
Contents

1	Definitions and interpretation	3
1.1	Definitions	3
1.2	Interpretation.....	6
1.3	Related matters	8
1.4	Several liability	8
1.5	Civil liability	8
1.6	Ambiguity	8
2	Term	9
3	Appointment of Independent Certifier	9
3.1	Appointment.....	9
3.2	Payment.....	9
4	Acknowledgements and Reliance	9
5	Independent Certifier's Obligations	10
5.1	Performance of the Services	10
5.2	Conflict of Interest.....	10
5.3	Key Personnel	11
5.4	Quality assurance and audit	11
5.5	Progress Reports by the Independent Certifier	11
5.6	Records, access and audit	12
5.7	Confidentiality and publicity	12
5.8	Public disclosure of deed details	12
6	Obligations of the Client Parties	12
6.1	No interference or influence.....	12
6.2	Cooperation	13
6.3	Right to enter, inspect, monitor and test.....	13
6.4	Client Parties to have no liability.....	13
6.5	Change to Services	13
6.6	Suspension of Services	14
6.7	Client Parties meeting.....	14
6.8	State's Representative.....	14
6.9	Site Office and Facilities	15
7	Insurance	15
7.1	Insurance Policies.....	15
7.2	General	15
7.3	Term of the Insurance Policies	16
7.4	Approval of the proposed terms and conditions of the Insurance Policies.....	16
7.5	Proof of Insurance Policies	16
7.6	Failure to produce proof of Insurance Policies	16
7.7	Independent Certifier's further obligations	17
7.8	Insurance Policies primary.....	17

8	Liability and indemnities	17
8.1	References to Independent Certifier.....	17
8.2	General indemnity.....	17
8.3	Exclusion	17
8.4	Limitation of liability.....	17
9	Termination and consequences	18
9.1	Termination for breach.....	18
9.2	Termination for Convenience	18
9.3	Termination of Development Agreement.....	18
9.4	Termination of appointment of Independent Certifier	18
9.5	Delivery of documents	18
9.6	Reasonable assistance.....	18
9.7	Payment until date of termination	19
9.8	Termination without prejudice.....	19
10	Dispute resolution	19
10.1	Dispute.....	19
10.2	Injunctive or urgent relief	19
10.3	Related Disputes	19
11	Goods and Services Tax	19
12	Notices	20
12.1	Procedure for sending Notices	20
12.2	Party details	21
13	General	22
13.1	Relationship of the parties	22
13.2	Entire agreement	22
13.3	Counterparts	22
13.4	Governing law.....	22
13.5	Waiver and estoppel.....	22
13.6	Variations and waivers.....	22
13.7	Amendments to this deed.....	22
13.8	No dealing.....	22
13.9	Joint and several liability.....	23
13.10	Indemnities	23
13.11	Clauses to survive termination	23
13.12	Costs and expenses	23
13.13	Further acts and documents	23
13.14	Severability of provisions.....	24
	Schedule 1 – Key Personnel	26
	Schedule 2 – Services	27
	Schedule 3 – Payment Schedule	28

INDEPENDENT CERTIFIER DEED

This deed is made on [*insert date*]

BETWEEN: **MINISTER FOR EDUCATION** a body corporate under the School Education Act 1999 of 151 Royal Street East Perth Western Australia (**Minister**)

SHIRE OF JERRAMUNGUP of a local government and body corporate under the *Local Government Act 1995* of 8 Vasey Street Jerramungup Western Australia (**Developer**)

[] of [] (**Independent Certifier**)

RECITALS

- A. The Minister and the Developer entered into the Development Agreement in connection with the construction of the Development on land managed and controlled by the Minister.
- B. The Minister and the Developer wish to appoint the Independent Certifier to perform the Services on the terms and conditions set out in this deed.
- C. This is the "Independent Certifier Deed" as referred to in the Development Agreement.

OPERATIVE PROVISIONS

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

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this deed:

Authorisation means any consent, authorisation, registration, filing, agreement, notarisation, clearance, certificate, permission, licence, permit, waiver, approval, authority or exemption from, by or with a Government Agency required under any Laws, and includes any renewal of, or variation to, any of them, but does not include any act or omission by the Minister under this deed.

