technical Documents relate to the Council Activities, the Council Works, the Common Area Works or the Additional Works), including:

- (a) increases or decreases in, or omissions from, the Council Activities, the Council Works, the Common Area Works or the Additional Works;
- (b) changes in the character or quality of any material or work which are beyond design development;
- (c) changes in the levels, lines, positions or dimensions of the Council Works; or
- (d) changes to the requirements of the Technical Documents (in so far as the Technical Documents relates to the Council Activities, the Council Works, the Common Area Works or the Additional Works),

but does not include any progression of the Technical Documents arising from design development.

Variation Order means a written document titled "Variation Order" directing the performance of a Variation.

Variation Proposal has the meaning given to that term in clause 35.1.2.

Variation Proposal Request has the meaning given to that term in clause 35.1.1.

Warm Shell Practical Completion means:

- (a) the Council Works are complete, except for minor Defects and any work required to complete the Additional Works (and works which are impacted on the completion of those Additional Works and the Developer Works Stage 1);
- (b) provision of the following certificates to Council:
 - a. a surveyor's certificate which confirms that the area of the Council Works Lot is consistent with the Development Consent (Primary) and final surveyors certificate;
 - b. a certificate from a structural engineer confirming that the Council Works Lot is in accordance with the specified structural design;
 - c. waterproofing certificate for wet areas;
 - d. glazing certificate for windows;
 - e. fire door certification (as applicable);
 - f. statement certifying that the fire seals relating to plumbing, electrical and other penetrations are installed correctly;

- (c) a report has been prepared by the Developer and submitted to Council (and Council is satisfied with that report (acting reasonably)) addressing the following;
 - a. confirming what works require to be undertaken to achieve Practical Completion (**Outstanding Works**);
 - b. the anticipated cost of the Outstanding Works (broken down into each element);
 - c. the anticipated program to complete the Outstanding Works;
 - d. a summary of each of the paragraphs of the definition of 'Practical Completion' in terms of status, proposed arrangements and any issues that the Developer is aware of in relation to the relevant paragraph;
- (d) having reviewed the report in paragraph (c) of this definition each of the Developer and Council have agreed in writing (or failing agreement, the matter has been determined by the Independent Certifier having regard to standard industry practice for the security of such Outstanding Works) appropriate security to be granted to Council to secure the Developer's obligations in connection with achieving Practical Completion by the Date for Practical Completion; and
- (e) the security referenced in paragraph (d) of this definition has been provided to Council.

WHS Act means the *Work Health and Safety Act 2011* (NSW).

WHS Plan means a site specific work health and safety management plan.

WHS Regulation means the *Work Health and Safety Regulation 2011* (NSW).

Works means the whole of the work to be carried out and completed in accordance with this Deed, including Variations, Developer Works Stage 1 Variations and any works that the Developer must design and construct, or procure a Contractor or Contractors to design and construct, under this Deed, and for the avoidance of doubt includes the Developer Works and the Third Party Agreement Works.

Works Documents means the:

- (a) Approvals;
- (b) Final Design Documents; and
- (c) to the extent that its requirements have not been incorporated into paragraphs (a) and (b), Technical Documents.

Works Program means the most recent Draft Works Program or updated Works Program submitted by the Developer under clause 31.2 or clause 31.4 (as applicable), and which has not been rejected by Council in accordance with clause 31.3.

1.2 General Interpretation

Unless the contrary intention appears, a reference in this Deed to:

- 1.2.1 a document (including this Deed) includes any variation or replacement of it;
- 1.2.2 a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this Deed;
- 1.2.3 a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- 1.2.4 an industry standard includes any amendment, update or replacement of any of them;
- 1.2.5 the singular includes the plural and vice versa;
- 1.2.6 the word 'person' includes an individual, a firm, a body corporate, a partnership, a joint venture, an unincorporated body or association, or any Authority;
- 1.2.7 any gender includes every gender;
- 1.2.8 a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- 1.2.9 an agreement, representation or warranty by two or more persons binds them jointly and each of them individually;
- 1.2.10 a group of persons or things is a reference to any two or more of them jointly and to each of them individually;
- 1.2.11 Australian dollars, dollars, A\$ or \$ is a reference to the lawful currency of Australia;
- 1.2.12 if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- 1.2.13 a day is to be interpreted as the period of time commencing at midnight on a calendar day and ending 24 hours later;
- 1.2.14 other than with respect to the issue of a payment schedule under clause 36.5, if an act under this Deed to be done by a party on or by a given day is done after 5.00pm on that day, it is taken to be done on the next day;
- 1.2.15 if an event under this Deed (other than the performance of any part of the Activities) must occur on or by a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day;
- 1.2.16 time is a reference to Sydney time;
- 1.2.17 month is a reference to a calendar month;
- 1.2.18 an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act, or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia;

- 1.2.19 the words "includes" and "including" (and any variants of those words) will be read as if followed by the words "without limitation";
- 1.2.20 writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible form;
- 1.2.21 the word 'Council' in any provision of this Deed which provides for:
- (a) the release or excuse of Council from obligations or liability;
 - (b) an indemnity in favour of Council; or
 - (c) a waiver of Council's obligations,
- (but not other provisions of this Deed) includes a reference to Council's Associates and any person claiming through or under Council, including the Council's Representative but excludes any of Council's contractors, subcontractors, invitees, licensees or other persons carrying out construction work or providing related goods and services (as those terms are defined in the SOP Act), and excludes the Developer and any such person on its behalf;
- 1.2.22 an amount for which a person is contingently liable includes an amount that that person may become actually or contingently liable to pay if a contingency occurs, whether or not that liability actually arises; and
- 1.2.23 this Deed includes a reference to this document and any amending documentation and include all annexures, schedules and exhibits to this Deed.

All obligations of the Developer under this Deed must, except to the extent this Deed expressly provides otherwise, be carried out and satisfied at the Developer's cost.

1.3 Headings

Headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this Deed.

1.4 Inconsistent agreements

If a provision of this Deed is inconsistent with a provision of any other Project Document, this Deed prevails.

1.5 Order of precedence

In the event of any inconsistency, ambiguity, discrepancy or conflict in this Deed, including between any of the clauses, the Schedules, the Annexures and the Exhibits, the inconsistency, ambiguity, discrepancy or conflict will be resolved in accordance with the following principles:

- 1.5.1 where the inconsistency, ambiguity, discrepancy or conflict exists between figured and scaled dimensions, figured dimensions will prevail; and
- 1.5.2 where the inconsistency, ambiguity, discrepancy or conflict cannot be resolved in accordance with clause 1.5.1, the inconsistency, ambiguity, discrepancy or conflict will be resolved by applying the following decreasing order of priority:
- (a) with respect to Council Works and any requirements or provisions of the Deed relating to Council Works:

- (i) clauses 1 to 61 and Schedule 1 of this Deed;
 - (ii) Council Works Specification;
 - (iii) the Council Works Drawings;
 - (iv) Schedules 2 to 18 of this Deed; and
 - (v) the remaining requirements of this Deed; and
- (b) with respect to the Developer Works and any requirements or provisions of the Deed relating to the Developer Works:
- (i) clauses 1 to 61 and Schedule 1 of this Deed;
 - (ii) Schedules 2 to 18 of this Deed; and
 - (iii) the remaining requirements of this Deed.

2. The Project

2.1 Project Objectives

The parties agree that the Project Objectives are to:

- 2.1.1 deliver key community facilities and public infrastructure which meet Council's requirements and delivery timetable, specifically: library, visitor information centre, community centre, plus associated infrastructure such as car parking and landscaping;
- 2.1.2 deliver and activate public spaces for the benefit of the local community and visitors to the region;
- 2.1.3 encourage and facilitate the Developer to create and deliver a development which is attractive to the market, creates an environment which is a pleasure to both live in and visit and which compliments Council's facilities and infrastructure;
- 2.1.4 deliver the Works on a staged basis in accordance with Council's required timetable and otherwise meeting market demands;
- 2.1.5 deliver a project of architectural merit, and utilise relevant environmentally sustainable designs which improve the appearance of the Land and compliments its surrounds;
- 2.1.6 generate sustainable local employment opportunities; and
- 2.1.7 deliver a site which has strong connectivity and integration with the adjacent Forster CBD and water front of Wallis Lake.

2.2 Appointment for the provision of Development Services

Council appoints the Developer to provide the Development Services on the terms of this Deed in consideration for the payment of the Contract Sum in accordance with clause 36.

2.3 Term

Subject to any other provision of this Deed (including clause 45.4), this Deed, takes effect from date of this Deed and continues until the earlier of:

- 2.3.1 the date all Council Works and the Developer Works have been completed, all monies required to be paid have been paid as required by this Deed and all obligations under this Deed have been satisfied; and
- 2.3.2 the date this Deed is terminated by a party exercising a right to terminate this Deed.

3. Bank Guarantee

3.1 Developer to give Bank Guarantee

- 3.1.1 Prior to the Date of Warm Shell Practical Completion, the Developer must give Council an unconditional undertaking, for the amount specified in Item 16 (**Bank Guarantee**).
- 3.1.2 The Bank Guarantee required under clause 3.1.1 must be:
 - (a) an irrevocable and unconditional on demand undertaking (with no expiry date) on terms approved in writing by Council (for which purpose the parties acknowledge and agree that the form set out in Schedule 4 is approved); and
 - (b) issued by the Commonwealth Bank of Australia or such other financial institution which is approved in writing by Council.

3.2 Bank guarantee as security

Without limiting clause 3.3, the Developer acknowledges and agrees that the Bank Guarantee given under clause 3.1 is security for:

- 3.2.1 damage to surrounding areas during the performance of the Activities;
- 3.2.2 the completion of the Council Works (including the achievement of Early Access Completion and Practical Completion);
- 3.2.3 the rectification of Defects;
- 3.2.4 the completion of the Developer Works Stage 1; and
- 3.2.5 the due and proper performance by the Developer of its obligations under this Deed.

3.3 Recourse to a Bank Guarantee

- 3.3.1 Notwithstanding clause 3.2, Council may (without notice to the Developer or the Approved Nominee) call on, or otherwise have recourse to, any or all of a Bank Guarantee (and the proceeds of a Bank Guarantee, including any interest earned in respect of such proceeds) provided under this clause 3 at any time, including:
 - (a) in respect of any:
 - (i) debt or other moneys due from the Developer to Council; or

- (ii) claim to money which Council has, or may have, against the Developer whether for damages (liquidated or unliquidated) or otherwise,

whether under this Deed or otherwise in connection with the Works or the Activities;

- (b) where an Insolvency Event has occurred in respect of the Developer or a Guarantor; or
- (c) where this Deed is terminated for any reason other than under clause 9.2 or 45.3.3.

3.3.2 The Developer is not entitled to, and must not seek, an injunction against, or otherwise restrain (or seek to restrain), Council from making a call on, or otherwise having recourse to, a Bank Guarantee or the use to which the proceeds of any such Bank Guarantee can be put.

3.3.3 Without limiting clauses 3.3.1 and 3.3.2, if Council has had recourse to any or all of the Bank Guarantee (or the proceeds of the Bank Guarantee) and it is later determined in any litigation or other binding dispute resolution process that Council was not entitled under clause 3.3.1 to have such recourse, then Council must repay the amount to the Developer to the extent that it was not entitled to have such recourse.

3.4 Not used

3.5 Returning the Bank Guarantee

Subject to clause 3.3, Council will return to the Developer the Bank Guarantee on the later of:

- 3.5.1 the expiry of the last Defects Liability Period; and
- 3.5.2 rectification of all Defects notified to the Developer prior to the expiry of the relevant Defects Liability Period,

or within 20 Business Days of the earlier termination of this Deed, but subject to Council's right to have recourse to the Bank Guarantee under clause 3.3.1.

However, the Developer may request and Council will consider (acting reasonably) an earlier partial release of the Bank Guarantee to the extent that the Developer has satisfied Council that it has rectified the majority of Defects notified to the Developer and to the extent that the Developer provides a replacement bank guarantee for a sum securing the outstanding Defects acceptable to Council (acting reasonably), in which case all references to "Bank Guarantee" will be taken to be references to that replacement bank guarantee.

4. Guarantee

On the date of this Deed, the Developer must give Council a duly executed and enforceable Deed of Guarantee provided by the Guarantor.

5. Approvals Strategy and Sequence

5.1 Obtaining Approvals

5.1.1 In this clause 5, the Developer will not be taken to be in breach of an obligation to obtain an Approval, unless the Developer has not obtained the Approval in accordance with the relevant provision of this Deed because the Developer has:

- (a) failed to apply for it in a complete, proper and timely manner; or
- (b) having so applied, has failed to take all steps and actions which a reasonable and prudent developer in the position of the Developer would take in order to enable the Approval to be granted,

however, nothing in this clause 5.1.1 will make Council responsible for obtaining any Approval that the Developer does not obtain (notwithstanding paragraphs (a) and (b) above) or any delay in obtaining any Approval which the Developer is responsible for obtaining under this Deed.

5.1.2 The Developer must:

- (a) without limiting clause 31, promptly and in a manner consistent with the Works Program:
 - (i) obtain the Development Consent (Primary); and
 - (ii) obtain all other required Approvals; and
- (b) ensure that the Approvals referred to in clause 5.1.2(a)(ii) are consistent with the Development Consent (Primary).

5.2 Approvals for Council Works and Developer Works Stage 1

Without limiting clauses 5.1 and 31, the Developer must:

- 5.2.1 obtain all Approvals for the Council Works and the Developer Works Stage 1 (including the Development Consent (Primary)) that are necessary to enable the Developer to commence the construction of the Council Works and the Developer Works Stage 1 by the date which is 11 months after the Proceed Date in accordance with clause 31.1.1; and
- 5.2.2 provide copies of such Approvals referred to in clause 5.2.1 to Council within 15 Business Days of obtaining each of those Approvals.

5.3 Specific requirements for the Development Consent (Primary)

The Development Application (Primary) for the Development Consent (Primary) must:

- 5.3.1 be an application made to Council under Part 4 of the EP&A Act (but not as State Significant Development) under Division 4.1 of Part 4;
- 5.3.2 seek consent for the development of the whole Land and all of the Works; and
- 5.3.3 set out detailed proposals for the Council Works and the Developer Works, including all requisite details of the development comprising both the Council Works and the Developer Works.

5.4 Sequence of Approvals

The Developer must not make, lodge or submit an Application (other than the Development Application (Primary)) unless the Development Application (Primary) has been properly made.

5.5 If Approvals not required

The parties acknowledge that it may be possible that certain Approvals envisaged by this Deed may not be required and this Deed will be read accordingly.

5.6 Council to be informed of progress towards Applications

The Developer must keep Council informed regarding the likely timing of lodgement of an Application with an Authority and:

- 5.6.1 in connection with, each Application;
- 5.6.2 use its reasonable endeavours to identify, and keep Council informed of, the anticipated timing of Applications required to be made to the relevant Authorities; and
- 5.6.3 notify Council in writing of the determination of each Application, within 2 Business Days after the Developer becomes aware of the determination of the Application.

6. Preparation of Applications

6.1 Developer to prepare and lodge Applications

- 6.1.1 The Developer must:
 - (a) prepare all Applications, or procure the preparation of all Applications;
 - (b) ensure that all Applications are complete and accurate and in a form capable of acceptance and processing by the relevant Authorities; and
 - (c) lodge all Applications, or procure the lodgement of all Applications, with the relevant Authority in compliance with this Deed.
- 6.1.2 All Applications must:
 - (a) be consistent with the Development Consent (Primary) (if it has been granted);
 - (b) be consistent with the Works Program;
 - (c) comply with, and be consistent with, any Final Design Documents and with the Technical Documents;
 - (d) comply with the requirements of this Deed;
 - (e) be developed to a level necessary to support an application for the relevant Approval including being accompanied by the necessary Supporting Documents to enable the prompt assessment and processing of the Application by the relevant Authority; and
 - (f) comply with all Laws.

- 6.1.3 Simultaneously with preparing any Application which relates to Council Works (**Proposed Premises**), the Developer must also prepare a draft plan (progressed to the extent it is able to be at that time) which shows the boundaries of that Proposed Premises in comparison to the rest of the Land (**Proposed Premises Plan**) which must be consistent with the Subdivision Concept Plan (unless the parties agree otherwise in writing).
- 6.1.4 Where a draft Proposed Premises Plan is required to be prepared under this clause in respect of an Application, the Developer must lodge that draft plan with Council for its approval at or about the same time as lodgement of the draft Application with Council for its approval.

6.2 Consultation Authorities other than Council

- 6.2.1 In this clause 6.2, the word "Authority" does not include Council acting in its capacity as landowner or a party to this Deed but does include Council in its capacity as a Consent Authority or otherwise acting as an Authority issuing an Approval.
- 6.2.2 The Developer must, to the extent that each Authority is willing to do so, consult each relevant Authority in respect of:
- (a) the proposed terms and conditions of an Application so far as is necessary to seek to ensure that the Application will comply with the requirements of the Authority and will be processed promptly and efficiently;
 - (b) the progress of the Application and of the Authority's consideration of it and any information requirements that the Authority may have in order to progress the processing and determination of the Application; and
 - (c) the terms and conditions the relevant Authority may impose on any Approval granted by it including terms and conditions the relevant Authority indicates are required as a matter of policy or as a matter of good practice.
- 6.2.3 Unless otherwise agreed, the Developer must:
- 6.2.4 keep Council fully informed of the consultations referred to in clause 6.2.2;
- (a) give Council at least 5 Business Days' notice of any proposed meeting with a relevant Authority for the purpose of discussing an Application, giving details of the time, date and the matters to be discussed;
 - (b) give Council the opportunity to attend any such meeting;
 - (c) keep Council informed of any such meeting including providing minutes of the meeting to Council; and
 - (d) provide such other information as Council may request in respect of the meetings and the content, agreement or resolutions of the meeting.
- 6.2.5 The Developer acknowledges and agrees that Council may attend any meeting referred to in clause 6.2.3.

6.3 Application for Development Application and other Applications

The Developer must be the applicant for any Application unless the parties agree in writing otherwise.

7. Consent to Relevant Applications

7.1 No Application to be made without Council consent to lodge

7.1.1 In this clause 7, a 'Relevant Application' means each of:

- (a) an Application made prior to the Date of Practical Completion;
- (b) an Application made at any time in respect of the Council Works; and
- (c) an Application made at any time in respect of a Council Significant Developer Works Issue,

and an obligation to consult or seek the consent of Council in respect of a Relevant Application referred to in paragraph (c) is limited to the extent that the Application relates to the Council Significant Developer Works Issue.

7.1.2 The Developer must not lodge, make or otherwise submit a Relevant Application to a relevant Authority (including Council) unless the Council has granted a consent to lodge that Application in accordance with this clause 7.

7.1.3 The granting of consent under this clause 7 is consent to lodgement as a party to this Deed and is not:

- (a) a consent, approval or other decision or exercise of discretion by Council as an Authority or exercising any statutory power, function or discretion; or
- (b) an indication, assurance or warranty that the Application will be accepted or determined or determined in any particular manner or in any particular time frame by Council as an Authority or exercising any statutory power, function or discretion.

7.2 Applications must be submitted to Council

The Developer must, in the identical form it is proposed to be lodged with the relevant Authority, submit to Council for its consent to lodge under clause 7.1:

7.2.1 each proposed Development Application that is a Relevant Application and all Supporting Documents by the date specified in Item 18; and

7.2.2 each other proposed Application that is a Relevant Application and Supporting Documents at least 15 Business Days before it is intended to be lodged with the relevant Authority.

7.3 Non-conforming Applications

When submitting a proposed Relevant Application to Council for consent under clause 7.1, the Developer must:

7.3.1 disclose to Council each aspect of the proposed Application submitted for consent under clause 7.1 that is not in conformity with relevant requirements of any clause of this Deed or any relevant requirement of an Authority (including any non-conformance with a requirement or standard in an environmental planning instrument); and

7.3.2 otherwise certify to Council (in a form approved by Council) that any design shown or described in the relevant Supporting Documents associated with the proposed

Application has been prepared in accordance with clause 6.1 and meets the requirements of clause 6.1.

7.4 Timing for Council consent

7.4.1 Subject to clause 7.4.2, where the consent of Council is required under clause 7.1, that consent must be given or refused within:

- (a) subject to clause 7.5, 15 Business Days in the case of a Development Application or application for modification of a Development Consent; or
- (b) subject to clause 7.5, 10 Business Days for any Application for another Approval,

after Council receives:

- (c) a notice from the Developer requesting consent to the proposed Application;
- (d) a full and complete copy of the proposed Application;
- (e) full and complete copies of all Supporting Documents in connection with the proposed Application; and
- (f) the Developer's disclosure and certification referred to in clause 7.3.

7.4.2 In counting time for the purpose of the time periods referred to in clause 7.4.1(a) or 7.4.1(b) the following days will be excluded:

- (a) the day on which Council (acting reasonably) makes a request for further relevant information in order for it to consider the Application;
- (b) the day on which that information is provided in full and complete form; and
- (c) each day in between those two days,

and such days shall not count towards the expiry of those time periods.

7.5 Time limits where Council Resolution Required

Where the consideration of the Application or the grant or refusal of consent to lodge the Application requires a resolution of Council, then the time limits for Council to determine whether to grant its consent or not referred to in clause 7.4 only apply for the purposes of a claim by the Developer for an extension of time pursuant to clause 32 and not for any other purpose.

7.6 Rejecting Applications

Council must act reasonably in determining whether to grant consent or to refuse consent under this clause 7, but (in any event) may refuse consent to lodge a proposed Relevant Application which:

- 7.6.1 does not satisfy the requirements of this clause 7 or clause 6.1;
- 7.6.2 (together with any accompanying documents and information) does not disclose that the relevant parts of the Works the subject of the proposed Application conform with all Laws that apply to those parts of the Works and the Land;

- 7.6.3 is (subject to any enhancements) not consistent with any component of the then current Final Design Documents (if any);
- 7.6.4 does not otherwise comply with the requirements of this Deed; or
- 7.6.5 in the case of a Development Application, does not specify the external design, appearance, material or finishes of any building to be constructed in respect of the relevant parts of the Works the subject to the proposed Application.

7.7 Consequences of refusal of consent to a proposed Application

- 7.7.1 If Council refuses consent to lodge a Relevant Application, it must promptly (and where the time periods referred to in clause 7.4 applies, within those time periods) notify the Developer of its reasons.
- 7.7.2 Upon receipt by the Developer of any notice referred to in clause 7.7.1, the Developer must either:
 - (a) as soon as practicable, amend the proposed Application (and any relevant Supporting Documents) taking Council's reasons into account, and re-submit the amended proposed Application (together with all Supporting Documents) to Council for consent pursuant to clause 7.1; or
 - (b) promptly advise Council that it disagrees with Council's reasons, in which case the matter must be resolved in accordance with clause 54.

7.8 Delay with respect to considering an Application

Any failure by Council to comply with clause 7.4 will not be a breach of this Deed, but may result in an application by the Developer for an extension of time under clause 32.

7.9 Developer not to amend Application

The Developer must not amend any Application or any Supporting Documents in any material way after Council has consented to it but must lodge the Application in exactly the same form and terms as that to which the consent to lodge under clause 7.1 has been granted.

7.10 Status of consent to lodge as land owner's consent

A consent to lodge granted under this clause 7 is a consent to the lodgement, making or submission of the Application only and:

- 7.10.1 where the relevant legislation under which the Application is made requires land owner's consent to the lodgement, making or submission of the Application – is to be taken to be Council's consent as land owner for land owned by Council; and
- 7.10.2 does not in any way require, imply or infer that the Authorisation will or will not be granted either at all or within a particular time frame or, if the Authorisation is granted, what the conditions of the Authorisation may be.

7.11 Confirmation of consent to lodge

Subject to the Developer complying with the provisions of clause 8, Council, in its capacity as landowner, agrees to sign all documents and promptly provide all confirmations of its consent to lodgement as may be reasonably required to enable the Developer to lodge any Application with an Authority.

7.12 Council's review of Applications

The Developer acknowledges and agrees that:

- 7.12.1 Council (or any person on its behalf) does not assume or owe any duty of care or other responsibility or obligation to the Developer in relation to any Application or Supporting Documents, and will not be required to check such Application or Supporting Documents for suitability, errors, omissions or compliance with the requirements of Law, any Authority or this Deed;
- 7.12.2 the Developer will not be entitled to make, and Council will not be liable upon or in connection with, any Claim, Liability or Loss arising out of or in connection with any failure by Council (or any person on its behalf) to detect or notify the Developer of any lack of suitability, errors, omissions or non-compliance with the requirements of Law, any Authority or this Deed in any Application or Supporting Documents; and
- 7.12.3 no review of, comment upon, consent to, or approval or rejection of, nor failure or refusal to review, comment upon, consent to, or approve or reject, any Application or Supporting Documents or any other direction (including approval) by Council (or any person on its behalf) about such Application or Supporting Documents will:
 - (a) relieve the Developer from, or otherwise limit, alter or affect, the Developer's liabilities or responsibilities under this Deed or otherwise at Law; or
 - (b) prejudice Council's rights against the Developer whether under this Deed or otherwise at Law.

8. Making and Progress of Applications

8.1 Prompt Lodgement

After receiving Council's consent to lodge an Application, the Developer must lodge that Application with the relevant Authority (in exactly the same form and terms as that to which the consent to lodge has been granted) no later than 5 Business Days after Council provides consent to lodge under clause 7.1.

8.2 Copies of Applications, Approvals and associated documents

- 8.2.1 The Developer must promptly give Council a copy of:
 - (a) each Relevant Application as lodged with any Authority;
 - (b) all material correspondence between the Developer (or any person on behalf of the Developer) and any Authority in connection with any Relevant Application, proposed Relevant Application, Approval in relation to a Relevant Application or proposed or draft determination of any Relevant Application; and
 - (c) all written submissions in relation to any Relevant Application which are received by the Developer or of which it has a copy.
- 8.2.2 The Developer must serve the Council with a copy of any Approval or other written determination of any Authority in respect of any Relevant Application within 5 Business Days of the receipt by the Developer of such written Approval or determination (including all documents that evidence the determination and any conditions of such determination).

8.3 Consult

Without limiting any of the Developer's other obligations under this Deed, the Developer must regularly consult with Council and keep Council fully informed in relation to all its dealings with any relevant Authority in relation to any Relevant Application or related Approval, including by providing Council with accurate minutes of all meetings between the Developer and Authorities.

8.4 Payment of Lodgement Fees

The Developer must pay the Lodgement Fee to Council (as the Consent Authority) on the earlier of:

- 8.4.1 the date which is six months after the lodgement date of the first Development Application that the Developer lodges with the Consent Authority in connection with the Works; and
- 8.4.2 10 Business Days after the date that the Development Consent (Primary) is issued by the relevant Consent Authority.

9. Material Adverse Conditions and refusal of Development Consent (Primary)

9.1 Defined terms

In this clause 9:

- 9.1.1 **Conditions Notice** means a notice properly served in accordance with clause 9.2.1(b);
- 9.1.2 **Expert Notice** means a notice properly served under clause 9.4.1;
- 9.1.3 **Material Adverse Condition** means either a condition of the Development Consent (Primary) that both parties agree in writing to be unacceptable or:
 - (a) if the Material Adverse Condition is claimed by the Developer, a condition of the Development Consent (Primary) that:
 - (i) would impose a Material Cost Consequence on the Developer Works;
 - (ii) would cause a material delay to the commencement of Developer Works; or
 - (iii) the Development Consent (Primary) or a condition of the Development Consent (Primary) will, in the Developer's reasonable opinion, materially impact the Developer Works; or
 - (b) if the Material Adverse Condition is claimed by Council:
 - (i) a condition of the Development Consent (Primary) that is inconsistent with the Works Program, the Council Works Design Documents or the Technical Documents – Council Works;
 - (ii) a condition of the Development Consent (Primary) that will have the effect of requiring Council to make a material financial or other contribution or payment, incur a cost or expense, or suffer a financial loss;

- (A) that is not referred to in the Deed; and
- (B) the Developer has not agreed to indemnify Council against that contribution, payment, cost, expense or loss; or
- (iii) a condition of the Development Consent (Primary) that will, in Council's reasonable opinion, materially impact Council Works, a Council Significant Developer Works Stage 1 Issue or a Council Significant Developer Works Issue,

and in each case that meet the following criteria:

- (c) is inconsistent with the Development Application (Primary) (including any supporting information or modifications);
- (d) would not normally be expected to be imposed on a Development Consent of this type. For this purpose the Developer acknowledges and agrees that this paragraph (d) does not apply in respect of a condition of a Development Consent that is substantially the same as a condition that is imposed on the retirement living development at 18-30 Bruce Street, Forster NSW 2428; and
- (e) is materially inconsistent with this Deed;

9.1.4 **Material Cost Consequence** means the costs of carrying out the Developer Works increases overall and after allowing for any compensating beneficial effects, by 5% or more. The determination of the overall increase in the costs of carrying out the Developer Works must be made having regard to:

- (a) the Developer Works as described in the totality of the Development Applications consented to by Council under clause 7.1 compared with the Developer Works as in fact approved by the Development Consent;
- (b) the reasonable costs, rates, prices and allowances that a developer in the position of the Developer at the time of making those Development Applications would have allowed for the Developer Works together with an allowance for consumer price index;
- (c) the reasonable additional costs determined using reasonable, rates and prices and excluding any increase for overheads or administration to be incurred by reason of those conditions; and
- (d) any reasonable reductions in costs, savings or prices arising from the conditions of the Development Consent or any other conditions of any Approvals or any circumstances or the passage of time since the making of the Development Application (Primary); and

9.1.5 **Termination Period** means the period expiring 2 Business Days after:

- (a) if the termination is in respect of the circumstance referred to in clause 9.2.1(a), the period of 5 Business Days following the date specified for the purposes of that clause; or
- (b) if the termination is in respect of the circumstance referred to in clause 9.2.1(b):
 - (i) if no Expert Notice has been issued, the period of 5 Business Days following the date that is 20 Business Days after the receipt of the Conditions Notice;

- (ii) if an Expert Notice has been issued, the period of 5 Business Days commencing on the date that is the earlier of:
 - (A) the date that is 20 Business Days after the expert makes his or her decision under clause 9.4; and
 - (B) 40 Business Days after the receipt of the Conditions Notice, whether or not an expert has been appointed or an expert has made a decision under clause 9.4.

9.2 **Ability to terminate if Development Consent (Primary) not granted or Material Adverse Condition unresolved**

9.2.1 If:

- (a) the Development Consent (Primary) is not granted by 31 December 2017 (or such later date as the parties agree in writing); or
- (b) the Development Consent (Primary) has been granted before or after 31 August 2017 (or such later date as the parties agree in writing)) and:
 - (i) either party has, within 10 Business Days after the Development Consent (Primary) being obtained, issued a written notice complying with clause 9.2.2 (**Conditions Notice**) to the other party that, in its reasonable opinion, the Development Consent (Primary) is subject to a Material Adverse Condition;
 - (ii) the Development Consent (Primary) is in fact subject to a Material Adverse Condition; and
 - (iii) the parties have not agreed in writing on the resolution of the matters constituting each Material Adverse Condition as properly specified in the Conditions Notice in accordance with clause 9.2.2,

then either party may terminate this Deed by giving written notice to the other party within the Termination Period, such notice specifying the date on which this Deed will terminate. This Deed terminates on the date so specified. The parties may agree in writing to extend any of the Termination Periods or time periods referred to in this clause 9.2.

Despite any other provision of this Deed, if the Development Consent (Primary) requires the Developer to pay Contributions of greater than \$4.2M (in aggregate), then the Developer may terminate this Deed by giving written notice to Council within the Termination Period, such notice specifying the date on which this Deed will terminate. This Deed terminates on the date so specified. The parties may agree in writing to extend any of the Termination Periods or time periods referred to in this clause 9.2

9.2.2 A written notice under clause 9.2.1(b)(i) must:

- (a) identify and describe the Material Adverse Condition;
- (b) if the notice specifies that there is a Material Cost Consequence:
 - (i) quantify the amount of that Material Cost Consequence; and
 - (ii) specify whether the Material Cost Consequence relates to the Council Works or the Developer Works; and

- (c) contain the supporting information, evidence and documentation as may be necessary to validate the assertion that there is a Material Adverse Condition and the quantum of the Material Cost Consequence (if any), but
 - (d) must not specify extraneous issues and conditions that are not on their own Material Adverse Conditions.
- 9.2.3 A party is not entitled to claim in a Conditions Notice that a condition is a Material Adverse Condition if the condition is the result of that party having counselled or procured the imposition of the condition or a condition to that effect on the Development Consent (including by way of a voluntary planning agreement under the EP&A Act).
- 9.2.4 If a party acting reasonably considers that there is insufficient supporting information, evidence or documentation to validate the assertion that there is a Material Adverse Condition, the party may request that the additional information, evidence or documentation be provided. That request must be made within 5 Business Days of service of the Conditions Notice by the other party, and the other party must promptly (and in any event within 10 Business Days of the service of the Conditions Notice) provide the necessary information, evidence or documentation.

9.3 Effect of termination

- 9.3.1 If this Deed is terminated under clause 9.2.1 or clause 9.5, neither party will be entitled to any payment or other consideration and the Developer will not be entitled to make, and Council will not be liable upon, any Claim except in respect of any any amount payable under clause 46.1 (if applicable).
- 9.3.2 If this Deed is not terminated under clause 9.2.1 following a notice under clause 9.2.1(b)(i), then the Material Adverse Condition that was specified in the notice is deemed to be no longer a Material Adverse Condition.

9.4 Disputing a Material Adverse Condition

- 9.4.1 Either party may within 5 Business Days of receiving a Conditions Notice, issue a written notice (**Expert Notice**) to the other party, requesting that an expert in accordance with this clause 9.4:
 - (a) determine whether or not the matters referred to in the Conditions Notice constitute one or more Material Adverse Conditions; and
 - (b) if so to make recommendations as to the resolution that might be adopted by the parties in respect of each Material Adverse Condition.
- 9.4.2 Subject to clause 9.4.3, the expert determination under this clause 9.4 is to be conducted by one of the people listed in Item 28 or Item 29 as agreed at the time by the parties (or failing such agreement within 5 Business Days after the Expert Notice, as selected by the person specified in Item 26).
- 9.4.3 If:
 - (a) the expert selected under clause 9.4.2:
 - (i) is unavailable;
 - (ii) declines to act; or

- (iii) does not respond within 10 Business Days to a request by one or both parties for advice as to whether he or she is able to conduct the determination;

the expert determination under this clause 9.4 is to be conducted by a planning expert or quantity surveyor (as applicable) appointed by the person specified in Item 26.

9.4.4 An expert determination conducted under this clause 9.4 is not arbitration and the expert is not an arbitrator. The expert may reach a decision from his or her own knowledge and expertise.

9.4.5 The expert will:

- (a) act as an expert;
- (b) proceed in any manner he or she thinks fit;
- (c) conduct any investigation which he or she considers necessary to determine the matter;
- (d) examine such documents, and interview such persons, as he or she may require;
- (e) notwithstanding anything else, to the extent permissible by Law, have no power to apply or have regard to the provisions of Part 4 of the *Civil Liability Act 2002* (NSW); and
- (f) make such directions for the conduct of the determination as he or she considers necessary.

9.4.6 The expert must:

- (a) disclose to the parties any interest he or she has in the subject matter or outcome of the determination; and
- (b) not communicate with one party to the determination without the knowledge of the other.

9.4.7 Each party will:

- (a) bear its own costs in respect of any expert determination; and
- (b) unless determined otherwise by the expert, pay one-half of the expert's costs.

9.4.8 Unless otherwise agreed between the parties, the expert must notify the parties of his or her decision upon an expert determination conducted under this clause 9.4 within 20 Business Days from the acceptance by the expert of his or her appointment.

9.4.9 The expert will not be liable to the parties arising out of, or in connection with, the expert determination process, except in the case of fraud.

9.4.10 The determination and recommendation of the expert:

- (a) must be in writing;

- (b) is final and binding in respect of whether or not there is a Material Adverse Condition; and
- (c) is not otherwise binding on either party.

9.5 Third party challenge

If a third party commences proceedings seeking orders declaring that the Development Consent (Primary) is invalid:

- 9.5.1 a party becoming aware of the proceedings must immediately upon becoming aware of them, notify the other party in writing;
- 9.5.2 the parties must in good faith seek to negotiate amendments to the time periods for termination in this clause 9 and such other consequential amendments to this Deed as may be necessary; and
- 9.5.3 if no agreement is reached under clause 9.5.2, either party may in the period between 40 and 50 Business Days after the commencement of those proceedings elect to terminate this Deed by written notice to the other party specifying the date on which this Deed will terminate. This Deed terminates on the date so specified.

10. Compliance with Law

10.1 Developer must comply with Law

The Developer must:

- 10.1.1 comply with all Laws in connection with the Works, the carrying out of the Activities and the use of the Land, and otherwise ensure that the Activities are carried out in accordance with, the Works comply with, and the Land is used in accordance with, all Laws;
- 10.1.2 without limiting clause 10.1.1, ensure that upon Practical Completion the Council Works and the Developer Works Stage 1 comply with all Laws; and
- 10.1.3 subject to the terms of this Deed, do everything necessary to ensure that:
 - (a) the Development Consent (Primary); and
 - (b) any other Approval,
 do not expire or become invalid due to any circumstance within the control of the Developer or its Associates.

10.2 Changes to Works Documents

If changes to the Works Documents or a requirement of them are required under a Law (including as a result of a Change in Law), then subject to the other provisions of this Deed (including clause 10.3) the Developer must:

- 10.2.1 subject to obtaining the prior written consent of Council (not to be unreasonably withheld), cause the Council Works and the Developer Works Stage 1 to be redesigned to accommodate the changes;
- 10.2.2 obtain all necessary Approvals for the changes; and

- 10.2.3 subject to obtaining such Approvals, incorporate those changes into the Council Works and the Developer Works Stage 1.

10.3 No entitlements

The Developer will not be entitled to make, and Council will not be liable in connection with, any Claim arising out of or in connection with any Change in Law or anything under clause 10.2.

11. Building Code

11.1 Definitions

11.1.1 In this clause 11:

- (a) **ABCC** has the same meaning as in the Building Code;
- (b) **Commonwealth Funded Building Work** has the same meaning as in the Building Code;
- (c) **Funding Entities** has the same meaning as in the Building Code;
- (d) **Project** means the works to be executed through the funding provided by the Commonwealth;
- (e) **Related Entity** has the same meaning as in the Building Code; and
- (f) **Supporting Guidelines** means the supporting guidelines in relation to the Building Code, once issued. The Supporting Guidelines, once issued, can be downloaded from www.abcc.gov.au.

11.1.2 Except to the extent otherwise expressly provided in clauses 1.1 or 11.1.1, terms used in this clause 11 have the meanings given to them in the Building Code.

11.2 Compliance with the Building Code

11.2.1 The Developer must comply with the Building Code. Copies of the Building Code are available at <http://employment.gov.au/building-code>.

11.2.2 Compliance with the Building Code does not relieve the Developer from responsibility to perform the Activities, or from liability for any Defect in the Works arising from compliance with the Building Code.

11.2.3 Where a Variation, Developer Works Stage 1 Variation or change in the Deed is proposed and that Variation, Developer Works Stage 1 Variation or change would affect compliance with the Building Code, the Developer must submit a report to Council's Representative and the Commonwealth specifying the extent to which the Developer's compliance with the Building Code will be affected.

11.2.4 The Developer must maintain adequate records of the compliance with the Building Code by:

- (a) the Developer;
- (b) its subcontractors (including each Contractor); and
- (c) its Related Entities.

- 11.2.5 The Developer acknowledges that, if the Developer does not comply with the requirements of the Building Code in the performance of this Deed such that a sanction is applied by the Minister for Employment, without prejudice to any rights that would otherwise accrue, those parties will be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Developer or a Related Entity in respect of Commonwealth Funded Building Work.
- 11.2.6 The Developer must not appoint a Contractor in relation to the Works where:
- (a) there are reasonable grounds to believe that the building contractor or building industry participant is covered by an enterprise agreement that is inconsistent with the Building Code;
 - (b) an exclusion sanction applies to the building contractor or building industry participant;
 - (c) an adverse decision, direction or order of a court or tribunal has been made in relation to the building contractor or building industry participant and a contravention of any of the following in respect of building work:
 - (i) a designated building law;
 - (ii) the WHS Act, the WHS Regulation or a corresponding work health and safety law; or
 - (iii) the *Competition and Consumer Act 2010* (Cth),and there are reasonable grounds to believe that the building contractor or building industry participant has failed to comply with the decision, direction or order.
- 11.2.7 The Developer must provide, and ensure that its Contractors and Related Entities provide, the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the ABCC, with full access to the premises and records of the above-mentioned entity:
- (a) inspect any work, material, machinery, appliance, article or facility;
 - (b) inspect and copy any record relevant to the Works the subject of this Deed; and
 - (c) interview any person,
- as is necessary to demonstrate its compliance with the Building Code.
- 11.2.8 Additionally, the Developer agrees that the Developer, its Contractors and Related Entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the ABCC, to produce a specified document within a specified period, in person, by fax or by post.
- 11.2.9 The Developer consents to disclosure by the Commonwealth, the Director of ABCC and Minister for Employment information concerning its and its Related Entities' compliance with the Building Code and whether or not an exclusion sanction has been imposed on it and/or its Related Entity. The Developer must ensure that its Contractors are also aware of, and agree to comply with, these rights of use and disclosure.

- 11.2.10 The Developer must ensure that all contracts with Contractors impose obligations on Contractors equivalent to the obligations under these clauses.

12. Representations and Warranties

12.1 Representations and warranties by Council

Council represents and warrants to the Developer that:

- 12.1.1 Council has the proper authority to enter into and perform Council's obligations under this Deed;
- 12.1.2 this Deed constitutes Council's valid and binding obligation enforceable against Council in accordance with its terms, subject to the availability of equitable remedies and other rights under this Deed; and
- 12.1.3 the execution by Council of, and the performance by Council of its obligations under this Deed does not and will not contravene any existing Law to which Council is subject.

12.2 Representations and warranties by the Developer

12.2.1 The Developer warrants to Council that:

- (a) it is a corporation (as defined in the Corporations Act) having limited liability, registered and validly existing under the Corporations Act;
- (b) all necessary action has been taken to authorise the execution, delivery and performance of its obligations under this Deed;
- (c) the information provided by the Developer to Council in connection with this Deed, which has not been subsequently superseded by further information supplied by or on behalf of the Developer to Council, is to the best of the Developer's knowledge and belief true, accurate and complete in all material respects and not misleading in any material respect;
- (d) this Deed constitutes the Developer's valid, legal and binding obligations enforceable against it according to their terms, subject to equitable remedies and Laws in respect of enforcement of creditors' rights;
- (e) the execution, delivery and performance of this Deed will not contravene:
 - (i) any Law to which it is subject;
 - (ii) its constitutional documents; or
 - (iii) any document which is binding on it or any of its assets;
- (f) no Insolvency Event has occurred in respect of it;
- (g) no litigation, arbitration, tax claim, dispute or administrative or other proceeding has been commenced or threatened against it which is likely to have a material adverse effect on it or its ability to perform its financial and other obligations under any Project Document to which it is or will become a party;

- (h) the Commonwealth Treasurer cannot prohibit the transfer of any part of the Land to the Developer or the Approved Nominee under the *Foreign Acquisitions and Takeovers Act 1975* (Cth); and
- (i) it does not have any immunity in respect of its obligations under this Deed from the jurisdiction of any court or any legal process for any reason.

12.2.2 Enyoc Pty Ltd ACN 098 769 469 (**Trustee**) represents and warrants to Council that, notwithstanding any other provision of this Deed:

- (a) the Graham Dong Family Trust (**Trust**) has been duly established; it is the only trustee of the Trust;
- (b) it has been validly appointed as trustee of the Trust and no action has been taken or proposed to remove it as trustee of the Trust;
- (c) true copies of the trust deed of the Trust (**Trust Deed**) (including any amending documents) have been provided to Council and disclose all the terms of the Trust;
- (d) it has full and valid power and authority under the Trust (and all necessary resolutions, consents, approvals and procedures have been obtained or duly satisfied) to enter into and perform its obligations under this Deed;
- (e) it has full and valid power and authority under the Trust to hold the rights, property and assets of the Trust of whatever kind and wherever situated and whether present or future (**Trust Property**) and to carry on the business as it is now being conducted;
- (f) it has the right to be fully indemnified out of the Trust Property for all liabilities incurred under the Project Documents, and this right has not been limited in any way, and it has no liability which may be set off against that right of indemnity;
- (g) the Trust Property is sufficient to satisfy that right of indemnity and all other obligations in respect of which the Trustee has a right to be indemnified out of the Trust Property;
- (h) it is not, and never has been, in default under the Trust Deed;
- (i) neither this Deed nor the Project Documents conflicts with the operation of the terms of the Trust Deed;
- (j) it enters into this Deed and the Project Documents and the transactions contemplated by those documents for the proper administration of the Trust and for the benefit of all of the beneficiaries of the Trust;
- (k) no action has been taken or proposed to terminate the Trust and no beneficiary is presently entitled to any of the property and assets of the Trust;
- (l) it and its directors and other officers have complied with their obligations in connection with the Trust;
- (m) Council's rights under this Deed and the Project Documents rank in priority to the interests of the beneficiaries of the Trust;

- (n) it has not exercised its powers under the Trust Deed to release, abandon or restrict any power conferred on it by the Trust Deed;
- (o) no Trust Property has been re-settled or set aside or transferred to any other trust; and
- (p) the constituent documents of the Trust comply in all material respects with applicable Laws.

12.2.3 The Trustee acknowledges that Council has entered into this Deed and the Project Documents in reliance on the representations and warranties in this clause 12.2.

12.2.4 The Trustee must:

- (a) at Council's request, exercise its right of indemnity from the Trust Property in respect of obligations incurred by it under this Deed and the Project Documents;
- (b) not to create any Encumbrance, or allow one to exist, over its right of indemnity from the Trust Property; and
- (c) comply with its obligations as trustee of the Trust.

12.2.5 Without the consent of Council, the Trustee must not, and must not agree, attempt or take any step to, do anything which:

- (a) effects or facilitates the retirement, removal or replacement of the Trustee as trustee of the Trust;
- (b) could restrict the Trustee's right of indemnity from the Trust Property in respect of obligations incurred by the Trustee under this Deed or the Project Documents;
- (c) could restrict or impair the ability of the Trustee to comply with its obligations under this Deed or the Project Documents;
- (d) effects of facilitates the termination of the Trust;
- (e) effects of facilitates the variation of the Trust Deed;
- (f) effects of facilitates the resettlement of the Trust Property; or
- (g) could result in the Trust Property being mixed with other property.

12.3 Notification of proceedings

The Developer must immediately notify Council if any proceeding referred to in clause 12.2.1(g) becomes current, pending or threatened where that proceeding will or is likely to have a Material Adverse Effect on the ability of the Developer to perform its obligations under this Deed.

12.4 Survival

Except as otherwise provided in this Deed, each representation and warranty by the Developer and contained in this Deed is made on the date of this Deed and survives the execution and delivery of this Deed and completion of the transactions contemplated by it and expiry or earlier termination of this Deed.

12.5 Reliance

The Developer acknowledges that Council has relied on the representations and warranties contained in clause 12.2 and the acknowledgements and agreements contained in clause 13 in entering into this Deed.

13. Information Documents

13.1 Acknowledgement

The Developer acknowledges and agrees that:

- 13.1.1 the Information Documents do not purport to:
 - (a) comprehensively describe the scope of the Works or the Activities or contain all of the information that the Developer required for the purposes of preparing and lodging a proposal or making a decision to enter into this Deed; or
 - (b) have been prepared having regard to the Developer's business objectives, financial situation or particular needs;
- 13.1.2 neither Council nor any Council's Associate has verified or has any obligation to verify the currency, reliability, accuracy, adequacy, suitability, correctness or completeness of the Information Documents;
- 13.1.3 neither Council nor any Council's Associate has made any representation or warranty either express or implied as to the currency, reliability, accuracy, adequacy, suitability, correctness or completeness of the Information Documents;
- 13.1.4 it was given an opportunity to itself undertake and to request others to undertake, tests, enquiries and investigations in respect of the Information Documents;
- 13.1.5 it has not relied upon and will not rely upon the accuracy, currency, adequacy, suitability, correctness or completeness of the Information Documents;
- 13.1.6 it accepts all risk arising out of its use of or reliance upon any Information Documents;
- 13.1.7 the Information Documents were provided to the Developer for the information only of the Developer and do not form part of this Deed;
- 13.1.8 it has independently carried out all relevant investigations and analysis of and acquainted itself with and verified to its satisfaction all information on which it intends to rely concerning:
 - (a) all aspects of the Works and the Activities;
 - (b) the contents, currency, reliability, accuracy, adequacy, suitability, correctness or completeness of the Information Documents;
 - (c) Site Conditions; and
 - (d) all information which is relevant to the risks, contingencies and other circumstances related to the Works and the Activities;

13.1.9 neither Council nor any Council's Associate is responsible or liable to the Developer as a result of:

- (a) any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind in, or the currency, reliability, accuracy, adequacy, suitability, correctness or completeness of, the Information Documents;
- (b) any failure to make available to the Developer any other information relating to the Works or the Activities;
- (c) any reliance placed on the Information Documents by the Developer; and
- (d) any representation whether express or implied contained in the Information Documents,

except as otherwise expressly provided in this Deed;

13.1.10 neither Council nor any Council's Associate has given any representation, warranty or undertaking in respect of:

- (a) the Works or the Activities;
- (b) Site Conditions, the Land, any Extra Land or any structure, building, improvement or other thing on, above or adjacent to or under the surface of, or in the vicinity of, the Land or any Extra Land;
- (c) any transaction or arrangement contemplated under any of the Project Documents; or
- (d) any other matter relevant to the Developer's decision to enter into the Project Documents;

13.1.11 it has understood the limitations of the Information Documents and in particular acknowledges its understanding that:

- (a) the results of investigations involving sampling and analysis of soils and groundwater are indicative only of the type and concentration of the particular analytes for which samples were analysed from each sampling point at the time and date of the sample and subject to any limitations in the sampling and analysis methodology;
- (b) any statement or representation about the presence or otherwise of Contamination or Pollution at any location other than at a particular sampling point or for substances other than the particular analytes for which a sample was analysed is inferred only;
- (c) conditions may change over time causing Contamination to move, migrate, change composition or character, abate or increase in concentration or toxicity, independently of the operation of any Remediation or management measures taken in respect of Contamination;
- (d) the Information Documents may not, and have not, been expressly or impliedly represented to provide comprehensive information about Contamination or any risks from it or as to the Suitability of the Land or any other land or matter; and
- (e) any assessment of or statement about the Suitability of any land or any risk presented by any Contamination or by any use of any land may or may not

be correct and is not a representation or warranty made by Council or any of Council's Associates;

- 13.1.12 the Developer is solely responsible for preparing the Design Documents and is solely responsible for ensuring that the Final Design Documents and the Works satisfy the requirements of the Technical Documents and the other requirements of this Deed (including compliance with all applicable Approvals and Laws);
- 13.1.13 Council's acceptance of, consent to, approval of, review of, comment on, rejection of or Direction in respect of any:
- (a) document submitted to Council under this Deed; or
 - (b) aspect of the Works or the Activities performed by the Developer,
- does not entitle the Developer to make any Claim or in any way limit or affect the Developer's obligations under this Deed or any other Project Document; and
- 13.1.14 Council has no liability for any Loss which the Developer suffers or incurs in respect of the incorrectness or inaccuracy of any assumption by any person made in the calculation of the investment in the Works or elsewhere relating to:
- (a) existing or future taxation requirements;
 - (b) revenue; or
 - (c) costs of the Works and the Activities.

13.2 Release

The Developer, in so far as is permitted by Law, releases Council and each Council's Associate from and against all Claims which it or any other person to whom the Information Documents are disclosed by the Developer may now or in the future have against Council or any Council's Associate in connection with the Information Documents.

14. Capacity of Council

14.1 Council as landowner

- 14.1.1 Council enters into this agreement as the registered proprietor and owner of the Land (**Landowner**).
- 14.1.2 To the extent that Council gives any approval or consent contemplated under this Deed, such approval or consent is given in its capacity as Landowner and not as a Consent Authority (unless otherwise specified in writing by Council) nor as an expert.

14.2 Council exercising statutory powers

- 14.2.1 Nothing in any Project Document operates to restrict or otherwise affect the unfettered discretion of Council to exercise any of its functions and powers under any Law.
- 14.2.2 The Developer agrees that Council is not liable for, and releases Council from, Liability or Loss arising from, and, subject to the provisions of this Deed and the provisions of any applicable Law, costs incurred in connection with, Council's exercise of its functions and powers under any Law.

- 14.2.3 The Developer must not interfere with the valid operations and functions of Council as a Consent Authority or as Landowner or otherwise interfere with the Council in relation to the Project Objectives.

14.3 Developer to disclose status

- 14.3.1 The Developer must at all times ensure that it and its Associates make known to persons with whom they deal that it is an independent contractor of (but not agent of) Council.
- 14.3.2 The Developer must not without the prior written approval of Council announce, advertise or publish in any media the fact that the Developer has contracted with Council in the performance of its obligations under this Deed.

14.4 Developer has no authority to bind Council

The Developer expressly agrees and acknowledges that it has no authority, and this Deed is not intended to grant to it any authority, to incur any liability or obligation by, for or on behalf of, or in the name of Council and the Developer must not do any of these things.

14.5 Developer to incur obligations in its own name

All obligations incurred by the Developer under contracts, agreements or other arrangements in order to fulfil its obligations under this Deed must be incurred by the Developer in its own name and on its own account.

14.6 Grants and Funding

The Developer acknowledges that Council has not represented and does not warrant the availability of any state or federal government grant or funding available to Council, the Developer, the Works or the Activities (including funding the Commonwealth Funding Agreement). If any grant or funding is not available to Council, the Developer or the Activities, or if available, ceases to be available (whether in whole or in part) or a Change in Law occurs which changes or impacts on any grant or funding, the Developer must continue with the Activities as required by this Deed and notwithstanding any other provision to the contrary, may not terminate this Deed.

15. Access

15.1 Developer's access to Land

- 15.1.1 Provided that the Developer has satisfied the conditions precedent in clause 15.1.3, Council will, within a reasonable time following a written request from the Developer, grant to the Developer a non-exclusive licence for the Developer, its Associates and Contractors to:
- (a) prior to the transfer of the Developer Works Lot to the Purchaser in accordance with the Residual Land Contract, access the Land for the purpose of providing the Development Services and undertaking the Developer Activities Stage 1; and
 - (b) on and from the transfer of the Developer Works Lot to the Purchaser in accordance with the Residual Land Contract, access the Council Works Lot for the purpose of providing the Development Services.
- 15.1.2 Not used.

- 15.1.3 Each of the following is a condition precedent for the purposes of clause 15.1.1:
- (a) not used;
 - (b) the Developer has provided Council with the Deed of Guarantee, as required by clause 4; and
 - (c) the Developer has effected the Insurances it is required to effect and maintain under clause 41.4, and complied with clause 41.7.

15.1.4 The Developer acknowledges and agrees that:

- (a) the right of access granted to the Developer by Council under clause 15.1.1 may not be continuous; and
- (b) without limiting clause 15.1.4(a), Council may, from time to time, suspend or terminate the licence under clause 15.1.1, or refuse to grant access under clause 15.1.1, if Council believes that the Developer is in breach of any obligation under this Deed, including under clauses 38 and 41.4.

15.2 Not used

15.3 Council's access

15.3.1 The Developer acknowledges and agrees that Council and Council's Associates may at any time after reasonable written notice to the Developer and subject to Council and Council's Associates complying with all reasonable site safety rules, have access to:

- (a) the Council Works and the Developer Works Stage 1;
- (b) any part of the Land where the Council Works and the Developer Works Stage 1 are being carried out;
- (c) any other place where the Council Activities or the Developer Activities Stage 1 are being carried out; and
- (d) any materials, equipment or plant that is being carried out, manufactured, prepared or stored as part of the Council Activities or the Developer Activities Stage 1,

for the purpose of inspecting the Council Activities or the Developer Activities Stage 1.

15.3.2 Council must use reasonable endeavours to minimise delay and disruption to the execution of the Activities caused by persons referred to in this clause 15.3. A failure by Council under this clause 15.3.2 will not be a breach of this Deed, but such failure may (subject to the other terms of this Deed) constitute an Extension Event.

15.4 Separate Contractors for Early Access Works

15.4.1 Council will be entitled to arrange for Separate Contractors to carry out the Early Access Works on the Land on and from the Date of Early Access Completion.

15.4.2 Council or the Council's Representative must, prior to the commencement on the Land of any Early Access Works, notify the Developer in writing of the identity of

Separate Contractors. Council must procure its Separate Contractors to cooperate with the Contractors.

15.4.3 The Developer:

- (a) must, and procure its Contractors to, cooperate with all Separate Contractors and Council working on, adjacent to or in proximity of the Land and facilitate the proper execution and integration of the Early Access Works with the Activities;
- (b) not used;
- (c) must permit the execution of Early Access Works by Separate Contractors;
- (d) must, without limiting clauses 15.3, 31 and 33, carry out the Activities in such a way as to ensure that Separate Contractors may have access to the Land from the Date of Early Access Completion for the purpose of carrying out the Early Access Works and completing the Early Access Works simultaneously with the execution of the Activities;
- (e) must, subject to compliance with the Developer's (or its Contractor's) reasonable requirements in relation to site safety, site safety induction and the provision and use of required personal protective equipment, but without limiting clause 15.3, allow each Separate Contractor and any person authorised by a Separate Contractor, at no cost (unless specified to the contrary in this clause 15.4.3), access to, and use of:
 - (i) the relevant part of the Land necessary for the purpose of Early Access Works;
 - (ii) any part of the Land (including delivery areas) as may be necessary for the relevant Separate Contractor to have access to or egress from that part of the Land on which the relevant Early Access Works are being carried out, or are to be carried out;
 - (iii) the Developer's (or its Contractor's) materials handling facilities (if any) to enable the handling of materials between delivery areas, the relevant part of the Land on which the Early Access Works are being carried out and waste disposal areas (but only at such times when the Developer (or its Contractor) is on the Land carrying out the Activities and (without limiting Developer's other obligations under this clause 15.4) subject to reasonable scheduling and organisation of such materials handling); and
 - (iv) power, water and other Services reasonably proximate to the Land (which will be metered and for which, Council must pay all usage charges in respect of usage by Separate Contractors);
- (f) must provide each Separate Contractor with access to, and sufficient copies of, relevant Council Works Design Documents and Developer Works Stage 1 Design Documents so as to properly facilitate the coordination and interfacing of the design of the Early Access Works with the design of the Council Works, the Common Area and the Developer Works Stage 1;
- (g) without limiting clauses 41.1 and 41.2, must not damage the Early Access Works and must take reasonable precautions to protect the Activities, the Council Works, the Common Area and the Developer Works Stage 1 from damage by the carrying out of the Early Access Works;

- (h) must comply with all reasonable directions by the Council's Representative in connection with the execution by each Separate Contractor of the Early Access Works and the co-ordination of the Activities with the Early Access Works;
- (i) must attend meetings as directed by the Council's Representative from time to time during or otherwise in relation to the execution of the Early Access Works;
- (j) must carefully co-ordinate the Activities with the Early Access Works;
- (k) without limiting the Developer's obligations under clauses 31 and 33, must take such steps as are reasonably necessary or required for the expeditious completion of the Activities, including as directed by the Council's Representative; and
- (l) without limiting clauses 15.3, 31 and 33, will use reasonable endeavours to avoid interfering with, disrupting or delaying Separate Contractors or the performance of the Early Access Works.

15.4.4 Subject to, and without limiting clause 15.4.3(h), Council:

- (a) will use reasonable endeavours to minimise delay and disruption to the execution of the Activities caused by the Early Access Works;
- (b) will use reasonable endeavours to facilitate the co-ordination of the execution of the Early Access Works with the execution of the Activities; and
- (c) must ensure that the Separate Contractors:
 - (i) take reasonable precautions to protect the Early Access Works from damage by the carrying out of the Council Works and the Developer Works Stage 1;
 - (ii) comply with all reasonable directions by the Developer (or its Contractor) in connection with the execution by each Separate Contractor of Early Access Works and the co-ordination of the Council Activities with the Early Access Works;
 - (iii) remove waste generated by the Separate Contractors;
 - (iv) attend meetings with the Developer and/or its Contractors as reasonably directed by the Developer from time to time during or otherwise in relation to the execution of Early Access Works;
 - (v) carefully co-ordinate the Early Access Works with the Council Activities and the Developer Works Stage 1;
 - (vi) use reasonable endeavours to minimise delay and disruption to the execution of the Council Activities and the Developer Works Stage 1 caused by Early Access Works; and
 - (vii) comply with the Developer's (or its Contractor's) reasonable requirements in relation to site safety, insurance, site safety induction and the provision and use of required personal protective equipment, which may include the execution of a separate contractor deed between the Separate Contractor and the Contractor,

and if a Separate Contractor does not comply with all of those provisions, the Developer or Contractor may, acting reasonably instruct the Council to remove the Separate Contractor from the Land and the Developer may exclude the Separate Contractor from the Land.

- 15.4.5 Council and Separate Contractors may, with the consent of the Developer or its Contractors (which consent will not be unreasonably withheld), store goods, materials, machinery, plant and equipment on or about the Land, and have access to those goods, materials, machinery, plant and equipment.
- 15.4.6 The Developer (and its Contractors) must provide all reasonable assistance Council and Separate Contractors in connection with any Applications to Authorities in relation to the Early Access Works.
- 15.4.7 The Developer acknowledges and agrees that delay or disruption to the execution of the Activities caused by the execution of the Early Access Works will not constitute a breach of this Deed by Council but may (subject to the other terms of this Deed) entitle Council to claim an extension of time under clause 32.3 and delay costs under clause 32.8.
- 15.4.8 The Developer releases Council from any Claim, other than in respect of any right which the Developer may have to claim an extension of time under clause 32.3 and delay costs under clause 32.8, which it now or in the future may have against Council arising out of, or in any way in connection with, any delay or disruption which a Separate Contractor may cause to the execution of the Activities.
- 15.4.9 The Developer acknowledges and agrees that:
- (a) its obligations under this clause 15.4 apply irrespective of:
 - (i) whether the workforce who purport to use any facilities are engaged by Council, a Separate Contractor or their respective subcontractors; and
 - (ii) any requirement of any applicable award relating to the provision of any such facilities; and
 - (b) neither Council nor Council's Representative assumes any duty of care or other responsibility to the Developer (or its Associates or Contractors) in relation to the execution of the Early Access Works other than as expressly provided in this clause 15.4.
- 15.4.10 This clause 15.4 does not limit or otherwise affect any other obligation or liability of the Developer under this Deed.

15.5 Developer risk

The Developer accesses any part of the Land (including under clause 15.1.1 or otherwise) solely at its own risk. The Developer indemnifies Council in respect of all Claims, Liability and Loss which Council may suffer or incur to the extent they are caused or contributed to by the Developer or its Associates accessing any part of the Land, or any act or omission of the Developer or its Associates whilst present on any part of the Land.

15.6 Contractual rights

The rights given to the Developer under this clause 15 are contractual only, and do not give the Developer any interest in the Land or any part of it.

15.7 Extra Land

The Developer must:

- 15.7.1 procure for itself the occupation and use of, and relevant rights over, any Extra Land;
- 15.7.2 indemnify Council against any Claim against Council by any owner or occupier of, or other person having an interest in, any Extra Land; and
- 15.7.3 as a condition precedent to Practical Completion, provide Council with an executed release in favour of Council (on terms satisfactory to Council (acting reasonably)) from all claims from the owner or occupier of, and any other person having an interest in, any Extra Land.

16. The Land

16.1 Acceptance of Site Conditions

- 16.1.1 The Developer acknowledges and agrees that, prior to the date of this Deed and for the purposes of entering into this Deed it has examined the Land, Extra Land and their respective surroundings.
- 16.1.2 The Developer acknowledges that it knows that the Land and Extra Land is Contaminated.
- 16.1.3 The Developer warrants and represents that it has obtained its own independent advice as to Contamination of the Land, Extra Land and their respective surroundings, and any references to Contamination in the Information Documents, including the nature, extent and characterisation of the Contamination, the risks arising or potentially arising from it and the Suitability of the Land and Extra Land.
- 16.1.4 The Developer warrants and represents that it has satisfied itself as to:
 - (a) the Suitability of the Land and Extra Land and each part of the Land and Extra Land in respect of which it will or proposes to receive an interest including the Suitability having regard to Contamination elsewhere on the Land;
 - (b) the nature, extent, cost and timeframes for carrying out any Remediation by it and or any other person on the Land and Extra Land;
 - (c) the extent of any Remediation that has been undertaken on the Land, Extra Land and their respective surroundings; and
 - (d) the need to maintain and the cost and works necessary to maintain any Remediation on any part of the Land in respect of which it will or proposes to take an interest.
- 16.1.5 Without limiting or otherwise affecting clauses 16.10, 16.11, 16.12 and 32:
 - (a) Council makes no representation and gives no warranty to the Developer in respect of the Site Conditions likely to be encountered during the execution of the Activities or otherwise in respect of the condition of the Land, Extra Land or any structure or other thing on, under or adjacent to, or otherwise in the vicinity of, the Land or any Extra Land;

- (b) the Developer accepts the Land, Extra Land and any structures or other things on, under or adjacent to, or otherwise in the vicinity of, the Land or any Extra Land, and any Site Conditions, in their existing condition subject to all defects (including all existing Contamination) whether or not disclosed or able to be deduced from the Information Documents;
- (c) the Developer specifically accepts the risk of subsurface structures, waste, scraps, remnant industrial structures, subsurface footings, pipes, tanks, infrastructure, cables or other buried objects being present at the Land; and
- (d) the Developer agrees that it is responsible for, and assumes the risk of all additional work, increased costs and any Loss, Liability or delay (including any delay in achieving Early Access Completion or Practical Completion) it suffers or incurs arising out of or in connection with:
 - (i) the Site Conditions actually encountered during the execution of the Activities; and
 - (ii) the Environment associated with the Land, Extra Land and their respective surroundings,

including:

- (iii) the existence of any Pollution or Contamination or any Remediation required to carry out the Activities or otherwise use and occupy the Works; and
- (iv) the Suitability or otherwise of the Land and any Extra Land (including Site Conditions) for the Works or the Activities.

16.1.6 Without limiting or otherwise affecting any other part of this clause 16.1 or clause 16.4, the Developer must, immediately upon encountering any Site Conditions or other physical conditions which will or may have a substantial effect on the Developer's ability to perform any part of the Activities, notify Council in writing of the Site Condition or other physical condition detailing the nature of the effects on the Developer's ability to perform its obligations under this Deed and the measures the Developer proposes to take to overcome those effects.

16.1.7 The Developer must, as a condition precedent to Practical Completion, provide to Council any certificate or other document required to be obtained from any Authority or under any Law in relation to the existence of any Contamination or any decontamination or remediation required to carry out the Council Activities or the Developer Activities Stage 1, or to otherwise use and occupy the Council Works or the Developer Works Stage 1.

16.1.8 Subject to this Deed including clause 32, the Developer:

- (a) assumes the risk of all delay, increased costs and any Loss it suffers or incurs in respect of the Site Conditions of the Land or Extra Land, including:
 - (i) the existence of any Pollution, Contamination or other Environmental aspect of the Land, Extra Land or their respective surroundings;
 - (ii) the existence of any hazardous conditions or hazardous substances on the Land, Extra Land or their respective surroundings (including any asbestos in any buildings, plant or equipment);
 - (iii) the suitability or otherwise of any material on the Land or Extra Land for use in the Works; and

- (iv) water, atmospheric and subsurface conditions or characteristics; and
- (b) may not Claim against the Council, and the Council has no liability in respect of, any delay, increased costs, any Loss or other effects on the Developer Activities or the Developer Works related to the conditions and characteristics referred to in clause 16.1.8(a), except to the extent that the Developer's Loss is caused by a negligent act or omission of Council or Council's Associates after the transfer of the Land to the Developer.

16.2 Services

- 16.2.1 The Developer must pay for all Services utilised or consumed by the Developer or its Associates in relation to the Land, even if the Land or part of the Land is owned by Council.

16.3 Statutory notices

The Developer must comply with, and pay all Enforcement Costs associated with, any work order or notice issued after the date of this Deed by an Authority in respect of the Works or the Activities (or any part of either the Works or the Activities) and to the extent that such work order or notice was made necessary due to a negligent act or omission of Council or Council's Associates, then to that extent Council will reimburse the Developer for any such costs incurred.

16.4 Notice of Pollution and Contamination

If the Developer or any of its Associates:

- 16.4.1 encounters, disturbs or affects any Pollution or Contamination during the performance of the Council Activities or the Developer Activities Stage 1; or
- 16.4.2 causes or contributes to any Contamination or Pollution during the performance of the Council Activities or the Developer Activities Stage 1,

the Developer must promptly give written notice to Council containing details of any such Pollution or Contamination.

16.5 Pollution or Contamination direction

Council may, following receipt of a notice under clause 16.4, give a written direction to the Developer regarding the Pollution or Contamination, including in respect of:

- 16.5.1 the protection of people or property from exposure to the Pollution or the Contamination; or
- 16.5.2 the protection of the surrounding parts of the Land (or any part of it) or any Extra Land (or any part of it), or areas in the vicinity of the Land or any Extra Land.

16.6 General Environmental obligations

The Developer must:

- 16.6.1 comply with all requirements of the Law and this Deed for the protection of the Environment, including all Environmental Laws; and

- 16.6.2 not cause or create any Pollution or Contamination of the Land, Extra Land and their respective surroundings.

16.7 Making good Environmental damage

The Developer is responsible for, and must make good, any unlawful damage to the Environment caused by the performance of the Council Works or the Developer Works Stage 1 or any other act or omission of the Developer or its Associates, including any Pollution or Contamination of the Land, Extra Land or their respective surroundings.

16.8 Clean-up obligations

Without limiting clauses 16.5, 16.6 and 16.7, the Developer must:

- 16.8.1 clean up any Pollution or Contamination on the Land and its surroundings of which it becomes aware, regardless of whether that Pollution or Contamination is caused by substances brought on to the Land by, or any other act or omission of, the Developer or its Associates; and
- 16.8.2 comply with all directions of any Authority regarding the cleaning up of that Pollution or Contamination.

16.9 Developer's additional obligations

The Developer must:

- 16.9.1 provide, or procure the provision of, all materials, equipment, labour, services and other things required for the timely performance of the Council Activities and the Developer Activities Stage 1 in accordance with this Deed;
- 16.9.2 during the performance of the Council Activities and the Developer Activities Stage 1 keep the Land free from all unnecessary obstruction and must periodically store or remove any surplus materials and clear away from the Land any wreckage, rubbish or temporary works;
- 16.9.3 prevent nuisance and take all reasonable precautions to prevent unreasonable disturbance of or to:
- (a) properties surrounding the Land; and
 - (b) following the achievement of Practical Completion, the use of the Common Area and the Council Works,
- and the occupiers and Users thereof and the general public, including that caused by dust, debris and noise; and
- 16.9.4 provide or procure the provision of all things and take all measures necessary to protect people and property (including maintaining all lighting, fencing and security).

16.10 Native Title

- 16.10.1 The Developer acknowledges and agrees that it has not entered into this Deed or any other Project Document in reliance on any representation, warranty, promise or statement by Council, or any of Council's Associates nor any other person as to the existence or otherwise of any native or aboriginal title in respect of the Land, or any part of the Land.

- 16.10.2 If a Native Title Application is made in respect of the Land, then the Developer is responsible for dealing with any Native Title Application in respect of the Land or any part of the Land.
- 16.10.3 The Developer is responsible for payment of any compensation or other moneys required to be paid to the native title holders of the Land or any part of the Land or any applicants of such title, under a Native Title Application by those native title holders or applicants.
- 16.10.4 In respect of any Native Title Application that is made in respect of the Land, the Developer must consult with Council and act reasonably in taking into account any recommendation or comments made by Council in connection with any response to such application, including management of any negotiation, mediation, settlement or other procedures provided for under the *Native Title Act 1993* (Cth).
- 16.10.5 The Developer is not entitled to make, and Council will not be liable upon, any Claim (including for any Liability or Loss suffered or incurred by the Developer) arising out of or in connection with a Native Title Application in respect of the Land or any part of the Land or any of the other matters referred to in this clause 16.10.
- 16.10.6 If there is a Native Title Application with respect to the Land or any part of it, the Developer must:
- (a) notify Council in writing within 5 Business Days of becoming aware of the Native Title Application;
 - (b) continue to perform the Activities as required by this Deed, except to the extent otherwise:
 - (i) directed by any relevant Authority or ordered by a court or tribunal; or
 - (ii) required by Law; and
 - (c) take all steps to mitigate any Loss arising out of or in connection with the Native Title Application and the performance of the Developer's obligations under this clause 16.10.

16.11 Relics

- 16.11.1 The Developer acknowledges that Relics may be found on or in the Land. If a Relic is found, the Developer must:
- (a) notify Council in writing within 5 Business Days of becoming aware of the existence of the Relic;
 - (b) continue to perform the Activities as required by this Deed, except to the extent otherwise:
 - (i) directed by any relevant Authority or ordered by a court or tribunal; or
 - (ii) required by Law;
 - (c) take all practical steps to prevent the Relic being disturbed, damaged or lost;
 - (d) comply with any directions given by any relevant Authority relating to the handling of the Relic; and
 - (e) comply with all Laws in respect of the Relic.

- 16.11.2 The Developer is not entitled to make, and Council will not be liable upon, any Claim (including for any Liability or Loss suffered or incurred by the Developer) arising out of or in connection with any Relic or any of the matters referred to in this clause 16.11 other than in respect of applying for a claim for an extension of time in accordance with clause 32.3.

16.12 Threatened Species

- 16.12.1 If a Threatened Species Claim is commenced, affecting any part of the Land or the carrying out of the Activities on the Land, the Developer must:
- (a) notify Council in writing within 5 Business Days of becoming aware of the Threatened Species Claim; and
 - (b) continue to perform the Activities as required by this Deed, except to the extent otherwise:
 - (i) directed by any Relevant Authority or ordered by any court or tribunal; or
 - (ii) required by Law.

- 16.12.2 The Developer is not entitled to make, and Council will not be liable upon, any Claim (including for any Liability or Loss suffered or incurred by the Developer) arising out of or in connection with any of the matters referred to in this clause 16.12.

16.13 Surrounding areas

The Developer must:

- 16.13.1 take all reasonable steps to ensure that it does not cause, and that its Associates do not cause:
- (a) the streets adjoining the Land to be in an unclean or untidy condition as a result of the performance of the Activities; or
 - (b) any damage to the existing streets, kerbs, Services and any property located in the vicinity of the Land;
- 16.13.2 not wash or permit the washing of concrete trucks or other vehicles or machinery employed in relation to the Activities in the streets or areas surrounding the Land; and
- 16.13.3 without limiting clauses 16.9, 41.1, 41.2 and 41.3, promptly following the Date of Practical Completion, ensure that the access roads to the Land and any adjoining structures or infrastructure, fencing, footpaths or other roadways which have been damaged by the Developer or the Developer's Associates in carrying out the Council Activities or the Developer Activities Stage 1 are repaired or, if repair is not possible, the relevant damaged part replaced to the satisfaction of any relevant Authority, in compliance with all Laws and otherwise to the reasonable satisfaction of Council.

Clause 16.13.3 does not relieve the Developer from the obligation to ensure that the access roads to the Land and any adjoining structures or infrastructure, fencing, footpaths or other roadways are constructed or repaired as necessary to achieve Practical Completion.

16.14 Safety of persons

Without limiting clauses 38, 41.1, 41.2 and 41.3, the Developer must:

- 16.14.1 before any Activities are commenced or performed on the Land and to the extent it is appropriate, while such Activities are being performed, ensure that appropriate safety measures (including safety fencing, barriers, barricades, hoardings and protective coverings) are in place to prevent public access to the Land;
- 16.14.2 if required as a result of the carrying out of the Activities, shore up, maintain, underpin and support adjoining structures (including the relevant access roads, buildings, fencing, footpaths and roadways) so as to ensure:
 - (a) stability and continued use of these structures; and
 - (b) the safety of persons;
- 16.14.3 cause the Council Activities to be carried out in accordance with all Laws relating to workplace health and safety; and
- 16.14.4 cause the Developer Activities to be carried out in accordance with all Laws relating to workplace health and safety.

16.15 Inconvenience or interference

Without limiting clause 8 and clause 16.9, the Developer:

- 16.15.1 must ensure that any person involved in the carrying out of the Developer Activities Stage 1 or the Council Activities complies with any applicable Laws with respect to noise suppression methods for building or construction machinery used in carrying out the Activities;
- 16.15.2 must minimise any inconvenience or interference to:
 - (a) any owner or occupier of adjoining land; and
 - (b) following the achievement of Practical Completion, the use of the Common Area and the Council Works by Users;
- 16.15.3 acknowledges and agrees that, without limiting clause 16.15.2:
 - (a) it is aware that, from the Date of Practical Completion, the Common Area and the Council Works will be occupied, used and operated by Users;
 - (b) from the Date of Practical Completion, it must, despite any other provisions of this Deed to the contrary, ensure that, except to the extent permitted under this Deed, the use and operation of the Common Area and the Council Works is not unreasonably interfered with or interrupted by reason of the execution of the Developer Works;
 - (c) from the Date of Practical Completion, the Developer must maintain and coordinate safe, sufficient and convenient access so as not to unreasonably hinder road traffic and pedestrian access to and from the Common Area and the Council Works; and
 - (d) all signage, line marking, flagmen, barriers and other traffic devices needed by the Developer to comply with its obligations under this clause 16.15.3 must be provided and maintained by the Developer;

16.15.4 without limiting clause 16.15.2, must, and must ensure that its Associates:

- (a) from the Date of Practical Completion, take all reasonable steps necessary to protect the Users occupying, using and operating the Common Area or the Council Works from risks to safety caused by the carrying out of the Developer Activities, including protecting Users occupying, using and operating the Common Area or the Council Works against weather, dust, dirt, water or other nuisance by the use of temporary hoardings and the like;
- (b) after the Date of Practical Completion, comply with all procedures, policies and rules adopted from time to time by Council in connection with the occupation, use and operation of the Common Area or the Council Works, provided that such procedures, policies and rules must not unreasonably hinder the Developer from performing its obligations under clause 34;
- (c) comply with, and not do anything which may place Council in breach of, any Laws applying to the Common Area or the Council Works;
- (d) keep the Land clean and tidy and regularly remove rubbish and surplus materials;
- (e) keep Council informed as frequently as is reasonably required (including as reasonably required by Council) of any matters which may affect any Users of the Common Area or the Council Works;
- (f) consult and co-operate with Council and any Users and attend meetings as required by Council in relation to the interface between the activities and duties of the Users and the carrying out of the Developer Activities;
- (g) carry out the Developer Works so as to minimise nuisance to Users occupying, using or operating the Common Area or the Council Works, to ensure their safety and comfort and to ensure Council is not in breach of its obligations to Users (whether pursuant to any Laws or otherwise);
- (h) from the Date of Practical Completion, without limiting clause 16.15.3(c), keep safe and convenient access to the Common Area and the Council Works available at all times to Users during the carrying out of the Developer Activities and comply with the reasonable requirements and reasonable directions of Council relating to such access; and
- (i) ensure that all Associates on the Land conduct themselves appropriately, including by dressing appropriately, refraining from using profane or offensive language or behaviour, not smoking or consuming alcohol on the Land, not playing any loud music or sound equipment; and

16.15.5 acknowledges and agrees that, without limiting clause 16.15.2, nothing in this clause 16.15 will limit or otherwise affect the Developer's other obligations under this Deed and it has made due allowance (including in the Contract Sum and in any Draft Works Program or Works Program) for complying with its obligations under this clause 16.15.

16.16 Rights of Council to protect persons and property

If the Developer fails to comply with its obligations under clause 16.14, then in addition to Council's other remedies, Council may after giving reasonable written notice to the Developer (such notice is not required where Council determines (acting reasonably) that urgent action is required to protect persons or property), carry out or procure the carrying out of the necessary work to comply with clause 16.14. The Developer must pay to Council on

demand a sum equal to all Enforcement Costs incurred by Council in carrying out or procuring the carrying out of such work.

16.17 Securing of the Land

Without limiting clause 15.5, the Developer acknowledges that Council is not responsible nor liable in any manner whatsoever for security of or within the Land or any part of the Land, or in respect of any unauthorised entry to or misdemeanour within the Land or any part of the Land.

16.18 No noxious use

The Developer must not permit, and must ensure that its Associates do not permit, any illegal act, trade, business, occupation or calling at any time to be exercised, carried on, permitted or suffered in or on the Land or any part of the Land during the period from commencement of the Activities until Practical Completion.

16.19 Emergencies

If there is, or Council or the Developer has grounds for believing there is, an Emergency of any nature in connection with the Council Works or the Developer Works Stage 1 or the Land (prior to the Date of Practical Completion) then:

- 16.19.1 on becoming aware of the Emergency or possible Emergency, the Developer must immediately advise and cooperate with Council, and keep Council fully informed about the nature of the Emergency and any actions being taken by, or on behalf of, the Developer to address the Emergency and ameliorate any risks; and
- 16.19.2 whether or not the Developer is aware of the Emergency or possible Emergency or is taking any action, Council must take reasonable steps to notify the Developer of the Emergency and is permitted to have reasonable access to the Land, having regard to the nature of the Emergency or possible Emergency, and to take whatever action it considers is reasonably necessary to eliminate the Emergency or assist the Developer to eliminate the Emergency.

16.20 Removal of materials, debris etc.

- 16.20.1 If the Developer removes any Material from the Land (whether or not required by any Authority) then, as between the Council and the Developer, ownership in all such Material transfers to the Developer immediately on the Material leaving the Land.
- 16.20.2 The Developer must contain, manage (including remove where necessary) and make safe and comply with the directions of the Council in respect of any Material excavated from, stockpiled on or brought onto any Land.

17. Call Option Deed (Developer Works Lot) and Residual Land Contract

17.1 Call Option Deed (Developer Works Lot)

- 17.1.1 On or about the date of this Deed, the Developer and Council will enter into the Call Option Deed (Developer Works Lot).
- 17.1.2 If the Developer or Approved Nominee does not exercise the call option granted under the Call Option Deed (Developer Works Lot) on the terms of that deed, this Deed terminates immediately at the end of the Call Option Period (Developer Works Lot).

17.2 Residual Land Contract

17.2.1 Following exercise by the Developer (or Approved Nominee) of the call option the subject of the Call Option Deed (Developer Works Lot) in accordance with that deed, Council and the Purchaser will enter into the Residual Land Contract in connection with the sale of the proposed Developer Works Lot to the Purchaser. Completion under that contract will be conditional upon each of the following conditions being satisfied (unless one or more of such conditions are waived in writing by Council):

- (a) a public positive covenant burdening the whole of the Developer Works Lot has been created pursuant to section 88D of the Conveyancing Act 1919, the terms of which must be reasonably acceptable to each of the Council and the Purchaser, which terms must expressly repeat, in effect, such of the provisions of this deed which concern or relate to "development" of the Land to the extent that it relates to Stage 1, "development" having, for the purposes of this clause, the same meaning given that word in section 4 of the Environmental Planning and Assessment Act 1979; and
- (b) the Purchaser granting to the Council a first registered mortgage (under the Real Property Act 1900) over the Developer Works Lot, that mortgage securing moneys payable to the Council under this Deed comprising the whole or any part of the Default Amount and Council being reasonably satisfied that upon transfer of the Developer Works Lot to the Developer Council will become the proprietor of a first registered mortgage over the Developer Works Lot; and
- (c) the Purchaser, granting to the Council a first registered charge (under the Real Property Act 1900) over the Developer Works Lot, such charge securing moneys payable to the Council under this Deed comprising the whole or any part of the Default Amount, and Council being reasonably satisfied that upon transfer of the Developer Works Lot to the Purchaser, Council will become the proprietor of a first registered charge over the Developer Works Lot,

providing that the Developer is not in breach of its obligations under this Deed as at the Date of Warm Shell Practical Completion, it is proposed that such securities will be released by Council on that date.

17.3 Call Option Deed (Council Buyback)

17.3.1 The Developer acknowledges that:

- (a) completion of the Developer Land Contract is subject to and conditional on the Purchaser entering into the Call Option Deed (Council Buyback) with Council; and
- (b) Council may lodge a caveat on the title to the Developer Works Lot to protect its interest under the Call Option Deed (Council Buyback).

17.3.2 If Council lodges a caveat on title pursuant to clause 17.3.1(b), Council will, promptly after a request by the Developer or Purchaser, provide its consent as caveator to the registration of:

- (a) any plan or dealing required to be lodged by the Developer to allow it to comply with its obligations under this Deed.

17.4 Compulsory Acquisition

- 17.4.1 If the Developer does not transfer the Developer Works Lot to the Council in the event the Council exercises the option granted under the Call Option Deed (Council Buyback), the Developer consents to the Council compulsorily acquiring the whole or any part of the Developer Works Lot in accordance with the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), for the amount of \$1.00.
- 17.4.2 The Developer and the Council agree that:
- (a) this clause 17.4 is an agreement between the Council and the Developer for the purposes of section 30 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW); and
 - (b) in this clause 17.4 the Council and the Developer have agreed on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition.
- 17.4.3 Except as otherwise agreed between the Developer and the Council and subject to any caveat lodged by the Council in relation to the interest created by the Call Option Deed (Council Buyback), the Developer (or Approved Nominee) must ensure that the Developer Works Lot is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges), on both the date that the Developer (or Approved Nominee) is liable to transfer the Developer Works Lot to the Council in accordance with clause 17.4 and the date on which the Council compulsorily acquires the whole or any part of the Developer Works Lot in accordance with the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).
- 17.4.4 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the Developer Works Lot under this clause 17.3.2(a).
- 17.4.5 The Developer must pay the Council, promptly on demand, an amount equivalent to all Costs incurred by the Council in acquiring the whole or any part of the Council as contemplated by this clause 17.4.

18. Subdivision

18.1 Obligation to Subdivide

- 18.1.1 Before the Date of Base Works PC, the Developer must procure the issue of a Subdivision Certificate approving a subdivision of the Land relevant to the Council Works in accordance with this clause 18 and consistent with the Proposed Premises Plan (relevant to the Land the subject of the Council Works) approved by Council pursuant to 6.1.3 or as otherwise agreed by Council (in its absolute discretion).
- 18.1.2 Council must promptly do all things necessary on its parts to facilitate the Developer's compliance with clause 18.1.1. The Developer will pay the cost of any action that Council is required to take as a result of a request for subdivision by the Developer.

18.2 Notice by Developer

- 18.2.1 At least 4 months before the earlier of the anticipated Date of Base Works PC, the Developer must give a notice to the Council outlining the manner in which the Land relevant to the Council Works will be subdivided for those Council Works.
- 18.2.2 The Developer must in any notice given under clause 18.2 also notify the Council, if the Developer proposes to carry out a subdivision option which relates to a subdivision and/or stratum subdivision of the whole or any part of the Land, and where relevant, the general nature of the stratum lots to be created and which parts of the Works they will comprise.
- 18.2.3 In relation to any subdivision, or stratum subdivision, the Developer must, no later than 5 Business Days after receipt by Council of the Developer's notice under clause 18.2.2 provide the following draft documents to the Council:
- (a) if and where relevant, an indicative Plan of Subdivision; or
 - (b) where relevant, an indicative Plan of Early Stratum Subdivision and Plan of Stratum Subdivision; and
 - (c) where relevant, Stratum Documents,
- the terms of which must be reasonable (having regard to the nature of the development) to the extent that the provisions of any of the Stratum Documents relate to risk to, or Liabilities of, the Council, and in such instance, those provisions may be determined by the Council acting reasonably.
- 18.2.4 Without limiting the other provisions in clause 18.2, within 5 Business Days after serving a notice under clause 18.2.1 the Developer must give to the Council a copy of a plan on which the Developer has clearly indicated the area that is the subject of the proposed subdivision.

18.3 Preparation of Plan of Stratum Subdivision and Stratum Documents

The Developer must:

- 18.3.1 if and where relevant, engage a surveyor (reasonably acceptable to Council) to prepare the Plan of Subdivision;
- 18.3.2 engage a surveyor (reasonably acceptable to Council) to prepare the Plan of Early Stratum Subdivision and Plan of Stratum Subdivision;
- 18.3.3 if and where relevant, keep Council informed as to progress in preparing drafts of the Plan of Subdivision and submit drafts of it (or any documents to be registered with them) on a regular basis with amendments clearly identified;
- 18.3.4 keep Council informed as to progress in preparing drafts of the Plan of Early Stratum Subdivision and Plan of Stratum Subdivision and Stratum Documents and submit drafts of them (or any documents to be registered with them) on a regular basis with amendments clearly identified;
- 18.3.5 consult with Council and take into account any comments, suggestions or objections which Council (each acting reasonably) may make in respect of the draft plans or documents;

- 18.3.6 in consultation with Council (acting reasonably), prepare, and obtain Council's approval to the Stratum Documents which without limitation, must address the Agreed BMS Principles:
- 18.3.7 amend the documents provided under clauses 18.3.5 and 18.3.6 as requested by Council, acting reasonably, having regard to the nature and effect of the subdivision proposed;
- 18.3.8 if and where relevant, finalise the Plan of Subdivision (and other documents referred to in this clause) having taken into account any reasonable comments, suggestions or objections which Council have made;
- 18.3.9 finalise the Plan of Early Subdivision and Plan of Stratum Subdivision (and other documents referred to in this clause) having taken into account any reasonable comments, suggestions or objections which Council have made;
- 18.3.10 if and where relevant, submit the final draft of the Plan of Subdivision and other relevant documents to Council for its approval at least 20 Business Days prior to the Developer submitting the Plan of Subdivision to the Consent Authority for its approval. If Council does not approve the final draft of the Plan of Subdivision and other relevant documents within 20 Business Days after receipt of such Plan of Subdivision and other relevant documents (as applicable), then the Developer may by notice in writing to Council request Council to approve the final draft of the Plan of Subdivision and other relevant documents within 10 Business Days after the date of the notice and the Council must not unreasonably withhold or delay giving that consent; and
- 18.3.11 submit the final draft of the Plan of Early Stratum Subdivision and Plan of Stratum Subdivision and other Stratum Documents to Council for its approval at least 20 Business Days prior to the Developer submitting the Plan of Stratum Subdivision to the Consent Authority for its approval. If Council does not approve the final draft of the Plan of Stratum Subdivision and other Stratum Documents within 20 Business Days after receipt of such Plan of Stratum Subdivision and other Stratum Documents (as applicable), then the Developer may by notice in writing to Council and request Council to approve the final draft of the Plan of Stratum Subdivision and other Stratum Documents within 10 Business Days after the date of the notice, and Council must not unreasonably withhold or delay giving that consent.

18.4 Consent to Plan of Subdivision, and Plan of Stratum Subdivision

The Developer must obtain the consent of Council to each of the Plan of Subdivision (if applicable), the Plan of Early Stratum Subdivision and the Plan of Stratum Subdivision which cannot be unreasonably withheld or delayed. Council may withhold its consent to any of the Plan of Subdivision, the Plan of Early Stratum Subdivision and the Plan of Stratum Subdivision if, in the opinion of the Council acting reasonably:

- 18.4.1 the boundaries of the lots described in the draft Plan of Subdivision or draft Plan of Stratum Subdivision do not, where appropriate, follow the external vertical planes of the Works except to the extent contemplated in the Proposed Premises Plan as approved by the Council pursuant to clause 6.1.4;
- 18.4.2 the Works are not sufficiently advanced to achieve accurate boundary definitions of the various components of the Works;
- 18.4.3 a Plan of Early Stratum Subdivision or Plan of Stratum Subdivision for a stratum subdivision is not accompanied by the Stratum Documents approved by Council in accordance with clause 18.3;

- 18.4.4 a Plan of Early Stratum Subdivision or Plan of Stratum Subdivision is not accompanied by Stratum Subdivision Documents setting out appropriate easements, covenants or restrictions having regard to the nature and effect of the particular subdivision and the reasonable requirements of Council or the requirements of any Authority; or
- 18.4.5 the Developer has failed to comply in a material manner with clause 18.3.