Best Industry Practice means:

- (a) the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a reputable and prudent person with skill and experience in, and resources necessary to complete, works and services similar to the Independent Certifier's Obligations and under conditions comparable with those applicable to the Independent Certifier's Obligations;
- (b) compliance with applicable standards and codes, being the standards and codes specified in this deed or, if this deed does not specify the applicable standards and codes, those standards and codes as would ordinarily be applied in the circumstances; and
- (c) compliance with all applicable Laws.

Business Day means any day other than:

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

Change in Control means in respect of any person, a change in the person or persons who, directly or indirectly, ultimately Control that person other than as a result of any dealing in securities listed on a stock exchange.

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

- (a) under, or arising in connection with, this deed or the Development; or

(b) under any Law.

Client Parties means the Minister and the Developer.

Confidential Information means any information relating to the affairs of the Minister, the Developer's Activities, the Independent Certifier's Obligations or the Development generally that:

- (a) is, by its nature, confidential;
- (b) is specified by the Minister to be confidential, including any information specified to be confidential in this deed or the Development Agreement; or
- (c) the Independent Certifier knows, acting reasonably, ought to know, is confidential, and includes the Development Information.

Developer's Activities means all of the activities which the Developer is required to perform for the Development, including all incidental and ancillary works and services required to carry out and complete the activities.

Developer's Representative means [*insert name of representative*].

Control has the same meaning as defined in the Corporations Act.

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

Date of Practical Completion has the meaning given in the Development Agreement.

Defect means any defect or omission in the Development including any part of the Development that does not comply with the Specifications.

Development means the design and construction of the Development.

Development Agreement means the Development Agreement for construction of a swimming pool and associated facilities between the Minister and the Developer dated on or about the date of this deed.

Development Information means each of the documents provided by the Client Parties to the Independent Certifier to carry out its obligations under this deed.

Development Plans has the meaning given in the Development Agreement.

Dispute means any real or perceived conflict, difference of opinion, or unresolved issue in relation to this deed or the parties' rights or obligations under this deed.

Fee means the amount payable to the Independent Certifier for the performance of the Services in accordance with Clause 3.2 and Schedule 3 (Payment Schedule).

Government Agency means any government or any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, Minister of the Crown, agency, entity or Parliament.

Independent Certifier's Obligations means all of the liabilities, obligations and requirements imposed or assumed by the Independent Certifier under this deed, express or implied, or arising from or in connection with this deed from time to time including the performance of the Independent Certifier's obligations as amended by any variation to this deed.

Independent Certifier's Representative means the person named as the Independent Certifier's Representative in Schedule 1 (Key Personnel).

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

- (a) **(informs creditors)**: the Independent Certifier informs its creditors generally that it is insolvent;
- (b) **(receiver)**: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in respect of any of the assets of the Independent Certifier;
- (c) **(execution)**: a distress, attachment or other execution is levied or enforced upon or against any assets of the Independent Certifier and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;
- (d) **(voluntary liquidation)**: the Independent Certifier enters into voluntary liquidation;

- (e) **(application)**: an application is made for the administration, dissolution or winding up of the Independent Certifier, which application is not stayed, withdrawn or dismissed within 10 Business Days of being made;
- (f) **(winding up)**: an order is made for the administration, dissolution or winding up, of the Independent Certifier other than for the purposes of a solvent reconstruction or amalgamation on terms approved by Minister;
- (g) **(resolution)**: a resolution is passed for the administration or winding up of the Independent Certifier;
- (h) **(arrangement or composition)**: the Independent Certifier enters into, or resolves to enter into or has a meeting of its creditors called to enter into, any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by Minister;
- (i) **(statutory demand)**:
 - (i) the Independent Certifier fails to comply with, or apply to have set aside, a statutory demand within 10 Business Days of the time for compliance; or
 - (ii) if the Independent Certifier applies to have the statutory demand set aside within 10 Business Days of the time for compliance, the application to set aside the statutory demand is unsuccessful and the Independent Certifier fails to comply with the statutory demand within 5 Business Days of the order of the court dismissing the application;
- (j) **(execution levied against it)**: the Independent Certifier has execution levied against it by creditors, debenture holders or trustees or under a floating charge; or
- (k) **(insolvency)**: the Independent Certifier is unable to pay its debts when they fall due, or is deemed unable to pay its debts in accordance with any applicable Law (other than as a result of a failure to pay a debt or claim which is the subject of a good faith dispute).

Insurance Policies means the insurance policies described in Clause 7.1.

Key Personnel means each of the Independent Certifier's personnel or sub consultants identified in Schedule 1 (Key Personnel).