18.5 Registration

On approval of each of the Plan of Subdivision, Plan of Early Stratum Subdivision and the Plan of Stratum Subdivision by the Consent Authority, Council (at the Developer's Cost) must promptly produce (or where applicable, procure the production), at LPI, the certificates of title for the Land to be subdivided to enable the Developer to lodge and register the Plan of Subdivision, Plan of Early Stratum Subdivision and the Plan of Stratum Subdivision (and other documents referred to in this clause 18) at LPI.

18.6 Easements

The parties acknowledge that:

- 18.6.1 comprehensive easements including (without limitation) easements for support, services and access may be required between the various lots created by subdivision under this clause 18;
- 18.6.2 to the extent that the relevant easements have been identified as at the time of lodgement of the Plan of Subdivision, the Plan of Early Stratum Subdivision or the Plan of Stratum Subdivision, the Developer must at the Cost of the Developer cooperate with the Council and do all things necessary to cause the easements referred to in clause 18.6.1 to be registered on the folio of the register for the Land together with the registration of the Plan of Subdivision or the Stratum Documents; and
- 18.6.3 to the extent that the relevant easements have not been identified as at the time of lodgement of the Plan of Subdivision, the Plan of Early Stratum Subdivision or the Plan of Stratum Subdivision creating the lots the subject of the easements, the easements may be created by registration of such other instruments as are acceptable to the LPI and Council, provided that Council is not obliged to grant an easement referred to in this clause 18.6 if:
- (a) that easement would materially interfere with the normal use and enjoyment of the land to be burdened; or
 - (b) Council is not the registered proprietor of the land to be burdened by the easement.

18.7 Amendments to Documents

If the Developer wants to amend any of the Stratum Documents or any term of any By Law Instrument or the easements or restrictions created (or to be created) on registration of the Plan of Subdivision, the Plan of Early Stratum Subdivision or the Plan of Stratum Subdivision, it must obtain the prior consent of Council, such consent not to be unreasonably withheld or delayed.

18.8 Amendments required by Law or an Authority

Subject to obtaining Council's consent, the Developer may alter the Stratum Documents to the extent necessary to comply with any Law or any requirements of any Authority. The

Council may only refuse to consent to any alteration which is of a material concern to them because of Council's capacity as a government agency.

18.9 Boundary adjustments

- 18.9.1 Council acknowledges that at the time of registration of the Plan of Early Stratum Subdivision, the Works comprising the relevant Council Works may not be sufficiently advanced to achieve accurate boundary definitions of those Improvements.
- 18.9.2 If upon Practical Completion of Council Works, the boundaries of a lot created by subdivision do not follow the external vertical and/or horizontal planes of the Works designated for that lot (except to the extent contemplated in the Proposed Premises Plan as approved by the Council, Council agree (at the Developer's Cost and risk) to do all things necessary to assist the Developer in the adjustment of the boundaries of that lot so that, if appropriate, those boundaries follow the external vertical and/or horizontal planes of the Works designated for that lot.

18.10 Establishment of Agreed BMS Principles

Within five months after the date of this Deed, the Developer and Council must agree the set of principles which must be taken into account when the Developer prepares the first draft of the Building Management Statement including the following:

- 18.10.1 access by members of the public to the public areas;
- 18.10.2 by-laws or rules for the use, management and operation of the Improvements;
- 18.10.3 the creation of all necessary easements for support, utilities and access;
- 18.10.4 the sharing of costs and responsibilities for shared facilities between the owners of stratum lots in the Plan of Stratum Subdivision;
- 18.10.5 addressing the Council Significant Common Area Issues; and
- 18.10.6 any other matters required by the Council (acting reasonably),

The parties acknowledge that BMS Principles (and the subsequent Building Management Statement) will be prepared on the basis that the ownership of any Common Areas in a Plan of Subdivision will not be a relevant factor in determining how to apportion the rules for those areas.

18.11 Definitions

In this clause 18, the following expressions have the following meanings:

Agreed BMS Principles means the principles agreed between the Developer and Council pursuant to clause 18.10.

Base Works PC means that stage in the performance of the Activities when:

- (a) the Council Works are complete to the extent necessary to enable the Plan of Early Stratum Subdivision to be lodged with the Land and Property Information NSW for registration;
- (b) the Developer has given Council a survey prepared by a registered surveyor showing that the Council Works (other than overhangs and encroachments

agreed in writing by Council) are within the intended area for those works (as contemplated by this Deed);

- (c) the Stratum Documents have been executed by the parties and exchanged in accordance with clause 18; and
- (d) the Developer and Council have reached agreement on the proposed program for the carrying out and completion of the Additional Works.

Building Management Statement means a statement under Division 3B of Part 23 of the Conveyancing Act 1919 as varied or superseded over time having regard to the staging of the proposed subdivision arrangements contemplated in the Subdivision Concept Plan.

By Law Instrument means an instrument which creates by laws under Part 7 of the Strata Schemes Management Act 2016.

Date of Base Works PC means the date Base Works PC is achieved.

Plan of Early Stratum Subdivision means the plan of subdivision applicable to Stage 1A.

Plan of Stratum Subdivision means a plan to effect a Stratum Subdivision of the Land.

Plan of Subdivision means a plan to effect a subdivision of the Land.

Strata Management Statement means a strata management statement under the Strata Schemes Development Act.

Stratum Documents means each or any (as the context may require):

- (a) Building Management Statement which must incorporate and be consistent with the Agreed BMS Principles (unless the parties agree otherwise in writing);
- (b) Plan of Early Stratum Subdivision;
- (c) Plan of Stratum Subdivision; and
- (d) Stratum Subdivision Document.

Stratum Subdivision means procuring a subdivision in accordance with clause 18.

Stratum Subdivision Document means an instrument creating easements, covenants or restrictions under the Conveyancing Act.

Subdivision Concept Plan means the subdivision concept plan comprised in Schedule 14.

19. Council's Representative

19.1 Appointment of Council's Representative

19.1.1 Council must appoint and ensure that at all times there is appointed a person to be the Council's Representative. The Developer acknowledges and agrees that the Council's Representative:

- (a) subject to clause 19.2.2, will exercise the power, duties, discretions and authorities delegated by Council under this Deed as agent for Council and not as an independent certifier, assessor or valuer;

- (b) will have power and authority to act for and on behalf of Council and to bind Council under this Deed;
- (c) with respect to matters beyond the extent of the delegation notified by Council to the Developer from time to time, will have power to communicate the decisions of such other delegates of Council who do have the power and authority to act with respect to those matters, and the Developer may rely upon any communication issued by the Council's Representative in that respect; and
- (d) may be an employee of, or contractor to, Council.

19.1.2 The Developer must comply with any Direction of Council or the Council's Representative given, or purported to be given, under and in accordance with this Deed.

19.2 Notification

19.2.1 Council must notify the Developer within 5 Business Days after the date of this Deed of the identity and address of the Council's Representative and of any changes (as soon as practicable) in the identity or address of the Council's Representative.

19.2.2 Council must notify the Developer within 5 Business Days after the date of this Deed of the extent of delegation to the Council's Representative.

19.2.3 Nothing in this clause 19.2 restricts the ability of Council to replace the Council's Representative or to change the extent of delegation to the Council's Representative at any time.

19.3 Further delegation

The Council's Representative may from time to time:

- 19.3.1 appoint one or more individuals to act as its representative and assist the Council's Representative in exercising its powers, duties, discretions or authorities; or
- 19.3.2 vary or terminate the appointment of, or the powers, duties, discretions or authorities of, such representatives.

19.4 No prevention

The appointment of a representative by the Council's Representative does not prevent the Council's Representative from exercising any of his or her powers, duties, discretions and authorities.

19.5 Notification of representative

The Council's Representative must promptly notify the Developer of the appointment of any individual in accordance with clause 19.3.1 and the extent of such appointment.

20. Developer's Representative

20.1 Appointment of Developer's Representative

The Developer must appoint and ensure that at all times there is appointed a person to be the Developer's Representative, who:

- 20.1.1 may exercise the power, duties, discretions and authorities under this Deed as agent for the Developer;
- 20.1.2 will have full power and authority to act for and on behalf of the Developer and to bind the Developer under this Deed; and
- 20.1.3 may be an employee of, or contractor to, the Developer.

20.2 Developer still liable

The Developer retains all of its rights under and remains the party principally liable in respect of this Deed, despite the designation of the Developer's Representative as the agent of the Developer.

20.3 Notification

- 20.3.1 The Developer must notify Council within 5 Business Days after the date of this Deed of the identity and address of the Developer's Representative and of any changes (as soon as practicable) in the identity or address of the Developer's Representative.
- 20.3.2 Nothing in this clause 20.3 restricts the ability of the Developer to replace the Developer's Representative at any time.

20.4 Further delegation

The Developer's Representative may from time to time:

- 20.4.1 appoint one or more individuals to act as its representative and assist the Developer's Representative in exercising its powers, duties, discretions or authorities; or
- 20.4.2 vary or terminate the appointment of, or the powers, duties, discretions or authorities of, such representatives.

20.5 No prevention

The appointment of a representative by the Developer's Representative does not prevent the Developer's Representative from exercising any of his or her powers, duties, discretions and authorities.

20.6 Notification of representative

The Developer's Representative must immediately notify Council of the appointment of any individual in accordance with clause 20.4.1 and the extent of such appointment.

21. Engagement of Contractors

21.1 Developer to engage Contractors

- 21.1.1 The Developer:
 - (a) warrants that the performance of the Council Activities does not constitute Residential Building Work; and
 - (b) acknowledges and agrees that:

- (i) the Developer Works and the Developer Activities are not carried out on behalf of Council; and
- (ii) the Developer is not carrying out, or procuring the carrying out of, any Residential Building Work on behalf of Council.

21.1.2 To the extent that any part of the Activities involves the performance of Residential Building Work, the Developer must ensure that:

- (a) it is appropriately licensed and registered in accordance with Law (including by holding all relevant licences required by the Home Building Act) for the purposes of the performance of such Residential Building Work; or
- (b) such part of the Activities as constitutes Residential Building Work is performed or supervised by a Contractor or Contractors who are appropriately licensed and registered in accordance with Law (including by holding all relevant licences required by the Home Building Act) for the purposes of the performance of such Residential Building Work.

21.1.3 The parties acknowledge and agree that, to the extent clause 21.1.2(b) applies, all references in this Deed to the performance or carrying out of such part of the Activities as constitute or involve the performance of Residential Building Work are to be read as references to the Developer procuring the relevant Contractor to perform or carry out the relevant part of the Activities.

21.2 Separate engagement of Contractors and subcontractors

21.2.1 The Developer must ensure that any Contractor involved in the performance of both:

- (a) Council Activities and Developer Activities Stage 1; and
- (b) other Activities,

is engaged to do so under separate agreements, such that any agreement between the Developer and a Contractor relating to Council Activities and/or Developer Activities Stage 1 does not include the performance of any Activities other than Council Activities and Developer Activities Stage 1.

21.2.2 The Developer must ensure that all Contractors engage subcontractors on the same basis.

21.3 Approval of Contractors for Council Works

21.3.1 The Developer must not subcontract the construction of any part of the Council Works except to a contractor approved by Council in accordance with this clause 21.3. Council agrees that Global Construction Corporation Pty Ltd (ACN 602 572 243) is approved for the purpose of this clause 21.3 (on the basis that that entity's shareholding is comprised of any one or more of Coyne Graham, Tyler Graham, Mal Kukas or Robert Kukas (or any entity owned and controlled by any of them)).

21.3.2 Where the Developer proposes to subcontract the construction of any part of the Council Works to anyone other than Global Construction Corporation Pty Ltd (ACN 602 572 243), it must issue a written proposal to Council setting out:

- (a) details of the contractor it proposes to engage;

- (b) the terms upon which the Developer proposes to engage the proposed contractor (including a copy of the proposed form of contract) so that Council can determine whether the Developer will be able to comply with its obligations under clause 21.3.7;
- (c) details of the work to be carried out and completed by the proposed contractor;
- (d) the time for commencement and completion of that work and confirmation that these times are in accordance with this Deed;
- (e) not used; and
- (f) any other details which may be reasonably required by Council.

21.3.3 Council will consider the Developer's proposal under clause 21.3.2 and either:

- (a) approve the Developer's proposal under clause 21.3.2; or
- (b) reject the Developer's proposal under clause 21.3.2, giving reasons.

21.3.4 Not used.

21.3.5 Council must not unreasonably reject the Developer's proposal under clause 21.3.2. The parties acknowledge and agree that it will be reasonable for Council to reject the Developer's proposal under clause 21.3.2 if (without limitation):

- (a) the proposed contractor is not appropriately licensed or registered in accordance with Law; or
- (b) the proposed contractor does not have the:
 - (i) resources;
 - (ii) financial capacity; or
 - (iii) degree of skill, expertise or experience,
 reasonably required to perform the relevant work in accordance with this Deed.

21.3.6 Where the Developer conducts a tender process for the purposes of selecting a contractor to propose to Council under clause 21.3.2, the Developer must ensure that:

- (a) none of the tenderers have any arrangement or arrive at any understanding with the Developer or any of the other tenderers or with any employee of an association of which the Developer or any of the tenderers is a member about the work the subject of tender; and
- (b) no tenderer engages in:
 - (i) any discussion or correspondence with any such persons concerning the sum of money it is going to tender as its tender sum; or
 - (ii) any collusive tendering with any of the other tenderers or any conduct or any arrangement or arrives at any understanding with any of the other tenderers which in any way could have the effect of reducing the

competitiveness of the tender process for the work or increasing the price.

21.3.7 The Developer must ensure that the terms of contract upon which each Contractor is engaged for the carrying out of Council Activities includes provisions:

- (a) which will enable the Developer to discharge the Developer's obligations and liabilities to Council under the terms of this Deed in respect of the contracted work or services, including (to the extent relevant to the contract):
 - (i) warranties given by the Developer;
 - (ii) indemnities given by the Developer;
 - (iii) provisions that Council and the Council's Representative are able to enter upon and remain in or about the Land or other site upon which the Contractor is undertaking the work or to make other suitable arrangements for Council and the Council's Representative to satisfy themselves, acting reasonably, as to the relevant subcontracted work;
 - (iv) undertakings that the Contractor will, upon the termination of this Deed, if so directed by Council provide to Council all designs, documents, materials and other things intended for incorporation in, or use in connection with the design or construction of, the Council Works;
 - (v) with respect to the Builder, undertakings that the Builder will enter into a Contractor Side Deed; and
 - (vi) with respect to each Relevant Contractor, undertakings that the Relevant Contractor will enter into a Civic Precinct Side Deed;
- (b) required by any other provision of this Deed;
- (c) which are otherwise required or approved by Council; and
- (d) which comply (to the extent relevant to the relevant Contractor) with the Commonwealth Funding Agreement terms and conditions (subject to clause 58).

21.3.8 The Developer must:

- (a) have engaged the Builder; and
- (b) provided evidence to Council of such engagement together with evidence that the Builder is compliant with the Building Code and accredited under the Australian Government Building and Construction WHS Accreditation Scheme,

by the date which is 10 Business Days after the Proceed Date (or such later date as the parties agree in writing).

21.3.9 The Developer must not terminate or replace a Contractor engaged for the carrying out of Council Activities without the prior written consent of Council.

21.4 Warranties regarding Contractors

The Developer warrants and represents to Council that:

21.4.1 not used

21.4.2 each Contractor will:

- (a) be appropriately licensed and registered in accordance with Law (including by holding all relevant licences required by the Home Building Act);
- (b) be suitably qualified and experienced in the performance of work the same as, or substantially similar to, the relevant part of the Activities they are engaged to perform; and
- (c) exercise the degree of skill, professionalism, care, prudence, diligence and operating practice which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the performance of work of a nature the same as, or substantially similar to, the relevant part of the Activities; and

21.4.3 where a Contractor engages subcontractors, suppliers or consultants, those subcontractors, suppliers and consultants (as applicable) will:

- (a) be appropriately licensed and registered in accordance with Law;
- (b) be suitably qualified and experienced in the performance of work the same as, or substantially similar to, the relevant part of the Activities they are engaged to perform; and
- (c) exercise the degree of skill, professionalism, care, prudence, diligence and operating practice which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the performance of work of a nature the same as, or substantially similar to, the relevant part of the Activities.

21.5 Liability unaffected

21.5.1 The Developer's obligations and liabilities under this Deed remain unaffected notwithstanding the engagement of a Contractor or Council's consent to the identity or engagement of a Contractor.

21.5.2 The Developer is liable for any act, omission, default or negligence of any Developer's Associate as if it was the act, omission, default or negligence of the Developer.

21.5.3 The Developer must ensure that Council is named as a beneficiary of each of the warranties obtained by the Developer or a Contractor (whether from subcontractors or otherwise) in respect of each part of the Council Works.

22. Independent Certifier

22.1 Appointment of Independent Certifier

The Developer and Council must, within 10 Business Days after the Proceed Date (or such other date that the parties agree in writing), jointly engage the Independent Certifier on the terms of the Independent Certifier Deed.

22.2 Independent Certifier under this Deed

- 22.2.1 The Independent Certifier's role is to undertake the services described in the Independent Certifier Deed. The Independent Certifier is obliged to act independently of the Developer and Council and in accordance with the Independent Certifier Deed.
- 22.2.2 The Developer and Council must co-operate with the Independent Certifier to enable it to carry out its functions, including by providing all information and documents requested by the Independent Certifier in relation to its scope of work and allow the Independent Certifier to have access to the Land, the Works and such other places where any part of the Activities are being performed.

22.3 Termination and replacement of Independent Certifier

If the Independent Certifier Deed is to be terminated or if the Independent Certifier otherwise ceases to act as the Independent Certifier, the Developer and Council must use their reasonable endeavours to agree on another Independent Certifier to be appointed within 10 Business Days (or such longer period agreed in writing between the parties) on terms substantially the same as the Independent Certifier Deed and to each take such steps as are necessary to appoint that person. If the parties are unable to agree on another Independent Certifier within 10 Business Days (or such longer period agreed in writing between the parties), the parties will appoint as the Independent Certifier the person nominated by the Resolution Institute upon request by either party.

22.4 Costs of Independent Certifier

Council and the Developer must pay the costs of the Independent Certifier (and any fees charged by the Resolution Institute for appointment of an Independent Certifier) in equal amounts.

23. Additional Works

23.1 General

The parties acknowledge and agree that:

- 23.1.1 the Activities relating to the Additional Works form part of the Developer Activities Stage 1; and
- 23.1.2 the Contract Sum has been calculated and agreed to by the parties on the basis that the Additional Works form part of the Developer Activities Stage 1 and that Council has an interest in the completion of the Additional Works.

24. Incomplete Design, Design Issues and Buildability Problems

24.1 Incomplete Design

The Developer acknowledges and agrees that:

- 24.1.1 the Technical Documents do not contain a complete or fulsome design of all or any part of the Council Works or the Developer Works;

- 24.1.2 without limiting clause 13.1, neither Council nor any Council's Associate has given any representation, warranty or undertaking in respect of the completeness, or the degree of completeness, of any part of the Technical Documents; and
- 24.1.3 further design work and design development work will need to be carried out in respect of the design and other technical requirements set out in the Technical Documents in order to prepare the Final Design Documents, and otherwise construct the Council Works and the Developer Works Stage 1 in accordance with this Deed.

24.2 Acceptance by Developer

The Developer:

24.2.1 acknowledges and warrants that:

- (a) prior to the date of this Deed, it fully and carefully reviewed the Technical Documents and the other documents comprising this Deed with a view to assuming the risk of all Incomplete Design, Design Issues and Buildability Problems and for this purpose it provided, allocated and otherwise committed sufficient resources (including where necessary by engaging consultants) to undertake a detailed due diligence of the Technical Documents and the other documents comprising this Deed to identify any Incomplete Design, Design Issues and Buildability Problems;
- (b) the Technical Documents are suitable, appropriate and adequate for their intended purposes, as stated in or reasonably inferable from this Deed; and
- (c) it has allowed for and included in the Date for Base Works PC, Date for Warm Shell Practical Completion Date for Early Access Completion and the Date for Practical Completion, and any allowances for costs it anticipates it will incur in connection with the Activities, contingencies for these risks, including such that the Date for Base Works PC, Date for Warm Shell Practical Completion, Date for Early Access Completion and the Date for Practical Completion and such cost allowances cover, in addition to its other obligations under this Deed, the risk of the Developer being required to modify or re-design any existing design or provide further design and/or carry out additional design development, construction or other work arising out of, or in any way in connection with, Incomplete Design, Design Issues or Buildability Problems; and

24.2.2 acknowledges and agrees that:

- (a) any additional work or activities (including amendments to existing, or the preparation of additional, Design Documents, the provision of different or additional Services, Plant and work and/or the carrying out of new or additional construction work) which it is required to perform arising out of, or in connection with, overcoming or dealing with any Incomplete Design, a Design Issue or any Buildability Problem will be deemed to form part of the Activities and will not be a Variation or Developer Works Stage 1 Variation, even if the relevant work or activity is not contained, designed (wholly or partially), described or referred to (either expressly or impliedly) in the Technical Documents or any other document comprising this Deed or otherwise relating to the Works;
- (b) it bears the risk that the allowances it has made, including any contingencies included in the Date for Base Works PC, Date for Warm Shell Practical Completion, Date for Early Access Completion and the Date for Practical Completion, for assuming the risk of Incomplete Design, Design Issues and

any Buildability Problems are insufficient to properly compensate the Developer for carrying out the Activities referred to in clause 24.2.2(a);

- (c) it is not entitled to make, and Council will not be liable upon, any Claim (including for any Liability or Loss suffered or incurred by the Developer) arising out of, or in connection with, any Incomplete Design, Design Issue or Buildability Problem which it encounters, including anything referred to in clause 24.2.2(a), but nothing in this clause 24.2.2(c) limits or otherwise affects the Contractor's entitlements under clauses 32.3 and 32.8 in respect of a Council Initiated Variation; and
- (d) Council does not owe or assume any duty of care to the Developer in preparing, or providing it with, the Technical Documents or the other documents comprising this Deed.

25. Design

25.1 Design warranties and obligations

25.1.1 The Developer warrants that:

- (a) it will design, or will procure each relevant Contractor to design, the Council Works and the Developer Works Stage 1 by developing the design contained within the Technical Documents and otherwise preparing, or procuring each relevant Contractor to prepare, all associated Council Works Design Documents and Developer Works Stage 1 Design Documents:
 - (i) in accordance with:
 - (A) the Technical Documents (except to the extent otherwise expressly agreed in writing by Council);
 - (A) the Sustainability Principles;
 - (B) all applicable Laws; and
 - (C) the other requirements of this Deed;
 - (ii) having regard to and with the intent of causing, allowing or facilitating the achievement of the Project Objectives;
 - (iii) in a timely and efficient manner, with due expedition and without delay, and otherwise so as to achieve each Milestone by the relevant Milestone Date; and
 - (iv) in accordance with Good Industry Practice;
- (b) it will procure and engage, and ensure that each relevant Contractor procures and engages, the resources, expertise and experience necessary to design the Council Works and the Developer Works Stage 1 in accordance with the requirements of this Deed;
- (c) the construction, commissioning and completion of the:
 - (i) Council Works in accordance with the Final Council Works Design Documents will ensure that the Council Works will be, at the Date of Practical Completion, fit for their intended purpose; and

- (ii) Developer Works Stage 1 in accordance with the Final Developer Works Stage 1 Design Documents will ensure that the Council Works will be, at the Date of Practical Completion, fit for their intended purpose,

as stated in or reasonably inferable from this Deed;

- (d) it will ensure, and will procure each relevant Contractor to ensure, that the Council Works and the Developer Works Stage 1 are designed so that the Council Works, at the Date of Practical Completion, will be fit for their intended purpose, as stated in or reasonably inferable from this Deed;
- (e) it is familiar in all respects with, and will ensure satisfaction of, all relevant performance, aesthetic, quality and design intent requirements, and all other specified requirements, of Council in respect of the Council Works;
- (f) it is fully aware of everything needed to be done, and will do all such things (or procure the doing of all such things) necessary to be done, to develop the design contained within the Technical Documents and otherwise complete the design of the Council Works and the Developer Works Stage 1 in accordance with this Deed;
- (g) it will ensure that the Final Council Works Design Documents and the Final Developer Works Stage 1 Design Documents allow the Council Works and the Developer Works Stage 1 to be constructed fully in accordance with the requirements of this Deed; and
- (h) it will attend all meetings as may be required by Council in connection with the design of the Council Works, the Council Activities, the Developer Works Stage 1 and the Developer Activities Stage 1 in accordance with the Design Development Program.

25.1.2 Without limiting clause 25.1.1, the Developer must:

- (a) undertake such design, or procure each relevant Contractor to undertake such design, as is necessary to ensure that the design of the Council Works are complete for all purposes;
- (b) ensure that Council's design intent, and all other specified requirements, evidenced in the Technical Documents is fully achieved; and
- (c) prepare shop drawings, designs, technical information and any other Council Works Design Documents and Developer Works Stage 1 Design Documents necessary to ensure that the Council Works and the Developer Works Stage 1 are constructed in accordance with Council's design intent, and all other specified requirements, evidenced in the Technical Documents.

25.2 Submission of Design Documents

25.2.1 The Developer must prepare, develop and complete, or procure a relevant Contractor to prepare, develop and complete, the Design Documents and progressively submit them, together with all relevant supporting documentation, to Council:

- (a) on a regular basis, and in any event not less than on a monthly basis during the Design Development Program;
- (b) in sufficient time to allow Council 10 Business Days to review them; and

- (c) otherwise:
 - (i) not used; and
 - (ii) from time to time following any amendment to previous Design Documents (including amendments to Final Design Documents), including to take account of any:
 - (A) alterations permitted, approved or required under clause 25.3 or 25.6;
 - (B) Variations directed in a Variation Order;
 - (C) a Developer Works Stage 1 Variation directed by Council under clause 35.2.4(a) or 35.2.4(b); or
 - (D) a Developer Works Stage 1 Variation approved by Council under clause 35.3.1.

25.2.2 The Developer must ensure that the Design Documents comply with:

- (a) the Technical Documents;
- (b) the Sustainability Principles;
- (c) all applicable Laws; and
- (d) the other requirements of this Deed.

25.3 Review of Council Works Design Documents and Developer Works Stage 1 Design Documents

25.3.1 Council may (without being under any obligation to do so) review:

- (a) the Council Works Design Documents (including any amended Council Works Design Documents or alterations to previous Council Works Design Documents or to Final Council Works Design Documents) and within 20 Business Days after their submission, by written notice to the Developer, reject the relevant Council Works Design Documents; and
- (b) the Developer Works Stage 1 Design Documents (including any amended Developer Works Stage 1 Design Documents or alterations to previous Developer Works Stage 1 Design Documents or to Final Developer Works Stage 1 Design Documents) and within 20 Business Days after their submission, by written notice to the Developer, reject the relevant Developer Works Stage 1 Design Documents.

25.3.2 If any:

- (a) Council Works Design Document is rejected by Council, the Developer must submit an amended Council Works Design Document to Council; or
- (b) Developer Works Stage 1 Design Document is rejected by Council, the Developer must submit an amended Developer Works Stage 1 Design Document to Council,

in which case this clause 25.3 will reapply.

25.3.3 Council must not unreasonably reject any:

- (a) Council Works Design Document; or
- (b) Developer Works Stage 1 Design Document.

25.3.4 The parties acknowledge and agree that, without limiting the grounds on which Council may reject a Council Works Design Document or Developer Works Stage 1 Design Document, it will be reasonable for Council to reject a Council Works Design Document or Developer Works Stage 1 Design Document (including any alterations to the Council Works Design Document or Developer Works Stage 1 Design Document, referred to in clause 25.5 or 25.6) where:

- (a) any aspect of the relevant Council Works Design Document or Developer Works Stage 1 Design Document (as applicable) does not comply with the requirements of this Deed (including a requirement of the Technical Documents) or any aspect of the Council Works or the Developer Works Stage 1 (as applicable) depicted or described in the relevant Council Works Design Document or Developer Works Stage 1 Design Document (as applicable) does not comply (or would not comply) with the requirements of this Deed (including a requirement of the Technical Documents);
- (b) any aspect of a Council Works Design Document or Developer Works Stage 1 Design Document may have an adverse impact on:
 - (i) the standard, quality, appearance or performance of any aspect of the Council Works;
 - (ii) Council's use or enjoyment of the Council Works or the Common Area; or
 - (iii) the cost to Council of outgoings associated with the Council Works or the Common Area;
- (c) any aspect of a Council Works Design Document or Developer Works Stage 1 Design Document may have an adverse impact on a Council Significant Developer Works Stage 1 Criteria;
- (d) an aspect of the Developer Works Stage 1 is likely to delay the carrying out or completion of the Council Works;
- (e) an aspect of a Council Works Design Document or Developer Works Stage 1 Design Document may not enable Council to comply with this Deed; or
- (f) an aspect of a Council Works Design Document or Developer Works Stage 1 Design Document may otherwise adversely affect the Council Works or the Common Area.

25.3.5 If Council rejects a Council Works Design Document or Developer Works Stage 1 Design Document, then the Developer must amend the relevant Council Works Design Document or Developer Works Stage 1 Design Document (as applicable) and submit the relevant Council Works Design Document or Developer Works Stage 1 Design Document (as applicable) again to Council in which case this clause 25.3 will reapply.

25.4 Review of Developer Works Design Documents

25.4.1 For the purpose of clauses 25.4.2, 25.4.3 and 25.4.5 only, any reference to:

- (a) the Developer Works Design Documents, excludes the Developer Works Stage 1 Design Documents; and
 - (b) amended Developer Works Design Documents, excludes amended Developer Works Stage 1 Design Documents.
- 25.4.2 Council may (without being under any obligation to do so) review the Developer Works Design Documents (including any amended Developer Works Design Documents or alterations to previous Developer Works Design Documents or to Final Developer Works Design Documents) and within 10 Business Days after their submission, by written notice to the Developer:
 - (a) provide comments on the relevant Developer Works Design Documents to the Developer; or
 - (b) reject the relevant Developer Works Design Document where any aspect of the Developer Works Design Document may have an adverse impact on a Council Significant Developer Works Criteria.
- 25.4.3 If Council provides any comment on any Developer Works Design Document to the Developer, the Developer must (acting reasonably) take those comments into account.
- 25.4.4 If Council rejects a Developer Works Design Document, then the Developer must amend the relevant Developer Works Design Document.
- 25.4.5 Where the Developer amends the relevant Developer Works Design Document under clause 25.4.4 or as a result of taking into consideration Council's comments under clause 25.4.3, the Developer must submit the relevant Developer Works Design Document again to Council, in which case this clause 25.4 will reapply.
- 25.4.6 The Developer is not entitled to make, and Council will not be liable for, any Claim arising out of, or in any way in connection with, any comment on any Developer Works Design Document made by or on behalf of Council (including under this clause 25.4), or any change to a Developer Works Design Document, or the Developer Works, arising out of, or in any way in connection with, any such comment, but nothing in this clause 25.4.6 limits or otherwise affects the Contractor's entitlements under clauses 32.3 and 32.8 in respect of a Council Initiated Variation.

25.5 Changes due to Approvals

If, after the submission of any Design Document accordance with clause 25.3, the Developer obtains any Approval that results in, or requires, any change to any such Design Document, then the Developer must:

- 25.5.1 consult with Council in relation to possible amendments to the documentation;
- 25.5.2 amend accordingly the Design Document which is so affected (but without limiting the Developer's obligations and liabilities under clause 8); and
- 25.5.3 re-submit the amended Design Document in accordance with clause 25.3.

25.6 Changes to documents

- 25.6.1 The Developer may at any time submit to Council a Design Document which amends, replaces or updates a Final Design Document.

25.6.2 The Developer must ensure that the relevant Design Document clearly identifies all changes to the relevant Final Design Document.

25.6.3 Clauses 25.3 and 25.4 will apply to any such Design Document.

25.7 No amendment

The Developer must ensure that the Final Design Documents are not amended, replaced or updated, except:

25.7.1 in accordance with this clause 25;

25.7.2 with respect to:

- (a) the Final Council Works Design Documents, by means of a Variation directed by Council pursuant to a Variation Order; or
- (b) the Final Developer Works Stage 1 Design Documents, by means of a Developer Works Stage 1 Variation:
 - (i) directed by Council under clause 35.2.4(a) or 35.2.4(b); or
 - (ii) approved by Council under clause 35.3.1.

25.8 Developer not to proceed

The Developer must ensure that the construction of any part of the Council Works or the Developer Works Stage 1 is not commenced or carried out except in accordance with the Final Design Documents.

25.9 No obligation or liability

The Developer acknowledges and agrees that:

- 25.9.1 Council (or any person on its behalf) does not assume or owe any duty of care or other responsibility or obligation to the Developer in relation to any Design Documents, and will not be required to check such Design Documents for suitability, errors, omissions or compliance with the requirements of Law, any Authority or this Deed;
- 25.9.2 the Developer will not be entitled to make, and Council will not be liable upon or in connection with, any Claim, Liability or Loss arising out of or in connection with any failure by Council (or any person on its behalf) to detect or notify the Developer of any lack of suitability, errors, omissions or non-compliance with the requirements of Law, any Authority or this Deed in any Design Documents; and
- 25.9.3 no review of, comment upon, consent to, or approval or rejection of, nor failure or refusal to review, comment upon, consent to, or approve or reject, any Design Documents or any other direction (including approval) by Council (or any person on its behalf) about such Design Documents will:
 - (a) relieve the Developer from, or otherwise limit, alter or affect, the Developer's liabilities or responsibilities under this Deed or otherwise at law or in equity; or
 - (b) prejudice Council's rights against the Developer whether under this Deed or otherwise at law or in equity.

26. Construction

26.1 Construction obligations

The Developer must ensure that the Council Activities and the Developer Activities Stage 1 are carried out, and the Council Works and the Developer Works Stage 1 are constructed, commissioned and completed:

26.1.1 so as to achieve each Milestone by the relevant Milestone Date;

26.1.2 in accordance with:

- (a) in respect of the Council Works, the Final Council Works Design Documents;
- (b) in respect of the Developer Works Stage 1, the Final Developer Works Stage 1 Design Documents;
- (c) Good Industry Practice;
- (d) all Laws;
- (e) all relevant Australian Standards;
- (f) the Technical Documents;
- (g) the Sustainability Principles;
- (h) the Quality Assurance System; and
- (i) the other requirements of this Deed;

26.1.3 in a proper and workmanlike manner, and using proper and tradesman like workmanship;

26.1.4 using materials that are suitable, new, undamaged, of good merchantable quality, and which are otherwise fit for their intended purpose, as stated in or reasonably inferable from this Deed;

26.1.5 solely within the relevant part of the Land (except where the Approvals require works external to the relevant part of the Land); and

26.1.6 in a professional, timely, safe and environmentally responsible manner.

26.2 Construction warranties

Without limiting clause 26.1, the Developer warrants that:

26.2.1 it will procure and engage, and ensure that each relevant Contractor procures and engages, the resources, expertise and experience necessary to carry out the Activities, and otherwise construct, commission and complete the Works, in accordance with the requirements of this Deed; and

26.2.2 at the Date of Practical Completion and at the date of the expiry of the Defects Liability Period:

- (a) the Council Works and the Developer Works Stage 1 will comply with:

- (i) in respect of the Council Works, the Final Council Works Design Documents;
- (ii) in respect of the Developer Works Stage 1, the Final Developer Works Stage 1 Design Documents;
- (iii) all Laws;
- (iv) all relevant Australian Standards;
- (v) the Technical Documents;
- (vi) the Sustainability Principles; and
- (vii) the other requirements of this Deed,

except (as at the date of Practical Completion only) for minor Defects:

- (viii) which do not prevent Council Works and the Developer Works Stage 1 from being reasonably capable of being used for their intended purposes, as stated in or reasonably inferable from this Deed;
 - (ix) which the Independent Certifier determines the Developer has reasonable grounds for not promptly rectifying;
 - (x) the rectification of which will not prejudice the convenient use of the Council Works or Common Areas by the Users or others; and
 - (xi) which do not cause any legal or physical impediment to the use of the Council Works or Common Areas by the Users or others; and
- (b) the Council Works will be fit for their intended purpose, as stated in or reasonably inferable from this Deed.

26.3 Obligations remain unaffected

The Developer's warranties, obligations and liabilities arising under or in connection with this Deed (including in clauses 25 and 26) remain unaffected notwithstanding:

- 26.3.1 that design work may have been carried out by or on behalf of Council and included in the Technical Documents;
- 26.3.2 any receipt or review of, or comment or direction on, consent to, or approval or rejection of, nor any failure or refusal to review, comment on or provide of a direction in relation to, consent to, or approve or reject, the Design Documents by Council (or any person on its behalf); and
- 26.3.3 any Variation or any Developer Works Stage 1 Variation (including any Council Initiated Variation).

27. Working Method and Documentation

27.1 Developer's Responsibility

The Developer:

- 27.1.1 acknowledges that the Technical Documents do not prescribe any method of working for the Activities (in this clause 27 referred to as **Work Method**);
- 27.1.2 is solely responsible for developing a Work Method in respect of the Activities; and
- 27.1.3 must ensure that the Work Method it uses will ensure it complies with its obligations under this Deed.

27.2 Work Method

The Developer bears all the risks and costs involved in the selection of the Work Method.

The Work Method is not part of this Deed and the Developer (subject to compliance with this Deed) is free to use any Work Method, notwithstanding that before or after the date of this Deed, the Developer may have made known to Council the Developer's proposed Work Method, including if Council was given a copy of it.

The fact that the proposed Work Method is impractical or impossible or the Developer, with or without the approval of Council, uses another Work Method will not:

- 27.2.1 entitle the Developer to make any Claim against Council;
- 27.2.2 without limiting clause 27.2.1, be an Extension Event or otherwise give rise to an entitlement to an extension of time under clause 32; or
- 27.2.3 cause this Deed to be frustrated.

27.3 Developer's Warranties

Without limiting clause 25.1 or 26.2, the Developer warrants that the Work Method it uses for the Activities will:

- 27.3.1 be fit for its intended purpose, as stated in or reasonably inferable from this Deed;
- 27.3.2 ensure the highest standards of safety in the execution of the Activities; and
- 27.3.3 enable the operation, maintenance and any future decommissioning of the Council Works according to the highest standards of safety.

27.4 No Obligation to Review

The Developer acknowledges and agrees that:

- 27.4.1 Council (or any person on its behalf) does not assume or owe any duty of care or other responsibility or obligation to the Developer in relation to any Work Method, and will not be required to check such Work Method for suitability, errors, omissions or compliance with the requirements of Law, any Authority or this Deed;
- 27.4.2 the Developer will not be entitled to make, and Council will not be liable upon or in connection with, any Claim, Liability or Loss arising out of or in connection with any failure by Council (or any person on its behalf) to detect or notify the Developer of any lack of suitability, errors, omissions or non-compliance with the requirements of Law, any Authority or this Deed in any Work Method; and
- 27.4.3 no review of, comment upon, consent to, or approval or rejection of, nor failure or refusal to review, comment upon, consent to, or approve or reject, any Work Method or any other direction (including approval) by Council (or any person on its behalf) about such Work Method will:

- (a) relieve the Developer from, or otherwise limit, alter or affect, the Developer's liabilities or responsibilities under this Deed or otherwise at law or in equity; or
- (b) prejudice Council's rights against the Developer whether under this Deed or otherwise at law or in equity.

28. Quality Assurance

28.1 Quality

The Developer must (or must procure its Contractor to):

- 28.1.1 plan, establish and maintain, and ensure each Contractor plans, establishes and maintains, a quality system which conforms to the requirements of ISO 9001, including to ensure the Council Activities and the Developer Activities Stage 1 are carried out and completed in accordance with this Deed;
- 28.1.2 within 14 days of the Proceed Date, prepare and submit to Council a Quality Plan that conforms to the requirements of ISO 9001; and
- 28.1.3 ensure that Council has access to the Quality Plan and the quality system of the Developer and Contractors so as to enable monitoring and quality auditing.

28.2 Not used

28.3 Finalisation of Quality Plan

The Developer must appoint or provide a quality manager who will be responsible for the maintaining of the Quality Plan. The quality manager must have:

- 28.3.1 recognised qualifications in construction quality assurance;
- 28.3.2 experience in quality procedures and standards as generally applied within the construction industry; and
- 28.3.3 the capability to establish and coordinate a fully documented quality system in connection with the Works.

The Developer must permit, and ensure that all Contractors permit, Council and its nominated representatives to undertake quality audits and surveillance of the Developer's quality system and Quality Plan and compliance with such quality system and Quality Plan by the Developer and Contractors. The Developer must ensure that any deficiencies notified to it by Council or its nominated representatives are promptly and effectively rectified.

The Developer must establish and maintain, and ensure that each Contractor establishes and maintains, a system of records which provides objective evidence that the requirements of this Deed, the Quality Plan and the quality system have been satisfied.

The Developer must submit to Council copies of all quality records as the different phases of the Council Works and the Developer Works Stage 1 are completed and upon request by Council.

The Developer must make the quality records available for review and audit by Council and its nominated representatives upon three Business Days written notice.

28.4 Compliance with Quality Plan

The Developer must ensure that:

- 28.4.1 the Quality Plan is implemented, maintained and adhered to during the performance of the relevant Activities; and
- 28.4.2 without limiting clause 28.4.1, each Contractor adheres to the Quality Plan.

28.5 Implementation of Quality Plan

Nothing in this clause 28, nor the establishment, implementation or maintenance of, or adherence to, any Quality Plan by the Developer or a Contractor will limit or otherwise affect the Developer's liabilities and obligations under this Deed or any other Project Document.

28.6 Audit

Council may, at any time and from time to time, either itself or through a third party, audit the Developer's compliance with the requirements of this clause 28.

The Developer must fully cooperate with Council and any relevant third party in respect of any such audit.

29. Inspection and testing of Council Works and Developer Works Stage 1

29.1 Council's rights to inspect

Without prejudice to any other rights Council may have under this Deed, Council may at any time after giving reasonable notice to the Developer (except in the case of an Emergency, in which case notice will not be required):

- 29.1.1 inspect any or all of the Council Works, the Council Activities, the Developer Works Stage 1 or the Developer Activities Stage 1, whether on the Land or otherwise;
- 29.1.2 inspect the materials used in the construction of the Council Works, the Developer Works Stage 1 or the performance of any other part of the Council Activities or the Developer Activities Stage 1; and
- 29.1.3 request the Developer to provide copies of any test results that it has obtained in connection with the Council Works and the Developer Works Stage 1, to ensure that the Council Works and the Developer Works Stage 1 comply with the requirements of this Deed.

29.2 Developer cooperation

Subject to clause 29.1, the Developer must cooperate with Council, the Council's Representative and their respective representatives in respect of any activities carried out under clause 29.1 and must:

- 29.2.1 provide all reasonable access to Council, the Council's Representative and their respective representatives;
- 29.2.2 comply with any reasonable direction by Council that any part of the Council Works or the Developer Works Stage 1 not be covered up or made inaccessible;
- 29.2.3 attend any such testing or inspections at the reasonable request of Council; and

- 29.2.4 provide such information and explanations as to the Council Activities, the Council Works (including the design of the Council Works), the Developer Activities Stage 1 and the Developer Works Stage 1 (including the design of the Developer Works Stage 1) as may be requested by Council, the Council's Representative and their respective representatives.

29.3 Costs of inspection or testing

- 29.3.1 Council's costs of inspection or testing under this clause 29, and any additional reasonable costs of the Developer directly incurred in complying with this clause 29 and notified by the Developer to Council before testing or inspections are carried out, will be borne by Council or paid by Council to the Developer, unless:
- (a) the inspection or test is required by this Deed;
 - (b) the inspection or test shows that material or work is not in accordance with this Deed; or
 - (c) the inspection or test is consequent upon a failure of the Developer to comply with a requirement of this Deed.
- 29.3.2 The costs payable to the Developer under this clause 29.3 will only include the costs the Developer reasonably incurs directly as a result of the exercise by Council of its rights under this clause 29 and which are additional to the costs the Developer would ordinarily incur in carrying out the Activities.

29.4 Effect of exercise of rights

- 29.4.1 The Developer acknowledges that Council is not obliged and does not owe any duty to the Developer to exercise its rights under this clause 29.
- 29.4.2 Except as expressly provided in this clause 29, the exercise by Council of its rights under this clause 29, does not:
- (a) entitle the Developer to make any Claim; or
 - (b) limit or otherwise affect the Developer's liabilities or obligations under this Deed or any other Project Document.

30. Commissioning of Council Works and Developer Works Stage 1

- 30.1.1 The Developer acknowledges and agrees that it is responsible for testing and commissioning of all of the Services and Plant forming part of the Council Works and the Developer Works Stage 1 to verify that:
- (a) all Services and Plant have been installed, tested and are capable of operating in accordance with this Deed under both normal and emergency working conditions; and
 - (b) the Council Works are fit for their intended purpose, as stated in or reasonably inferable from this Deed.
- 30.1.2 The Developer must prepare a commissioning plan in respect of the testing and commissioning required under this Deed, including as referred to in clause 30.1.1 and the Technical Documents, and submit it to Council at least 30 days before the Developer anticipates that the testing and commissioning of the Services and Plant

will commence and setting out how the Services and Plant will be commissioned in accordance with this Deed, including this clause 30.

- 30.1.3 The Developer must ensure that:
- (a) testing and commissioning of all Services and Plan is carried out in accordance with the Technical Documents.
 - (b) the testing and commissioning of all of the Services and Plant by the Developer includes all of the associated interlocking of the Services and Plant; and
 - (c) it fully demonstrates to Council compliance with this clause 30.
- 30.1.4 The Independent Certifier will determine if the Services and Plant are acceptable and if they have passed the testing regime and have therefore been commissioned.
- 30.1.5 Without limiting the Developer's obligations in respect of Defects and the achievement of Early Access Completion and Practical Completion, if the Independent Certifier determines that the testing or commissioning of the Services and Plant is unsuccessful, the Developer must ensure that all required remedial works and technical adjustments are effected and must arrange for further testing and commissioning and demonstrate to Council compliance with this clause 30.
- 30.1.6 The Developer must ensure that experienced and competent engineers are provided on behalf of the Developer to control, coordinate and arrange detailed procedures in connection with testing and commissioning of the Services and Plant and to record the testing and commissioning results for the duration of the testing and commissioning demonstrations.
- 30.1.7 The Developer must ensure that any relevant Contractors provide all necessary personnel, facilities, resources, equipment and input for the testing and commissioning of the Services and Plant.
- 30.1.8 The Developer acknowledges and agrees that satisfactory commissioning, which includes acceptance testing by Council, as required by this Deed, (including the Technical Documents) is a condition precedent to Practical Completion.

31. Progress and Program

31.1 Progress

The Developer must ensure that:

- 31.1.1 it promptly commences the Council Activities and the Developer Activities Stage 1 and in any event must commence construction of the Council Works and the Developer Works Stage 1 by the Milestone Date nominated for construction commencement in the Works Program;
- 31.1.2 the Council Activities and the Developer Activities Stage 1 are carried out diligently, continuously, with due expedition and without delay; and
- 31.1.3 each Milestone is achieved by the relevant Milestone Date.

If the Developer Works (to the extent those works relate to Stage 2) are not completed by the Developer by the date that is two years after the Date of Practical Completion of the

Developer Works Stage 1 (or such later date as the parties agree in writing), then the hoarding along the Lake Street boundary must be moved and 'set further back' from Lake Street by the Developer and a 'parkland/pedestrian area' constructed and maintained by the Developer to allow access directly to the Council Works and the Developer Works Stage 1.

31.2 Development of Works Program

The Developer must, within 30 Business Days of the date of this Deed (or such later date as the parties agree in writing), prepare and submit to Council a copy of a detailed program (the **Draft Works Program**) for the Council Activities and the Developer Activities Stage 1, which:

- 31.2.1 must be in the form of a computer generated critical path network logic gantt chart;
- 31.2.2 must be provided to Council in both fully editable electronic and hard copy form;
- 31.2.3 shows each Milestone to be achieved by the applicable Milestone Date;
- 31.2.4 contains and clearly shows a critical path for the design, construction and commissioning activities required for the Council Activities and the Developer Activities Stage 1;
- 31.2.5 enables Base Works PC to be achieved by the Date for Base Works PC, Warm Shell Practical Completion to be achieved by the Date for Warm Shell Practical Completion, Early Access Completion to be achieved by the Date for Early Access Completion and Practical Completion to be achieved by the Date for Practical Completion;
- 31.2.6 shows or includes:
 - (a) a project calendar, including:
 - (i) the provision of Design Documents to Council;
 - (ii) the obtaining of all Approvals, including:
 - (A) the order in which those Approvals will be applied for; and
 - (B) a program for applying for and obtaining Approvals;
 - (iii) appointment of Contractors;
 - (iv) estimated crewing and productivity rate at each stage of construction and near critical activities;
 - (v) all activities and any time, site or other restraints that may have a significant bearing on the time required to achieve Warm Shell Practical Completion, Base Works PC, Practical Completion and Early Access Completion, including the ability to achieve Warm Shell Practical Completion by the Date for Warm Shell Practical Completion, Base Works PC by the Date for Base Works PC, Early Access Completion by the Date for Early Access Completion and Practical Completion by the Date for Practical Completion;
 - (vi) projected inspection and test plan schedules;
 - (vii) identification of the mandatory inspection hold points nominated in this Deed or the Quality Plan; and

- (viii) supply of essential materials and off-site activities such as the manufacture or prefabrication of key items;
 - (b) mobilisation to the Land;
 - (c) without limiting clause 31.2.6(a), all principal activities relating to the design, construction and commissioning of the Council Works and the Developer Works Stage 1;
 - (d) activities in Business Days' time scales, their order, duration and interrelationship including each Milestone and each applicable Milestone Date;
 - (e) if known, the impact and the estimated potential impact of any delaying events or circumstances;
 - (f) any allowances for delay; and
 - (g) any other matters which may have a material effect on the time required to complete the Council Works or the Developer Works Stage 1 in accordance with this Deed; and
- 31.2.7 includes such other information as required by this Deed or otherwise reasonably requested by Council.

31.3 Works Program

- 31.3.1 Subject to the other terms of this Deed, the Developer will proceed in accordance with the Works Program at its own risk. The Developer may only depart from the Works Program with reasonable cause, in which case such departure will also be at the Developer's own risk and the Developer will not be entitled to make, and Council will not be liable upon or in connection with, any Claim, Liability or Loss, except for any extension of time to which the Developer may be entitled under clause 32.
- 31.3.2 Council may (without being under any obligation to do so) review the Draft Works Program or updated Works Program (as applicable) and within 20 Business Days after their submission, by written notice to the Developer, reject the Draft Works Program or updated Works Program.
- 31.3.3 If the Draft Works Program or updated Works Program (as applicable) is rejected by Council, the Developer must submit an amended Draft Works Program or updated Works Program (as applicable) to Council.
- 31.3.4 Council must not unreasonably reject the Draft Works Program or updated Works Program (as applicable) in circumstances where the Draft Works Program or updated Works Program is compliant with this Deed.
- 31.3.5 The Developer acknowledges and agrees that:
- (a) Council (or any person on its behalf) does not assume or owe any duty of care or other responsibility or obligation to the Developer in relation to the Draft Works Program or updated Works Program, and will not be required to check such Draft Works Program or updated Works Program for suitability, errors, omissions or compliance with the requirements of Law, any Authority or this Deed;
 - (b) the Developer will not be entitled to make, and Council will not be liable upon or in connection with, any Claim, Liability or Loss arising out of or in

connection with any failure by Council (or any person on its behalf) to detect or notify the Developer of any lack of suitability, errors, omissions or non-compliance with the requirements of Law, any Authority or this Deed in any Draft Works Program or updated Works Program; and

- (c) no review of, comment upon, consent to, or approval or rejection of, nor failure or refusal to review, comment upon, consent to, or approve or reject, any Draft Works Program or updated Works Program or any other direction (including approval) by Council (or any person on its behalf) about such Draft Works Program or updated Works Program will:
 - (i) relieve the Developer from, or otherwise limit, alter or affect, the Developer's liabilities or responsibilities under this Deed or otherwise at law or in equity; or
 - (ii) prejudice Council's rights against the Developer whether under this Deed or otherwise at law or in equity.

31.4 Updated Works Program

31.4.1 Subject to clause 31.4.2, the Developer must:

- (a) as part of the monthly report provided under clause 37.2;
- (b) within 5 Business Days after a Milestone Date (where the Developer has failed to achieve the relevant Milestone by that Milestone Date; and
- (c) otherwise from time to time as reasonably required by Council,

prepare and submit to Council a copy of an updated Works Program, which is in the form of a gantt chart and must include updated dates to reflect actual progress of the Council Activities and the Developer Activities Stage 1 and (to the extent applicable) the information referred to in clause 31.2.

31.4.2 Where the Works Program is being submitted in accordance with clause 31.4.1(b), the Developer must also submit to Council notice which sets out:

- (a) the reason the Milestone was not achieved by the Milestone Date;
- (b) the date by which the Milestone will be achieved;
- (c) the impact of the failure to achieve the Milestone by the Milestone Date on achieving Early Access Completion and Practical Completion;
- (d) the progress of the Council Activities and the Developer Activities Stage 1, with a comparison to the progress planned in the previous Works Program;
- (e) the Developer's current estimate, and particulars of the estimate, of the percentage of the Council Works and the Developer Works Stage 1 which have been completed (separately addressing each portion of the Council Works and the Developer Works Stage 1); and
- (f) such other information relevant to the achievement of Milestones, Early Access Completion and Practical Completion as Council may require or the Developer (acting reasonably) considers pertinent.

31.5 Review of Works Program

If any Milestone is not achieved by the applicable Milestone Date, the Developer must carry out a review of the Works Program and the performance of the Council Activities and the Developer Activities Stage 1 having regard to the Works Program.

31.6 Not used

31.7 Suspension

31.7.1 Council may direct the Developer to suspend the carrying out of the whole or part of the Council Activities for such time as Council thinks fit, including if Council is of the opinion that it is necessary:

- (a) because of an act, default or omission of:
 - (i) Council or its employees, consultants, contractors or agents (not being the Developer or employed by the Developer); or
 - (ii) the Developer, an Associate of the Developer or the employees or agents of an Associate of the Developer;
- (b) for the protection or safety of any person or property; or
- (c) to comply with a court order.

31.7.2 If the Developer wishes to suspend the carrying out of the whole or part of the Council Activities, otherwise than under a right under a Law, the Developer must obtain Council's prior written approval. Council may in its absolute discretion approve, or refuse to approve, the suspension and may impose conditions of approval.

31.7.3 As soon as Council becomes aware that the reason for any suspension no longer exists, Council will direct the Developer to recommence suspended Council Activities as soon as reasonably practicable.

31.7.4 The Developer may recommence the Council Activities suspended under clause 31.7.2 at any time after reasonable notice to Council.

31.7.5 The Developer will bear the cost of suspension under clause 31.7.1(a)(ii). If the Developer made the protection, safety, court order or suspension of work necessary, the Developer will bear the cost of suspension under clause 31.7.1(b) or 31.7.1(c). If the Developer otherwise incurs more or less cost than otherwise would have been incurred, the difference shall be assessed by Council and added to or deducted from the Contract Sum.

32. Extensions of time

32.1 Notice of delay

If the Developer reasonably considers that any circumstance or event has delayed, or is likely to delay, any part of the Activities (including the achievement of any Milestone), the Developer must, within 4 Business Days of the first occurrence of the relevant circumstance or event give Council and the Independent Certifier a written notice including details of the nature, cause and the extent, or likely extent, of the delay.

32.2 Entitlement to extensions of time

32.2.1 If the Developer is, or will be, delayed:

- (a) prior to a Milestone Date, by an Extension Event in a manner that will prevent it from achieving the Milestone by the relevant Milestone Date; or
- (b) on or after a Milestone Date, by an Extension Event in a manner that will delay it in achieving the relevant Milestone,

then (subject to clause 32.2.2), the Developer is entitled to claim an extension of time to the relevant Milestone Date in accordance with clause 32.3

32.2.2 The Developer will not be entitled to an extension of time to any Milestone Date unless:

- (a) the Developer is, or will be, delayed by a relevant Extension Event, in the manner described in clause 32.2.1;
- (b) in respect of an extension of time to the Milestone Date relating to Early Access Completion or Practical Completion, the delay is evidenced by delay to an activity or activities on the critical path as identified in the then current Works Program; and
- (c) the Developer gives Council and the Independent Certifier:
 - (i) a notice of delay as required by clause 32.1; and
 - (ii) the claim required by clause 32.3 within the time required by that clause.

32.2.3 It is a condition precedent to the Developer's entitlement to an extension of time that the Developer submits the notices required by clauses 32.1 and 32.3, strictly in accordance with the requirements set out in those clauses (including in relation to timing). The Developer releases Council from any Claim (including for an extension of time) arising out of, or in connection with, an Extension Event where the Developer has failed to submit the notices required by clauses 32.1 and 32.3 strictly in accordance with the requirements set out in those clauses (including in relation to timing).

32.2.4 Where more than one event causes concurrent delays and at least one of those events is not an Extension Event, then the Developer is not entitled to an extension of time to the extent the delays are concurrent.

32.2.5 The Developer's entitlement to an extension of time is proportionately reduced to the extent that:

- (a) the Developer or any Developer's Associate causes or contributes to the delay or the relevant Extension Event; or
- (b) the Developer or any Developer's Associate fails to take all reasonable steps to preclude the occurrence of the delay and minimise its consequences (including by reasonable re-programming or re-sequencing of activities).

32.2.6 The conditions specified in clause 32.2.2 are conditions precedent to the Developer's entitlement to an extension of time.

32.3 Claims for extensions of time

- 32.3.1 If the Developer wishes to claim an extension of time to a Milestone Date the Developer must, as soon as reasonably practicable, and in any event within 15 Business Days after the Developer becomes aware, or ought reasonably to have become aware, of the occurrence of the relevant Extension Event, submit to Council and the Independent Certifier a claim for an extension of time to the relevant Milestone Date.
- 32.3.2 The Developer's claim for an extension of time must:
- (a) be in writing;
 - (b) specify the number of days extension of time claimed;
 - (c) set out details of the relevant Extension Event and the other facts on which the claim is based;
 - (d) include evidence that the achievement of a Milestone has been, or will be, delayed as required by clause 32.2.1; and
 - (e) include details of the steps which the Developer has taken, or can take, to preclude the occurrence of the delay and minimise the consequences of the delay.

32.4 Grant of extension of time

- 32.4.1 Within 10 Business Days after the Developer submits a claim for an extension of time pursuant to clause 32.3, the Independent Certifier will:
- (a) determine the number of days (if any) extension of time which the Developer is entitled to receive pursuant to this Deed; and
 - (b) give the parties a written notice setting out the Independent Certifier's determination.
- 32.4.2 In determining whether the Developer is or will be delayed in achieving a Milestone, the Independent Certifier will not consider whether:
- (a) the Developer can achieve the relevant Milestone by the relevant Milestone Date without an extension of time; or
 - (b) the Developer can, by committing extra resources or incurring extra expenditure, make up the time lost.

32.5 Unilateral right to extend time

- 32.5.1 Notwithstanding that the Developer is not entitled to, or has not claimed, an extension of time, Council may, in its absolute discretion, at any time, extend a Milestone Date or the Sunset Date for any reason.
- 32.5.2 Council's right to extend time pursuant to clause 32.5.1 is a discretionary right which may be exercised by Council for its sole benefit. Council is not obliged to exercise its discretionary right under clause 32.5.1 reasonably, for the benefit of the Developer, or at all.

32.6 Waiver of determination of extensions of time

Council is entitled to (but is not under any obligation to) confirm that the Developer is entitled to an extension of time claimed by the Developer without reference to the Independent Certifier.

32.7 Failure to achieve Milestone by Milestone Date

If the Developer fails to achieve any Milestone by the relevant Milestone Date, the Developer must take such action as is necessary to accelerate the Council Activities or the Developer Activities Stage 1 (as applicable) so as to achieve all remaining Milestones by the relevant Milestone Dates.

Nothing in this clause 32.7 limits or otherwise affects the Developer's obligations and liabilities, or Council's rights, under clause 32.9.

32.8 Delay Costs

32.8.1 For every day:

- (a) which is the subject of an extension of time determined under clause 32.4 for a cause listed in paragraph (a), (b), (c) or (d) of the definition of Extension Event in clause 1.1; and
- (b) for which the Developer gives Council a written claim for delay costs under this clause 32.8 within 15 Business Days after the Developer becomes aware, or ought reasonably to have become aware, of the occurrence of the relevant Extension Event,

then Council must pay to the Developer such extra costs and expenses (if any) as are reasonably and necessarily incurred by the Developer as a direct consequence of the delay, up to and including the maximum daily amount of \$5,000 per day.

32.8.2 To the extent that the Developer is entitled to delay costs under this clause 32.8 for a Council Initiated Variation, the Developer is only entitled to such costs under this clause 32.8 to the extent that they were not otherwise included in the pricing of the Council Initiated Variation under clause 35.5.

32.8.3 The amount that the Developer is entitled to under this clause 32.8 (and any entitlement to an extension of time under clause 32.4) will be a limitation upon Council's liability to the Developer arising out of, or in any way in connection with, any delay or disruption encountered by the Developer in carrying out the Activities (however caused) and the Developer will not be entitled to make any Claim against Council arising out of, or in any way in connection with, any such delay or disruption, other than for the amount payable under this clause 32.8 (or an extension of time under clause 32.3).

32.9 Liquidated Damages

32.9.1 If Practical Completion is not achieved by the Date for Practical Completion, the Developer will be indebted to Council for, and must pay to Council as a debt due, liquidated damages at the rate set out in Item 21 for every day after the Date for Practical Completion to and including the earliest of the Date of Practical Completion or termination of this Deed.

32.9.2 The parties acknowledge and agree that the amount of liquidated damages in Item 21, subject to clause 32.9.6, is an agreed genuine pre-estimate of Council's damages if the Date of Practical Completion does not occur by the Date for Practical Completion.

- 32.9.3 The amount payable under this clause 32.9 will be a debt due from the Developer to Council.
- 32.9.4 If an extension of time for Practical Completion is directed after the Developer has paid or Council has set off liquidated damages, Council must forthwith repay to the Developer such of those liquidated damages as represent the days the subject of the extension of time.
- 32.9.5 If this clause 32.9 (or any part of this clause 32.9) is found for any reason to be void, invalid or otherwise inoperative, so as to disentitle Council from recovering liquidated damages for the Developer's failure to achieve Practical Completion by the Date for Practical Completion, Council will be entitled to recover damages from the Developer for such failure under general law.
- 32.9.6 Nothing in this clause 32.9 limits or otherwise affects Council's rights, or the Developer's liabilities and obligations, under or in connection with:
- (a) a failure by the Developer to ensure that each Milestone (other than Practical Completion) is achieved by the relevant Milestone Date;
 - (b) clause 45; or
 - (c) clause 46.

33. Milestones

33.1 Notice of Anticipated Achievement of Milestones

The Developer must give the Independent Certifier and Council a written notice:

33.1.1 20 days; and

33.1.2 5 days,

prior to the date that the Developer anticipates that each Milestone and Developer Works Stage 1 Completion (as applicable) will be achieved, specifying in each such notice the date the Developer estimates that relevant Milestone, or Developer Works Stage 1 Completion (as applicable) will be achieved.

33.2 Notice of Milestones

Where the Developer believes that a Milestone or Developer Works Stage 1 Completion (as applicable) has been achieved, the Developer must give the Independent Certifier and Council written notice requesting the Independent Certifier to:

33.2.1 In respect of Warm Shell Practical Completion, issue a Certificate of Warm Shell Practical Completion;

33.2.2 in respect of Early Access Completion, issue a Certificate of Early Access Completion;

33.2.3 in respect of Practical Completion, issue a Certificate of Practical Completion; or

33.2.4 in respect of Developer Works Stage 1 Completion, issue a Certificate of Developer Works Stage 1.

33.3 Inspection

Within 10 Business Days after the Developer gives a notice under clause 33.2 or clause 33.4.3(a), the Independent Certifier, the Developer and Council must jointly inspect the Council Works and the Developer Works Stage 1 and all relevant records (including commissioning records and test results) for the purposes of determining whether the relevant Milestone has been achieved.

33.4 Certification

33.4.1 Within 5 Business Days after the inspection referred to in clause 33.3, the Independent Certifier will issue to the Developer and Council:

- (a) in respect of Early Access Completion:
 - (i) a Certificate of Early Access Completion;
 - (ii) an outstanding work list specifying the works which the Independent Certifier considers must be carried out before Early Access Completion is achieved; or
 - (iii) a written notice stating that the Developer is so far from achieving Early Access Completion that it is not practicable to issue a notice under clause 33.4.1(a)(ii);
- (b) in respect of Practical Completion:
 - (i) a Certificate of Practical Completion;
 - (ii) an outstanding work list specifying the works which the Independent Certifier considers must be carried out before Practical Completion is achieved; or
 - (iii) a written notice stating that the Developer is so far from achieving Practical Completion that it is not practicable to issue a notice under clause 33.4.1(b)(ii);
- (c) in respect of Developer Works Stage 1 Completion:
 - (i) a Certificate of Developer Works Stage 1 Completion;
 - (ii) an outstanding work list specifying the works which the Independent Certifier considers must be carried out before Developer Works Stage 1 Completion is achieved; or
 - (iii) a written notice stating that the Developer is so far from achieving Developer Works Stage 1 Completion that it is not practicable to issue a notice under clause 33.4.1(c)(ii); or
- (d) in respect of Warm Shell Practical Completion:
 - (i) a Certificate of Warm Shell Practical Completion;
 - (ii) an outstanding work list specifying the works which the Independent Certifier considers must be carried out before Warm Shell Practical Completion is achieved; or

- (iii) a written notice stating that the Developer is so far from achieving Warm Shell Practical Completion that it is not practicable to issue a notice under clause 33.4.1(d)(ii).
- 33.4.2 If the Independent Certifier issues an outstanding work list under clause 33.4.1(a)(ii), 33.4.1(b)(ii), 33.4.1(c)(ii) or 33.4.1(d)(ii):
 - (a) the Developer must notify the Independent Certifier and Council in writing when the Developer believes it has completed the work specified in the list; and
 - (b) clause 33.2, 33.3 and this clause 33.4 will reapply.
- 33.4.3 If the Independent Certifier issues a notice under clause 33.4.1(a)(iii), 33.4.1(b)(iii), 33.4.1(c)(iii) or 33.4.1(d)(iii):
 - (a) the Developer must give the Independent Certifier and Council a written notice specifying the date that the Developer estimates that the relevant Milestone will be achieved, 10 Business Days before that date; and
 - (b) clauses 33.2, 33.3 and this clause 33.4 will reapply.
- 33.4.4 When the Independent Certifier considers that a Milestone has been achieved, the Independent Certifier may issue to the Developer and Council:
 - (a) in respect of Early Access Completion, a Certificate of Early Access Completion setting out the Date of Early Access Completion;
 - (b) in respect of Practical Completion, a Certificate of Practical Completion setting out the Date of Practical Completion; or
 - (c) in respect of Developer Works Stage 1 Completion, a Certificate of Developer Works Stage 1 Completion setting out the date on which the Developer Works Stage 1 achieved Developer Works Stage 1 Completion; or
 - (d) in respect of Warm Shell Practical Completion, a Certificate of Warm Shell Practical Completion setting out the Date of Warm Shell Practical Completion

33.5 Effect of certificates

The issue of a Certificate of Early Access Completion, Certification of Warm Shell Practical Completion, Certificate of Practical Completion or a Certificate of Developer Works Stage 1 Completion will not:

- 33.5.1 constitute approval by Council of the Developer's performance of its obligations under this Deed;
- 33.5.2 be taken as an admission or evidence that the Works or Activities comply with the requirements of this Deed; or
- 33.5.3 prejudice any rights or powers of Council.

33.6 Not used

34. Defects

34.1 Defects Liability

- 34.1.1 Subject to clause 34.2, the Developer must rectify all Defects, or ensure that all Defects are rectified, whether or not they are identified and notified by Council.
- 34.1.2 Without limiting the previous paragraph, the Developer must ensure that any Defects existing at Early Access Completion or at Practical Completion (as applicable) are rectified as soon as possible after Early Access Completion or Practical Completion (as applicable).
- 34.1.3 The Developer must ensure that the rectification of Defects is carried out at times and in a manner which causes as little inconvenience to the occupants or Users of the Council Works as is reasonably possible.
- 34.1.4 Council acknowledges and agrees that the Developer may access the Council Works Lot after Practical Completion for the purpose of rectification of Defects under this clause 34, provided that the Developer complies with clauses 34.1.3 and 34.3.1 in doing so.

34.2 Defect Notification

If at any time prior to the expiration of any Defects Liability Period (including, for the avoidance of doubt, prior to Practical Completion), Council discovers or believes there is a Defect, Council may give the Developer a direction identifying the Defect and doing one or more of the following:

- 34.2.1 requiring the Developer to rectify the Defect, or any part of it, and specifying the time within which this must occur; or
- 34.2.2 with respect to a Defect in respect of the Council Works or the Council Activities:
 - (a) requiring the Developer to carry out a Variation to overcome the Defect, or any part of it, and specifying the time within which this must be carried out; or
 - (b) advising the Developer that Council will procure, or has procured, another contractor to rectify the Defect, or any part of it, or carry out a Variation to overcome the Defect, or any part of it.

34.3 Rectification of Defect

- 34.3.1 If Council gives a notice under clause 34.2.1 or 34.2.2(a), the Developer must rectify the Defect (or the part of it notified) or carry out the Variation work (as the case may be):
 - (a) within the time specified in Council's direction; and
 - (b) if after Practical Completion:
 - (i) at other times otherwise agreed with Council;
 - (ii) in accordance with the requirements of any relevant Authority;

- (iii) so as to minimise the impact on the use of the Council Works and the Common Area; and
- (iv) in a manner which causes as little inconvenience as possible to the Users, any Service or any access to the Council Works or the Common Area; and
- (c) regardless of the existence of a Dispute as to whether Council's notice is valid or whether the subject matter of the notice is in fact a Defect.

34.3.2 If:

- (a) Council issues a notice under clause 34.2.2(b); or
- (b) the Developer does not comply with clause 34.3.1,

Council may, without prejudice to any other rights that Council may have against the Developer with respect to the Defect under this Deed or otherwise at Law, have the rectification or Variation work carried out at the Developer's expense, and the cost of the rectification or Variation work incurred by Council will be a debt due from the Developer to Council.

- 34.3.3** The Developer acknowledges and agrees that its obligation to rectify Defects survives the expiry of the Defects Liability Period where it has received a direction under clause 34.2 prior to the expiration of any Defects Liability Period.

34.4 Claim for Variation

Where a Variation to overcome a Defect has been directed under clause 34.2.2(a):

34.4.1 the Independent Certifier will determine:

- (a) the value of the Variation work in accordance with clause 35.5; and
- (b) the cost of rectifying the Defect (or the part notified), valued under clause 35.5 as if the work involved in the rectification of the Defect (or the part notified) were a Variation the subject of a direction by Council;

34.4.2 the Developer must make a payment to Council, or Council must make a payment to the Developer, as follows:

- (a) if the value under clause 34.4.1(a) is greater than the cost under clause 34.4.1(b), Council must pay the difference to the Developer; or
- (b) if the cost under clause 34.4.1(b) is greater than the value under clause 34.4.1(a), the Developer must pay the difference to Council; and

34.4.3 the Developer will not be entitled to an extension of time to any Milestone Date.

34.5 Acceptance of defective work

Instead of a direction under clause 34.2, Council may direct the Developer that Council elects to accept the subject work, whereupon the Independent Certifier will determine the decrease in value to Council of the Council Works and any other loss or damage suffered by Council and such amount will be a debt due from the Developer to Council.

34.6 Extension of Defects Liability Period

34.6.1 Council may give the Developer a notice under clause 34.2 during any Defects Liability Period.

34.6.2 If the Developer:

- (a) rectifies a Defect (or the part notified) following receipt of a notice under clause 34.2.1;
- (b) completes the Variation work following receipt of a notice under clause 34.2.2(a); or
- (c) rectifies a Defect or completes a Variation to overcome a Defect in the absence of any notice from Council under clause 34.2,

then the relevant Defects Liability Period for the work required will be extended to the date that is the later of:

- (d) 12 months after completion of the rectification of the Defect (or the part) or completion of the Variation work (as the case may be); and
- (e) 12 months after the Date of Practical Completion.

34.7 Defect Rectification by other contractor

Where Council advises the Developer (under clause 34.2.2(b)) that another contractor has or will be rectifying a Defect or any part of it, or will carry out a Variation to overcome the Defect or any part of it:

34.7.1 the Developer must not impede the other contractor from having sufficient access to the Land to rectify the Defect or carry out the Variation;

34.7.2 any costs, losses or damages suffered or incurred by Council arising out of or in connection with the other contractor rectifying the Defect will be a debt due from the Developer to Council; and

34.7.3 the Developer acknowledges and agrees that:

- (a) no act or omission by such other contractor will, whether or not it causes any delay or disruption to the Activities, entitle the Developer to an extension of time to any Milestone Date;
- (b) Council will not be liable upon any Claim by the Developer arising out of or in connection with:
 - (i) the other contractor rectifying the Defect or carrying out a Variation to overcome the Defect; or
 - (ii) any other act or omission of the other contractor; and
- (c) rectification of a Defect by another contractor does not limit or otherwise affect any of the Developer's obligations under this Deed or any other Project Document.

34.8 Rights Not Affected

Neither Council's rights, nor the Developer's liability, whether under this Deed or otherwise according to Law in respect of Defects, whether before or after the expiration of any relevant Defects Liability Period, will be limited or otherwise affected by:

- 34.8.1 the rights conferred upon Council by this clause 34 or any other provision of this Deed;
- 34.8.2 the exercise of, or the failure by Council to exercise, any such rights; or
- 34.8.3 any notice or direction of Council under clause 34.2.

35. Variations

35.1 Proposed Variations

- 35.1.1 At any time prior to the Date of Practical Completion (but without limiting clause 34.2.2(a)) Council may issue a document setting out details of a proposed Variation that Council is considering, and requesting the Developer to provide a proposal in respect of that proposed Variation (**Variation Proposal Request**). Where possible, any proposed Variations will be discussed at the meetings of the Project Control Group.
- 35.1.2 Within 10 Business Days of the receipt of a Variation Proposal Request, or at such other time as is approved by Council, the Developer must provide to Council a written notice (**Variation Proposal**) notifying Council whether the proposed Variation can be effected in accordance with this Deed, and, if it can be effected in accordance with this Deed, setting out:
 - (a) the amount the Developer proposes as payable by Council to the Developer and that the Developer would claim in respect of the proposed Variation, with details of how such amount has been calculated;
 - (b) the expected effect that the proposed Variation would have on the Works Program and the Developer achieving a Milestone by the relevant Milestone Date, with details of how the effect has been assessed;
 - (c) without limiting paragraph (b), if the proposed Variation would entitle the Developer to an extension of time, the amount of the extension of time that the Developer would claim in respect of the proposed Variation, with details of how the amount has been calculated;
 - (d) sufficient details to allow Council to review the reasons, and, if desired, reconsider the need, for the Variation; and
 - (e) any other information concerning the proposed Variation that Council requires.
- 35.1.3 Council is not obliged to proceed with any proposed Variation that is the subject of a Variation Proposal Request.

35.2 Developer Works Stage 1 Variations by Council

- 35.2.1 Subject to clause 35.2.2, if Council requires a Developer Works Stage 1 Variation, Council must submit details of the proposed Developer Works Stage 1 Variation to

the Developer for the Developer's approval (which is not to be unreasonably withheld).

35.2.2 The parties acknowledge and agree that, without limiting the grounds on which the Developer may withhold its approval, reasonable grounds for the withholding of the Developer's approval as referred to in clause 35.2.1 include that the proposed Developer Works Stage 1 Variation is likely to give rise to a Developer Rejection Right.

35.2.3 If a Developer Works Stage 1 Variation is required by Council under this clause 35.2, the Developer must, within 10 Business Days of receipt of the details of the Developer Works Stage 1 Variation from Council, provide Council with:

- (a) where the Developer Works Stage 1 Variation is required by Council under clause 35.2.1, written notice of whether the Developer Works Stage 1 Variation is approved in accordance with clause 35.2.1, and if it is not approved, clearly identifying the reasons why the Developer Works Stage 1 Variation is not approved; and
- (b) if the Developer's written notice under clause 35.2.3(a) states that the relevant Developer Works Stage 1 Variation is approved:
 - (i) a quote from the Contractor for the estimated additional cost or saving arising out of the Developer Works Stage 1 Variation, which:
 - (A) must be obtained in accordance with the process set out in the relevant building contract between the Developer and the Contractor; and
 - (B) must include such reasonable supporting information and documentation as Council may require;
 - (ii) the expected effect that the proposed Developer Works Stage 1 Variation would have on the Works Program and the Developer achieving each Milestone by the relevant Milestone Date, with details of how the effect has been assessed;
 - (iii) without limiting paragraph (ii), if the proposed Developer Works Stage 1 Variation would entitle the Developer to an extension of time, the amount of the extension of time that the Developer would claim in respect of the proposed Developer Works Stage 1 Variation, with details of how the amount has been calculated;
 - (iv) sufficient details to allow Council to review the reasons, and, if desired, reconsider the need, for the Developer Works Stage 1 Variation; and
 - (v) any other information concerning the proposed Developer Works Stage 1 Variation that Council reasonably requires (provided that such information is requested within 5 Business Days of Council's notice being provided under clause 35.2.1).

35.2.4 Council may, within 10 Business Days of receipt of the Developer's notice under clause 35.2.3(b):

- (a) notify the Developer that the Contractor's quote (as referred to in clause 35.2.3(b)(i)) is agreed and direct the Developer to proceed with the relevant Developer Works Stage 1 Variation;

- (b) notify the Developer that the Contractor's quote (as referred to in clause 35.2.3(b)(i)) is not agreed, but nonetheless direct the Developer to proceed with the relevant Developer Works Stage 1 Variation, which (without limiting clause 32) will be valued in accordance with clause 35.5.2; or
 - (c) withdraw the request for the relevant Developer Works Stage 1 Variation.
- 35.2.5 The Developer must carry out any Developer Works Stage 1 Variation directed by Council under clause 35.2.4(a) or 35.2.4(b).
- 35.2.6 The parties acknowledge and agree that the Developer will not be entitled to make, and Council will not be liable in connection with, any Claim arising out of or in connection with any Developer Works Stage 1 Variation, other than where the Developer is directed by Council to carry out the Developer Works Stage 1 Variation in accordance with clause 35.2.4(a) or 35.2.4(b).

35.3 Developer Works Stage 1 Variations by the Developer

35.3.1 Subject to:

- (a) clauses 25.1 and 26.2; and
- (b) the Developer having obtained Council's prior written approval (which is not to be unreasonably withheld),

the Developer may at any time prior to the Date of Practical Completion, make Developer Works Stage 1 Variations which are:

- (c) reasonably necessary or desirable; or
- (d) required by Law.

35.3.2 The parties acknowledge and agree that, without limiting the grounds on which Council may withhold its approval, reasonable grounds for the withholding of Council's approval as referred to in clause 35.3.1(b) include that the proposed Developer Works Stage 1 Variation is likely to:

- (a) have a material or adverse impact on:
 - (i) the standard, quality, appearance or performance of aspects of the Early Access Works, the Council Works, the Common Area or the Developer Works Stage 1;
 - (ii) Council's use or enjoyment of the Early Access Works, the Council Works or the Common Area;
 - (iii) the cost of the Early Access Works or the Council Works; or
 - (iv) the cost to Council of outgoings associated with the Council Works or the Common Area;
- (b) delay the carrying out or completion of the Council Works;
- (c) cause Council to be in breach of a term of this Deed or any Law; or
- (d) otherwise adversely affect the Early Access Works, the Council Works, the Common Area or the Developer Works Stage 1.

- 35.3.3 The Developer must promptly submit details of any proposed Developer Works Stage 1 Variation referred to in clause 35.3.1 to Council.
- 35.3.4 The parties acknowledge and agree that any Developer Works Stage 1 Variation carried out under this clause 35.3 must be carried out by the Developer at its cost.

35.4 Variation Orders

- 35.4.1 Whether or not Council has issued a Variation Proposal Request under clause 35.1, Council may at any time prior to the Date of Practical Completion (but without limiting clause 34.2.2(a)) direct the Developer to carry out a Variation by issuing a Variation Order. Council may, in any Variation Order, state that the proposed amount set out in any relevant Variation Proposal is agreed.
- 35.4.2 No Variation or direction to carry out a Variation will invalidate this Deed.
- 35.4.3 Subject to clause 35.4.5, the Developer must comply with a Variation Order irrespective of:
- (a) the nature, extent or value of the work the subject of the Variation;
 - (b) the location or timing (including the impact on the achievement of each Milestone and each Milestone Date) of the work involved in the Variation;
 - (c) whether or not it agrees with any or all of the terms of the Variation Order; or
 - (d) any Dispute related to the Variation.
- 35.4.4 The Contractor's entitlement (if any) to an extension of time arising out of a Council Initiated Variation will be dealt with under clause 32 and not this clause 35.
- 35.4.5 The Developer may only refuse to perform a Variation if:
- (a) the Variation is, as a matter of fact, not capable of being carried out by the Developer in accordance with this Deed (excluding the requirement to comply with the Technical Documents); and
 - (b) the Developer has given a notice to this effect to Council within 5 Business Days of the earlier of:
 - (i) the receipt by the Developer of a:
 - (A) Variation Proposal Request in respect of the Variation (if applicable); and
 - (B) Variation Order; and
 - (ii) commencement of compliance with the relevant Variation Order.

35.5 Valuation

Subject to clauses 35.10 and 56.5, but without limiting clause 36.9, the Contract Sum will be increased or decreased (as applicable) for each Council Initiated Variation by an amount determined as follows:

- 35.5.1 with respect to Variations:

- (a) to the extent the relevant Variation Order stated that the proposed amount set out in the relevant Variation Proposal is agreed, the agreed amount as specified in the relevant Variation Proposal; and
- (b) to the extent clause 35.5.1(a) does not apply, an amount determined by the Independent Certifier on the basis of:
 - (i) reasonable rates and prices,
 which will be increased, to the extent that those rates and prices are not already inclusive of overheads, preliminaries or profit, by the percentage set out in Item 22, provided however that where Council has issued a Variation Proposal Request in respect of the relevant Variation, the amount will not be greater than any relevant amount set out in any relevant Variation Proposal issued by the Developer; and

35.5.2 with respect to Developer Works Stage 1 Variations:

- (a) if Council has issued a notice under clause 35.2.4(a), the amount set out in that Contractor's quote (as referred to in clause 35.2.3(b)(i)); and
- (b) to the extent clause 35.5.2(a) does not apply, an amount determined by the Independent Certifier on the basis of:
 - (i) reasonable rates and prices,
 which will be increased, to the extent that those rates and prices are not already inclusive of overheads, preliminaries or profit, by the percentage set out in Item 22, provided however that the amount will not be greater than any relevant amount set out in the Contractor's quote (as referred to in clause 35.2.3(b)(i)).

35.6 Omissions

If a Variation the subject of a direction by Council requires the omission or deletion of any part of the Council Works or the Council Activities:

- 35.6.1 Council may thereafter either perform this work itself or employ or engage any other person or persons to carry out and complete the omitted or deleted work; and
- 35.6.2 Council will not be liable upon any Claim by the Developer arising out of or in connection with any work being omitted or deleted from the Council Works or the Council Activities, whether or not Council thereafter performs this work itself or employs or engages any other person or persons to carry out and complete the omitted or deleted work.

35.7 Variations Requested by Developer

The Developer may, for its convenience, or if required by Law, request Council to direct a Variation. Any such request must be in writing and must contain the following details:

- 35.7.1 a full description of the proposed Variation, including any associated amendments to be made to any Design Documents;
- 35.7.2 the additional or reduced cost or time involved in the Variation and any proposal for sharing any cost savings with Council, including the amount;
- 35.7.3 any benefits that would flow to Council or others;

- 35.7.4 the expected effect on the Works Program and the achievement of any Milestone (including the Date of Early Access Completion and the Date of Practical Completion);
- 35.7.5 detailed particulars as to whether the proposed Variation would:
- (a) have an adverse effect on the workmanship, quality or durability of any part of the Council Works;
 - (b) have an adverse effect on the delivery of the Council Works in accordance with the Project Objectives;
 - (c) breach any applicable Laws, or require any additional Approvals; or
 - (d) diminish the design quality indicated in the Technical Documents or any other requirement of the Technical Documents in terms of the:
 - (i) appropriateness of bulk, height and scale;
 - (ii) building alignments, proportions, building type and the management of building elements;
 - (iii) use of resources, energy and water;
 - (iv) landscape design and quality; and
 - (v) the amenity of the Council Works.

35.8 Determination by Council

- 35.8.1 If the Developer makes a request in accordance with clause 35.7, Council may, in its absolute discretion (unless the Variation is required by Law):
- (a) give a written notice to the Contractor rejecting the request; or
 - (b) issue a Variation Order directing the Developer to carry out the relevant Variation.
- 35.8.2 Council will not be obliged to exercise its discretion reasonably, for the benefit of the Developer, or at all.
- 35.8.3 If the Developer makes a request in accordance with clause 35.7 due to a Variation being required by Law, Council cannot withhold its consent and must promptly issue a Variation Order.

35.9 Variation Approved by Council

- 35.9.1 If Council issues a Variation Order under clause 35.8:
- (a) unless otherwise agreed in the relevant Variation Order, the Developer will not be entitled to make, and Council will not be liable upon, any Claim arising out of or in connection with the Variation;
 - (b) if the Developer's request offered to share savings in cost with Council, the amount offered by the Developer in its request, or such other amount as may have been agreed between Council and the Developer prior to the issue of the relevant Variation Order, will be a debt due from the Developer to Council; and

- (c) the Developer will be responsible for ensuring that all parts of the Works that are in any way affected by the Variation comply with the requirements of this Deed.

35.9.2 Not used.

35.9.3 Unless and until Council issues a Variation Order under clause 35.8, no Variation will arise out of the Developer's request, and the Developer must at all times:

- (a) continue to carry out the Activities as required by this Deed; and
- (b) otherwise comply with its obligations under this Deed.

35.10 Notice of Variation

35.10.1 If the Developer believes that a direction by Council (other than a Variation Order) constitutes or involves a Variation or a Developer Works Stage 1 Variation, the Developer must, if it wishes to make, and as a condition precedent to, a Claim against Council arising out of or in connection with the direction:

- (a) within 2 Business Days of receiving the direction and before commencing work on the subject matter of the direction, give notice to Council that it considers the direction constitutes or involves a Variation or a Developer Works Stage 1 Variation;
- (b) within 5 Business Days of issuing the notice under clause 35.10.1(a), submit the Claim referred to in clause 35.10.2; and
- (c) continue to carry out its obligations in accordance with this Deed and all directions of Council, including (subject to clause 35.10.3(c)) any direction in respect of which notice has been given under this clause 35.10.1.

35.10.2 Any written Claim referred to in clause 35.10.1(b) must include:

- (a) detailed particulars, including the date or dates, of the direction, including any related event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;
- (b) the provisions of this Deed or other legal basis upon which the Claim is based; and
- (c) details of the amount claimed and how it has been calculated.

35.10.3 If the Developer issues a notice referred to in clause 35.10.1(a) or a Claim referred to in clause 35.10.1(b), Council may:

- (a) confirm that the direction constitutes or involves a Variation or a Developer Works Stage 1 Variation, by issuing a Variation Order, in which case the Contractor must continue to comply with the direction;
- (b) deny that the direction constitutes or involves a Variation or a Developer Works Stage 1 Variation, in which case the Contractor:
 - (i) must continue to comply with the direction irrespective of any Claim or Dispute in relation to the direction or any part of it; and
 - (ii) may issue a notice of dispute under clause 54; or

- (c) withdraw the direction by written notice to the Developer.

36. Payment

36.1 Developer's Payment Entitlements

36.1.1 The parties acknowledge and agree that:

- (a) the Contract Sum; and
- (b) any other consideration that may be payable for 'construction work' carried out under this Deed, or for 'related goods and services' supplied under this Deed (in each case as those terms are defined in the SOP Act),

are each calculated otherwise than by reference to the value of the work carried out, or goods supplied, under this Deed.

36.1.2 Subject to clauses 36.1.4, 36.9, 36.17 and 36.19 and to any other right to set-off that Council may have, Council must pay the Developer the Contract Sum in accordance with this clause 36 and the other terms of this Deed. Other payments payable to the Developer by Council under this Deed (including costs payable under clause 32.8) must also be paid in accordance with this clause 36 and the other terms of this Deed.

36.1.3 Notwithstanding any other provision of this Deed, but without limiting clause 36.1.4, the Developer and Council acknowledge and agree that the value of each Progress Payment Claim (and the amount payable by Council under this clause 36 in respect of each Progress Payment Claim)

must not be greater than an amount equal to:

$$\mathbf{PC = A - B + D}$$

where:

PC = the value of the Progress Payment Claim;

A = the lesser of \$12,000,000 and an amount which is the aggregate of the value of the Council Activities, and design work relating to a Development Consent not already included in the value of Contract Activities (such value of design work capped in the aggregate at \$700,000) completed in accordance with this Deed as at the date of the relevant Progress Payment Claim;

B = the total amount of all payments made as part of the Contract Sum to the Developer by Council prior to the date of the relevant Progress Payment Claim (capped at \$12,000,000); and

D = the total of all money payable by Council to the Developer under this Deed as at the date of the relevant Progress Payment Claim that is not part of the Contract Sum (including delay costs).

36.1.4 Notwithstanding the value of the Contract Sum, the parties acknowledge and agree that the Developer will not be entitled to claim, and will not be entitled to payment, of any amount on account of the Contract Sum under this clause 36 in excess of \$12,000,000. To the extent that amounts claimed (in the aggregate) by the Developer in Progress Payment Claims on account of the Contract Sum and paid

(in the aggregate) by Council on account of the Contract Sum equal \$12,000,000, the parties acknowledge and agree that all costs incurred and amounts paid to Contractors by the Developer in connection with the Council Activities, the Additional Works and design work relating to a Development Consent in excess of \$12,000,000 must be borne by the Developer, however such costs and amounts in excess of \$12,000,000 will be deducted from the Purchase Price. Such deductions from the Purchase Price:

- (a) will be limited in the aggregate to \$3,300,000; and
- (b) will be taken to be discharge by Council of its obligation to pay any part of the Contract Sum in excess of \$12,000,000.

36.2 Timing for Payment Claim

The Developer must, and may only, give the Independent Certifier (with a copy to Council) a claim for payment of the amount payable by Council to the Developer under clause 36.1.2 in accordance with clauses 36.4, 36.11 and 36.13.

36.3 Form of Payment Claim

Each payment claim referred to in clause 36.2 must:

- 36.3.1 be in such form as Council reasonably requires;
- 36.3.2 include details and evidence (including as reasonably required by Council) of how the amount claimed as payable has been calculated, including the following (to the extent applicable):
 - (a) the value (subject to clause 36.1.3) of the:
 - (i) Council Activities completed,

including evidence of supporting payment claims and payment certificates under the contracts between the Developer and the Contractors with respect to the Council Activities and the Council Works (as approved by Council under clause 21.3), clearly showing the value of the Council Activities performed to the date of the payment claim made under this clause 36.3;
 - (b) the total of all adjustments to the Contract Sum in accordance with this Deed;
 - (c) the total of all money payable by Council to the Developer under this Deed that is not part of the Contract Sum (including delay costs);
 - (d) the total amount of all payments made to the Developer by Council prior to the date of the payment claim;
 - (e) the total amount previously certified under clause 36.5; and
 - (f) details of any amount claimed by the Developer that is the subject of:
 - (i) a Dispute; or
 - (ii) not used; and

- 36.3.3 be accompanied by:

- (a) relevant Supporting Documentation; and
- (b) such further information and evidence in respect of the payment claim as is reasonably required by Council.