Law means all applicable present and future laws comprised of:

- (a) all acts, ordinances, regulations, by-laws, orders, awards and proclamations of the State of Western Australia, the Commonwealth of Australia or a local authority;
- (b) Authorisations;
- (c) principles of common law or equity;
- (d) whether or not existing at the date of this deed.

Loss means:

- (a) any liability of any kind whatsoever, cost, expense, loss, personal injury (including illness), death or damage and includes direct and indirect, consequential or special damage, loss of use, loss of revenue; and
- (b) in respect of a Claim or Third Party Claim, includes amounts payable on the Claim or Third Party Claim and (whether or not the Claim or Third Party Claim is successful) legal costs and disbursements on a full indemnity basis,

whether or not such liability, cost, expense, loss, personal injury, death or damage, Claim or Third Party Claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.

Month means a calendar month.

Practical Completion has the meaning given in the Development Agreement.

Records means all records and information of any kind (including originals and copies of all accounts, financial statements, books, files, reports, records, correspondence, documents, drawings, diagrams, graphs, photographs, videos, computer models, design models and other materials) created for, or relating to, or used in connection with, the Development or

the performance of the Independent Certifier's Obligations, whether or not containing Confidential Information, and however those records and information are held, stored or recorded.

Records include:

- (a) all documentation and information relevant to the Development;
- (b) any electronic communication in any format;
- (c) the results of any monitoring and testing; and
- (d) anything which is a "record" under the *State Records Act 2000 (WA)*.

Related Entity means a "related entity" as defined in the Corporations Act.

Relevant Period means, in respect of any Record:

- (a) a minimum of 7 years after the creation of the Record; and
- (b) any additional length of time required under any Law or by any Government Agency.

Schedule means a schedule to this deed.

Schedule of Rates means the schedule of rates in Section 6 of Schedule 3 (Payment Schedule).

Specifications means scope requirements for the Works, as set out in Annexure C of the Development Agreement.

Services means those services to be provided by the Independent Certifier in respect of the Development Agreement as listed in Schedule 2 (Services), as may be varied from time to time in accordance with this deed.

Site means the area where the Works will be carried out, being that area identified as the Development Licence Area in annexure A to the Development Agreement and any other land made available by the Minister to the Developer to form the Development Licence Area.

State's Representative means the person the Minister notifies to the Developer as its representative in accordance with Clause 6.8(a) and includes any delegate of that representative.

Supplier has the meaning set out in Clause 11(c)(i).

Term has the meaning set out in Clause 2.

Third Party Claim means any Claim, demand, action, proceeding or suit of any nature, whether actual or threatened, initiated by a person other than the parties to this deed or a Related Entity of the Developer or the Independent Certifier, including any Claim by:

- (a) or with respect to, any person engaged in, or associated with, the performance of the Services, for damages or workers' compensation payments or contribution to such payments;
- (b) any relevant authority or other person for any premium or levy associated with the performance of the Services; or
- (c) any authority or other person for an indemnity for, or recovery of, workers' compensation benefits paid, or other costs and expenses incurred, under the *Workers' Compensation and Injury Management Act 1981 (WA)* or like legislation and paid to, or with respect to, any person engaged in, or associated with, the performance of the Services.

Works has the meaning given in the Development Agreement.

1.2 Interpretation

In this deed unless the context otherwise requires:

- (a) **(persons)**: references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), or a partnership;
- (b) **(includes)**: the words "including", "includes" and "include" will be read as if followed by the words "without limitation";

- (c) **(or)**: the meaning of "or" will be that of the inclusive "or", that is meaning one, some or all of a number of possibilities;
- (d) **(party)**: a reference to a "party" is to a party to this deed;
- (e) **(other persons)**: a reference to any party or person includes each of their legal representatives, executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (f) **(authority)**: a reference to any authority, utility company, institute, association or body is:
- (i) if that authority, utility company, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that authority, utility company, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as applicable; and
 - (ii) if that authority, utility company, institute, association or body ceases to exist, a reference to the organisation which serves substantially the same purposes or objectives as that authority, utility company, institute, association or body;
- (g) **(this deed)**: a reference to this deed or to any other deed, agreement, document or instrument includes a reference to this deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (h) **(legislation)**: a reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for, that legislation, section or provision;
- (i) **(rights)**: a reference to a right includes any benefit, remedy, discretion, authority or power;
- (j) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (k) **(headings)**: headings are for convenience only and do not affect the interpretation of this deed;
- (l) **(inclusive)**: a reference to this deed includes all Schedules;
- (m) **(Clauses)**: a reference to:
- (i) a Clause or Schedule is a reference to a Clause or Schedule of or to this deed, unless otherwise stated; and
 - (ii) a Section is a reference to a section of a Schedule;
- (n) **(defined meaning)**: where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (o) **(\$)**: a reference to "\$" is to Australian currency;
- (p) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (q) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (r) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this deed or any part;
- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (t) **(remedy)**: the use of the word "remedy" or any form of it in this deed means that the event to be remedied must be cured or its effects overcome;