The Developer must not include in any payment claim under this clause 36 any amount for a Claim which is the subject of a release under clause 56.5 or any other provision of this Deed.

36.4 Progress Payment Claims

36.4.1 On each Progressive Payment Claim Reference Date, the Developer may issue to the Independent Certifier (with a copy to Council's Representative) a claim for payment (on the basis of the principles set out in clause 36.1.3 and clause 36.1.4) on account of the Contract Sum and other amounts payable under this Deed in respect of the Council Activities (**Progress Payment Claim**).

36.4.2 Each Progress Payment Claim must:

- (a) not used;
- (b) not used;
- (c) include evidence:
 - (i) of the Activities performed, and to which the Progress Payment Claim relates; and
 - (ii) demonstrating to the satisfaction of the Independent Certifier that the Developer has achieved those Milestones which are required to have been met by any Milestone Date which falls prior to the relevant Progressive Payment Claim Reference Date;
- (d) be accompanied by the relevant Supporting Documentation; and
- (e) include such other information, documents and evidence as may reasonably be necessary for Council to assess the amount claimed and determine the amount payable in respect of the relevant Progress Payment Claim.

36.5 Payment schedule

36.5.1 The Independent Certifier must, within 10 Business Days of receiving:

- (a) a Progress Payment Claim under clause 36.4;
- (b) a Practical Completion Payment Claim under clause 36.11; or
- (c) the Final Payment Claim under clause 36.13,

issue to the Developer a payment schedule which identifies the payment claim to which it relates, and which sets out:

- (d) the amount (if any) Council is entitled to retain, deduct, withhold or set-off under this Deed;
- (e) its determination of:
 - (i) the moneys due from Council to the Developer in respect of the payment claim; and

- (ii) if the Independent Certifier determines that no moneys are due from Council to the Developer, the moneys due from the Developer to Council (if any); and
- (f) if the amount in clause 36.5.1(e)(i) is less than the amount claimed in the relevant payment claim:
 - (i) the reason why the amount in clause 36.5.1(e)(i) is less than the amount claimed in the relevant payment claim; and
 - (ii) if the reason for the difference is that Council proposes to retain, deduct, withhold or set-off payment for any reason, the reason for Council retaining, deducting, withholding or setting-off payment.

36.5.2 If:

- (a) the Developer does not make a payment claim in accordance with clause 36.11 or 36.13 within the time required by clause 36.11 or 36.13 (as applicable); or
- (b) the Developer does not make a payment claim in accordance with clause 36.11 within 15 Business Days of the date on which the Certificate of Practical Completion is issued,

the Independent Certifier may issue a payment schedule.

36.5.3 The parties acknowledge and agree that, to the extent the SOP Act applies to this Deed, for the purposes of the SOP Act, in:

- (a) receiving a payment claim under this clause 36; and
- (b) issuing a payment schedule under this clause 36.5;

the Independent Certifier acts as Council's agent.

36.5.4 The issue of a payment schedule by Council does not constitute approval of any work nor will it be taken as an admission or evidence that any relevant Milestone or event has occurred or been achieved, or that the part of the Works covered by the payment schedule has been satisfactorily carried out in accordance with this Deed.

36.5.5 Failure by Council to set out in a payment schedule an amount, or the correct amount, which Council is entitled to retain, deduct, withhold or set-off from the amount which would otherwise be payable to the Developer by Council will not prejudice Council's right to subsequently exercise its right to retain, deduct, withhold or set-off any amount under this Deed.

36.5.6 To the extent the SOP Act applies to this Deed, the Developer agrees that the amount referred to in the payment schedule in respect of clause 36.5.1(e)(i), for the purposes of sections 9 and 10 of the SOP Act, is the amount of the "progress payment" (as defined in the SOP Act) calculated in accordance with the terms of this Deed to which the Developer is entitled in respect of this Deed.

36.5.7 The Developer must, after receipt of the payment schedule issued by the Independent Certifier under clause 36.5.1, give Council (with a copy to the Independent Certifier):

- (a) where the relevant payment schedule determines moneys due from Council to the Developer, a Valid Tax Invoice for the amount of the payment schedule; and
- (b) a copy of the payment schedule signed by a representative of the Developer.

36.6 Payment

Subject to clauses 36.1, 36.2 and 36.17 if the Independent Certifier, in a payment schedule:

- 36.6.1 determines that moneys are due from Council to the Developer, within 10 Business Days of receiving the items required by clause 36.5.7 (or such earlier time as may be prescribed by law), Council must pay to the Developer the amount set out in the payment schedule; or
- 36.6.2 determines that moneys are due from the Developer to Council, within 10 Business Days of the relevant payment schedule, the Developer must pay to Council the amount set out in the payment schedule, which amount will be a debt due from the Developer to Council.

36.7 Payment on Account

Neither the issue of a payment schedule nor the payment of moneys by Council under clause 36.6, nor payment of the Purchase Price under the Residual Land Contract, is:

- 36.7.1 an admission or evidence of the value of work or that work has been satisfactorily carried out in accordance with this Deed;
 - 36.7.2 an admission of liability; or
 - 36.7.3 approval by Council of the Developer's performance or compliance with this Deed,
- and payment by Council (other than payment of the Purchase Price under the Residual Land Contract) is only to be taken as payment on account.

36.8 Supporting Documentation

The Developer must submit the Supporting Documentation to Council:

- 36.8.1 within 15 Business Days after the date on which the Certificate of Practical Completion is issued;
- 36.8.2 within 25 Business Days after the expiry of the last Defects Liability Period to expire;
- 36.8.3 without limiting clauses 36.8.1 and 36.8.2, with each payment claim referred to in clauses 36.4, 36.11 and 36.13; and
- 36.8.4 when otherwise requested by Council.

36.9 Entitlement to payment

Without limiting clause 36.17 or any claim, right or entitlement Council may have against the Developer, the parties acknowledge and agree that the Developer's entitlement to payment will be \$0, except to the extent that the Developer has:

- 36.9.1 in respect of Progress Payment Claims:

- (a) submitted the Supporting Documentation on or before the date required under clause 36.8.3; and
- (b) complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7 on the date of submission of the Progress Payment Claim;

36.9.2 in respect of the Practical Completion Payment Claim:

- (a) submitted the Supporting Documentation on or before the date required under clause 36.8.1; and
- (b) complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7 on the date of submission of the Practical Completion Payment Claim; and

36.9.3 in respect of the Final Payment Claim:

- (a) submitted the Supporting Documentation on or before the date required under clause 36.8.2; and
- (b) complied with clauses 3, 4, 31.2, 31.4, 31.5, 41.4 and 41.7 on the date of submission of the Final Payment Claim.

36.10 Not used

36.11 Practical Completion Payment Claim

36.11.1 On the Practical Completion Payment Claim Reference Date, the Developer must lodge with Council a payment claim marked "Practical Completion Payment Claim".

36.11.2 The Practical Completion Payment Claim must:

- (a) satisfy the requirements of clause 36.3;
- (b) be accompanied by such information as Council may reasonably require; and
- (c) in addition to the requirements of clause 36.3, identify all Claims that the Developer has communicated in accordance with the other provisions of this Deed, and which the Developer wishes to make against Council in respect of any fact, matter or thing which occurred prior to the date of the Practical Completion Payment Claim.

36.11.3 The claims and notices required under this clause 36.11 are in addition to the other notices which the Developer must give to Council under this Deed in order to preserve its entitlements to make any such Claims.

36.11.4 Without limiting clause 36.11.3, the Developer must not include in the Practical Completion Payment Claim Claims that are barred, or have otherwise been released under this Deed, including by clause 56.5.

36.12 Release after Practical Completion

The Developer releases Council from any Claim in respect of any fact, matter or thing arising out of, or in connection with, the Works, the Activities or this Deed that occurred prior to the date for submission of the Practical Completion Payment Claim, except for any Claim which:

36.12.1 has been included in the Practical Completion Payment Claim; and

36.12.2 has not been barred under another provision of this Deed.

36.13 Final Payment Claim

36.13.1 On the Final Payment Claim Reference Date, the Contractor must lodge with Council a payment claim marked "Final Payment Claim" stating:

- (a) the amount (if any) payable under clause 36.1.2;
- (b) all payments received by the Developer on account of the amount (if any) payable under clause 36.1.2; and
- (c) the balance, if any, due to the Developer.

36.13.2 The Final Payment Claim must:

- (a) satisfy the requirements of clause 36.3;
- (b) be accompanied by such information as Council may reasonably require; and
- (c) in addition to the requirements of clause 36.3, identify all Claims that the Developer has communicated in accordance with the other provisions of this Deed, and which the Developer wishes to make against Council in respect of any fact, matter or thing arising out of or in connection with, the Works or this Deed which occurred prior to the date of the Final Payment Claim.

36.13.3 The claims required under this clause 36.13 are in addition to the other notices that the Developer must give to Council under this Deed in order to preserve its entitlements to make any such Claims.

36.13.4 Without limiting the previous paragraph, the Developer must not include in any claim or notice under this clause 36.13 any Claims that are barred, or have otherwise been released under this Deed, including by clause 56.5.

36.14 Release after Final Payment Claim

The Developer releases Council from any Claim in respect of any fact, matter or thing arising out of, or in connection with, the Works or this Deed that occurred prior to the date of submission of the Final Payment Claim, except for any Claim which:

36.14.1 has been included in the Final Payment Claim which is given to Council within 40 Business Days after the expiry of the last Defects Liability Period to expire; and

36.14.2 has not been barred under another provision of this Deed.

36.15 Interest

If any moneys due to either party remain unpaid after the date upon which, or the expiration of the period within which, they should have been paid, then interest will be payable thereon from, but excluding the date upon which, or the date at the end of the expiration of the period within which, they should have been paid to and including the date upon which the moneys are paid.

The rate of interest will be simple interest based on the Commonwealth Bank business banking overdraft index rate effective as at the date upon which, or the expiration of the period within which, the relevant moneys should have been paid.

36.16 Correction of payment schedules

The Independent Certifier may, in any payment schedule:

36.16.1 correct any error; and

36.16.2 modify any assumptions or allowances made,

in any previous payment schedule issued by the Independent Certifier.

36.17 Set-Off

Council may deduct from moneys otherwise due to the Developer, including under clause 44.3:

36.17.1 any debt or other moneys due from the Developer to Council; or

36.17.2 any claim to money which Council may have against the Developer whether for damages (including liquidated damages) or otherwise,

whether under this Deed (including in respect of the Default Amount) or otherwise in connection with the Council Works, the Council Activities, the Developer Works Stage 1 or the Developer Activities Stage 1.

If those moneys are insufficient, Council may have recourse to the Bank Guarantee held under clause 3.

36.18 Reference Dates

To the extent the SOP Act applies to this Deed, each Reference Date is a "reference date" for the purposes of the SOP Act.

36.19 Payment Withholding Request under Division 2A of Part 3 of the SOP Act

36.19.1 Clauses 36.19.2 to 36.19.6 only apply to the extent the SOP Act applies in respect of this Deed.

36.19.2 Without limiting clause 36.17, Council may withhold any amount that is less than or equal to the amount claimed to be owed under a payment withholding request served on Council pursuant to Division 2A of Part 3 of the SOP Act.

36.19.3 If Council withholds from money otherwise due to the Developer any amount that is less than or equal to the amount claimed to be owed under a payment withholding request served on Council pursuant to Division 2A of Part 3 of the SOP Act, then:

- (a) Council may plead and rely upon Division 2A of Part 3 of the SOP Act as a defence to any claim for the money by the Developer from Council; and
- (b) the period during which Council retains money due to the Developer pursuant to an obligation under Division 2A of Part 3 of the SOP Act will not be taken into account for the purpose of determining:
 - (i) any period for which money owed by Council to the Developer has been unpaid; and
 - (ii) the date by which payment of money owed by Council to the Developer must be made.

- 36.19.4 The Developer agrees not to commence proceedings to recover any amount withheld by Council pursuant to a payment withholding request served on Council in accordance with Division 2A of Part 3 of the SOP Act.
- 36.19.5 Any amount paid by Council pursuant to section 26C of the SOP Act will be a debt due and payable from the Developer to Council.
- 36.19.6 If Council withholds money pursuant to a payment withholding request served on Council pursuant to Division 2A of Part 3 of the SOP Act and the Developer:
- (a) pays the amount claimed to be due under the adjudication application to which the payment withholding claim relates; or
 - (b) becomes aware that the adjudication application to which the payment withholding claim relates has been withdrawn,
- then the Developer must so notify Council within 5 days after the occurrence of the event in clause 36.19.6(a) or 36.19.6(b) (as applicable) by providing to Council a statement in writing in the form of a statutory declaration together with such other evidence as Council may require evidencing that the amount has been paid or the adjudication application has been withdrawn (as the case may be).

36.20 Developer Contributions - Council Works

- 36.20.1 Council must pay to the Developer as and when due and payable (in accordance with the terms of any relevant Development Consent) all Contributions payable in respect of the Council Works.

37. Corporate and project reporting

37.1 Project information

The Developer undertakes to give to Council up to the date on which the Developer has completed the Council Works, the Council Activities, the Developer Works Stage 1 and the Developer Activities Stage 1 and satisfied all other obligations under this Deed in relation to the Council Activities and the Developer Activities Stage 1:

- 37.1.1 promptly after it becomes aware of it, notice of any material damage to or Defect in any of the Council Works;
- 37.1.2 promptly after it becomes aware of it, notice of any accidents giving rise to material loss, or damage to property, or injury to persons, on the Land or any land adjacent to the Land;
- 37.1.3 promptly after it becomes aware of it, notice of any act, omission or circumstances (including any lapse in safety precautions) which creates or poses (or created or posed) a risk to the health or safety of persons on the Land or any adjoining property, whether or not such act, omission or circumstance gives rise to any accidents of the type referred to in clause 37.1.2; and
- 37.1.4 promptly upon request, any other information in relation to the Developer's financial condition, the carrying out (or otherwise) of any part of the Activities, or the Works as may be reasonably requested by Council from time to time.

37.2 Monthly report

The Developer must, at regular monthly intervals, provide Council with a written report setting out:

- 37.2.1 the status of the Activities, clearly separating the Council Activities and the Developer Activities (including whether the Milestones are being met by each Milestone Date);
- 37.2.2 deviations from the Works Program;
- 37.2.3 circumstances materially adversely affecting the performance of the Activities;
- 37.2.4 circumstances with potential to materially adversely affect the performance of the Activities;
- 37.2.5 particulars of remedial action taken, or that may be taken, in respect of the circumstances referred to in clauses 37.2.3 and 37.2.4;
- 37.2.6 forthcoming witness and hold inspection points; and
- 37.2.7 any other information reasonably requested by Council.

37.3 Project control group

37.3.1 The parties agree that:

- (a) a representative of the Developer;
- (b) a representative of Council;
- (c) a representative of the Contractor (if agreed between Council and the Developer); and
- (d) the Independent Certifier (if requested by the Developer or Council),

will attend the project control group meetings.

The Developer acknowledges that such project control group meetings may take place at the Land or at any other place nominated by Council or Council's Representative. The Council or Council's Representative (as is applicable) will attempt to give advance notice of meetings where it is practicable to do so. The Developer must, if requested by Council or Council's Representative (as is applicable), report on any matters relevant to the Activities at project control group meetings as reasonably directed, including ensuring that each Contractor report on any matters the subject of a direction from the Council or Council's Representative.

Without limiting the preceding paragraph, the Developer must prepare all project control group meeting reports and prepare and distribute minutes of all such meetings in the manner and form, and within the time period, required by Council's Representative.

Nothing which occurs during a project control group meeting will relieve the Developer of its obligations, or constitute a waiver of any of Council's rights, under this Deed.

38. Work health and safety

38.1 Principal contractor

38.1.1 Without limiting or otherwise affecting the obligations of the Developer under any other provision of this Deed and without limiting clause 38.1.2, the parties acknowledge and agree that, to the extent Council “commissions a construction project” (as that term is used in the WHS Regulation) under this Deed or in respect of the Land, the Activities, the Council Works or the Developer Works, Council appoints the Developer as its agent for the purpose of:

- (a) appointing the Builder as principal contractor for the Land, the Activities, the Council Works, the Developer Works and any other “construction project” (as that term is defined in the WHS Regulation) commissioned by Council under this Deed;
- (b) for the purposes of clause 293(2) of the WHS Regulation, authorising the Builder to:
 - (i) have management and control of the Land, the Activities, the Council Works, the Developer Works and any relevant or associated “workplace” (as that term is defined in the WHS Regulation); and
 - (ii) discharge, exercise and fulfil the functions, duties and obligations of a principal contractor under Chapter 6 of the WHS Regulation in connection with the Land, the Activities, the Council Works, the Developer Works and any other “construction project” (as that term is defined in the WHS Regulation) commissioned by Council under this Deed; and
- (c) the Developer must ensure that the Builder:
 - (i) accepts the engagement as principal contractor; and
 - (ii) discharges, exercises and fulfils all the functions, duties and obligations imposed on a principal contractor by the WHS Act and WHS Regulation for the Land, the Activities, the Council Works and the Developer Works.

38.1.2 To the extent that the Builder is, for any reason, taken or otherwise found not to be the principal contractor for the Land, the Activities, the Council Works or the Developer Works, the Developer must discharge, exercise and fulfil the functions, duties and obligations of a principal contractor in respect of the Land, the Activities, the Council Works and the Developer Works as if the Developer was the principal contractor of the Land, the Activities, the Council Works and the Developer Works.

38.2 General obligations

- 38.2.1 Without limiting or otherwise affecting the obligations of the Developer under any other provision of this Deed, the Developer must:
- (a) comply with, and ensure that all Contractors and subcontractors comply with, the WHS Act and the WHS Regulation, including to the extent that the Developer, the relevant Contractor or the relevant subcontractor, is a person conducting a business or undertaking; and
 - (b) ensure that sections 22, 23, 24, 25 or 26 of the WHS Act are complied with.

38.2.2 The Developer must:

- (a) ensure that all of the Developer's Associates comply with their respective obligations under the WHS Act and the WHS Regulation in connection with the Activities;
- (b) ensure that it carries out, or each Contractor carries out, the Activities as required by this Deed in a manner which ensures that, and otherwise provide all required assistance to Council to ensure that, Council satisfies its obligations under the WHS Act and the WHS Regulation in connection with the Works and the Activities;
- (c) consult with, and ensure that the Builder consults with, the designer or designers (regardless of whether they are Contractors or whether they were engaged by or on behalf of Council to prepare any part of the Technical Documents) of the whole or any part of any structure relating to the Activities (including the Works and any temporary works) about how to ensure that risks to health and safety arising from the design during the performance of the Activities are:
 - (i) eliminated, so far as is reasonably practicable; or
 - (ii) if it is not reasonably practicable to eliminate the risks, minimised so far as is reasonably practicable;
- (d) without limiting clause 38.2.2(c), give, and ensure that the Builder gives, each designer referred to in clause 38.2.2(c) any information that the Developer or the Builder (as applicable) has in relation to the hazards and risks at any place where the Activities are to be carried out (including the Land and any Extra Land);
- (e) manage, and ensure that each Contractor manages, risks associated with the carrying out of the Activities in accordance with Part 3.1 of the WHS Regulation and (where applicable) clause 305 of the WHS Regulation;
- (f) ensure, so far as is reasonably practicable, that the Land, and any other workplace relevant to the Activities (including Extra Land), is secured from unauthorised access;
- (g) ensure that:
 - (i) to the extent required by the WHS Regulation, a safe work method statement for the Activities (or relevant parts of the Activities) complying with the requirements set out in the WHS Regulation is prepared;
 - (ii) a copy of each safe work method statement referred to in clause 38.2.2(g)(i) is provided to Council prior to the commencement of the relevant part of the Activities;
 - (iii) each part of the Activities is carried out in accordance with the relevant safe work method statement referred to in clause 38.2.2(g)(i);
 - (iv) without limiting or otherwise affecting any of the Developer's other obligations or liabilities under this Deed, if any part of the Activities is not carried out in accordance with the relevant safe work method statement referred to in clause 38.2.2(g)(i), the relevant part of the Activities is:

- (A) stopped immediately or as soon as it is safe to do so; and
 - (B) resumed only in accordance with the relevant safe work method statement;
- (v) each safe work method statement referred to in clause 38.2.2(g)(i) is reviewed and, as necessary, revised if relevant control measures are revised under clause 38 of the WHS Regulation; and
- (vi) it keeps a copy of each safe work method statement referred to in clause 38.2.2(g)(i) as required by the WHS Regulation;
- (h) ensure that:
 - (i) all reasonable steps are taken to obtain current underground essential services information about the Land and surrounding areas before directing or allowing excavation work (if any) to commence as part of the Activities;
 - (ii) all information referred to in clause 38.2.2(h)(i) is provided to any person or Contractor engaged by the Developer or the Builder to carry out excavation work (if any) as part of the Activities;
 - (iii) the Developer, and any person who is given information referred to in clause 38.2.2(h)(i), has regard to the information referred to in clause 38.2.2(h)(i) in carrying out or directing or allowing the carrying out of excavation work (if any) as part of the Activities; and
 - (iv) the information referred to in clause 38.2.2(h)(i) is available for inspection as required by clause 304 of the WHS Regulation;
- (i) manage risks to health and safety associated with excavation work (if any) forming part of the Activities in accordance with Part 3.1 of the WHS Regulation and clause 305 of the WHS Regulation;
- (j) secure relevant work areas from unauthorised access;
- (k) ensure that general construction induction training is provided to any worker engaged in the carrying out of the Activities, if that worker:
 - (i) has not successfully completed general construction induction training; or
 - (ii) successfully completed general construction induction training more than 2 years previously and has not carried out construction work in the preceding 2 years;
- (l) ensure that no worker engaged in relation to the Activities carries out, or is directed or allowed to carry out, construction work as part of the Activities unless:
 - (i) the worker has successfully completed general construction induction training; and
 - (ii) if the worker completed the training more than 2 years previously – the worker has carried out construction work in the preceding 2 years;
- (m) ensure that each worker referred to in clause 38.2.2(l);

- (i) holds a general construction induction training card; or
 - (ii) if the worker has applied for but not yet been issued with a general construction induction training card, holds a general construction induction training certification, issued within the preceding 60 days;
 - (n) without limiting or otherwise restricting any other provision of this Deed, ensure that at all times any work or other things done in respect of the Works or as part of the Activities by the Developer or any Contractor does not knowingly infringe the work health, safety or rehabilitation obligations of Council or any other person who may enter upon the Land;
 - (o) ensure that there is no unreasonable risk to health, safety and welfare of any persons employed in connection with the Activities (whether by the Developer, a Contractor or otherwise);
 - (p) without limiting clause 38.2.2(o), ensure that no person is exposed to a risk to his or her safety or health arising out of, or in connection with, the carrying out of the Activities;
 - (q) without limiting clause 38.2.2(o) or 38.2.2(p), ensure, so far as it is reasonably practicable:
 - (i) the health and safety of any persons on the Land, including all workers; and
 - (ii) the Land, the means of entering and exiting the Land, and anything arising from the Land insofar as the Land comprises a place of work, are without risks to the health and safety of any person;
 - (r) comply with any Directions, manuals, policies or rules formulated from time to time by Council in relation to safety insofar as they relate to the Land and are notified to the Developer;
 - (s) without limiting any provisions of this clause 38, have in place systems to assess and eliminate risks to health and safety at the Land, which are consistent with the requirements of the WHS Act and the WHS Regulation;
 - (t) monitor any measures it implements under clauses 38.2.2(c) and 38.2.2(s);
 - (u) provide appropriate information, training, instruction and supervision to all persons who may be affected by the performance of the Activities, including workers employed or engaged by it or its Contractors, or who otherwise undertake work for its benefit, or at its direction, at the Land;
 - (v) ensure that the Works required by this Deed are safe and without risks to health and safety; and
 - (w) so far as is reasonably practicable, consult, co-operate and co-ordinate with Council to the extent that Council, may have obligations in respect of the same matter under WHS Act.
- 38.2.3 The Developer acknowledges and warrants that Council has given the Developer all relevant information in relation to hazards and risks at or in the vicinity of each workplace where the Activities are to be carried out (including the Land).
- 38.2.4 The Developer must provide Council (or ensure that the Builder provides Council), monthly or as reasonably requested by Council, with a copy of all registers, records

and documents that the Builder or the Developer (as applicable) is required to prepare or maintain as a principal contractor under the WHS Regulation.

38.2.5 The Developer must:

- (a) notify Council, or ensure that the Builder notifies Council, immediately (and in any event within 12 hours of such matter arising) of all work health, safety and rehabilitation matters arising out of, or in connection with, the Works or the Activities;
- (b) institute systems to obtain regular written assurances from all Contractors about their ongoing compliance with the WHS Act and WHS Regulation including the due diligence obligation contained therein;
- (c) provide the written assurances obtained under clause 38.2.5(b), together with written assurance(s) from the Developer about the Developer's ongoing compliance with the WHS Act and WHS Regulation, to Council;
- (d) upon request, provide Council, or ensure that the Builder provides Council, with a written report on all work health, safety and rehabilitation matters (including matters concerning or arising out of, or in connection with, this clause 38), or any other relevant matters as Council may require from time to time, including a summary of the Developer's and the Builder's compliance with the WHS Act and WHS Regulation;
- (e) ensure that, if any Law requires that:
 - (i) a person (including a Contractor) be authorised, registered or licensed (including in accordance with the WHS Act and WHS Regulation) to carry out any work, that person is so authorised, registered or licensed, and complies with any conditions of such authorisation, registration or licence;
 - (ii) a person (including a Contractor) has prescribed qualifications or experience or, if not, is to be supervised by a person who has prescribed qualifications or experience (including as defined in the WHS Act or WHS Regulation), that person has the required qualifications or experience or is so supervised; and
 - (iii) a workplace, plant, substance, design or work (or class of work) be authorised, registered or licensed, that workplace, plant, substance, design or work is so authorised, registered or licensed;
- (f) not direct or allow a person to carry out or use plant or substances at a workplace unless the requirements of clause 38.2.5(e) are met (including any requirement to be authorised, licensed, qualified or supervised); and
- (g) if requested by Council or required by the WHS Act or WHS Regulation, produce evidence of any approvals, certificates, authorisations, licences, registration, prescribed qualifications or experience, or any other information relevant to work health and safety (as the case may be) to the satisfaction of Council before the Developer or any relevant Contractor (as the case may be) commences such work.

38.3 WHS Plan

Without limiting any other provision of this clause 38, the Developer must:

- 38.3.1 within 60 Business Days prior to commencement of the Activities prepare, or ensure that the Builder prepares, a WHS Plan and submit that plan (or ensure that the Builder submits that plan) to Council;
- 38.3.2 maintain, or ensure that the Builder maintains, the WHS Plan in accordance with the WHS Act and WHS Regulation; and
- 38.3.3 promptly provide, or ensure that the Builder promptly provides, any updated WHS Plan to Council.

38.4 Warranty

The Developer warrants that compliance with the WHS Plan will enable the Developer to discharge its obligations under this clause 38.

38.5 Discharge of obligations

If it is not feasible to carry out the Activities in accordance with the WHS Plan, the Developer must use, or ensure that the Builder uses, such work health and safety plans and systems as may be necessary to discharge the Developer's obligations.

38.6 Council may carry out WHS obligations

- 38.6.1 Without limiting clause 60.16, if the Developer fails to comply with an obligation under this clause 38 (including in relation to any obligation to procure the Builder to perform anything or ensure that the Builder does, or does not do, anything), Council may (after giving the Developer a reasonable opportunity to cure the breach) perform, or have performed, the obligation on the Developer's behalf and the Developer must pay to Council on demand the costs (including Enforcement Costs) incurred.
- 38.6.2 If and to the extent that Council (acting reasonably) considers it necessary to undertake any activity, give any direction or otherwise perform any of the Activities under clause 38.6.1, the parties acknowledge and agree that in doing so, Council is not acting as a principal contractor, nor is Council to be taken, for any purpose, to be the principal contractor or otherwise responsible for the management or control of the Land or the Activities.

38.7 Monitoring by Developer

The Developer must:

- 38.7.1 monitor the compliance by each Contractor with the requirements of this clause 38;
- 38.7.2 report to Council regarding the monitoring program and the standard of compliance by each Contractor; and
- 38.7.3 take such steps as are within its power to direct and cause each Contractor to rectify any non-compliance or amend its systems to ensure compliance is achieved or likely to be achieved.

38.8 Audit

Council may, at any time and from time to time, either itself or through a third party, audit the Developer's compliance with the requirements of this clause 38.

The Developer must fully cooperate with, and ensure that the Builder fully cooperates with, Council and any relevant third party in respect of any such audit.

38.9 Australian Government Building and Construction WHS Accreditation Scheme

The Developer must ensure that:

- 38.9.1 on engagement by the Developer, the Builder is accredited under the Australian Government Building and Construction OHS Accreditation Scheme established by the *Fair Work (Building Industry) Act 2012* (Cth) (**Scheme**);
- 38.9.2 the Builder maintains Scheme accreditation for the term of its engagement in connection with this Deed; and
- 38.9.3 the Builder complies with all conditions of the Scheme accreditation.

38.10 Indemnity

The Developer indemnifies Council against any Loss, Liability or Claim suffered or incurred by Council arising out of, or in connection with, any breach of:

- 38.10.1 any Law relating to work health and safety; or
- 38.10.2 the provisions of this clause 38.

38.11 Definitions

Except as otherwise provided in clause 1, all terms used in this clause 38 have the meanings given to them in the WHS Act and the WHS Regulation.

39. GST

39.1 GST exclusive amounts

Unless otherwise provided in this Deed, all consideration (including both monetary and non-monetary consideration) payable by one party to another party in relation to a supply under this Deed have been calculated exclusive of any GST which may be imposed on the supply.

39.2 GST imposed

If any supply made under this Deed is, or becomes, subject to GST, the party to whom the supply is made (**Recipient**) must pay to the party making the supply (**Supplier**), as consideration, in addition to any consideration payable or to be provided elsewhere in this Deed, subject to issuing a Valid Tax Invoice (or an adjustment note, as applicable), an additional amount on account of GST, such amount to be calculated by multiplying the GST-exclusive consideration by the applicable rate of GST.

39.3 Timing of payment of GST

Unless otherwise expressly stated in this Deed, any amount in respect of GST payable under clause 39.2 (**GST imposed**) must be paid to the Supplier on the later of the date the Recipient receives the Valid Tax Invoice in respect of the GST and the date this Deed requires the payment for the supply to be made.

39.4 Reimbursement obligations

If any party is required to reimburse or indemnify another party for a cost incurred by the other party, the amount of that cost for the purpose of this Deed is the amount of the cost incurred, less the amount of any Input Tax Credit or refund of GST, which the party (or to

which the representative member for a GST group of which the other party is a member) incurring the cost is entitled to claim in respect of the cost.

39.5 Recovery of Input Tax Credits

The Supplier must do all things reasonably necessary to assist the Recipient to enable it to claim any Input Tax Credit available to the Recipient in respect of the supply.

40. Warranties and Certificates

40.1 Warranties

The Developer must, as a condition precedent to Practical Completion, ensure that it assigns to Council (and provides copies of) all warranties which the Developer has the benefit of in respect of the Council Works immediately prior to the Date of Practical Completion and which are capable of assignment to Council.

40.2 Design Certificates

The Developer must provide Council with a duly completed certificate in the form of Schedule 15:

- 40.2.1 with each submission of Council Works Design Documents under clause 25.2.1, covering all such Council Works Design Documents, from all consultants (whether engaged by the Developer or a Contractor) involved in the creation of those Council Works Design Documents; and
- 40.2.2 as a condition precedent to Practical Completion, from all consultants (whether engaged by the Developer or a Contractor) involved in the creation of any Council Works Design Documents, dated no earlier than 20 Business Days prior to the Date of Practical Completion.

41. Risk and Insurance

41.1 Developer's obligation for care of Works and the Land

The Developer is responsible for the care of:

- 41.1.1 the Developer Works, any associated temporary works, all materials and things (including Plant) brought onto, or in storage on, the Land by the Developer or its Associates in connection with the Developer Activities and all materials and things in storage relating to the Developer Activities which are not on the Land or which are in transit to the Land (together the "**Relevant Developer Property**") at all times from the date of this Deed;
- 41.1.2 the Council Works, any associated temporary works, all materials and things (including Plant) brought onto, or in storage on, the Land by the Developer or its Associates in connection with the Council Activities and all materials and things in storage relating to the Council Activities which are not on the Land or which are in transit to the Land (together the "**Relevant Community Facility Property**") from the date of this Deed until the issue of the Certificate of Practical Completion; and
- 41.1.3 the Land at all times from the date of transfer to the Developer or the Approved Nominee.

41.2 Developer to rectify damage

- 41.2.1 Subject to clause 41.2.3, where any loss of, or damage to, the Relevant Developer Property occurs during the period for which the Developer is responsible for the care of the Relevant Developer Property under clause 41.1, the Developer must:
- (a) promptly notify Council of any material loss of, or material damage to, the Relevant Developer Property; and
 - (b) promptly rectify any loss of, or damage to, the Relevant Developer Property so that they conform in every respect with the requirements of this Deed.
- 41.2.2 Subject to clause 41.2.3, where any loss of, or damage to, the Relevant Community Facility Property occurs during the period for which the Developer is responsible for the care of the Relevant Community Facility Property under clause 41.1, the Developer must:
- (a) promptly notify Council of any loss of, or damage to, the Relevant Community Facility Property; and
 - (b) promptly rectify any loss of, or damage to, the Relevant Community Facility Property so that the Council Works (and any other Relevant Community Facility Property) conform in every respect with the requirements of this Deed.
- 41.2.3 The Developer is not obliged to rectify any damage to the Council Works or the Developer Works Stage 1 to the extent that a negligent act or omission of a Separate Contractor caused or contributed to the damage, provided that the Developer has complied with its obligation under clause 15.4.3(g).

41.3 Indemnity

- 41.3.1 The Developer indemnifies Council and each Council's Associate from and against any Claim, Loss or Liability brought against, suffered or incurred by Council or the relevant Council's Associate in respect of:
- (a) damage to, or loss or destruction of, any real or personal property (including the Works or any other Relevant Developer Property or Relevant Community Facility Property); or
 - (b) injury to, or illness or death of, any person,
- arising out of or in connection with the performance of, or any act or omission of the Developer or its Associates in connection with, the Activities.
- 41.3.2 The Developer's liability to indemnify Council and each Council's Associate under clause 41.3.1 will be proportionately reduced to the extent that a negligent act or omission of Council or Council's Associate caused or contributed to the claim, damage, expense, loss or liability.

41.4 Insurances

The Developer must effect and maintain or procure to be effected and maintained current the following insurances (and any other insurance required by Law or that a prudent design and construction contractor or owner in the Developer's position would take out) on the terms and conditions set out in this clause 41:

- 41.4.1 a contractor's all risks insurance policy covering risks including loss or damage to:

- (a) the Council Works and the Developer Works Stage 1 (including any associated temporary works);
- (b) all materials and things (including Plant) brought onto, or in storage on, the Land by the Developer or its Associates in connection with the Council Activities or the Developer Activities Stage 1;
- (c) all materials and things in storage relating to the Council Activities or the Developer Activities Stage 1 which are not on the Land or which are in transit to the Land including by sea or air shipment (and in this regard the Developer must effect appropriate marine cargo insurance in connection with any materials or Plant to be imported into Australia); and
- (d) the property of Council on the Land,

for an amount not less than the full value of the Council Works and the Developer Works Stage 1 on a full reinstatement and replacement basis plus:

- (e) costs of demolition and removal of debris (to a limit of at least 10% of the aggregate value of the Council Works and the Developer Works Stage 1 on a full reinstatement and replacement basis);
- (f) additional consultants' and professionals' fees (to a limit of at least 10% of the aggregate value of the Council Works and the Developer Works Stage 1 on a full reinstatement and replacement basis);
- (g) expediting costs (to a limit of at least 5% of the aggregate value of the Council Works and the Developer Works Stage 1 on a full reinstatement and replacement basis); and
- (h) allowance for escalation of costs (to a limit of at least 4% per annum of the aggregate value of the Council Works and the Developer Works Stage 1 on a full reinstatement and replacement basis);

41.4.2 a third party legal liability insurance policy which covers:

- (a) the Developer and (subject to clause 41.6.4(b)) its Associates, Council and Council's Associates for their respective rights and interests; and
- (b) liabilities to third parties for loss of or damage to property (other than property required to be insured under clause 41.4.1) and the death of, or injury to, any person, excluding personal injury to or death of a person who at the time is defined as a worker of the insured under any Legislation in relation to worker's compensation insurance of any Australian jurisdiction where such claims are made directly by the worker of the insured or any dependant of such worker (excepting worker to worker claims),

for an amount not less than \$50,000,000 for any one occurrence;

41.4.3 a workers compensation insurance policy for all employees employed by the Developer and each Contractor including liability under statute and at common law;

41.4.4 a motor vehicle insurance policy for:

- (a) loss or destruction of, or damage to, motor vehicles owned by or held on trust by, or in the custody or control of, the Developer or any of its Associates, for an amount not less than the market value of the motor vehicles; and

- (b) liability to third parties in respect of:
 - (i) death of, or injury to, any person, as required to comply with any relevant Law relating to compulsory third party liability insurance arising out of the ownership or use of motor vehicles; and
 - (ii) loss or destruction of, or damage to, property, including property owned or held on trust by, or in the custody or control of, Council, for an amount not less than \$20,000,000, arising out of the ownership or use of motor vehicles, including CTP Gap Coverage Endorsement cover;

41.4.5 to the extent professional services (including design services) are provided by or on behalf of the Developer, a professional indemnity insurance policy:

- (a) with a total aggregate cover limit of indemnity of not less than \$10,000,000 for each claim and in the aggregate for any 12 month period of insurance, or such lesser limit which is approved by Council;
- (b) which extends to any liability the Developer may have to Council under this Deed as a result of any failure by the Developer or any person engaged by the Developer to exercise due skill and care; and
- (c) which extends to any professional services in connection with the Works provided before the date of this Deed; and

41.4.6 if any component of the Council Activities or the Developer Activities Stage 1 involve the disturbance of existing asbestos, then prior to the commencement of those works, an asbestos disease liability insurance policy with an indemnity limit of not less than \$10,000,000 in respect of any one occurrence. Such policy must be maintained until such time as the Developer has received (and provided a copy to Council) an asbestos clearance certificate for the Land issued by a duly licenced and qualified assessor.

41.5 Quantum of insurance

- (a) The dollar amounts of coverage specified in clause 41.4 must be increased by the Developer if determined by Council (acting reasonably), by notice to the Developer. Following receipt of such a notice the Developer must, when renewing or seeking to effect the relevant policy to which the amended dollar amount of coverage relates, renew or effect (as applicable) the relevant policy with the amended dollar amount of coverage specified in Council's most recent direction under this clause 41.5.

41.6 Insurance generally

Insurances:

41.6.1 must be with a Reputable Insurer or otherwise with insurers approved by Council;

41.6.2 except with respect to the terms and conditions of the workers compensation insurance policy required by clause 41.4.3, must be on terms and conditions (including as to endorsements, exclusions, alterations and deductibles) approved by Council;

41.6.3 except for the Insurances specified in clauses 41.4.3, 41.4.5 and 41.4.5, must be in the name of both Council and the Developer (as well as such other names as the Developer specifies, acting reasonably) and must identify their respective rights and interests;

41.6.4 specified in clauses 41.4.1 and 41.4.2 must include:

- (a) subject to clause 41.6.4(b), cover for all Contractors engaged by the Developer in relation to the Activities and the Works; or
- (b) if the Developer's public liability insurance policy (required under clause 41.4.2) is a stand-alone policy not forming part of its contractor's all risks insurance policy under clause 41.4.1, and that has the effect that the Developer is unable to obtain cover for all of the Contractors in accordance with clause 41.6.4, the Developer must ensure that (without limiting the other requirements of clause 41.4.2) all the Contractors effect and maintain third party legal liability insurance satisfying the requirements of clause 41.4.2(b).

41.6.5 if in the name of both Council and the Developer, then:

- (a) for as long as there is money owed to any Project Lender, must provide that the Project Lender will be the loss payee for any benefit payable to the Developer; and
- (b) where there is no money owed to any Project Lender, can provide that the Developer will be the loss payee for any benefit payable to the Developer,

unless otherwise provided in this Deed; and

41.6.6 must be governed by Australian law and contain an acknowledgment by the insurer that it submits to the non-exclusive jurisdiction of the courts of the New South Wales.

The Developer must ensure that Council is given not less than 10 Business Days' notice of an insurer's notification of its intention to cancel the Insurance.

41.7 Certified copies

Before commencement of the Activities and whenever requested by Council (but no more frequently than twice a year and as a condition precedent to Practical Completion), the Developer agrees to give Council:

41.7.1 certified copies of all:

- (a) Insurance policies except for the terms of the professional indemnity policy required by clause 41.4.5;
- (b) renewal certificates; and
- (c) endorsement slips; and

41.7.2 evidence satisfactory to Council that the Insurances have been effected and maintained.

41.8 Failure to produce proof of insurance

If within 10 Business Days of request to provide evidence that the Developer is in compliance with this clause 41, the Developer fails to demonstrate that it is in compliance with this clause 41, Council may effect and maintain the Insurances and pay the premiums. The Enforcement Costs incurred by Council in connection with taking that action are recoverable from the Developer as a debt due to Council payable on demand.

41.9 Dates for effecting Insurances

The Insurances referred to in clause 41.4 must be effected from the following dates:

- 41.9.1 for the Insurance referred to in clause 41.4.1, on or before the date the Developer commences the Activities on the Land;
- 41.9.2 for the Insurances referred to in clauses 41.4.2, 41.4.4 and 41.4.4, on or before the date of this Deed;
- 41.9.3 for the Insurance referred to in clause 41.4.5, on or before the date the relevant professional services are provided or on the date of this Deed if those services were provided before the date of this Deed; and
- 41.9.4 for the Insurance referred to in clause 41.4.6, on or before the date the Developer commences the Activities on the Land.

41.10 Periods of insurance

The Developer must maintain:

- 41.10.1 the Insurances referred to in clauses 41.4.1, 41.4.2, 41.4.4 and 41.4.4, from the respective dates referred to in clause 41.9.1 and 41.9.2 until the expiry of the last Defects Liability Period;
- 41.10.2 the Insurance referred to in clause 41.4.5 from the date referred to in clause 41.9.3 until the date which is six years after Date of Practical Completion; and
- 41.10.3 the Insurance referred to in clause 41.4.6:
 - (a) if the policy is on a 'claims occurring' basis from the relevant date in clause 41.9.4 to the date of expiry of the last Defects Liability Period; and
 - (b) if the policy is on a 'claim made' basis, then the policy must be maintained from the relevant date in clause 41.9.4 to the date which is not less than 6 years after the expiry date of the last Defects Liability Period.

41.11 Premiums

The Developer must punctually pay or procure the payment of all premiums, Taxes, excesses and deductibles in respect of the Insurances.

41.12 Developer's obligations not limited

The effecting of Insurances does not limit the liabilities or obligations of the Developer under this Deed.

41.13 General insurance obligations

The Developer:

- 41.13.1 must not do anything which prejudices, or which may prejudice any Insurance;
- 41.13.2 must ensure that each Contractor complies with the terms and conditions of the policies effected by the Developer under this Deed and that each Contractor, to the extent relevant having regard to that Contractor's work or services that form part of the Council Activities or the Developer Activities Stage 1, similarly hold insurance on the same terms and conditions;

- 41.13.3 must rectify anything done by the Developer or its Associates which prejudices, or which may prejudice, any Insurance;
- 41.13.4 must reinstate an Insurance if it lapses;
- 41.13.5 must not cancel an Insurance, vary an Insurance in a manner which materially or adversely affects Council or allow an Insurance to lapse without the prior written consent of Council;
- 41.13.6 must immediately notify Council of any event which may result in an Insurance lapsing or being cancelled; and
- 41.13.7 must 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, including where failure to do so would vitiate or invalidate the relevant policy.

41.14 Notices of potential claims

In addition to the obligations to notify the insurer under any Insurance, the Developer must:

- 41.14.1 notify Council of any occurrence of which it is aware that may give rise to a claim under the Insurances; and
- 41.14.2 keep Council informed of subsequent developments of which it is aware concerning the claim.

The Developer must not compromise, settle, prosecute or enforce a claim under any Insurance in respect of which claim Council would benefit under Insurance without the prior consent of Council. Such consent must not to be unreasonably withheld or delayed in relation to enforcing any claim and will be deemed to have been given if an insurer compromises, settles, prosecutes or enforces a claim on behalf of the Developer.

41.15 Application of proceeds of Insurance for damage or destruction

If the Council Works or the Developer Works Stage 1 are damaged or destroyed the Developer must comply with its repair and reinstatement obligations under this Deed and all Insurance proceeds in respect of that damage or destruction are to be applied to repair or reinstate the Council Works and the Developer Works Stage 1 (as applicable).

41.16 Adequacy of proceeds

If the Insurance proceeds in respect of any damage or destruction:

- 41.16.1 are less than the cost of repairing, replacing or reinstating the Council Works and the Developer Works Stage 1, or those Insurances are void or unenforceable and there are no proceeds, the Developer must complete the repair, reinstatement and replacement of the Council Works and the Developer Works Stage 1 using its own funds (to the extent it is obliged to carry out such repair, reinstatement and replacement of the Council Works and the Developer Works Stage 1 under this Deed); or
- 41.16.2 exceed the costs of repairing, replacing or reinstating the Council Works and the Developer Works Stage 1:
 - (a) if this Deed has not been terminated, upon completion of the repair, reinstatement and replacement and payment of all costs the Developer may

keep that excess after first applying the balance towards amounts owing to Council by the Developer; or

- (b) if this Deed has been terminated, that excess will be held and applied towards amounts owing to Council by the Developer with any excess being paid to the Developer.

41.17 Cross liability

All Insurances which name more than one insured must include a cross liability clause in which the insurer agrees:

- 41.17.1 to waive all rights of subrogation or action against any of the persons comprising the insured;
- 41.17.2 that the term 'insured' applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them; and
- 41.17.3 that any non-disclosure, breach of any duty or act or omission by one insured does not prejudice the right of the other insured to claim under any Insurance.

42. Side Deeds

42.1 Contractor Side Deed

Prior to the Proceed Date, the Developer must ensure that the Developer and the Builder duly executes a Contractor Side Deed and provide originals to Council.

42.2 Civic Precinct Side Deed

Prior to the Proceed Date, the Developer must ensure that the Developer and the Relevant Contractors duly execute a Civic Precinct Side Deed and provide originals to Council.

43. Developer Default

43.1 Developer Default

It is a Developer Default if (for whatever reason) at any time:

- 43.1.1 a Milestone has not been achieved by the relevant Milestone Date despite any other provision of this Deed;
- 43.1.2 a Guarantor becomes Insolvent (or, where the Insolvency Event is capable of being cured, it is not cured such that the Insolvency Event is no longer current, within 30 Business Days after the Insolvency Event occurs) and is not replaced by a Guarantor acceptable to Council (acting reasonably) within 30 Business Days;
- 43.1.3 the Developer becomes Insolvent;
- 43.1.4 a Change in Control Breach has occurred and Council does not approve the Change in Control and the Developer does not reverse the Change in Control within 60 days of it occurring;
- 43.1.5 the Developer Abandons the Council Activities or the Developer Activities Stage 1;

- 43.1.6 during the term of this Deed there is serious fraud, or intentional and dishonest, collusive, misleading or deceptive conduct affecting Council on the part of the Developer in the performance of the Works or the Activities or any part of either of them;
- 43.1.7 the Funding is cancelled or ceases to be available to the Developer (whether in whole or in part) due to the fault of the Developer and this materially adversely affects the Developer's ability to comply with its obligations under the Project Documents;
- 43.1.8 the Developer or a Guarantor fails to pay a sum of money due and owing to Council in accordance with the Project Documents and that sum (and interest on that sum) remains unpaid 30 days after a demand for payment is made by Council on or after its maturity;
- 43.1.9 the Developer or a Guarantor is in material breach of any warranty or obligation under, or is not materially complying with any provision of, a Project Document;
- 43.1.10 the Developer breaches its obligations under clause 53.5 of this Deed;
- 43.1.11 the Builder becomes Insolvent on or before the Date of Practical Completion and the relevant Contractor is not replaced on terms acceptable to Council (acting reasonably) within 120 days of the occurrence of that event; or
- 43.1.12 any Project Document is terminated in accordance with its terms by reason of a breach of warranty or obligation, default under, or non compliance with its terms by the Developer and the Developer does not put in place agreements to substantially replace the terminated Project Document on terms acceptable to Council within 60 days of the termination.

44. Council Default

44.1 Council default- non financial obligations

- 44.1.1 If Council breaches an obligation imposed on it by this Deed, other than those detailed in clause 44.2, the Developer may provide written notice to Council describing the nature of Council's breach, when the breach occurred and what action, consistent with the rights and obligations of the parties under this Deed, the Developer requires Council to take in order to remedy such breach.
- 44.1.2 Unless this Deed specifically provides otherwise, the Developer is not entitled to terminate this Deed for a breach by Council of its obligations under this Deed whether or not notice was served in accordance with clause 44.1.1.

44.2 Council default- financial obligations

- 44.2.1 If Council's breach relates to:
 - (a) an obligation of Council to pay money to the Developer under clause 36.6, provided the amount is not in dispute; or
 - (b) the obligation of Council to transfer the Developer Works Lot to the in accordance with the Residual Land Contract,

the Developer may provide written notice to Council sufficiently detailing the breach and requiring the breach to be rectified within 10 Business Days from the date the notice is received by Council.

- 44.2.2 If on receipt of the Developer's notice served in accordance with clause 44.2.1 Council disputes that Council is in breach of its obligations as set out in the Developer's notice, then Council must prior to the expiry of the 10 Business Days referred to in clause 44.2.1 provide a notice of dispute to the Developer accordingly and the matter will be a dispute for resolution under clause 54.
- 44.2.3 If it is agreed or determined under clause 54 that Council is in default as detailed in the Developer's notice served in accordance with clause 44.2.1, then Council must rectify the breach within 30 days from the date of the agreement or expert determination (as the case may be).
- 44.2.4 If Council fails to rectify the breach in accordance with clause 44.2.1 or 44.2.3, then the Developer may serve a further written notice on Council specifying that if the breach is not rectified within a further 10 Business Days the Developer intends to terminate this Deed.
- 44.2.5 If the breach is not rectified by Council with the further 10 Business Days notified by the Developer under clause 44.2.4, then and only then may the Developer by written notice served on Council, terminate this Deed.

44.3 Payment for certain costs at termination (including for Developer Default)

- 44.3.1 Upon termination of this Deed under clause 45.1.1 or 44.2.5, but subject to Council's rights under clause 36.17, Council must pay the Developer:
- (a) if, as at the date of termination, legal title to the Developer Works Lot has not been transferred to the Purchaser in accordance with the Residual Land Contract the lesser of:
 - (i) \$12,000,000 (plus any amounts for Variations payable in accordance with this Deed); and
 - (ii) an amount which is the aggregate of:
 - (A) all amounts that have become payable by Council under clause 36, but which remain unpaid as at the date of termination;
 - (B) the value of any Progress Payment Claims that the Developer is entitled to make (but have not been made and paid) in accordance with this Deed (as determined by the Independent Certifier) prior to the date the termination notice takes effect; and
 - (C) the cost of unfixed materials reasonably ordered by the Developer for the Council Works which it is legally liable to accept, but only if on payment these unfixed materials become the property of Council, free of any Encumbrance; and
 - (b) if, as at the date of termination, legal title to the Developer Works Lot has been transferred to the Purchaser in accordance with the Residual Land Contract, \$0.
- 44.3.2 Council is not required to pay to the Developer any amount under clause 45.3.1 where such amount has not been certified as reasonable by the Independent Certifier.

- 44.3.3 The payments referred to in this clause 44.3 are full compensation to the Developer for termination of this Deed under clause 45.1.1 or 44.2.5, and the Developer has no other Claim whether under this Deed or otherwise arising out of, or in connection with, such termination of this Deed. Nothing in this clause 44.3 will limit or otherwise affect Council's entitlements under clause 45.1.3 and clause 46.2.

45. Termination

45.1 Termination for Developer Default

45.1.1

- (a) If a Developer Default occurs in respect of a Developer Default that is capable of being remedied, Council must issue to the Developer a written notice requiring the Developer to remedy the relevant Developer Default within 30 days from the date of that notice (**First Notice**). In the event that the Developer Default remains to be remedied after the expiry of the 30 day period, Council must issue to the Developer a second written notice requiring the Developer to remedy the relevant Developer Default within 30 days from the date of that second notice (**Second Notice**). If the Developer Default remains to be remedied after the expiry of the 30 day period referenced in the Second Notice, then Council may terminate this Deed by notice in writing to the Developer specifying the date on which this Deed will terminate (the date of issue of this notice is the **Trigger Date**) (**Third Notice**). This Deed terminates on the date specified in the Third Notice.
- (b) If a Developer Default occurs in respect of a Developer Default that is not capable of being remedied, then Council may terminate this Deed by notice in writing to the Developer specifying the date on which this Deed will terminate (the date of issue of this notice is the **Trigger Date**). This Deed terminates on the date specified in this notice.

- 45.1.2 The Developer is not entitled to any payment (other than any payment to which the Developer is entitled under clause 44.3) or other consideration and may not make any other Claim if this Deed is terminated under this clause 45.1.

- 45.1.3 If this Deed is terminated under clause 45.1.1:

- (a) without limiting, and in addition to, Council's entitlement to payment of the Default Amount under clause 46.2, Council's remedies and rights, and the Developer's Liabilities, will be the same as they would have been under the Law governing this Deed had the Developer repudiated this Deed and Council elected to treat this Deed at an end and elected to recover damages; and
- (b) not used.

45.2 No other right to terminate for default

Despite any rule of Law to the contrary or other specific provisions of this Deed (but excluding termination under clause 44.2.5), this Deed may not be terminated by the Developer for default other than in accordance with clause 44.2.5.

45.3 Termination for Developer's inability to fund the Council Activities and Developer Activities Stage 1

45.3.1 On or before the date which is four months after the date on which the Development Consent (Primary) is obtained, the Developer must:

- (a) provide evidence of its plans for procuring funding to carry out the Developer Activities (other than the Developer Activities Stage 1 and the Council Activities);
- (b) provide evidence to Council of its financial capacity to fund the carrying out of the:

- (i) Council Activities; and
- (ii) Developer Activities Stage 1,

in accordance with the requirements of this Deed, including providing:

- (iii) details of the identity and commitment of its shareholders and investors and evidence that those shareholders and investors are legally bound to honour those commitments;
- (iv) evidence that the Developer has secured debt finance to the extent necessary to complete the Council Activities, the Developer Activities Stage 1 and otherwise perform all of its obligations under this Deed;
- (v) the details regarding its equity and debt facilities, including expected drawdown of funds; and
- (vi) asset and liability statements (or other evidence identifying the net worth of an individual or entity) for the Developer, the Guarantor, the Developer's shareholders and investors and any investor likely to be a party to the Building Management Statement,

it being acknowledged by Council that no financial statements or audited financial statements will be required by Council for the purposes of the Developer satisfying its obligations under this clause; and

- (c) provide evidence to Council that Stage 1 is feasible and provide information to Council's nominated consultant outlining the project feasibility details in connection with Stage 1,

(Financial Capacity Report).

45.3.2 On receipt of the Financial Capacity Report, Council may, acting reasonably, request any further evidence and details it considers necessary to determine the financial capacity of the Developer to fund the carrying out of the Activities to satisfy its obligations under the Deed of Guarantee. If Council requests such further evidence and details, the Developer must provide that information within 5 Business Days of such request.

45.3.3 During the Financial Capacity Termination Period, if Council determines, in its absolute discretion, that:

- (a) the Developer does not have the financial capacity to fund the carrying out of the Activities in accordance with this Deed, or to otherwise perform its obligations under this Deed;

Council may terminate this Deed immediately by giving written notice to the Developer within 5 Business Days after the Financial Capacity Termination Period. If Council determines that the Developer does have the financial capacity to fund the carrying out of the Activities in accordance with this Deed, it must provide written notice of such finding to the Developer during the Financial Capacity Termination Period.

- 45.3.4 The Developer acknowledges and agrees that Council may, after termination under clause 45.3.3, enter into a contract with another party for the performance of any part of the Works.
- 45.3.5 If Council terminates this Deed under this clause 45.3, then without limiting clause 45.4, this Deed has no further force or effect and the Developer will not be entitled to make, and Council will not be liable upon, any Claim as a result of this Deed being terminated, except in respect of amounts payable under clause 46.1.

45.4 Provisions surviving termination

If this Deed is terminated, the rights and obligations of the Developer and Council under this Deed will cease other than:

- 45.4.1 any rights or obligations accruing under this Deed prior to its termination;
- 45.4.2 any rights or obligations accruing under this Deed as a result of its termination;
- 45.4.3 any rights or obligations that are expressed to continue after termination of this Deed; and
- 45.4.4 as applicable, the rights and obligations of the Developer and Council under clauses 3, 4, 17, 45.1.2, 45.1.3, 45.3.5, 46, 47.1, 53.1, 54 and 57 and any other clause of this Deed which, by its nature, should survive the termination of this Deed.

The remedies of the Developer or Council under this clause 45.4 are in addition to and not in substitution for any other rights and remedies either may have at Law.

46. Rights after Termination

46.1 Acquisition by Council of Design Documents

- 46.1.1 Notwithstanding clause 52.2, if Council terminates this Deed under clause 9 or 45.3 Council may (in its absolute discretion) elect, at any time after the date of termination, to acquire from the Developer (by notice in writing to the Developer) all rights (including licence to use rights), title, interest and all Intellectual Property Rights in the Design Documents and all other Intellectual Property Rights, information and material in connection with the Council Works and the Developer Works (to the extent such rights, title, interest and Intellectual Property Rights have not otherwise vested, accrued or otherwise been granted to Council under clause 52.2) by paying the IP Transfer Sum to the Developer and, in that instance, the Developer must do all things necessary to give effect to that acquisition.
- 46.1.2 The Developer must co-operate and use its reasonable endeavours to ensure that its agents, licensees, Contractors and employees co-operate with Council in exercising its rights under this clause 46, including by providing to Council four hard copies and two electronic copies (one in .pdf file format and one in the original file format) of all Design Documents and any Final Design Documents.

46.2 Default Amount

Notwithstanding clause 44.3, without limiting clause 45.1.3 and despite any other clause in this Deed, if this Deed is terminated pursuant to either 44.2.5 or 45.1, Council will be entitled to be paid, and the Developer must pay to Council, the Default Amount within 20 Business Days from the date of such termination.

46.3 Exercise of rights not affect other rights

Council's election to exercise its rights under this clause 46 will not affect any other Claims or powers it may have, including under clause 3.3.

47. Home Building Act

47.1 Indemnity

The Developer indemnifies Council in respect of all Claims, Liability and Loss which Council may suffer or incur under or in connection with the Home Building Act, including to the extent Council is liable to a third party in connection with the warranties under Part 2C of the Home Building Act, to the extent such Claim, Liability or Loss arises out of or in connection with this Deed, the Works or the Activities.

47.2 Only Developer Activities to include Residential Building Work

The Developer must ensure that the Council Activities do not involve the carrying out of Residential Building Work.

47.3 No Residential Building Work prior to transfer

The Developer must not commence any works in connection with level 2 (or above) of Stage 1 Works (other than those Works necessary to achieve stratum subdivision of Stage 1A) until such time as the Developer Works Lot has been transferred to the Purchaser.

48. Developer's Indemnity and Warranties

48.1 Indemnity

The Developer indemnifies Council against and keeps Council indemnified against all Liabilities, Losses, Claims and Enforcement Costs suffered or incurred in connection with, or arising from, and releases Council from all Liabilities, Losses, Claims and Enforcement Costs in connection with or arising from:

- 48.1.1 a breach of duty of care by the Developer or its Associates;
- 48.1.2 a breach of any Law by the Developer or its Associates in connection with the Works;
- 48.1.3 any other breach of warranty or undertaking, default or non-compliance by the Developer of its obligations under any Project Document;
- 48.1.4 any act or omission of the Developer arising out of, or in connection with, this Deed; and
- 48.1.5 any Claim by a third party in connection with any breach by the Developer of clause 52,

but the indemnity shall be reduced proportionally to the extent that an act or omission of Council caused or contributed to the Liabilities, Losses or Claims.

The Developer agrees to pay amounts due under this indemnity on demand from Council.

48.2 Items included in Loss, Liability and Enforcement Costs

The Developer agrees that the Liability, Loss or Enforcement Costs referred to in clause 48.1 include legal costs on whichever is the lesser of a full indemnity basis or solicitor and own client basis.

49. Power of attorney

49.1 Appointment

The Developer irrevocably and for valuable consideration appoints Council and the Council's Representative individually as the Developer's attorney to do those things nominated in clause 49.2, and agrees to ratify anything an Attorney does under clause 49.2.

49.2 Powers

If a Developer Default occurs an Attorney may:

- 49.2.1 do anything which the Developer is obligated to do in favour of Council under the Project Documents (these things may be done in the Developer's name or the Attorney's name, and they include signing and delivering documents and starting, conducting and defending legal proceedings);
- 49.2.2 delegate their powers (including this power) and revoke a delegation; and
- 49.2.3 exercise their powers even if this involves a conflict of duty or they have a personal interest in doing so.

50. Assignment and other dealings

50.1 General Restriction on assignment

Subject to clause 50.2, the Developer must not sell, transfer, novate, dispose of or assign, or create or allow to exist any Encumbrance (other than the Permitted Encumbrances) over, the whole or any part of its right, title and interest in, to or under this Deed, the Project Documents, the Land (excluding the Developer Works Lot, once it is created) or the Works.

50.2 Assignment and disposal

The Developer may with the prior written consent of Council assign, novate or otherwise dispose of or deal with its rights under this Deed, its rights, title and interest in the Project Documents, the Land and the Works. Council will not unreasonably withhold its consent to such disposal, assignment, novation or dealing if:

- 50.2.1 the Developer first demonstrates to Council's satisfaction that the beneficiary of such assignment, novation, nomination, disposal or dealing (**Beneficiary**) is of suitable character and satisfies Council's reasonable probity requirements;

- 50.2.2 such assignment, novation, nomination, disposal or dealing is to the same person that the Developer transfers the Land to or is to the Approved Nominee, and is undertaken in connection with that transfer;
- 50.2.3 such assignment, novation, nomination, disposal or dealing is only in respect of the relevant rights and obligations of the Developer so far as they relate to the Land transferred;
- 50.2.4 the Developer is engaged by the Beneficiary to design, construct and deliver the Works on the Land unless the Beneficiary:
- (a) is a company which is either itself listed on the Australian Stock Exchange Limited; or
 - (b) is a subsidiary of, and guaranteed by, a company listed on the Australian Stock Exchange Limited;
- 50.2.5 the Developer first demonstrates to Council's satisfaction that the Beneficiary has or will have available to it the skill and experience necessary to carry out the Developer's obligations under this Deed and the Project Documents applicable to its role as transferee of the Land;
- 50.2.6 the Developer is not otherwise in default of its obligations under this Deed or any Project Document;
- 50.2.7 the Beneficiary obtains all necessary Approvals in order to perform the applicable obligations under this Deed and the Project Documents;
- 50.2.8 the Beneficiary enters into such deeds and other agreements that are reasonably required by Council to ensure that the applicable obligations of the Developer under this Deed and the Project Documents are assumed by the Beneficiary for the benefit of all other parties to those arrangements; and
- 50.2.9 the new guarantor (if any) enters into such deeds as are reasonably required by Council to ensure that the new guarantor guarantees to Council the performance of the Beneficiary's obligations under this Deed and the Project Documents in substantially the same form as the Deed of Guarantee.

50.3 Costs

The Developer must pay to Council on demand all reasonable costs incurred by Council in dealing with an application for consent under this clause 50 including the reasonable costs of preparing any deeds and agreements required by Council under this clause 50.

50.4 Assignment by Council

Council may by notice given to the Developer sell, transfer, novate, dispose of or assign the whole or any part of its right, title and interest in, to or under this Deed or the Project Documents to which it is a party, without the consent of the Developer provided that the purchaser, transferee, novatee, disponent or assignee (as applicable) is the registered owner of any part of the Land that is then not owned by the Developer, provided that Council first procures such person to enter into such deeds and other agreements that are reasonably required by the Developer to ensure that the applicable obligations of Council under this Deed and the Project Documents are assumed by such person for the benefit of all other parties to those arrangements.

50.5 Change in Control

- 50.5.1 Subject to clause 50.5.5, without the prior consent of Council there must not be a Change in Control.
- 50.5.2 The Developer must give Council reasonable prior notice of a proposed Change in Control for which the consent of Council is sought (**Developer Change in Control Notice**). The Developer Change in Control Notice must include full details of the proposed Change in Control including the acquisition of voting power, the change in control or any other event which will constitute the Change in Control and evidence of the matters referred to in clause 50.5.4.
- 50.5.3 Within 10 Business Days after the later of receipt by Council of the Developer Change in Control Notice and receipt by Council of such further information about the proposed Change in Control as Council reasonably requests within that 10 Business Days, Council must consent or not consent to the proposed Change in Control, by notice to the Developer.
- 50.5.4 Council may withhold its consent to a proposed Change in Control if:
- (a) Council is of the reasonable opinion that any one of the following applies:
 - (i) a person or persons acquiring the voting power, the control or the share capital or other equity interests that gives rise to the proposed Change in Control:
 - (A) is or are not solvent; or
 - (B) is or are not reputable; or
 - (C) has or have an interest or duty which conflicts or may conflict in a material way with the interests of Council;
 - (ii) the proposed Change in Control is against the public interest; or
 - (iii) having regard to the evaluation criteria applied by Council in selecting the proponents and the Developer for the Works or the Activities or the Project Objectives, the proposed Change in Control would impact adversely on the ability or capacity of the Developer to perform its obligations under any of the Project Documents or to pay its Taxes when due;
 - (b) the Developer Change in Control Notice does not comply with clause 50.5.2 or 50.5.5 or the Developer does not provide the further information reasonably requested by Council in accordance with clause 50.5.3; or
 - (c) a Developer Default has occurred and has not been remedied.
- 50.5.5 If shares or other equity interests (including shares or units) in an entity with ultimate control of the Developer are quoted on a prescribed financial market and a Change in Control occurs due to the transfer of such shares or interests on that market:
- (a) promptly after the Developer becomes aware of the Change in Control, the Developer must notify Council, providing full details of the Change in Control including the acquisition of voting power, the change in control or any other event which has constituted the Change in Control; and

- (b) the provisions of clauses 50.5.1, 50.5.2, 50.5.3 and 50.5.4 will not apply.

51. Taxes and expenses

51.1 Costs of document preparation

Each of the Developer and Council agrees to bear its own costs in connection with the negotiation, preparation and execution of the Project Documents entered into on or before the date of this Deed.

The Developer must pay Council's reasonable costs in connection with giving and considering consents, waivers, variations, discharges and releases but only to the extent they arise from a breach by the Developer of its obligations under this Deed or as otherwise expressly provided for in this Deed.

52. Intellectual Property

52.1 Ownership of intellectual property

- 52.1.1 The Developer warrants that the Developer has or will have a transferable right to use all design, materials, documents and methods of working produced by or on behalf of the Developer for the purpose of the Council Activities, the Council Works, the Developer Works Stage 1 and the Developer Activities Stage 1, including the right to use such items for the purpose of designing, constructing, operating, maintaining, repairing, rectifying, adding to and altering the Council Works and the Developer Works Stage 1. The Developer warrants that any design, materials, documents and methods of working produced by or on behalf of the Developer for the purpose of the Council Activities, the Council Works, the Developer Activities Stage 1 or the Developer Works Stage 1 will not infringe any Intellectual Property Rights.
- 52.1.2 Council warrants that any design, materials or documents provided to the Developer or a Contractor by or on behalf of Council or any Council's Associate will not infringe any Intellectual Property Rights.

52.2 Vesting of intellectual property

- 52.2.1 This clause 52.2 applies to the extent that Council has not obtained equivalent rights directly with the person or entity that created the property the subject of this clause 52.2.
- 52.2.2 All Intellectual Property Rights in the Council Works Design Documents and the Final Council Works Design Documents hereby vest in Council, and Council grants to the Developer an irrevocable licence to use those Council Works Design Documents and the Final Council Works Design Documents for the Council Activities. The Developer must do everything necessary to perfect such vesting. Such vesting will not extend to components of the design which have been developed by the Developer for general use in the Developer's work and have not been specially developed for incorporation in the Council Works Design Documents or the Final Council Works Design Documents (**Developer's Material**).
- 52.2.3 The Developer grants to Council an irrevocable, royalty free licence (with a right to sub-licence) to use the Developer's Material for the Works and the Activities and to use all Intellectual Property Rights in the Developer Works Stage 1 Design Documents and the Final Developer Works Stage 1 Design Documents. Such

licence includes for the purposes of any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the Council Works (or part thereof) (whether by the Developer, a Contractor, Council or otherwise) or any works, building or structure of which the Council Works form part, and the copying of the Developer's Material, the Developer Works Stage 1 Design Documents and the Final Developer Works Stage 1 Design Documents for such purposes. The Developer must do everything necessary to perfect such licence.

52.2.4 This clause 52.2 survives the termination of this Deed.

52.3 Moral rights warranty and indemnity

The Developer:

- 52.3.1 must ensure that it does not, and its Contractors do not, infringe any Moral Right in any Artistic Work in carrying out the Council Activities or the Developer Activities Stage 1;
- 52.3.2 must ensure that it obtains irrevocable consents, including for the benefit of Council and Council's licensees and successors in title, from all authors of any Artistic Work to be incorporated into, or used during the design and construction of, the Council Works and the Developer Works Stage 1, including any necessary consents from Contractors and their employees, to:
 - (a) any non-attribution or false attribution of the Artistic Work; and
 - (b) any repairs to, maintenance and servicing of, additions, refurbishment or alterations to, changes, relocation, destruction or replacement of the whole or any part of the Artistic Work or the Council Works; and
- 52.3.3 indemnifies Council against any Loss, Liability or Claim suffered or incurred by Council arising out of or in connection with any breach by the Developer of its obligations under this clause 52.3.

This clause 52.3 survives the termination of this Deed.

53. Information and Confidentiality

53.1 Confidentiality

Both the Developer and Council agree not to disclose information provided by any other party that is not publicly available (including the existence of or contents of any Project Document) except:

- 53.1.1 to any person in connection with an exercise of Powers or a permitted dealing with rights or obligations under a Project Document provided the recipient first agrees to be bound by the confidentiality requirements of this clause as if it were a party to this deed;
- 53.1.2 to officers, employees, legal and other advisers, consultants and auditors of the party who are under a duty of confidence;
- 53.1.3 to any potential Project Lender or any person who is to become such a person on substitution, novation, refinancing or otherwise provided the recipient first agrees to be bound by the confidentiality requirements of this clause as if it were a party to this deed;

- 53.1.4 to any party to this Deed or any Related Entity of any party to this Deed, provided the recipient first agrees to be bound by the confidentiality requirements of this clause as if it were a party to this deed;
- 53.1.5 that Council may disclose information to the State, the Parliament, Cabinet or any Minister of the State or Parliamentary or Cabinet committee or sub-committee of Council or the Commonwealth;
- 53.1.6 with the consent of the party who provided the information (such consent not to be unreasonably withheld); or
- 53.1.7 as required by any Law or stock exchange.

If required in writing by Council, the Developer must enter into, and must procure any subcontractor (including any Contractor) nominated by Council to enter into, a separate agreement or undertaking (with Council or any third party) not to disclose to anyone else any information identified in the paragraph above even after the expiry of the Defects Liability Period or the earlier termination of this Deed, on such terms as Council may require.

53.2 Openness in Government Contract

- 53.2.1 Despite any copyright or other Intellectual Property Rights which may subsist in the Developer, the Developer consents to Council publishing (on the internet or otherwise) the name of the Developer and copies or details of the conditions of this Deed generally.
- 53.2.2 Despite clause 53.1, the Developer acknowledges and agrees that Council may disclose this Deed (and information concerning the terms of this Deed) under or in accordance with any Law, including the *Government Information (Public Access) Act 2009* (NSW) and the *Freedom of Information Act 1982* (Cth).
- 53.2.3 Where Council has received a request for access to a document created by, or in the possession of, the Developer or any subcontractor (including each Contractor) that relates to this Deed, Council may at any time by written notice require the Developer to provide, or to procure the relevant subcontractor (including each Contractor) to procure, the document to Council and the Developer will, at no cost to Council, promptly comply with the notice.

53.3 Publicity

The Developer must not make press or other announcements or releases relating to this Deed and the transactions the subject of this Deed, or exploit the fact that it has entered into this Deed, without the approval of the Council's Representative to the form and manner of the announcement or release. The Developer must provide Council with at least 20 Business Days' prior written notice in respect of any proposed information, publication, announcement, document, release or article for publication.

53.4 Retention and auditing of documents

Despite any other clause of this Deed the Developer must:

- 53.4.1 retain all documents and information relating to this Deed and the Works for a period of 5 years (or such longer period as required by Law) after completion of all of its obligations under this Deed, unless otherwise agreed with Council; and
- 53.4.2 when requested by Council to do so for the purposes of a request for information or the auditing of documents or information relating to this Deed, supply, permit the auditing of, or otherwise make available (at the Developer's cost), any document or

other information relating to this Deed or the performance of the Activities under this Deed.

53.5 Probity checks

- 53.5.1 The Developer acknowledges and agrees that Council may require probity, security and accreditation checks to be carried out on the Developer or its Associates on an ongoing basis.
- 53.5.2 The Developer agrees to provide promptly to Council all information and consents of its Associates requested by Council in writing and which Council considers necessary to facilitate the carrying out of any probity, security and accreditation checks.
- 53.5.3 If any probity, security accreditation check is not satisfactory to Council, it will advise the Developer by notice and may in that notice direct the Developer to take action to remove from the Activities that person or entity the subject of the notice.
- 53.5.4 If Council issues a notice under clause 53.5.3 which requires the Developer to take action to remove a Developer's Associate from the Activities, the Developer must promptly remove that person.
- 53.5.5 not used.
- 53.5.6 If as a result of any action taken under clause 53.5, a Change in Control occurs, then the Developer must also follow the provisions of clause 50.5 in respect of that Change in Control.
- 53.5.7 The Developer agrees that any decision of Council regarding an unsatisfactory probity, security or accreditation check is a matter for Council in its absolute discretion.

53.6 Community consultation and media

Within 20 Business Days after the date of this Deed (or such longer period as the parties agree), the Developer and Council must co-operate and act reasonably with a view to agreeing a community consultation strategy to apply to the Activities in connection with:

- 53.6.1 meeting with local residents, businesses and other stakeholders;
- 53.6.2 distributing information and conducting surveys, as necessary from time to time;
- 53.6.3 establishing procedures for dealing with complaints or concerns raised by the local community;
- 53.6.4 having discussions with the local community;
- 53.6.5 the handling of media and the issuing of press releases; and
- 53.6.6 such other matters as the parties agree,

and both parties agree to comply with the arrangements set out in such strategy.

53.7 Adverse effects

- 53.7.1 The Developer must use its reasonable endeavours to ensure that the Activities required or contemplated by this Deed are carried out in such a manner as to avoid or minimise any adverse effects on the local community.

53.8 Developer's privacy obligations

The Developer must in respect of Personal Information held in connection with this Deed, whether received from Council or otherwise:

53.8.1 comply with the Privacy Laws;

53.8.2 immediately notify Council where it becomes aware of:

(a) a breach of clause 53.8.1 by the Developer; or

(b) any investigation by the Office of the Australian Information Commissioner; and

53.8.3 indemnify Council against any Loss, Liability or Claim suffered or incurred by Council arising out of or in connection with a breach of this clause 53 by the Developer.

If, prior to the expiry of the last Defects Liability Period, Council gives notice to the Developer that it proposes to audit, either directly or through its auditors, the Developer's information handling practices, the Developer must provide all reasonable assistance to the party conducting such an audit.

This clause 53.8 will continue to have effect after the termination or expiration of this Deed.

54. Dispute resolution

54.1 Operation

The operation of clauses 54.2 to 54.13 is subject to clause 59.

54.2 Notice of Dispute

If a Dispute between the parties arises, including a dispute concerning:

54.2.1 a Council Direction; or

54.2.2 a Claim,

then either party must, by hand or by registered post, give the other a written notice of Dispute adequately identifying and providing details of the Dispute.

Notwithstanding the existence of a Dispute, the parties must, subject to clauses 45 and 54.14, continue to perform this Deed.

54.3 Conference

Within 10 Business Days after receiving a notice of Dispute under clause 54.2, the Dispute is to be referred to the Dispute Representatives (or such other representative of each party who has authority to agree to a resolution or to agree upon a procedure to resolve the Dispute) who must meet and undertake genuine and good faith negotiations with a view to resolving the Dispute.

All aspects of every such conference except the fact of occurrence will be privileged.

54.4 Expert Determination

The Dispute must, if it is not resolved within 10 Business Days (or such longer period as may be agreed in writing by the parties prior to the expiration of that 10 Business Day period) following referral of the Dispute to negotiation in accordance with clause 54.3 (whether or not the parties conferred in accordance with clause 54.3) be submitted to expert determination.

54.5 The expert

The expert determination under clause 54.4 is to be conducted by:

54.5.1 the independent industry expert selected by the Developer from the list in Item 25 and notified in writing to Council; or

54.5.2 where:

- (a) no such person is specified; or
- (b) the independent industry expert specified in Item 25 or an independent industry expert otherwise appointed under this clause 54.5:
 - (i) is unavailable;
 - (ii) declines to act;
 - (iii) does not respond within 10 Business Days to a request by one or both parties for advice as to whether he or she is able to conduct the determination; or
 - (iv) does not make a determination within the time required by clause 54.10,

an independent industry expert appointed by the person specified in Item 26.

54.6 Not arbitration

An expert determination conducted under this clause 54 is not arbitration and the expert is not an arbitrator. The expert may reach a decision from his or her own knowledge and expertise.

54.7 Procedure for determination

The expert will:

- 54.7.1 act as an expert and not as an arbitrator;
- 54.7.2 proceed in any manner he or she thinks fit but will observe the rules of natural justice;
- 54.7.3 conduct any investigation which he or she considers necessary to resolve the Dispute;
- 54.7.4 examine such documents, and interview such persons, as he or she may require;
- 54.7.5 notwithstanding anything else, to the extent permissible by Law, have no power to apply or have regard to the provisions of Part 4 of the *Civil Liability Act 2002* (NSW); and

54.7.6 make such directions for the conduct of the determination as he or she considers necessary.

54.8 Disclosure of interest

The expert must:

54.8.1 disclose to the parties any interest he or she has in the outcome of the determination; and

54.8.2 not communicate with one party to the determination without the knowledge of the other.

54.9 Costs

Each party will:

54.9.1 bear its own costs in respect of any expert determination; and

54.9.2 unless determined otherwise by the expert, pay one-half of the expert's costs.

54.10 Conclusion of expert determination

Unless otherwise agreed between the parties, the expert must notify the parties of his or her decision upon an expert determination conducted under this clause 54 within 20 Business Days from the acceptance by the expert of his or her appointment.

54.11 Liability of expert

The expert will not be liable to the parties arising out of, or in connection with, the expert determination process, except in the case of fraud.

The parties must enter into an agreement with the appointed expert on the terms prescribed in Item 27 or such other terms as the parties and the expert may agree.

54.12 Determination of expert

The determination of the expert:

54.12.1 must be in writing;

54.12.2 will be:

(a) substituted for the relevant Direction of Council; and

(b) final and binding,

unless:

(c) there is a manifest error of law;

(d) the Expert's decision requires a party to pay in excess of \$250,000; or

(e) the Claim the subject of expert determination is for an amount in excess of \$250,000 or is a non-monetary Claim (including a Claim for an extension of time),

and a party gives notice of appeal to the other party within 15 Business Days of the determination; and

54.12.3 is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following clauses.

54.13 Litigation

If:

54.13.1 the Dispute is not in relation to a Direction of Council under one of the clauses referred to in Item 24 and the Dispute is not resolved within 10 Business Days (or such longer period as may be agreed in writing by the parties prior to the expiration of that 10 Business Day period) following referral of the Dispute to negotiation in accordance with clause 54.3 (whether or not the parties conferred in accordance with clause 54.3); or

54.13.2 the Dispute is in relation to a Direction of Council under one of the clauses referred to in Item 24, the Dispute is submitted to expert determination in accordance with clause 54.4 and a notice of appeal is given under clause 54.12,

then either party may commence proceedings in relation to the Dispute.

Subject to clause 54.14, the parties must follow the Dispute resolution procedures set out in this clause 54 before either commences litigation or takes similar action.

54.14 Summary relief

Nothing herein will prejudice the right of a party to institute proceedings to enforce payment due under this Deed or to seek injunctive or urgent declaratory relief.

54.15 Survive termination

This clause 54 will survive the termination of this Deed.

55. Notices

55.1 Form

Unless expressly stated otherwise in this Deed, all notices, certificates, consents, approvals, waivers and other communications (in this clause, each a **Notice** or, collectively, **Notices**) in connection with this Deed must be in writing, signed by:

55.1.1 in the case of the Developer, the Developer's Representative or any director of the Developer; and

55.1.2 in the case of Council, the Council's Representative,

and marked for attention as set out in clause 55.2.1 below or, if the recipient has notified otherwise, marked for attention in the way last notified.

55.2 Delivery

Notices must be:

55.2.1 left at the following address:

- (a) **Council:**
 Address: Breese Parade Forster NSW 2428
 Attention: Glenn Handford, General Manager
 Email address(es): glenn.handford@midcoast.nsw.gov.au

- (b) **Developer:**
 Address: Suite 14, 30 Tedder Avenue Main Beach Qld 4217
 Attention: Coyne Graham
 Email address: coyne@aion.com.au

- (c) **Guarantor**
 Address: Coyne Graham:
 Suite 14, 30 Tedder Avenue Main Beach Qld 4217
 Attention: Coyne Graham
 Email address: coyne@aion.com.au

55.2.2 sent by regular prepaid post, priority prepaid post, registered post, priority registered post or express post to the address set out above; or

55.2.3 subject to clause 55.7, sent by email to the email address set out above.

However, if the intended recipient has notified a changed postal address or changed email address(es), then the communication must be to that address(es).

55.3 When effective

A Notice takes effect from the time the Notice is received unless a later time is specified in the Notice.

55.4 Deemed receipt - postal

If sent by post, Notices are taken to be received:

55.4.1 if posted within Australia to an Australian address:

- (a) using regular prepaid post or registered post, 6 Business Days after posting;
- (b) using priority prepaid post or priority registered post, 4 Business Days after posting; or
- (c) using express post, 2 Business Days after posting; or

55.4.2 if posted from a place to an address in a different country, 10 Business Days after posting;

55.5 Deemed receipt - email

If sent by email, a Notice is taken to be received at the time the Notice is received by the recipients server, unless the sender receives notification that the email containing the Notice was not received by the recipient.

55.6 Deemed receipt - general

Despite clauses 55.4 and 55.5, if a Notice is received after 5pm in the place of receipt or on a non-Business Day, the Notice is taken to be received at 9am on the next Business Day.

55.7 Particular notices

Any Notice in connection with this Deed which is purported to be given or made by the Developer by way of email, shall be of no effect if such Notice:

- 55.7.1 is not sent to all email addresses specified in clause 55.2.1(a);
- 55.7.2 is given in relation to clause 36 or 44; or
- 55.7.3 concerns a claim for payment (including a payment claim under clause 36 or any communication whatsoever in respect of the SOP Act).

56. Notices of Claims

56.1 Notice and Claims

56.1.1 Subject to clause 56.1.2, if the Developer wishes to make any Claim against Council in respect of any direction of Council or the Council's Representative or any other event, circumstance, act, omission, fact, matter or thing (including a breach of this Deed by Council) under, arising out of, or in connection with, this Deed, the Activities or the Works, including anything in respect of which:

- (a) it is otherwise given an express entitlement under this Deed; or
- (b) this Deed expressly provides that:
 - (i) specified costs are to be added to the Contract Sum; or
 - (ii) the Contract Sum will be otherwise increased or adjusted,

the Developer must, as a condition precedent to the Developer's entitlement to make any such Claim, give Council:

- (c) the notice required by clause 56.2.1;
- (d) a Claim in accordance with clause 56.2.2; and
- (e) the information required by clause 56.4.

56.1.2 Clause 56.1.1 does not apply to any claim:

- (a) for a Council Initiated Variation;
- (b) for an extension of time to any Milestone Date under clause 32; or
- (c) for payment under clause 36.

56.2 Form of Notices and Claims

56.2.1 Any written notice referred to in clause 56.1.1(c) must:

- (a) be provided not later than 5 Business Days after the date the Developer becomes aware, or the date the Developer ought reasonably to have become aware (whichever is earlier), of the direction, event, circumstance, act, omission, fact, matter or thing which gave rise to the alleged entitlement; and

- (b) expressly specify:
 - (i) that the Developer proposes to make a Claim; and
 - (ii) the direction, event, circumstance, act, omission, fact, matter, or thing, which gave rise to the alleged entitlement in the Claim.

56.2.2 Any written Claim referred to in clause 56.1.1(d) must:

- (a) be provided not later than 15 Business Days after giving the written notice under clause 56.2.1; and
- (b) include:
 - (i) detailed particulars, including the date or dates, of the direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;
 - (ii) the legal basis for the Claim, whether based on a term of this Deed or otherwise, and if based on a term of this Deed, 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.

56.3 Submission of Claims

- 56.3.1 Claims submitted by the Developer under clause 56.1.1 will be considered in the first instance by Council who may accept or reject the Claim in part or in full.
- 56.3.2 If within 28 days after first receipt of a written Claim Council has not made a decision on the Claim, the Claim will be deemed to have been rejected on that 28th day.

56.4 Continuing Events

If the direction, event, circumstance, act, omission, fact, matter or thing upon which a Claim is based, or their consequences are continuing, the Developer must continue to give the information required by clause 56.2.2 every 28 days after the written Claim under clause 56.1.1 was submitted, until after the direction, event, circumstance, act, omission, fact, matter or thing or the consequences thereof have ceased.

56.5 Release

If the Developer fails to satisfy the condition precedent referred to in clause 56.1.1:

56.5.1 Council will not be liable upon any Claim by the Developer; and

56.5.2 the Developer releases Council from any Claim,

arising out of, or in connection with, the relevant direction of Council or the Council's Representative or other event, circumstance, act, omission, fact, matter or thing (including a breach of this Deed by Council) to which clause 56.1.1 applies.

The Developer acknowledges and agrees that, where the Developer breaches or otherwise fails to strictly comply with the requirements of a provision requiring the Developer to give

Council a notice (including in a particular form or within a particular time) or otherwise fails to satisfy any condition precedent to an entitlement to make a Claim (including by failing to strictly comply with the notice requirements of clauses 32.1, 32.3, 35.10 or 56.1.1):

- 56.5.3 the loss or damage suffered or incurred, or which may be suffered or incurred, by Council, and the damage to the interests of Council, arising out of or in connection with that breach or failure are insusceptible of evaluation and assessment in money terms; and
- 56.5.4 damages will not be an adequate remedy for Council arising out of, or in any way in connection with, that breach or failure.

56.6 Other Provisions Unaffected

Nothing in clauses 56.1 to 56.5 will limit the operation or effect of any other provision of this Deed that requires the Developer to give notice to Council or the Independent Certifier in order to preserve an entitlement to make a Claim against Council.

57. Proportionate Liability

57.1 Exclusion

- 57.1.1 It is agreed to the extent permitted by Law the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities under or in connection with this Deed, the Activities or the Works, whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort (including negligence) or otherwise.
- 57.1.2 Without limiting the generality of clause 57.1.1 it is further agreed that the rights and obligations and liabilities of the Developer (including those relating to proportionate liability) are as specified in this Deed and not otherwise whether such right, obligations and liabilities are sought to be enforced by a claim in contract, tort (including negligence) or otherwise.

57.2 Subcontracts

The Developer must ensure that:

- 57.2.1 in each subcontract (including each contract with a Contractor) into which it enters for the carrying out of the Activities includes provisions that, to the extent permitted by Law effectively exclude the operation of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all rights, obligations or liabilities are sought to be enforced as a breach of contract or in tort (including negligence) or otherwise; and
- 57.2.2 each subcontractor (including each Contractor) will include in any further contract that it enters into with others for the carrying out of the Activities, provisions that, to the extent permitted by Law, each further contract will include provisions that effectively exclude the operation of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all rights, obligations or liabilities under such further contract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract, tort or otherwise.

58. Commonwealth Funding Agreement

58.1 General Provisions

The Developer:

- 58.1.1 acknowledges that Council has entered into, or will enter into, the Commonwealth Funding Agreement;
- 58.1.2 warrants that as at the date of this Deed it had a chance to review, and that it is familiar with, the terms of the Commonwealth Funding Agreement (to the extent that such Commonwealth Funding Agreement have been provided to the Developer);
- 58.1.3 will, to the extent the conditions and requirements of the Commonwealth Funding Agreement are relevant to the Activities, comply with, satisfy, carry out and fulfil the conditions and requirements of the Commonwealth Funding Agreement, including those conditions and requirements that Council is required, under the terms of the Commonwealth Funding Agreement to comply with, satisfy, carry out and fulfil except nothing in this clause 58 requires the Developer to carry out and complete the Milestones prior to the Milestone Dates;
- 58.1.4 will, in carrying out the Activities:
 - (a) ensure that no act or omission of the Developer or its employees, agents or subcontractors (including each Contractor) constitutes, causes or contributes to any breach by Council of its obligations to the relevant parties to the Commonwealth Funding Agreement (other than Council); and
 - (b) otherwise act consistently with the terms of the Commonwealth Funding Agreement; and
- 58.1.5 comply with any reasonable requirements of the relevant parties to the Commonwealth Funding Agreement (other than Council) (as notified to the Developer by Council).

58.2 Interim Milestones

Without limiting clause 32.5, Council may in its absolute discretion at any time and from time to time before the expiry of the Defects Liability Period by notice in writing to the Developer extend the time for satisfying any Milestone by a Milestone Date for any reason whatsoever. Council will not be obliged to exercise this discretion reasonably or for the benefit of the Developer.

58.3 Reports

The Developer acknowledges and agrees that Council is required to prepare and provide various reports to the relevant parties to the Commonwealth Funding Agreement (other than Council). The Developer will provide all required assistance, documents and information to Council in the preparation of those reports.

58.4 Records and Audits by Commonwealth Funding Agreement Parties

- 58.4.1 The Developer acknowledges and agrees that under the Commonwealth Funding Agreement, Council is required to retain accounts and records of the conduct of the project and activity, including all progress against the milestones and the receipt and use of funding for a period of no less than seven years after the completion date under the Commonwealth Funding Agreement. The Developer will similarly

retain accounts and records of the conduct of the Activities, including all progress against each of the "milestones" referred to in clause 58.2 for a period of no less than seven years after the completion date under the Commonwealth Funding Agreement, as notified by Council to the Developer.