- (u) **(may)**: the term “may”, when used in the context of a power or right exercisable by the Minister or the State's Representative, means that the Minister or the State's Representative (as the case may be) can exercise that right or power in its absolute and unfettered discretion and the Minister or the State's Representative (as applicable) has no obligation to the Independent Certifier to exercise that right or power;
- (v) **(no double counting)**: if this deed requires calculation of an amount payable to a party there should be no double counting in calculating that amount;
- (w) **(writing)**: references to a notice, request, Claim, consent, approval, record or report means that the same must be in writing unless otherwise agreed by the parties or expressly stated in this deed; and
- (x) **(obligations)**: a reference to an obligation includes a warranty and a reference to a failure to observe or perform an obligation includes a breach of warranty.

1.3 Related matters

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

1.4 Several liability

If a provision of this deed binds either or both of the Client Parties, that provision binds each of the Client Parties severally and not jointly and severally.

1.5 Civil liability

- (a) The operation of Part 1F of the *Civil Liability Act 2002 (WA)* is excluded in relation to all and any rights, obligations and liabilities (including negligence) arising out of, or in connection with, this deed or the performance of the Independent Certifier's Services.
- (b) The Independent Certifier must ensure that all Insurance Policies required by this deed which cover third party liability:
 - (i) cover the Independent Certifier for potential liability to the Client Parties assumed by reason of the exclusion of Part 1F; and
 - (ii) do not exclude cover for any potential liability the Independent Certifier may have to the Client Parties under, or by reason of, this deed.

1.6 Ambiguity

- (a) If any party discovers any inconsistency, ambiguity or discrepancy in this deed, that party must promptly notify the other parties.
- (b) the Minister will, acting reasonably, direct the parties as to the interpretation to be followed by the parties in performing their obligations under this deed with respect

to the Services, provided that any direction must not be inconsistent with the Development Agreement.

- (c) The Independent Certifier will have no Claim against the Client Parties arising out of or in connection with a direction issued by the Minister under this Clause 1.6.
- (d) To the extent of any inconsistency or conflict between this deed and the Development Agreement, the Development Agreement will prevail.

2 TERM

The term of this deed commences on the date this deed is executed and, subject to the earlier termination of this deed in accordance with its terms or at Law, will continue until the end of the last defects correction period for the Works, unless otherwise agreed by the parties (**Term**).

3 APPOINTMENT OF INDEPENDENT CERTIFIER

3.1 Appointment

- (a) The Client Parties appoint the Independent Certifier to perform the Services.
- (b) The Independent Certifier confirms its acceptance of the appointment in this Clause 3 and agrees to perform the Services as required by this deed.

3.2 Payment

- (a) In consideration of the provision of the Services under this deed, the Developer will pay the Independent Certifier the Fee, in accordance with Schedule 3 (Payment Schedule).
- (b) Unless expressly stated otherwise in this deed, the Fee is the Independent Certifier's sole entitlement to payment.
- (c) The Independent Certifier and the Client Parties acknowledge and agree that, as at the date of this deed, the Fee as set out in Schedule 3 is:
 - (i) for Services required to be performed by the Independent Certifier until and including the date that is four weeks after the Date of Practical Completion of the whole of the Works; and
 - (ii) based on Practical Completion being achieved on or before 1 July 2021.
- (d) If:
 - (i) the Minister requires the Independent Certifier to perform Services after the date that is four weeks after the Date of Practical Completion of the whole of the Development; or
 - (ii) there is a change between the relevant date specified in Clause 3.2(c)(ii) and the Date of Practical Completion and that change results in an increase or decrease of the Independent Certifier's costs of carrying out the Services,

Clause 6.5 will apply (including as to the calculation of any increase or decrease to the Fee).