- 58.4.2 The Developer acknowledges and agrees that under the Commonwealth Funding Agreement, Council may have agreed to provide access to premises where obligations under the Commonwealth Funding Agreement are being carried out to the parties to the Commonwealth Funding Agreement (other than Council) and their nominees and to permit those persons to inspect and take copies of any documents relevant to the Commonwealth Funding Agreement. Without limiting clauses 15 or 53.2.3, the Developer similarly agrees to provide access to, and procure the provision of access to, premises where the Activities are being carried out and access to any document relevant to the Activities (including to take copies), to such persons for such purposes.

58.5 Conflict of interest

- 58.5.1 In this clause 58.5, "conflict" means any matter, circumstance, interest or activity involving or affecting the Developer, any subcontractor (including each Contractor) or any of their respective employees, officers or agents which may or may appear to impair the ability of the Developer to perform the Activities diligently and independently.
- 58.5.2 The Developer warrants that, to the best of its knowledge after making diligent enquiry, at the date of this Deed, no conflict exists or is likely to arise in the performance of the Activities. If a conflict arises, the Developer will:
- (a) notify Council immediately;
 - (b) make full disclosure of all relevant information relating to the conflict; and
 - (c) take any steps Council may require to resolve or otherwise deal with the conflict.

59. Third Party Agreements

59.1 General Provisions

- 59.1.1 The Developer:
- (a) acknowledges and agrees that it must enter into the Third Party Agreements other than any Third Party Agreements which are required by the relevant Authority to be entered into by Council;
 - (b) must comply with, satisfy, carry out and fulfil the conditions and requirements of all Third Party Agreements, including those conditions and requirements that Council is required, under the terms of any Third Party Agreements, to comply with, satisfy, carry out and fulfil;
 - (c) in respect of any Third Party Agreements which are required by the relevant Authority to be entered into by Council:
 - (i) must comply with any reasonable directions of Council (who will have regard to any reasonable submissions made by the Developer to Council) in relation to compliance with the relevant conditions and requirements of the Third Party Agreement;

- (ii) must, where the Third Party Agreement provides for Council to provide a document, notice or information to the Third Party, provide such document, notice or information to Council (and not the Third Party) within a reasonable time sufficient for Council to review and comment on the document, notice or information and provide it to the Third Party within the time period required by the Third Party Agreement;
 - (iii) agrees that whenever, pursuant to the terms of the Third Party Agreement, Council makes an acknowledgement or gives a release or warranty, indemnity or covenant to the relevant Third Party under any clause of that Third Party Agreement, subject to the other terms of this Deed, the Developer is deemed to make the same acknowledgement or give the same release or warranty, indemnity or covenant to Council on the same terms and conditions as the acknowledgement, release or warranty, indemnity or covenant made or given by Council under the Third Party Agreement in the same way as if the relevant terms of the acknowledgement, release or warranty, indemnity or covenant were set out in full in this Deed; and
 - (iv) acknowledges that to the extent that the Third Party Agreement contains a provision pursuant to which the Third Party is stated to make no representation as to a state of affairs, the Developer agrees that Council similarly makes no representation to the Developer in respect of that state of affairs in the same way as if the relevant terms of the Third Party Agreement were set out fully in this Deed; and
- (d) must, in carrying out the Activities:
- (i) ensure that no act or omission of the Developer or its Associates constitutes, causes or contributes to any breach by:
 - (A) Council of its obligations to a Third Party under any Third Party Agreement which is required by the relevant Authority to be entered into by Council; and
 - (B) the Developer of its obligations to a Third Party under a Third Party Agreement; and
 - (ii) otherwise act consistently with the terms of each Third Party Agreement.

59.1.2 The parties acknowledge and agree that the Developer has included in the Contract Sum all of its costs (including the cost of all administration, physical works and an allowance for any delay or disruption) in complying with its obligations under clause 59.1.1.

59.2 Third Party Agreement Disputes

59.2.1 This clause 59.2 applies to any Third Party Agreement which is required by the relevant Authority to be entered into by Council.

59.2.2 Under any Third Party Agreement which is required by the relevant Authority to be entered into by Council, disputes between Council and the relevant Third Party are required to be determined in accordance with the relevant Third Party Agreement Dispute Procedures (if any).

59.2.3 The Developer agrees that certain Disputes will be determined under the relevant Third Party Agreement Dispute Procedures (if any) in accordance with clause 59.3 in lieu of the procedures set out in clauses 54.2 to 54.13.

59.2.4 If, in relation to any Third Party Agreement which is required by the relevant Authority to be entered into by Council:

- (a) the Developer gives a notice under clause 54.2; and
- (b) the Dispute relates, in whole or in part, to either:
 - (i) an alleged breach of this Deed by Council, which assuming the breach has actually occurred, has been caused, or contributed to, by an act or omission (including breach of the Third Party Agreement) of a Third Party; or
 - (ii) a Direction given by or on behalf of Council's Representative or Council relating to a particular subject matter, in circumstances where a Direction has been given by or on behalf of a Third Party to Council relating, in whole or in part, to that subject matter,

Council may, within 14 days of receipt of the notice under clause 54.2, give a notice to the Developer stating that clause 59.3 applies in relation to the Dispute.

59.3 Procedure for Third Party Agreement Disputes

If a notice is given under clause 59.2 stating that this clause 59.3 applies:

59.3.1 subject to the Developer complying with its obligations under clause 59.3.2, Council will:

- (a) take such steps as are reasonably necessary to progress the Developer's Dispute under the relevant Third Party Agreement;
- (b) regularly consult with the Developer to ascertain its views as to the progression of the Developer's Dispute; and
- (c) use its reasonable endeavours to ensure that the Developer's views, where relevant, are put to any third party (such as a mediator or expert) appointed under the relevant Third Party Agreement Dispute Procedures or any court which may hear any matter relating to the Developer's Dispute as between Council and the relevant Third Party; and

59.3.2 the Developer will:

- (a) comply with Council's requirements relating to the conduct of the Third Party Agreement Dispute Procedures or any relevant court proceedings insofar as they relate to the Developer's Dispute;
- (b) indemnify Council against all claims against, or costs, losses, expenses or damages suffered or incurred by Council in complying with clause 59.3.1 (including in relation to any appeal referred to in clause 59.4); and
- (c) from time to time as required by Council, lodge with Council reasonable cash or other security against the claims, costs, losses, expenses or damages referred to in clause 59.3.2(b).

59.4 Further Procedures for Third Party Agreement Disputes

Where clause 59.3 applies, the following provisions also apply:

- 59.4.1 Council will not without the prior consent of the Developer (such consent not to be unreasonably withheld) agree to a settlement with the Third Party or any other relevant person of the Developer's Dispute; and
- 59.4.2 where a determination is made in relation to the Developer's Dispute as between Council and the Third Party:
- (a) if the determination is not final and binding upon Council:
 - (i) Council is not obliged to appeal against the determination unless the Developer gives a notice to Council requiring such an appeal within such time as to reasonably enable Council to comply with any relevant requirements relating to the time for commencement of such appeals and which contains any particulars required to reasonably enable Council to progress the appeal in accordance with any relevant requirements; and
 - (ii) the parties will be bound by and are to give effect to the determination including any findings as to law or fact unless and until it is reversed, overturned or otherwise changed on appeal as between Council and the Third Party; and
 - (b) if the determination is final and binding upon Council, the parties:
 - (i) will be bound by and are to give effect to the determination including any findings as to law or fact; and
 - (ii) release each other from any Claims which they may have arising out of or in connection with the subject matter of the Developer's Dispute insofar as the determination relates to the Developer's Dispute.

60. General

60.1 Entire agreement

This deed and the Project Documents constitute the entire agreement between the parties relating in any way to its subject matter.

60.2 No partnership

Other than for the grant of any power of attorney under this Deed, nothing contained or implied in this Deed constitutes a party the partner, agent, or legal representative of another party for any purpose or creates any partnership, agency or trust, and no party has any authority to bind another party in any way.

60.3 Discretion in exercising rights

Unless this Deed expressly provides otherwise, any consent or approval referred to in, or required under or in connection with, this Deed from Council (other than in its capacity as a Consent Authority) may be:

- 60.3.1 given or withheld; or

60.3.2 may be given subject to any conditions as it thinks fit.

60.4 Partial exercising of Powers

If a party does not exercise a Power fully or at a given time, the party may still exercise it later.

60.5 Remedies cumulative

The Powers provided in this Deed are in addition to other rights and remedies given by Law independently of this Deed.

60.6 Rights and obligations are unaffected

Rights given to the parties under this Deed and the parties' liabilities under it are not affected by anything which might otherwise affect them by Law.

60.7 Variation and waiver

A provision of this Deed or a right created under it, may not be waived or varied except in writing, signed by the party or parties to be bound.

60.8 No merger

The warranties, undertakings and indemnities in this Deed do not merge on the completion of any transaction contemplated by this Deed. They will survive the execution and delivery of any assignment or other document entered into for the purposes of implementing a transaction.

60.9 Indemnities

The indemnities in this Deed are continuing obligations, independent from the other obligations of the parties under this Deed and continue after this Deed ends. It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity under this Deed.

60.10 Further steps

Each party agrees, at its own expense, to do anything the other party asks (such as obtaining consents, signing and producing documents and getting documents completed and signed):

60.10.1 to bind the party and any other person intended to be bound under this Deed;

60.10.2 to give full effect to the provisions of this Deed; and

60.10.3 to show whether the party is complying with this Deed.

60.11 Prompt performance

If this Deed specifies when the party agrees to perform an obligation, the party agrees to perform it by the time specified. Each party agrees to perform all other obligations promptly.

60.12 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this Deed or any part of it.

60.13 Inconsistent law

To the extent permitted by Law, this Deed prevails to the extent it is inconsistent with any Law.

60.14 Supervening legislation

Any present or future legislation which operates to vary the obligations of a party in connection with this Deed with the result that another party's Powers are adversely affected (including, by way of delay or postponement) is excluded except to the extent that its exclusion is prohibited or rendered ineffective by Law.

60.15 Counterparts

This deed may consist of a number of copies, each signed by one or more parties to the agreement. If so, the signed copies are treated as making up the one document.

60.16 Council may take action

60.16.1 Council:

- (a) may do anything which should have been done by the Developer under this Deed but which has not been done; and
- (b) may (and Council's servants, contractors and agents may) enter and remain on the Land for so long as it is necessary for that purpose.

60.16.2 The Developer must pay to Council on demand a sum equal to all Enforcement Costs and liabilities incurred or suffered by Council in taking such action.

60.16.3 Council's rights and remedies under this clause 60.16 are in addition to any other rights and remedies of Council under this Deed or otherwise at Law.

60.17 PPS Law

60.17.1 The Developer acknowledges that if this Deed and the transactions contemplated by it, operate as, or give rise to, a security interest for the purposes of the PPS Law, the Developer must do anything (including amending any document, obtaining consents, getting documents completed and signed and supplying information) that Council considers necessary under or as a result of the PPS Law for the purposes of:

- (a) ensuring that the security interest is enforceable, perfected or otherwise effective and has the highest priority possible under the PPS Law;
- (b) enabling Council to apply for any registration, or give any notification, in connection with the security interest, including the registration of a financing statement or financing change statement; or
- (c) enabling Council to exercise rights in connection with the security interest and this Deed.

60.17.2 If Chapter 4 of the PPS Act applies to the enforcement of the security interest, the Developer agrees that sections 95, 96, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143 of the PPS Act will not apply to the enforcement of the security interest.

60.17.3 The Developer:

- (a) acknowledges that the security interests created under or pursuant to this Deed relate to collateral and all proceeds in respect of that collateral (until Council is paid in full for the collateral);
- (b) acknowledges that to the maximum extent permitted by law, it waives any right to receive a verification statement under the PPS Law in respect of the security interest; and
- (c) undertakes it will not register a financing change statement without the prior written consent of Council.

61. Governing law

61.1 Governing law

This deed is governed by the law in force in the New South Wales. Each party submits to the non-exclusive jurisdiction of the courts of that place.

61.2 Jurisdiction

Each party submits to the non-exclusive jurisdiction of the courts of the New South Wales and courts of appeal from them. Each party waives any right it has to object to an action being brought in those courts including, without limitation, by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

Schedule 1 Details

Item 1	Contract Sum (Clause 1.1)	\$15,300,000 (excluding GST)
Item 2	Not Used	
Item 3	Not Used	
Item 4	Not Used	
Item 5	Not Used	
Item 6	Not Used	
Item 7	Early Access Works (Clause 1.1)	Any works (other than the Council Activities) procured directly by Council to enable the Council Works to be used by Council for its intended purpose including any fit-out, furnishing and equipment installation, testing and commissioning.
Item 8	Guarantors (Clause 1.1)	Coyne Anthony Graham
Item 9	Not Used	
Item 10	Not Used	
Item 11	Conditions precedent to Practical Completion (Clause 1.1)	As set out elsewhere in the Deed.
Item 12	Conditions precedent to Early Access Completion (Clause 1.1)	As set out elsewhere in the Deed.
Item 13	Not used	
Item 14	Not Used	
Item 15	Sunset Date (Clause 1.1)	31 January 2021
Item 16	Value of Bank Guarantee (Clause 3.1.1)	\$765,000
Item 17	Not used	
Item 18	Not Used	

Item 19	Not Used	
Item 20	Not Used	
Item 21	Rate of liquidated damages for delay in achieving Practical Completion (Clause 32.9.1)	\$Not applicable per day
Item 22	Percentage for overheads, preliminaries and profit (Clause 35.5.2(b))	10%
Item 23	Independent Certifier (Clause 1.1)	Joe Grehan of JBG Construction Consultants or such other person that the Developer and Council agree in writing
Item 24	Not Used	
Item 25	Industry expert who will conduct determinations (Clause 54.5)	None specified.
Item 26	Nominating authority for expert determinations (Clause 54.5)	Resolution Institute
Item 27	Terms of agreement between expert, Council and the Developer (Clause 54.11)	The form of agreement contained in Schedule 9
Item 28	Quantity surveyor who will conduct determinations (clause 9.4.2)	Independent Certifier
Item 29	Planning expert who will conduct determinations (clause 9.4.2)	As agreed by between the parties

Schedule 2 Sustainability Principles

The following sustainability principles apply to the extent that they are not inconsistent with the requirements contained in the Functional Design Brief. The Functional Design Brief takes precedence in the event of any inconsistency.

Schedule 3 Common Areas Concept Plan

Schedule 4 Bank Guarantee

Approved form of Bank Guarantee

At the request of
ACN ABN (the Developer) and in consideration of
ACN ABN (Council) accepting this undertaking
in respect of the deed for
.....
ACN ABN (the Financial Institution) unconditionally
undertakes to pay on demand any sum or sums which may from time to time be demanded by
Council to a maximum aggregate sum of
..... (\$)

The undertaking is to continue until notification has been received from Council that the sum is no longer required by Council or until this undertaking is returned to the Financial Institution or until payment to Council by the Financial Institution of the whole of the sum or such part as Council may require.

Should the Financial Institution be notified in writing, purporting to be signed by
..... for and on behalf of Council that Council desires
payment to be made of the whole or any part or parts of the sum, it is unconditionally agreed that the
Financial Institution will make the payment or payments to Council forthwith without reference to the
Developer and notwithstanding any notice given by the Developer not to pay same.

Provided always that the Financial Institution may at any time without being required to do so pay to
Council the sum of
..... (\$)
less any amount or amounts it may previously have paid under this undertaking or such lesser sum
as may be required and specified by Council and thereupon the liability of the Financial Institution
hereunder shall immediately cease.

Dated at this day of 20.....

Schedule 5 Independent Certifier Deed

Date / /

Independent Certifier Deed

Mid-Coast Council - Forster Project

and

[insert company]
and

[insert certifier's details]

Dated / /

Name	Mid-Coast Council ABN [#]
Address	[insert address]
Email	[insert]
Contact	[insert]
Short name	Council

Name	[insert company]
Address	[insert address]
Email	[insert]
Contact	[insert]
Short name	Developer

Name	[insert certifier's details]
Address	[insert address]
Email	[insert]
Contact	[insert]
Short name	Independent Certifier

- A. Council and the Developer have entered into the Development Agreement under which the Developer has agreed to undertake the Works.
- B. The Development Agreement Parties wish to appoint the Independent Certifier to perform the Obligations specified in this Deed.
- C. By entering into this Deed, the Independent Certifier confirms its acceptance of its appointment on the terms set out in this Deed and the assumption of the Obligations to the Development Agreement Parties.
- D. The Development Agreement Parties consent to the appointment of the Independent Certifier in accordance with the terms of this Deed.

This Deed Witnesses

1. Definitions and Interpretation

1.1 Definitions

In this Deed, unless the context otherwise requires, expressions defined in the Development Agreement will have the corresponding meaning in this Deed and:

Business Day means a day other than a Saturday, Sunday or public holding in Sydney, New South Wales.

Claim includes any claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding, right of action, claim for compensation and claim for abatement of rent obligation.

Contractor means the contractor or contractors engaged from time to time to carry out the Works or any part of the Works.

Corporations Law means the *Corporations Act 2001* (Cth).

Cost includes any cost, charge, expense, outgoing, payment or other expenditure of any nature (whether direct, indirect or consequential and whether accrued or paid).

Deed means this deed and the Schedules.

Development Agreement means the Development Agreement between the Development Agreement Parties dated on or about [insert].

Development Agreement Parties means Council and the Developer and "Development Agreement Party" means any one of them.

Fee means the fee set out in Schedule 2.

GST means the goods and services tax as imposed by the GST Law including, where relevant, any related interest, penalties, fines or other charge.

GST Amount means, in relation to a Payment, an amount arrived at by multiplying the Payment (or the relevant part of a Payment if only part of a Payment is the consideration for a Taxable Supply) by the appropriate rate of GST prescribed under the GST Law from time to time (being 10% when the GST Law commenced) or any lower rate notified from time to time by the person making the relevant Supply.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth), or, if that Act is not valid or does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.

Insolvency Event means:

- (a) a receiver, manager, receiver and manager, trustee, administrator, controller or similar office is appointed in respect of the Independent Certifier or substantially all of the assets of the Independent Certifier;
- (b) a liquidator or provisional liquidator is appointed in respect of any corporate Independent Certifier;
- (c) an order is made, or a resolution is passed, for the purpose of:

- (i) appointing a person referred to in paragraphs (a) or (b);
- (ii) winding up a corporate Independent Certifier; or
- (iii) proposing or implementing a scheme of arrangement in respect of the Independent Certifier;
- (d) a moratorium of any debts of the Independent Certifier or an official assignment or a composition or an arrangement (formal or informal) with the Independent Certifier's creditors or any similar proceeding or arrangement by which the assets of the Independent Certifier are subjected conditionally or unconditionally to the control of the Independent Certifier's creditors is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 10 working days;
- (e) the Independent Certifier becomes, or admits in writing that it is, or is declared to be, is deemed under any applicable law to be, insolvent or unable to pay its debts; or
- (f) any writ of execution, garnishee order, mareva injunction or similar order, attachment, distress or other process is made, levied or issued (and not withdrawn in 10 Business Days) against or in relation to a substantial part of the assets of the Independent Certifier.

Key Person means the person named as the key person in Schedule 2, or any other person subsequently appointed as the Key Person pursuant to clause 6.2.

Land has the meaning given to that term in the Development Agreement.

Obligations means the obligations of the Independent Certifier set out in Schedule 1.

Payment means:

- (a) the amount of any monetary consideration (other than a GST Amount payable under clause 12); and
- (b) the GST Exclusive Market Value of any non-monetary consideration,

paid or provided by a party for any Supply made under or in connection with this Deed and includes any amount payable by way of indemnity, reimbursement, compensation or damages.

Relevant Documents means the Development Agreement and any other documents necessary for the Independent Certifier to carry out its obligations pursuant to this Deed.

Works has the meaning given to that term in the Development Agreement.

1.2 Interpretation

In this Deed, unless the context otherwise requires:

- 1.2.1 headings are for convenience only and do not affect the interpretation of this Deed;
- 1.2.2 words importing the singular include the plural and vice versa;
- 1.2.3 words importing a gender include any gender;

- 1.2.4 an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any authority;
- 1.2.5 a reference to a clause, party or Schedule is a reference to (respectively) a clause of, a party to and a Schedule to this Deed;
- 1.2.6 "including" and similar expressions are not words of limitation;
- 1.2.7 a reference to statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws varying, consolidating or replacing them, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- 1.2.8 no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Deed or any part of it;
- 1.2.9 a covenant or agreement on the part of two or more persons binds them jointly and severally;
- 1.2.10 a reference to an association or body which has ceased to exist includes the organisation established in the place of the association or body to serve substantially the same purposes;
- 1.2.11 a reference to an officer of an association or body which has ceased to exist includes the most senior officer of the organisation established in the place of the association or body to serve substantially the same purposes;
- 1.2.12 a reference to liquidation includes appointment of an administrator, compromise, arrangement, merger, amalgamation, reconstruction, winding up, dissolution, assignment for the benefit of creditors, scheme, compromise or arrangement with creditors, insolvency, bankruptcy, or similar procedure;
- 1.2.13 where in this Deed a period of time dating from a given day, act or event is specified or allowed for any purpose, the time must be reckoned exclusive of that day or of the date on which the act or event occurred but inclusive of the day on which that period expires;
- 1.2.14 any notice or other communication or moneys which is or are received on a day which is not a Business Day or after 5.00 pm on a Business Day are, for the purposes of this Deed, deemed to be received on the next occurring Business Day; and
- 1.2.15 where the day on or by which any thing is to be done is not a Business Day, such thing must be done on or by the immediately following Business Day.

1.3 Jurisdiction

This Deed will be governed by and interpreted according to the laws of the State of New South Wales and each party hereto submits irrevocably to the non-exclusive jurisdiction of the Courts of the State of New South Wales.

1.4 Act, matters or things

A reference to an act, matter or thing includes the whole or any part of that act, matter or thing and a reference to a group of acts, matters or things or persons includes each act, matter or thing or person in that group.

2. Appointment of Independent Certifier

2.1 Terms of appointment

- 2.1.1 The Development Agreement Parties hereby appoint the Independent Certifier to perform the Obligations, and the Independent Certifier agrees to perform the Obligations, on the terms of this Deed.
- 2.1.2 The Independent Certifier's appointment commences on the date of this Deed and terminates on the earlier of:
- (a) the date on which the Obligations have been completed in full;
 - (b) the date on which this Deed is terminated under the terms of this Deed.
- 2.1.3 The Independent Certifier warrants and acknowledges that:
- (a) it has received a copy of each of the Relevant Documents;
 - (b) it has read and will be deemed to have informed itself fully of the requirements of:
 - (i) the Relevant Documents, including the Development Agreement; and
 - (ii) all technical requirements, and other such documents and materials as may become relevant from time to time insofar as they relate to the Obligations so as to be in a position to perform the Obligations; and
 - (c) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Obligations and as to the correctness and sufficiency of description of the Obligations and that the fee payable to it covers the cost of its complying with the Obligations and of all matters and things necessary or ancillary to the due and proper performance of the Obligations.
- 2.1.4 Subject to clause 2.1.5, the Independent Certifier acknowledges and agrees that each of the Development Agreement Parties is entitled to correspond with the Independent Certifier in regard to the Obligations, including by providing documents and submissions in respect of any of the Obligations. The Independent Certifier must give due consideration to all correspondence sent to it by a Development Agreement Party.
- 2.1.5 Each Development Agreement Party must:
- (a) not interfere with or attempt to improperly influence the Independent Certifier in the performance of any of the Obligations; and
 - (b) provide a copy of any correspondence, information, documents or particulars to the other Development Agreement Party at the same time it sends it to the Independent Certifier.

2.2 Co-operation and Assistance

- 2.2.1 The Development Agreement Parties must each co-operate with each other and the Independent Certifier, and act in good faith and use their reasonable endeavours (without being obliged to pay money), to assist the Independent Certifier to enable it to satisfy the Obligations.

- 2.2.2 The Independent Certifier must:
- (a) fully co-operate with the Development Agreement Parties;
 - (b) co-ordinate the performance of the Obligations with the activities being performed by the Development Agreement Parties under the Development Agreement or in relation to the Works; and
 - (c) not cause any unnecessary interference, disruption or delay to the Works or any of the other transactions contemplated by the Development Agreement.
- 2.2.3 The Independent Certifier may from time to time give a notice to a Development Agreement Party requiring the provision of further information, documents or particulars. If such information, documents or particulars is necessary for the performance of the Obligations, the relevant Development Agreement Party must, subject to clause 2.1.5, provide such information, documents or particulars to the Independent Certifier at its own cost.

2.3 Provision of Information

Where a Development Agreement Party is obliged under a Relevant Document to provide information to the Independent Certifier to assist the Independent Certifier in the performance of its Obligations, the Development Agreement Party must, subject to clause 2.1.5, provide such information to the Independent Certifier within the time limits imposed by such document.

2.4 Information provided to Independent Certifier

- 2.4.1 The Independent Certifier will be entitled to rely upon information provided to it by a Development Agreement Party as being true and correct in all material respects, unless the trueness or correctness of the relevant information is a matter that the Independent Certifier must determine for the proper performance of the Obligations in accordance with this Deed, such information is manifestly incorrect, is provided on a qualified basis or the relevant Development Agreement Party subsequently informs the Independent Certifier of any change to information provided to it. Before relying on any information provided by a Development Agreement Party the Independent Certifier must give the other Development Agreement Party a reasonably opportunity to respond to, or otherwise provide submissions in respect of, that information.
- 2.4.2 The Independent Certifier must provide to a Development Agreement Party:
- (a) copies of any correspondence information or documents it receives from the other Development Agreement Party;
 - (b) copies of any correspondence, information or documents at the same time it sends it to the other Development Agreement Party; and
 - (c) a copy of any document or other information reasonably requested in writing by that Development Agreement Party provided that:
 - (i) a copy of the request has been sent to the other Development Agreement Party; and
 - (ii) the Independent Certifier complied with clause 2.4.2(a) when sending the document or information to the relevant Development Agreement Party.

2.5 Certification Final and Binding

The Development Agreement Parties acknowledge and agree that any determination or certificate given by the Independent Certifier pursuant to the Development Agreement and this Deed will, in the absence of manifest error and unless provided otherwise in the Development Agreement, be final and binding on the Development Agreement Parties under the Development Agreement and this Deed.

2.6 Access

The Independent Certifier may enter the Land, at its own risk:

- 2.6.1 before the Date of Practical Completion, at all reasonable times, after reasonable prior notice and subject to compliance by it with the reasonable requirements of the Developer and the Contractor; and
- 2.6.2 after the Date of Practical Completion, at all reasonable times, after reasonable prior notice and subject to compliance by it with the reasonable safety requirements of Council, the Developer and the Contractor,

for the purposes of enabling it to carry out its Obligations under this Deed.

3. Remuneration

3.1 Payment to the Independent Certifier

- 3.1.1 In consideration of the Independent Certifier performing the Obligations under this Deed, Council and the Developer will each be liable to, and each will, pay to the Independent Certifier 50% of the Fee.
- 3.1.2 The Independent Certifier must give the Development Agreement Parties claims for payment on account of the Fee:
 - (a) monthly on the last Business Day of the month;
 - (b) in the format the Development Agreement Parties reasonably require;
 - (c) which include:
 - (i) evidence as reasonably required by the Development Agreement Parties of the Obligations completed in accordance with this Deed and the amount of the Fee claimed; and
 - (ii) a report setting out those matters in respect of the Obligations that the Development Agreement Parties reasonably require from time to time.
- 3.1.3 The Development Agreement Parties must, within 10 Business Days, assess the payment claim and issue the Independent Certifier with a payment schedule, which sets out the Development Agreement Parties' determination as to:
 - (a) the value of Obligations completed in accordance with the Deed;
 - (b) the amount already paid to the Independent Certifier; and
 - (c) the amount then payable by the Development Agreement Parties to the Independent Certifier on account of the Fee under the Deed,

together with any reasons for any difference in the amount set out as then payable from the amount in the Independent Certifier's claim.

- 3.1.4 The Independent Certifier must, following receipt of a payment schedule under clause 3.1.3, provide each Development Agreement Party with a tax invoice for 50% of the sum assessed in the payment schedule as payable to the Independent Certifier.
- 3.1.5 The issue of a payment schedule by the Development Agreement Parties does not constitute approval of any work nor will it be taken as an admission or evidence that the part of the Obligations covered by the payment schedule has been satisfactorily carried out in accordance with the Deed.
- 3.1.6 Subject to subclause 3.1.7, the Development Agreement Parties must within the latter of:
- (a) 10 Business Days after receipt of correct tax invoices under clause 3.1.4; or
 - (b) 10 Business Days after the Independent Certifier has effected the insurance required by clause 5. and provided evidence of that insurance to the Development Agreement Parties,
- pay the Independent Certifier the amount set out as in the tax invoices provided under clause 3.1.4.
- 3.1.7 Any payment made under subclause 3.1.6 is not:
- (a) evidence of the value of work or that work has been satisfactorily carried out in accordance with the Deed;
 - (b) an admission of liability; or
 - (c) approval by the Development Agreement Parties of the Independent Certifier's performance or compliance with the Deed,
- but it is only to be taken as payment on account.

3.2 Payment by one Development Agreement Party

If a Development Agreement Party fails to pay to the Independent Certifier any amount which it is required to pay under clause 3.1 within the time required by clause 3.1, the other Development Agreement Party may, but is not obliged to:

- 3.2.1 pay to the Independent Certifier the unpaid amount; and
- 3.2.2 recover that amount as a debt due and payable from the defaulting Development Agreement Party.

Each Development Agreement Party indemnifies the other Development Agreement Party against any Claim which the other Development Agreement Party may pay, suffer or incur in respect of any failure by the relevant Development Agreement Party to pay the Independent Certifier in accordance with clause 3.1.

3.3 Variations

The Development Agreement Parties may jointly direct a variation to the Independent Certifier's Obligations. Any such direction will not vitiate the Deed, and must be in writing entitled "Variation Direction" and be signed by both Development Agreement Parties. Any such variation will be valued by agreement between the parties or failing agreement by Council using the rates set out in Schedule 2.

3.4 Specialist Advice

- 3.4.1 The Independent Certifier may, from time to time, with the Development Agreement Parties prior written approval (which approval will not be unreasonably withheld, but may be given subject to reasonable conditions) engage specialist advisory service providers to enable it to perform any Obligation that the Independent Certifier does not perform in the ordinary course of its business.
- 3.4.2 The Independent Certifier must, before engaging a specialist advisory service provider:
- (a) notify the Development Agreement Parties of the reasons for the proposed engagement; and
 - (b) provide that notice the identity and relevant specialist experience, skill and ability of the proposed provider.
- 3.4.3 The Independent Certifier remains responsible for the performance of its Obligations in accordance with this Deed despite any engagement of a specialist advisory service provider under this clause 3.4 or otherwise.

4. Performance of Independent Certifier's obligations

4.1 Standard of Performance

In performing the Obligations and its other duties under this Deed, the Independent Certifier must (and must ensure that all of its representatives and personnel engaged in the performance of the Obligations):

- 4.1.1 act in accordance with the terms of this Deed;
- 4.1.2 act as an expert and not an arbitrator;
- 4.1.3 perform all of the Obligations in a timely manner and in accordance with the required times set out in the Development Agreement, or where no time is specified, within a reasonable time;
- 4.1.4 arrive at a reasonable determination;
- 4.1.5 act in good faith, diligently, reasonably and with the degree of professional skill, care and diligence which may be reasonably expected of an expert professional provider of the Obligations experienced in the performance of the same or similar services;
- 4.1.6 act honestly, impartially and fairly;
- 4.1.7 comply with all laws; and
- 4.1.8 take into consideration the Development Agreement and all documents, information and other written and oral material provided to the Independent Certifier by any Development Agreement Party.

4.2 No Conflict of Interest

- 4.2.1 The Independent Certifier warrants and agrees that:

- (a) at the date of this Deed it has no conflict of interest with respect to the carrying out of the Obligations and it reasonably believes that no conflict of interest is likely to arise during the performance of the Obligations;
- (b) it owes duties to each of the Development Agreement Parties in connection with the performance of the Obligations;
- (c) the Development Agreement Parties are each relying on its independence;
- (d) it will not accept any role in relation to the Obligations, the Works or for any of the Development Agreement Parties in relation to any other project other than that expressly set out in this Deed except under any construction contract in relation to the Works to which the Developer is a party or with the prior written consent of the Development Agreement Parties, which consent will not be unreasonably withheld; and
- (e) it will comply with all agreed procedures that are satisfactory to the Development Agreement Parties from time to time and which are implemented to prevent a conflict or risk of conflict arising in connection with the performance of the Obligations.

4.2.2 If during the term of this Deed a conflict of interest or risk of a conflict of interest referred to in clause 4.2.1 does arise:

- (a) the Independent Certifier must immediately notify the Development Agreement Parties in writing, giving sufficient details of the nature of the perceived conflict of interest; and
- (b) the parties must negotiate in good faith to agree on how the conflict or risk of conflict can be properly managed. If the parties are not able to agree on how the conflict or risk of conflict is to be managed within 5 Business Days, the Independent Certifier must take such action as is reasonably required by the Development Agreement Parties to remove the conflict or risk of conflict.

4.3 Nature of Relationship

The Independent Certifier is an independent contractor and not an employee or agent of either Development Agreement Party.

4.4 Authority to Act

The Independent Certifier:

- 4.4.1 is an independent contractor and is not and must not purport to be, a partner, joint venturer or agent of a Development Agreement Party;
- 4.2.2 other than as expressly set out in this Deed, has no authority to give directions to a Development Agreement Party or their officers, employees, contractors, consultants or agents; and
- 4.4.3 has no authority to waive or alter any terms of the Development Agreement, or to discharge or release a party from any of its Obligations under the Development Agreement.

4.5 Quality Assurance System

The Independent Certifier must comply with any quality assurance system referred to in the Relevant Documents (but not so as to relieve it from any responsibilities it otherwise has under the Obligations).

5. Insurance and Indemnity

5.1 Own Risk

The Independent Certifier carries out its Obligations and duties under this Deed entirely at its own risk.

5.2 Effect and Maintain Insurances

From the date of this Deed, the Independent Certifier must effect and maintain, at its own Cost, the following policies of insurance in such form (including provisions for one automatic reinstatement and with cross liability provisions) as the Development Agreement Parties reasonably require:

- 5.2.1 a professional indemnity policy with an indemnity limit for any one occurrence of at least \$10,000,000;
- 5.2.2 a public liability policy in an amount of at least \$20,000,000 for any single claim;
- 5.2.3 a motor vehicle insurance policy for:
 - (a) loss or destruction of, or damage to, motor vehicles owned by or held on trust by, or in the custody or control of, the Independent Certifier, for an amount not less than the market value of the motor vehicles; and
 - (b) liability to third parties in respect of:
 - (i) death of, or injury to, any person, as required to comply with any relevant law relating to compulsory third party liability insurance arising out of the ownership, or use of, motor vehicles; and
 - (ii) loss or destruction of, or damage to, property, including property owned or held on trust by, or in the custody or control of, Council, for an amount not less than \$20,000,000, arising out of the ownership or use of motor vehicles, including CTP Gap Coverage Endorsement cover; and
- 5.2.4 such other insurance as may reasonably be required by a Development Agreement Party.

5.3 Workers Compensation

The Independent Certifier must maintain a workers' compensation policy in respect of all workers employed by it in relation to the Obligations with unlimited common law cover.

[Note to Proponent A - Where the Independent Certifier has no employees (in lieu of Workers Compensation Insurance), insurance for personal accident and illness will be required. These insurance provisions will be reviewed after the Independent Certifier is selected by Council.]

5.4 Cancellation

The insurance policies specified in clause 5.2 must provide that the policies may not be cancelled or avoided or allowed to lapse or altered without at least 30 days' prior notice to each Development Agreement Party.

5.5 Notice of Matter Affecting Insurance

The Independent Certifier must give notice to the Development Agreement Parties immediately:

- 5.5.1 if an event occurs which may affect its insurance policies, or may result in any of its insurance policies lapsing or being cancelled; or
- 5.5.2 if any insurance policy is cancelled, avoided or lapses.

5.6 Copies of Policies

The Independent Certifier must deliver to each of the Development Agreement Parties:

- 5.6.1 on the date of this Deed and within a reasonable time of request by a Development Agreement Party, copies of all insurance policies, and certificates of currency for such policies, effected under this clause 5.; and
- 5.6.2 during the term of this Deed, receipts for the payment of premiums for all such policies before the due date for payment of the premiums and within a reasonable time of request by a Development Agreement Party.

5.7 Periods of Insurance

The Independent Certifier must keep:

- 5.7.1 the professional indemnity insurance policy referred to in clause 5.2.1 current for 6 years after the date of completion of the Obligations or any earlier date on which this Deed is terminated;
- 5.7.2 the public liability and workers compensation insurance policies referred to in clauses 5.2.2 and 5.3 current until the date of completion of the Obligations or any earlier date on which this Deed is terminated; and
- 5.7.3 any other insurances referred to in clause 5.2.4 current for such period as may reasonably be required by the Development Agreement Parties.

5.8 Indemnity

The Independent Certifier must indemnify each Development Agreement Party against any Claim that the Development Agreement Party may suffer or incur arising out of or as a consequence of:

- 5.8.1 any breach by the Independent Certifier of its obligations under this Deed; or
- 5.8.2 any loss of or damage to property, or personal injury or death or loss of or damage to any other property, arising out of or in consequence of any act or omission of the Independent Certifier, its employees, agents or subcontractors,

but the Independent Certifier's liability to indemnify a Development Agreement Party will be reduced proportionally to the extent that any negligent act of that Development Agreement Party or the employees, agents or subcontractors of that Development Agreement Party contributes to the Claim.

6. Warranties of the Independent Certifier

6.1 Representations and Warranties

The Independent Certifier represents and warrants to each of the Development Agreement Parties that:

- 6.1.1 it is a corporation as that expression is defined in the Corporations Law having limited liability, incorporated (or taken to be incorporated) or registered and validly existing under the Corporations Law;
- 6.1.2 it has the corporate power to own its assets and to carry on its business as it is now being conducted;
- 6.1.3 it has full power and authority to enter into this Deed and perform the Obligations;
- 6.1.4 it has taken all necessary action to authorise the execution, delivery and performance of this Deed in accordance with its terms;
- 6.1.5 the Obligations constitute legal, valid and binding obligations and, subject to any necessary stamping and registration, are enforceable in accordance with the terms of this Deed;
- 6.1.6 the execution, delivery and performance by it of this Deed do not and will not violate, breach, or result in a contravention of:
 - (a) any law, regulation or authorisation;
 - (b) its memorandum and articles of association or other constituent documents; or
 - (c) any encumbrance or document which is binding upon it or any of its assets;
- 6.1.7 it has the appropriate qualifications to undertake all of the certification and dispute resolution requirements forming part of the Obligations; and
- 6.1.8 it and all of its representatives and personnel engaged in the performance of the Obligations will be and remain adequately and appropriately experienced and properly qualified to perform the Obligations with the required degree of professional skill, care and diligence.

The Independent Certifier acknowledges that:

- 6.1.9 the Development Agreement Parties are relying on the skill and expertise of the Independent Certifier in the performance of the Obligations; and
- 6.1.10 the Development Agreement Parties may suffer loss if the Independent Certifier does not perform the Obligations in accordance with the terms of this Deed.

6.2 Undertaking

- 6.2.1 The Independent Certifier must at all times provide sufficient competent, professional and qualified personnel to perform the Obligations.
- 6.2.2 The Independent Certifier must ensure the Key Person is provided and is available to perform the Obligations.
- 6.2.3 The Independent Certifier must not provide any person other than the Key Person for the purposes of carrying out the Obligations without the prior written consent of each of the Development Agreement Parties.
- 6.2.4 If:

- (a) a Key Person dies, becomes seriously ill, ceases to be employed by the Independent Certifier or is otherwise no longer capable of carrying out the Obligations in the reasonable opinion of the Development Agreement Parties; or
- (b) at any time during the term of this Deed the Development Agreement Parties jointly consider the conduct of the Key Person is prejudicial to either or both of their interests or the interests of the Works,

the Independent Certifier must appoint an alternative Key Person approved by in writing by both Development Agreement Parties.

7. Suspension of obligations

- 7.1.1 The Development Agreement Parties may, at any time by written notice to the Independent Certifier to that effect, elect to suspend the performance of all or part of the Obligations. If the Development Agreement Parties give a notice under this clause 7, the Independent Certifier must not carry out the Obligations specified in the notice unless and until a further notice is given by the Development Agreement parties asking it to carry out such Obligations.
- 7.1.2 The Independent Certifier must continue to carry out any Obligations not suspended under this clause 7.
- 7.1.3 The Independent Certifier is not entitled to make any Claim against either Development Agreement Party in connection with any suspension under this clause 7.

8. Termination

8.1 Right to Terminate

The Development Agreement Parties may, without giving advance notice, jointly terminate this Deed by giving notice in writing to the Independent Certifier if:

- 8.1.1 an Insolvency Event occurs in relation to the Independent Certifier, whether or not there has been a breach of this Deed by the Independent Certifier; or
- 8.1.2 the Development Agreement is terminated (other than as set out below);
- 8.1.3 the Independent Certifier commits a substantial breach of this Deed; or
- 8.1.4 the Development Agreement Parties jointly elect at any time to terminate the appointment of the Independent Certifier for any reason.

If the Development Agreement is terminated as a consequence of a default by either party, the non-defaulting party may unilaterally terminate this Deed by giving written notice to the Independent Certifier to that effect.

8.2 Rights on Termination

- 8.2.1 Upon termination of the appointment of the Independent Certifier under clause 8.1, the Independent Certifier will be entitled to payment of all amounts due to it under clause 3 up to and including the date of termination.
- 8.2.2 The termination of this Deed will not affect any rights or liabilities of the parties which may have accrued prior to the termination.

8.3 Return of Records

On termination or completion of its appointment the Independent Certifier must:

- 8.3.1 deliver to the Development Agreement Parties or, at the direction of the Development Agreement Parties, copies of all books, records, plans, specifications and other documents relating to the Obligations or the Works in the possession or control of the Independent Certifier; and
- 8.3.2 use its reasonable endeavours to ensure the representative of the Independent Certifier, its agents and sub-contractors deliver such material to the Development Agreement Parties or, at the direction of the Development Agreement Parties, to a replacement Independent Certifier. For the avoidance of doubt the Independent Certifier will not seek to exercise any lien against any of the documentation referred to in this clause 8.3.

The Independent Certifier acknowledges that the Development Agreement Parties, and any other independent certifier appointed by the Development Agreement Parties, has the right to use such books, records, plans, specifications and other documents for the purposes of the Works.

8.4 Reasonable Assistance

If this Deed is terminated, the Independent Certifier must provide all reasonable assistance requested by the Development Agreement Parties, and any subsequent independent certifier appointed by the Development Agreement Parties, to assist the Development Agreement Parties in connection with the Works and the independent certifier in performing its obligations.

8.5 No Prejudice

Termination of this Deed will not affect any rights which any party may have in respect of any breach of this Deed before termination.

9. General provisions

9.1 Notices

Any notice or other communication including any request, demand, consent, determination or approval, to or by a party under this Deed:

- 9.1.1 must be in legible writing and in English addressed as shown at the commencement of this Deed or as specified to the sender by any party by notice;
- 9.1.2 where the sender is the Independent Certifier, must be signed by the Key Person;
- 9.1.3 must be sent to the address of the relevant party set out in Schedule 2, or such other address notified by the relevant party from time to time;
- 9.1.4 a notice sent or delivered will be deemed to have been given and received:
 - (a) if delivered, on receipt;
 - (b) if posted within Australia to an Australian address:
 - (i) using regular prepaid post or registered post, 6 Business Days after posting;

- (ii) using priority prepaid post or priority registered post, 4 Business Days after posting; or
- (iii) using express post, 2 Business Days after posting;
- (c) if posted from a place to an address in a different country, 10 Business Days after posting; or
- (d) if by facsimile transmission, upon confirmation of correct transmission of the facsimile provided however:
 - (i) if the time of completion of transmission is after 5.00 pm, the document will be deemed to have been issued or given on the next Business Day; and
 - (ii) if the transmission is incomplete in any way or, though complete, illegible, and notice in writing to that effect is given by the recipient to the other party within one working day, service is deemed to have been ineffective.

9.2 Whole Agreement

This Deed and the rights and obligations of each party will be absolute and unconditional and will not be abrogated, prejudiced or affected by anything not contained in this Deed (subject to variation of this Deed agreed to by all the parties in writing) and which but for this clause 9.2 might operate to release or exonerate a party from its obligations in whole or in part.

9.3 Non-merger

None of the terms or conditions of this Deed nor any act matter or thing done under or by virtue of or in connection with this Deed will operate as a merger of any of the rights and remedies of the Parties under this Deed all of which will continue in full force and effect until the respective rights and obligations of the parties under this Deed have been fully performed and satisfied.

9.4 Moratorium

Unless application is mandatory by law, no statute, ordinance, proclamation, order, regulation or moratorium present or future will apply to this Deed so as to abrogate, extinguish, impair, diminish, fetter, delay or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to any of the parties under this Deed.

9.5 Severability of Provisions

Any provision of this Deed which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Deed or affecting the validity or enforceability of such provision in any other jurisdiction.

9.6 Counterparts

This Deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

9.7 Costs

Except as otherwise provided under a Relevant Document, each party must bear its own legal fees and expenses in connection with the negotiation, execution and enforcement of this Deed.

9.8 No fetter

Nothing in this Deed operates to restrict or otherwise affect the unfettered discretion of Council to exercise any of its functions and powers under any law.

10. Assignment

10.1 Independent Certifier

The Independent Certifier may not:

- 10.1.1 dispose of, deal with or part with possession of any interest in this Deed or rights or benefits in connection with this Deed; or
- 10.1.2 create or allow to come to existence any encumbrance which affects the interests of the Independent Certifier under this Deed.

10.2 Development Agreement Parties

- 10.2.1 Each Development Agreement Party may assign or novate its rights and obligations under this Deed to any party to which it assigns its rights under the Development Agreement in accordance with its rights under the Development Agreement. The parties must enter into any deed of assignment or novation reasonably required to document any such assignment or novation.
- 10.2.2 If the Developer obtains finance to fund the Works, the parties must enter into any document reasonably required by that financier in connection with the financier also receiving the benefit of the Obligations and certifications given under this Deed and having the right to require this Deed to be assigned or novated to it.

11. Confidentiality

- 11.1.1 The Independent Certifier agrees and undertakes to keep and maintain confidential all the terms covenants and conditions of this Deed together with any information supplied by one party to another under this Deed and not to disclose those terms, covenants and conditions or any part of them or any information or part of that information to any person, company or organisation except as provided in this clause 11.
- 11.1.2 Nothing in this clause 11 will prohibit the Independent Certifier from disclosing any term, covenant or condition of this Deed or other confidential information:
 - (a) which it believes in good faith is required to be disclosed by law or by the ASX Listing Rules; or
 - (b) which was already in the lawful possession of the recipient in written form; or
 - (c) which is generally available to the public otherwise than by disclosure in breach of the terms of this clause 11; or
 - (d) to any specialist advisory service provider approved by the Development Agreement Parties under clause 3.4, provided that the Independent Certifier ensures that such provider keeps the information confidential.

- ## 12. GST

12.2 Payment of GST

12.3 Input tax credit

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Executed by the parties as a Deed

Signature of []

Usual address

Schedule 1 Obligations

The Independent Certifier must perform all of the functions, tasks and obligations of the "Independent Certifier" as set out in the Development Agreement, including the functions, tasks and obligations contained in the following clauses of the Development Agreement:

1. clause 32.4.1 - determining claims for extensions of time;
2. clauses 33.3 and 33.4 – inspecting the Council Works and issuing a relevant notice in respect of the achievement of, or failure to achieve, a relevant Milestone;
3. clause 34.4 – where a Variation to overcome a Defect has been directed under clause 34.2.2(a), determining the value of Variation work in accordance with clause 35.5 or the cost of rectifying the Defect, valued under clause 35.5 (as relevant);
4. clause 34.5 – where defective work is accepted by Council, determining the decrease in value to Council of the Council Works and any other loss or damage suffered by Council;
5. clause 35.5.1 - certifying the value of Variations;
6. clause 35.5.2 – certifying the value of Developer Works Stage 1 Variations;
7. clause 44.3 – certification of certain amounts in the event of termination; and
8. clause 36 - assessment of Progress Payment Claims.

Schedule 2 Details

Fee (clause 1.1)

[to be inserted – fee should be itemised for each separate obligation]

Variation Rates (clause 3.3)

[to be inserted]

Key Person (clause 1.1)

[to be inserted]

Addresses for Service (clause 9.1)**Council**

[to be inserted]

Attention: *[to be inserted]*

Developer

[to be inserted]

Attention: *[to be inserted]*

Independent Certifier

[to be inserted]

Attention: *[to be inserted]*



Schedule 6 Milestones



Schedule 7 Additional Works

STATUTORY DECLARATION

1. I hold the position of _____ of the Developer.
2. I am in a position to know the facts contained herein and I am duly authorised to bind the Developer by the terms of this declaration.
3. All contractors, subcontractors, consultants and suppliers who have at any time been engaged by the Developer in connection with the work under the deed have been paid all amounts which as at the date of this declaration are due and payable to them in respect of the work under, or in connection with, the deed.
4. All workers (including employees and contractors) who have at any time been engaged by the Developer in connection with the work under the deed:
 - (a) have been paid all remuneration and benefits which as at the date of this declaration are due and payable to them in respect of their employment or under, or in connection with, the deed; and
 - (b) have otherwise received or had accrued to their account all benefits to which they are entitled as at the date of this declaration in respect of their employment or work in respect of, or in connection with, the deed pursuant to any award, enterprise agreement, Act or Regulation.
5. The Developer has been paid all that is due and payable to it under the deed as at the date of this declaration, except for any amounts claimed in any payment claim with which this declaration is provided.
6. The Developer has paid all relevant fees and maintains all insurance policies the Developer is required to maintain under the deed.
7. The Developer is solvent and able to meet its debts as and when they fall due.
8. The Developer has been informed (by statutory declaration in equivalent terms to this declaration) by each of its contractors, subcontractors, consultants and suppliers engaged by the Developer in connection with the work under the deed that all their respective employees, subcontractors, secondary subcontractors, suppliers and consultants have been paid all remuneration and other amounts or benefits due and payable to them in connection with the work under the deed.
9. Attached to and forming part of this declaration is a "Subcontractor's Statement" given by the Developer in its capacity as 'subcontractor' (as that term is defined in the *Workers Compensation Act 1987* (NSW), *Payroll Tax Act 2007* (NSW) and *Industrial Relations Act 1996* (NSW)) which is a written statement:

- And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1900* (NSW).

THIS _____ DAY OF _____ 20____
BEFORE ME

(Justice of the Peace/Solicitor)

**Cross out any text that does not apply*



Maddocks

1. *I saw the face of the person or *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.

2. *I have known the person for at least 12 months or *I have confirmed the person's identity using an identification document and the document I relied on was

[describe identification document relied on]

[Signature of person before whom the declaration is made]

Date: _____



SUBCONTRACTOR'S STATEMENT REGARDING WORKER'S COMPENSATION, PAYROLL TAX AND REMUNERATION (Note 1 – see back of form)

For the purposes of this Statement a "subcontractor" is a person (or other legal entity) that has entered into a contract with a "principal contractor" to carry out work.

This Statement must be signed by a "subcontractor" (or by a person who is authorised, or held out as being authorised, to sign the statement by the subcontractor) referred to in any of s175B *Workers Compensation Act 1987* (NSW), Schedule 2 Part 5 *Payroll Tax Act 2007* (NSW), and s127 *Industrial Relations Act 1996* (NSW) where the "subcontractor" has employed or engaged workers or subcontractors during the period of the contract to which the form applies under the relevant Act(s). The signed Statement is to be submitted to the relevant principal contractor.

SUBCONTRACTOR'S STATEMENT (Refer to the back of this form for Notes, period of Statement retention, and Offences under various Acts.

Subcontractor: ABN:

(Business Name)

of

(Address of subcontractor)

has entered into a deed with ABN:

(Business name of principal contractor)

(Note 2)

Deed number/identifier

(Note 3)

This Statement applies for work between:/...../..... and/...../..... inclusive,

(Note 4)

subject of the payment claim dated:/...../.....

(Note 5)

I, a Director or a person authorised by the Subcontractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters which are contained in this Subcontractor's Statement and declare the following to the best of my knowledge and belief:

- (a) The abovementioned Subcontractor has either employed or engaged workers or subcontractors during the above period of this contract. Tick [] if true and comply with **(b)** to **(g)** below, as applicable. If it is not the case that workers or subcontractors are involved or you are an exempt employer for workers compensation purposes tick [] and only complete **(f)** and **(g)** below. You must tick one box. **(Note 6)**
- (b) All workers compensation insurance premiums payable by the Subcontractor in respect of the work done under the contract have been paid. The Certificate of Currency for that insurance is attached and is dated/...../..... **(Note 7)**
- (c) All remuneration payable to relevant employees for work under the contract for the above period has been paid. **(Note 8)**
- (d) Where the Subcontractor is required to be registered as an employer under the *Payroll Tax Act 2007* (NSW), the Subcontractor has paid all payroll tax due in respect of employees who performed work under the contract, as required at the date of this Subcontractor's Statement. **(Note 9)**
- (e) Where the Subcontractor is also a principal contractor in connection with the work, the Subcontractor has in its capacity of principal contractor been given a written Subcontractor's Statement by its subcontractor(s) in connection with that work for the period stated above. **(Note 10)**

- (f) Signature Full name
- (g) Position/Title Date/...../.....

NOTE: Where required above, this Statement must be accompanied by the relevant Certificate of Currency to comply with section 175B of the Workers Compensation Act 1987 (NSW).

Notes

1. This form is prepared for the purpose of section 175B of the *Workers Compensation Act 1987* (NSW), Schedule 2 Part 5 *Payroll Tax Act 2007* (NSW) and section 127 of the *Industrial Relations Act 1996* (NSW). If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, payroll tax and remuneration payable by the subcontractor.

A principal contractor can be generally defined to include any person who has entered into a contract for the carrying out of work by another person (or other legal entity called **the subcontractor**) and where employees of the subcontractor are engaged in carrying out the work which is in connection with the principal contractor's business.
2. For the purpose of this Subcontractor's Statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity) referred to as the subcontractor, and employees/workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal contractor.
3. Provide the unique contract number, title, or other information that identifies the contract.
4. In order to meet the requirements of s127 *Industrial Relations Act 1996* (NSW), a statement in relation to remuneration must state the period to which the statement relates. For sequential Statements ensure that the dates provide continuous coverage.

Section 127(6) of the *Industrial Relations Act 1996* (NSW) defines remuneration 'as remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.'

Section 127(11) of the *Industrial Relations Act 1996* (NSW) states 'to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.'
5. Provide the date of the most recent payment claim.
6. For Workers Compensation purposes an exempt employer is an employer who pays less than \$7500 annually, who does not employ an apprentice or trainee and is not a member of a group.
7. In completing the Subcontractor's Statement, a subcontractor declares that workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid.
8. In completing the Subcontractor's Statement, a subcontractor declares that all remuneration payable to relevant employees for work under the contract has been paid.
9. In completing the Subcontractor's Statement, a subcontractor declares that all payroll tax payable relating to the work undertaken has been paid.
10. It is important to note that a business could be both a subcontractor and a principal contractor, if a business 'in turn' engages subcontractors to carry out the work. If your business engages a subcontractor you are to also obtain Subcontractor's Statements from your subcontractors.

Statement Retention

The principal contractor receiving a Subcontractor's Statement must keep a copy of the Statement for the periods stated in the respective legislation. This is currently up to seven years.

Offences in respect of a false Statement

In terms of s127(8) of the *Industrial Relations Act 1996* (NSW), a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:

- (a) the person is the subcontractor;
- (b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor; or
- (c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

In terms of s175B of the *Workers Compensation Act 1987* (NSW) and clause 18 of Schedule 2 of the *Payroll Tax Act 2007* (NSW) a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Further Information

For more information, visit the WorkCover website www.workcover.nsw.gov.au, Office of State Revenue website www.osr.nsw.gov.au, or Office of Industrial Relations, Department of Commerce website www.commerce.nsw.gov.au. Copies of the *Worker Compensation Act 1987*, the *Payroll Tax Act 2007* (NSW) and the *Industrial Relations Act 1996* can be found at www.legislation.nsw.gov.au.

Schedule 9 Form of expert agreement

Terms of Agreement between the expert, Council and the Developer

THIS AGREEMENT is made on the date set out in Item 1 of the Particulars.

BETWEEN **THE PERSON DESCRIBED IN ITEM 2 OF THE PARTICULARS ('Council')**

AND **THE PERSON DESCRIBED IN ITEM 3 OF THE PARTICULARS ('Developer')**

AND **THE PERSON DESCRIBED IN ITEM 4 OF THE PARTICULARS ('Expert')**

RECITALS

- A. Council and the Developer have entered into the Contract.
- B. Council and the Developer have agreed to refer the Dispute for determination by the Expert acting as an expert and not as an arbitrator.

OPERATIVE

1. INTERPRETATION

Words and phrases used in this Agreement, unless the contrary intention appears or they are otherwise defined in this Agreement, have the meaning attributed to those words and phrases in the Contract.

2. DEFINITIONS

'Contract' means the contract entered into between Council and the Developer described in Item 5 of the Particulars.

'Dispute' means the dispute or difference described in Item 5A of the Particulars.

3. DECIDE ON DISPUTES

The Expert shall:

- (a) determine the Dispute and not any other matter; and
- (b) in discharging his or her obligations under this Agreement, abide and be bound by the provisions of the Contract.

4. PROCEDURES

Subject to clause 6, the Expert shall determine the Dispute in accordance with the procedures set out in Item 6 of the Particulars unless varied, amended or otherwise changed by agreement between Council, the Developer and the Expert.

5. THE EXPERT RELEASED

The Expert is not liable to Council and the Developer jointly, or either of them separately, or to any third party for anything done or omitted by him or her under this Agreement.

Council and the Developer release and indemnify the Expert from and against any claims:

- (a) including (without limitation) negligence; but
- (b) excluding actual fraud,

in the course of discharging his or her obligations under this Agreement.

6. EXPERT'S POWERS

The Expert shall in discharging his or her obligations under this Agreement:

- (a) act as an expert and not as an arbitrator;
- (b) proceed in such manner as the Expert thinks fit without being bound to observe the rules of evidence but subject to the rule of natural justice;
- (c) take into consideration all documents, information and other written and oral material that Council and the Developer place before the Expert including documents, information and material relating to the facts the subject of the Dispute and to arguments and submissions upon the matters the subject of the Dispute;
- (d) not be expected or required to obtain or refer to any other documents, information or material but may do so if he or she so desires;
- (e) without giving reasons, make a decision in such form as he or she considers appropriate stating the determination of the Dispute; and
- (f) act with expedition with a view to making a decision within the time period specified in Item 7 of the Particulars.

7. MEET WITH PARTIES

If as part of the procedures under clause 4, the Expert meets with Council and the Developer:

- (a) Council and the Developer may be accompanied by their legal representatives if so specified in Item 8 of the Particulars; and
- (b) Council and the Developer agree to be bound by such procedural directions as may be given by the Expert both in preparation for, and during the course of, the meeting.

The parties agree that any such meeting or meetings are not in any way to be regarded as a formal hearing.

8. DECISION BINDING

Unless otherwise provided by the Contract or Item 9 of the Particulars, the Expert's determination of the Dispute is final and binding.

9. REMUNERATION

In consideration of the Expert performing his or her obligations under this Agreement the party or parties as specified in Item 10 of the Particulars shall pay to the Expert the amount set out in Item 11 of the Particulars or such other amount as is agreed between Council, the Developer and the Expert.

10. CONFIDENTIALITY

The Expert shall not at any time, without the consent of both Council and the Developer, disclose or suffer or permit his or her employees, consultants or agents to disclose to any person:

- (a) any details concerning the subject matter of the Dispute;
- (b) any of the contents of the Contract, this Agreement or any other collateral or supplemental agreements or any of the commercial bases or any information relating to the negotiations concerning the same; or
- (c) any other information which may have come to the Expert's knowledge in the course of this Agreement including (without limitation) information concerning the operations, dealings, transactions, contracts, commercial or financial arrangements or affairs of Council or the Developer.

The Expert and the Developer acknowledge and agree that Council may disclose this Agreement (and information concerning the terms of this Agreement) under or in accordance with any law, including the *Government Information (Public Access) Act 2009* (NSW).

11. NATURE OF EXPERT'S ROLE

The Expert:

- (a) is to be independent from Council and the Developer; and
- (b) without limitation, warrants that he or she has no conflict of interest in acting under this Agreement.

Nothing in this Agreement will be deemed to make the Expert an agent, employee or partner of Council or the Developer.

The Expert shall assume full responsibility and liability for the payment of all taxes due on moneys received by him or her under this Agreement.

12. TERMINATION

This Agreement may be terminated by either Council or the Developer in any of the following events:

- (a) the Expert being declared of unsound mind or mentally ill;
- (b) the Expert being declared bankrupt;
- (c) the Expert committing any proven act of dishonesty or, by wilful act or omission or by gross neglect, behaving in a fashion clearly prejudicial to the interests of Council or the Developer;
- (d) the Expert failing to observe and fulfil any of the substantive terms of this Agreement; or
- (e) the Expert being prevented by prolonged illness or incapacity from performing his or her obligations under this Agreement.

13. NOTICES

All notices to be given to the Expert under this Agreement will be deemed to be properly given if:

- (a) hand delivered to the Expert;
- (b) sent by certified or registered mail to the Expert's address set out in Item 12 of the Particulars or to such other address as the Expert may from time to time advise by notice in writing; or
- (c) forwarded by facsimile transmission to the Expert's facsimile number as set out in Item 13 of the Particulars or to such other facsimile number as the Expert may from time to time advise by notice in writing.



14. GOVERNING LAW

Unless specified otherwise in Item 14 of the Particulars, this Agreement is to be construed for all purposes in accordance with the laws applying to the Contract.

15. INCONSISTENCY BETWEEN AGREEMENT AND CONTRACT

If there is any inconsistency between the terms of this Agreement and the Contract, then unless otherwise specified in Item 15 of the Particulars the terms of the Contract will prevail.

PARTICULARS

Item 1: Date of Agreement

Item 2: Council: Mid-Coast Council ABN 44 961 208 161, Breese Parade, Forster NSW 2428

Item 3: Developer

Item 4: Expert

Item 5: Details of *Contract*
(clause 2)

Item 5A: Dispute
(clause 2)

Item 6: Procedure
(clause 4)

Item 7: Decision Time Limit
(clause 6)

Item 8: Legal Representation
(clause 7)

Item 9: Decision Binding
(clause 8)

Item 10: Costs Arrangement
(clause 9)

Item 11: Expert's Remuneration
(clause 9)

Item 12: Expert's Address
(clause 13)

Item 13: Expert's Facsimile
(clause 13)

Item 14: Governing Law
(clause 14)

Item 15: Inconsistency
(clause 15)



SIGNED by COUNCIL
in the presence of:

)
)

.....
(Signature of Witness)

.....
(Name of Witness in Full)

SIGNED by THE DEVELOPER
in the presence of:

)
)

.....
(Signature of Witness)

.....
(Name of Witness in Full)

SIGNED by THE EXPERT
in the presence of:

)
)

.....
(Signature of Witness)

.....
(Name of Witness in Full)

Schedule 10 Contractor Side Deed

Date

Parties

Name	Mid-Coast Council ABN 44 961 208 161
Address	Breese Parade, Forster NSW 2428
Facsimile	[insert]
Contact	[insert]
Short name	Council

Name	[insert details of Contractor]
Address	
Facsimile	
Contact	
Short name	Contractor

Background

- A. Under the Development Agreement, Council appointed the Developer in respect of the development of [#insert details#] in Forster, NSW.
- B. The Developer engaged the Contractor in respect of the construction, commissioning and completion of certain elements of that project.
- C. The Development Agreement requires (among other things) the Developer to procure the Contractor to enter into and execute this deed for the benefit of Council.
- D. The Developer has requested the Contractor to execute this deed and the Contractor has agreed to enter into and execute this deed accordingly.

This deed witnesses

1. Definitions

In this deed:

Building Contract means the building contract dated [insert] between the Developer and the Contractor.

Development Agreement means the development agreement entered into between the Developer and Council, dated [insert].

Developer means Enyoc Pty Ltd ACN 098 769 469 as trustee for the Graham Dong Family Trust ABN 41 606 503 623.

Good Industry Practice means the exercise of that degree of skill, professionalism, care, prudence, diligence and operating practice which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the performance of work of a nature the same as, or substantially similar to, the construction, commissioning and completion of the Works.

Law means all:

- (a) laws; and
- (b) authorisations, consents, approvals, licences, leases, rulings, permits, permission, exemptions, filings, registrations, lodgements, variances, orders, certificates, judgments, determinations, decrees, decisions, publications, notices, notarisations, declarations or regulations by, from or with any:
 - (i) governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity;
 - (ii) public or private electricity, telecommunications, gas or other utility company; or
 - (iii) any other body having statutory rights in connection with the Works.

Practical Completion means that stage when "Practical Completion" (as that term is defined in the Development Agreement) has been achieved in accordance with the Development Agreement.

Warranty Period means the period commencing on Practical Completion and expiring 12 months thereafter.

Works means the works constructed under the Building Contract.

2. Warranty

2.1 Warranties from Contractor

The Contractor warrants that the Works will:

- 2.1.1 comply in all respect with the requirements of the Building Contract; and
- 2.1.2 without limiting clause 2.1.1, be constructed, commissioned and completed:
 - (a) in accordance with:
 - (i) Good Industry Practice;
 - (ii) all Laws; and

- (iii) all relevant Australian Standards;
- (b) in a proper and workmanlike manner, and using proper and tradesman like workmanship;
- (c) using materials that are suitable, new, undamaged, of good merchantable quality, and which are otherwise fit for their intended purpose; and
- (d) in a professional, timely, safe and environmentally responsible manner.

2.2 Replacement or making good Works

2.2.1 Without limiting clauses 2.4 and 2.6, the Contractor must at its cost make good, to the reasonable satisfaction of Council, any of the Works which, within the Warranty Period, are found to:

- (a) be of a lower standard or quality than referred to in clause 2.1; or
- (b) have deteriorated to such an extent that they are no longer fit for the purposes for which they were required.

2.2.2 The liability of the Contractor under this clause 2.2 is reduced to the extent that deterioration is caused by:

- (a) mishandling, damage before installation, or incorrect installation, in each case caused by others;
- (b) normal wear and tear; or
- (c) incorrect operational procedures or maintenance, in each case not attributable to the Contractor.

2.3 Making good Works

The Contractor must at its cost carry out any work necessary to:

- 2.3.1 any part of the Works to satisfy its obligations under clause 2.2; and
- 2.3.2 restore or make good the Works after satisfying its obligations under clause 2.2.

2.4 Indemnity

The Contractor indemnifies Council against all costs, losses and damages suffered or incurred by Council arising out of or in connection with any breach by the Contractor of clauses 2.1 or 2.2.

2.5 Notice of Defects

Council may notify the Contractor in writing if it considers there has been any breach of any provision of this deed.

2.6 Time to remedy

The Contractor must do everything necessary to remedy all breaches notified to it by Council under clause 2.5 within a reasonable time after Council's notice.

2.7 Failure to remedy

- 2.7.1 If the Contractor fails to carry out and complete the works specified in Council's notice under clause 2.5 within a period determined by Council to be reasonable in the circumstances, Council may give written notice to the Contractor that Council intends to have that work carried out by others. This notice must allow a reasonable period for the Contractor to respond.
- 2.7.2 If the Contractor fails to complete the work by the date specified in the notice given pursuant to clause 2.7.1, Council may have the work carried out by others, and the Contractor indemnifies Council against all costs, losses and damages suffered or incurred by Council in doing so.

2.8 Urgent action by Council

- 2.8.1 Council may take any urgent action necessary to protect the Works, other property or people as a result of a breach of clause 2.1.
- 2.8.2 The Contractor agrees that Council taking such action does not affect any obligation of the Contractor under this deed.
- 2.8.3 The Contractor indemnifies Council against all costs, losses and damages suffered or incurred by Council in taking that action.

3. Miscellaneous

3.1 Governing law and jurisdiction

This deed shall be governed by and construed in all respects in accordance with the laws of the State of New South Wales, Australia and the parties hereby submit to the non-exclusive jurisdiction of the Courts of the said State of New South Wales and any courts empowered to hear appeals therefrom in respect of any proceedings in connection with this deed.

3.2 Counterparts

This deed may be executed in a number of counterparts and the counterparts taken together shall be deemed to constitute one and the same instrument.

3.3 No fetter

Nothing in this deed operates to restrict or otherwise affect the unfettered discretion of Council to exercise any of its functions and powers under any law.

3.4 Operation of Deed

This deed comes into effect when executed by the Contractor, and is effective whether or not executed by Council.

3.5 GIPA

The Contractor acknowledges and agrees that Council may disclose this deed (and information concerning the terms of this deed) under or in accordance with any law, including the *Government Information (Public Access) Act 2009* (NSW).

Executed by the parties as a deed:



EXECUTED by [##] in accordance with)
section 127(1) of the *Corporations Act*)
2001 (Cth) by authority of its directors:)

.....)
Signature of director)

.....)
Name of director (block letters))

.....
Signature of director/company
secretary*
*delete whichever is not applicable

.....
Name of director/company secretary*
(block letters)
*delete whichever is not applicable

EXECUTED by **COUNCIL** by [] in)
the presence of:)

.....)
Signature of witness)

.....)
Name of witness (block letters))

.....
Signature of []

Schedule 11 Information Documents

The following list of Information Documents is for identification purposes only and the Information Documents listed do not form part of this Deed.

Name	Date	Author
Mid-Coast Council Request For Proposal – Information for Proponents (provided as a guide only) – Civic Precinct Project, Forster, NSW RFP: (2016-17/21)	Date of this RFP	Council
Asbestos Inspection & Register Amenities, Cnr West/Middle & Lake Streets Forster NSW 2428	17 Sept 2015	Safe Environments Pty Ltd on behalf of Great Lakes Council (GLC)
Groundwater Testing Report	11 August 2014	Regional Geotechnical Solutions on behalf of GLC
DA 856/2006 - Notice of Determination (Development Consent) relevant to the subject site	2014	The former GLC
Great Lakes Development Control Plan 2014	2014	The former GLC
Great Lakes Local Environment Plan 2014	2014	The former Great Lakes Council
Urban Design & Density Review - Forster Tuncurry		The former GLC
'People Places: A Guide for Public Library Buildings in NSW (v 3)	2012	State Library of NSW
Forster Civic Precinct Master Plan (Note: these documents relate to the site <u>adjacent</u> to the Subject Site and are to be read in conjunction with the Council Report 9 February 2010)	2008	City Plan Services on behalf of former GLC
Report to Council - Civic Precinct Master Plan	9 Feb 2010	The former GLC

Date _____

Parties

Name	Coyne Anthony Graham ('Guarantor')
Notice details	Suite 14, 30 Tedder Avenue Main Beach Qld 4217Name Mid-Coast Council ABN 44 961 208 161 ('Council')
Notice details	Breese Parade, PO Box 450, Forster NSW 2428

Background

- A The *Developer* has, or will enter into, the *Deed with Council*.
- B At the request of *Council*, the *Guarantor* has agreed to provide a guarantee in favour of *Council* in relation to the due and punctual performance of the *Obligations* by the *Developer* on the terms and conditions of this deed.
- C The *Guarantor* considers that by providing this guarantee and indemnity there has been or will be a commercial benefit flowing to the *Guarantor*.

Agreed terms

1 DEFINED TERMS & INTERPRETATION

1.1 Defined terms

In this deed:

'Activities' has the same meaning as 'Activities' in the *Deed*.

'Abandonment' means the *Developer* wholly or substantially abandons the *Activities*.

'business day' has the same meaning as in the *Deed*.

'Deed' means the deed entitled 'Development Agreement Mid-Coast Council - Forster Civic Precinct between *Council* and the *Developer* dated on or about 8 August 2017 in relation to the *Activities*.

'Developer' means Enyoc Pty Ltd as trustee for the Graham Dong Family Trust.

'Insolvency Event' has the same meaning as in the *Deed*.

'Liability' means any debt, obligation, cost, expense, loss, damage, compensation, charge or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

'Loss' means any liability (including legal and other professional expenses) of any kind whatsoever and includes but is not limited to direct and indirect, consequential or special damage, loss of profits, loss of use, loss of revenue, anticipated revenue, interest or other

such claim arising from any cause whatsoever whether or not such loss, damage or claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.

'*Obligations*' means all the obligations and liabilities of the *Developer* to *Council* in respect of:

- (a) the Council Works;
- (b) the Council Works Lot;
- (c) the Developer Works Stage 1; and
- (d) that part of the *Activities* associated with the Council Works, the Developer Works Stage 1 or the Council Works Lot.

(whether liquidated or not, whether contingent or presently accrued due and whether relating to the payment of money or the performance or omission of any act or thing) that are now in existence, or may hereafter come into existence, pursuant to the *Deed*.

1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect the interpretation of this deed;
- (b) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (c) a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, bylaws, regulations, rules and statutory instruments (however described) issued under it;
- (d) a reference to \$ or dollar is to Australian currency;
- (e) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every gender;
- (f) where the day on which or by which any act, matter or thing is to be done under this deed is not a *business day*, that act, matter or thing will be done on the next following *business day*; and
- (g) includes and cognate expressions indicate what is included without limiting what may be included.

1.3 Guarantor's warranty as to capacity

The *Guarantor* warrants that it enters this deed in its own right and not as a trustee or in any other representative capacity.

1.4 Consideration

Each party acknowledges to each other party that it enters into this deed and incurs obligations and gives rights under it for valuable consideration from the other party.

1.5 Reliance

The *Guarantor* acknowledges that:

- (a) *Council* has entered into the *Deed* in reliance on the representations and warranties in clause 4; and
- (b) it has not entered into this deed in reliance on any representation, warranty, promise or statement of *Council* or of any person on behalf of *Council*.

2 GUARANTEE AND INDEMNITY

2.1 Guarantee

- (a) The *Guarantor* irrevocably and unconditionally guarantees to *Council* the due and punctual performance by the *Developer* of all the *Obligations*.
- (b) Subject to clause 3.2, if the *Developer* does not perform an *Obligation*, the *Guarantor* must:
 - (i) perform that *Obligation*; or
 - (ii) procure the performance of that *Obligation*,

on demand from *Council*. A demand may be made by *Council* at any time and from time to time after failure by the *Developer* to perform any of its *Obligations* in accordance with the *Deed*.

2.2 Payment by the Guarantor

If the *Developer* does not pay any monetary *Obligation* when due, the *Guarantor* must within 2 *business days* of receipt of a written demand from *Council* pay that amount to, or as directed by, *Council*.

2.3 Indemnity

The *Guarantor* indemnifies *Council* against any *Loss* *Council* suffers or incurs:

- (a) if the *Developer* does not, or is unable to, perform an *Obligation* (including the payment of a monetary *Obligation*);
- (b) if an *Obligation* (including the payment of a monetary *Obligation*) is found to be unenforceable, invalid, illegal or void;
- (c) if an obligation the *Guarantor* would otherwise have under clauses 2.1 or 2.2 is found to be unenforceable, invalid, illegal or void;
- (d) as a result of an *Insolvency Event* in respect of the *Developer*; or
- (e) if the *Guarantor* is in breach of this deed,

in each case, for any reason and whether or not *Council* knew or ought to have known anything about those matters.

The *Guarantor* agrees to pay amounts under this indemnity within 2 *business days* of receipt of a written demand from *Council* to pay such amounts to *Council*.

3 LIABILITY OF THE GUARANTOR

3.1 No reduction or release

The *Liability* of the *Guarantor* and the rights of *Council* under this deed will not be affected by any act, omission, matter or thing that would otherwise operate in law or in equity to reduce or release the *Guarantor* from *Liability* under this deed.

Without limiting the generality of the foregoing, the *Guarantor's Liability* will not be affected by:

- (a) the granting by *Council* to the *Developer* of time, waiver, indulgence or concession or the making of any composition or compromise with the *Developer*;
- (b) *Council* forbearing to enforce or neglecting to exercise any right against the *Developer*;
- (c) any laches, acquiescence or other act, neglect, default, omission or mistake by *Council*;
- (d) any variation of any of the *Obligations* or of the *Deed*, made either with or without the knowledge of the *Guarantor*;
- (e) the loss or release of any security or any variation in the order of priorities relating to that security;
- (f) any failure by *Council* to disclose to the *Guarantor* any fact, circumstance or event relating to the *Developer* at any time before or during the currency of this deed;
- (g) the cessation of the obligations, in whole or in part, of any person under any document or agreement;
- (h) the liquidation of any person;
- (i) any arrangement, composition or compromise entered into by *Council* or any other person;
- (j) any document or agreement being in whole or in part illegal, void, voidable, avoided, unenforceable or otherwise of limited force or effect;
- (k) any extinguishment, failure, loss, release, discharge, *Abandonment*, impairment, compound, composition or compromise, in whole or in part of any agreement;
- (l) any security being given to *Council* by any person;
- (m) any moratorium or other suspension of any right of *Council*;
- (n) *Council* or any receiver or attorney exercising or enforcing, delaying or refraining from exercising or enforcing, or being not entitled or unable to exercise or enforce any right of *Council*;
- (o) *Council* obtaining a judgment against any person for the payment or performance of any of the *Obligations*;

- ### 3.2 Reinstatement of rights

(c) *Council* is entitled immediately as against the *Guarantor* to the rights in respect of the *Obligation* to which it would have been entitled if all or that part of that payment, obligation, settlement, transaction, conveyance or transfer had not taken place; and

(d) the *Guarantor* must immediately take all action and sign all documents reasonably required by *Council* to restore to *Council* the benefit of the *Liability* of the *Guarantor* under this deed in place immediately before the payment or transaction.

3.3 Continuing obligations

- (a) The guarantee and indemnity contained in this deed are continuing obligations of the *Guarantor* and remain in full force and effect until all:
 - (i) the obligations owing to *Council* under this deed, contingently or otherwise, have been performed in full; and
 - (ii) the monetary obligations and all other moneys owing to *Council* under this deed, contingently or otherwise, have been paid in full.
- (b) *Council's* rights under this deed are additional to and do not merge with or affect and are not affected by any other obligation of the *Guarantor* to *Council*, despite any rule of law or equity or any statutory provision to the contrary.

3.4 Independent obligation

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3.5 Immediate recourse

The *Guarantor* waives any right it may have to require *Council* to proceed against, or enforce any other rights or security or claim payment from, any other person before claiming from the *Guarantor* under this deed. This waiver applies irrespective of any law or any provision of the *Deed* to the contrary.

4 REPRESENTATIONS AND WARRANTIES

The *Guarantor* represents and warrants that:

- (a) this deed constitutes a valid and legally binding obligation of it in accordance with its terms;
- (b) the execution, delivery and performance of this deed does not violate any law applying to it or any agreement or instrument binding on it or any of its property;
- (c) it has the power to enter into this deed and to authorise its execution and delivery and the performance of its obligations under it;
- (d) it is a corporation as that expression is defined in the *Corporations Act* and validly existing under that Act;
- (e) it is solvent and no *Insolvency Event* has occurred in respect of it; and
- (f) all information provided to *Council* by or on behalf of the *Guarantor* and all representations made in this deed are true and correct in all material respects and are not, whether by omission of information or otherwise, misleading.

The *Guarantor* will be taken to have repeated the representations and warranties in this clause 4 on each day during the term of this deed.

5 DEFENCES AND CROSS CLAIMS AVAILABLE TO GUARANTOR

Notwithstanding any other provision of this deed, the aggregate liability of the *Guarantor* under this deed will not exceed the aggregate liability of the *Developer* under the *Deed* (including any liability which would have been due if the *Deed* or the liability was enforceable, valid and not illegal).

6 NOT USED

7 COSTS AND EXPENSES

- (a) The *Guarantor* must pay all taxes, duties, fees, costs and expenses in relation to the delivery, stamping, registration and discharge of this deed.
- (b) The *Guarantor* must on demand reimburse *Council* for all expenses (including legal costs and disbursements on a solicitor/own client basis) incurred by *Council* in connection with the enforcement, attempted enforcement or preservation of any rights under this deed.
- (c) The *Guarantor* will be solely responsible for the payment of any and all taxes imposed by the government of any jurisdiction with respect to or by reason of the receipt or derivation of any and all actual or constructive payments to it under this deed, including any retrospective assessments or taxes that may be made at any time during or after the term of this deed by any duly constituted revenue authority.

- ## 7.1 Legal advice

- (a) was advised by *Council* to consult and receive advice as to the purport, effect and consequences of and obligations created by this deed from a solicitor or barrister independent of *Council*; and
- (b) was aware of and fully understood the purport, effect and consequences of and the obligations created by this deed.

8 MISCELLANEOUS

8.1 Severance

8.2 Notices

8.3 Waivers

- page 234

- (ii) a right, power, authority, discretion, or remedy created or arising upon default under this deed,

does not result in a waiver of that right, power, authority, discretion, or remedy.

- (c) A party is not entitled to rely on a delay in the exercise or non-exercise of a right, power, authority, discretion, or remedy arising from a breach of this deed or on a default under this deed as constituting a waiver of that right, power, authority, discretion, or remedy.
- (d) A party may not rely on any conduct of another party as a defence to the exercise of a right, power, authority, discretion, or remedy by that other party.
- (e) This clause may not itself be waived except by writing.

8.4 Variation

A variation of any provision of this deed must be in writing and signed by the parties.

8.5 Further assurances

Each party must do all things and execute all further documents necessary to give full effect to this deed.

8.6 Entire agreement

This deed supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties.

8.7 To the extent not excluded by law

The rights, duties and remedies granted or imposed under this deed operate to the extent not excluded by law.

8.8 Information

The *Guarantor* agrees to, promptly after request by *Council*, provide any financial and other information in relation to the *Guarantor* reasonably requested by *Council*.

8.9 Government Information

The *Guarantor* acknowledges and agrees that *Council* may disclose this deed (and information concerning the terms of this deed) under or in accordance with any law, including the *Government Information (Public Access) Act 2009* (NSW).

9 GOVERNING LAW AND JURISDICTION

9.1 Governing law

This deed is governed by and will be construed according to the laws of New South Wales, Australia.

9.2 Jurisdiction

- (a) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales, Australia, and the courts competent to determine appeals from those

(b) Each party irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, where that venue falls within paragraph (a) of this subclause 9.2.

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this deed, all of which together constitute one agreement.

Council may novate, assign or charge its rights under this deed without the prior written consent of the *Guarantor* to any person.

The *Guarantor* may not assign any of its rights under this deed without the prior written consent of *Council*. *Council* may withhold consent in its absolute discretion.

EXECUTED by MID-COAST COUNCIL)
The seal of Mid-Coast Council was)
hereunto affixed in the presence of the)
following authorised officers of the)
Council pursuant to a Council)
Resolution passed at the Ordinary)
Meeting held on 26 July 2017)

Signature of John Turner, Administrator)
)

Signature of Glenn Handford, General
Manager



Maddocks

EXECUTED by Coyne Anthony)
Graham in the presence of:)
)
)
.....)
Signature of witness)
)
.....)
Name of witness (block letters))
)
)
)
)
)

.....
Signature of Coyne Anthony Graham



Maddocks

Schedule 13 Not used



Schedule 14 Subdivision Concept Plan

Design Certification

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- b. the parts of works forming part of the Project relating to the design documents prepared by or on behalf of the Consultant satisfy and comply with the documents prepared by or on behalf of the Consultant.

Terms used in this design certificate have the following meaning:

Law means all:

- (a) laws; and
- (b) authorisations, consents, approvals, licences, leases, rulings, permits, permission, exemptions, filings, registrations, lodgements, variances, orders, certificates, judgments, determinations, decrees, decisions, publications, notices, notarisations, declarations or regulations by, from or with any:
 - (i) governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity;
 - (ii) public or private electricity, telecommunications, gas or other utility company; or
 - (iii) any other body having statutory rights in connection with the Works.

Technical Documents means those documents comprising Exhibits A, B and C of the deed between Council and the Developer relating to the Project, copies of which the Consultant acknowledges it has received.

Signed for and on behalf of

[## NAME OF CONSULTANT]

Signature of authorised person

Name and Designation of authorised person

SCHEDULE

[LIST DOCUMENTS TO BE INCLUDED IN CERTIFICATION]

Schedule 16 Civic Precinct Side Deed

Date

Parties

Name	Mid-Coast Council ABN 44 961 208 161
Address	Breese Parade, Forster NSW 2428
Facsimile	[insert]
Contact	[insert]
Short name	Council

Name	[insert details of Relevant Contractor]
Address	
Facsimile	
Contact	
Short name	Consultant

Background

- A. Under the Development Agreement, Council appointed the Developer in respect of the development of [#insert details#] in Forster, NSW.
- B. The Developer engaged the Consultant in respect of the design of certain elements of that project.
- C. The Development Agreement requires (among other things) the Developer to procure the Consultant to enter into and execute this deed for the benefit of Council.
- D. The Developer has requested the Consultant to execute this deed and the Consultant has agreed to enter into and execute this deed accordingly.

This deed witnesses

1. Definitions

In this deed:

Artistic Work has the meaning given to it in the *Copyright Act 1968* (Cth).

Consultancy Agreement means the consultancy agreement dated [insert] between the Developer and the Consultant.

Design Documents means all drawings, specifications and other information, samples, models, patterns and the like used or created, or required to be used or created, by the Consultant as part of the Services.

Development Agreement means the development agreement entered into between the Developer and Council, dated [insert].

Developer means Enyoc Pty Ltd ACN 098 769 469 as trustee for the Graham Dong Family Trust ABN 41 606 503 623.

Good Industry Practice means the exercise of that degree of skill, professionalism, care, prudence, diligence and operating practice which would reasonably and ordinarily be expected from a skilled and experienced consultant engaged in the performance of work of a nature the same as, or substantially similar to, the Services.

Intellectual Property Rights means all current and future registered and unregistered rights in respect of copyright, designs, circuit layouts, trade marks, know-how, confidential information, patents, inventions and discoveries and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organisation 1967 (as amended from time to time).

Law means all:

- (a) laws; and
- (b) authorisations, consents, approvals, licences, leases, rulings, permits, permission, exemptions, filings, registrations, lodgements, variances, orders, certificates, judgments, determinations, decrees, decisions, publications, notices, notarisations, declarations or regulations by, from or with any:
 - (i) governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity;
 - (ii) public or private electricity, telecommunications, gas or other utility company; or
 - (iii) any other body having statutory rights in connection with the Works or the Services.

Moral Rights means any of the rights described in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended and revised from time to time), being 'droit moral' or other analogous rights arising under any statute (including the *Copyright Act 1968* (Cth)) or any other law (including any law outside Australia), that exist, or that may come to exist, anywhere in the world.

Services means the services provided or performed (or to be provided or performed) by the Consultant under the Consultancy Agreement.

Technical Documents means those comprising Exhibits A, B and C to the Delivery Agreement, copies of which the Consultant acknowledges it has received.

Works means all of the works to be designed by the Consultant under the Consultancy Agreement.

2. Warranties

2.1 Warranty as to Services

The Consultant warrants that the Services will:

2.1.1 comply in all respect with the requirements of the Consultancy Agreement; and

2.1.2 without limiting clause 2.1.1, be carried out and completed:

- (a) in accordance with:
 - (iv) Good Industry Practice;
 - (v) all Laws; and
 - (vi) all relevant Australian Standards;
- (b) to ensure that the Works, upon their completion, will be fit for their intended purpose; and
- (c) in a professional, timely, safe and environmentally responsible manner.

2.2 Design warranty

Without limiting clause 2.1, the Consultant warrants that:

2.2.1 the Design Documents will be prepared in accordance with, and will comply with:

- (a) the Technical Documents (to the extent they relate to the Works); and
- (b) all Laws, relevant Australian Standards, the National Construction Code and Good Industry Practice;

2.2.2 if the Works are constructed in accordance with the Design Documents, the Works will, upon completion:

- (a) comply with the Technical Documents (to the extent they relate to the Works), all Laws, relevant Australian Standards and the National Construction Code; and
- (b) be fit for their intended purpose.

2.3 Indemnity

The Consultant indemnifies Council against all costs, losses and damages suffered or incurred by Council arising out of or in connection with any breach by the Consultant of clause 2.1, 2.2, 3.1, 3.2 or 3.3.

3. Intellectual Property

3.1 Ownership of intellectual property

The Consultant warrants that the Consultant has or will have a transferable right to use all Design Documents for the purpose of the Works, including the right to use such Design

Documents for the purpose of designing, constructing, operating, maintaining, repairing, rectifying, adding to and altering the Works. The Consultant warrants that Design Documents produced by or on behalf of the Consultant will not infringe any Intellectual Property Rights.

3.2 Vesting of intellectual property

- 3.2.1 All Intellectual Property Rights in the Design Documents hereby vest in Council, and Council grants to the Consultant an irrevocable licence to use those Design Documents for the Services. The Consultant must do everything necessary to perfect such vesting. Such vesting will not extend to components of the Design Documents which have been developed by the Consultant for general use in the Consultant's work and have not been specially developed for incorporation in the Design Documents (**Consultant's Material**).
- 3.2.2 The Consultant grants to Council an irrevocable, royalty free licence (with a right to sub-licence) to use the Consultant's Material for the Works and to use all Intellectual Property Rights in the Consultant's Material for the Works. Such licence includes for the purposes of any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the Works (or part thereof) (whether by the Developer, the Consultant, Council or otherwise) or any works, building or structure of which the Works form part, and the copying of the Consultant's Material for such purposes. The Consultant must do everything necessary to perfect such licence.

3.3 Moral rights warranty and indemnity

The Consultant:

- 3.3.1 must ensure that it does not, and its subcontractors do not, infringe any Moral Right in any Artistic Work in performing the Services; and
- 3.3.2 must ensure that it obtains irrevocable consents, including for the benefit of Council and Council's licensees and successors in title, from all authors of any Artistic Work to be incorporated into the Design Documents, or (to the extent provided by or on behalf of the Consultant) used during the design and construction of the Works, including any necessary consents from the Consultant's subcontractors and their employees, to:
- (a) any non-attribution or false attribution of the Artistic Work; and
 - (b) any repairs to, maintenance and servicing of, additions, refurbishment or alterations to, changes, relocation, destruction or replacement of the whole or any part of the Artistic Work or the Works.

4. Miscellaneous

4.1 Governing law and jurisdiction

This deed shall be governed by and construed in all respects in accordance with the laws of the State of New South Wales, Australia and the parties hereby submit to the non-exclusive jurisdiction of the Courts of the said State of New South Wales and any courts empowered to hear appeals therefrom in respect of any proceedings in connection with this deed.

4.2 Counterparts

This deed may be executed in a number of counterparts and the counterparts taken together shall be deemed to constitute one and the same instrument.

4.3 No fetter

Schedule 17 Not used

Not used

Executed as a deed

EXECUTED by MID-COAST COUNCIL)
The seal of Mid-Coast Council was)
hereunto affixed in the presence of the)
following authorised officers of the)
Council pursuant to a Council)
Resolution passed at the Ordinary)
Meeting held on 26 July 2017)

Signature of Glenn Handford, General
Manager

EXECUTED by Enyoc Pty Ltd ACN
098 769 469 as trustee for the
**Graham Dong Family Trust ABN 41
606 503 623** in accordance with section
127(1) of the *Corporations Act 2001*
(Cth) by authority of its directors:

Signature of director/company secretary*

*delete whichever is not applicable

Name of director/company secretary*
(block letters)
*delete whichever is not applicable

Exhibits

1. Exhibit A – Technical Documents – Council Works
2. Exhibit B - Technical Documents – Developer Works Stage 1
3. Exhibit C – Technical Documents – Developer Works (other than Developer Works Stage 1)

Exhibit A – Technical Documents – Council Works

Exhibit B - Technical Documents – Developer Works Stage 1

Exhibit C - Technical Documents – Developer Works (other than Developer Works Stage 1)