4 ACKNOWLEDGEMENTS AND RELIANCE

The Independent Certifier acknowledges and agrees that:

- (a) it has received a copy of the Development Agreement and that it has read, and is familiar with, the terms of the Development Agreement to the extent that it relates to the Services;
- (b) its obligations under this deed with respect to the Services extend to, and include, but are not limited to, the obligations, functions, duties and services of the "Independent Certifier" as described in the Development Agreement;
- (c) each of the Client Parties:
 - (i) is relying on the skill and expertise of the Independent Certifier in performing its obligations under this deed; and

- (ii) may suffer Loss if the Independent Certifier does not perform its obligations in accordance with the requirements of this deed;
- (d) without limiting Clauses 4(c) and 5.1(b), the Client Parties are entitled to and will rely on any certificate or other document signed or given by the Independent Certifier under this deed; and
- (e) it must perform the Services in a manner which will not prevent, hinder, disrupt, delay or otherwise interfere with any work or services performed by any person, including the Development, except where it is the unavoidable consequence of performing the Services.

5 INDEPENDENT CERTIFIER'S OBLIGATIONS

5.1 Performance of the Services

- (a) The Independent Certifier must perform the Services in accordance with this deed and at the times specified in this deed and the Development Agreement.
- (b) The Independent Certifier must, in performing the Services:
 - (i) comply with all Laws, act honestly, diligently, reasonably and with the degree of professional care, knowledge, experience and skill which would be expected of an experienced skilled professional providing services similar to the Services for projects similar to the Development;
 - (ii) act independently and impartially of the Client Parties;
 - (iii) take into consideration all documents, information and material (whether written or oral) that any Client Party places before the Independent Certifier provided that it is relevant to the decision being made by the Independent Certifier at that time;
 - (iv) make a reasonable determination on any matter which it is required to make in respect of the Services in an appropriate form and stating the Independent Certifier's determination; and
 - (v) not act in a way which discharges or releases the respective obligations of the parties to the Development Agreement, without the prior written consent of those parties, except as required in order to perform the Services.

5.2 Conflict of Interest

- (a) The Independent Certifier represents and warrants to the Client Parties that:
 - (i) no conflict of interest exists or is likely to arise in the performance of the Services and its other obligations and the discharge of its duties and functions under this deed;
 - (ii) it and its Related Entities are not a partner, joint venturer, employee or agent of any of the Client Parties or the contractor undertaking the Works for the Developer (unless each of the Client Parties has otherwise agreed in writing); and
 - (iii) it has disclosed in writing to all other parties all contractual relationships that it and any of its Related Entities has in connection with the Development and all contractual relationships that it and any of its Related Entities has with any of the Client Parties.
- (b) If any conflict of interest or risk of conflict of interest arises during the Term, the Independent Certifier must:
 - (i) immediately notify the Client Parties in writing of that conflict or risk; and
 - (ii) take such action as directed by the Minister to avoid, prevent or mitigate a conflict of interest or risk of conflict of interest arising out of, or in connection with, the performance of the Services.

5.3 Key Personnel

- (a) The Independent Certifier acknowledges that the Client Parties have engaged the Independent Certifier on the basis that they are to consent to the Key Personnel who will be involved in the performance of the Services.
- (b) The Client Parties confirm their agreement to the Key Personnel nominated by the Independent Certifier at the Commencement Date, as set out in Schedule 1.
- (c) The Independent Certifier must not, without the prior written consent of the Client Parties:
 - (i) remove any of the Key Personnel; or
 - (ii) substitute another person for one or more of the Key Personnel.
- (d) Without limiting Clause 5.3(c), if any of the Key Personnel cease to perform the Services, the Independent Certifier must provide a replacement acceptable to the Client Parties at no additional cost to the Client Parties.
- (e) The Independent Certifier must ensure that the relevant Key Personnel attend all meetings as requested by the Developer or the Minister during the performance of the Services.

5.4 Quality assurance and audit

- (a) The Independent Certifier must implement a quality assurance system complying with the requirements of ISO AS NZS 9001 to ensure that the Services comply with the requirements of this deed and the Development Agreement.
- (b) The Independent Certifier will not be relieved of any requirement to perform any obligation under this deed as a result of:
 - (i) its compliance with the quality assurance requirements of this deed; or
 - (ii) any acts or omissions of the Client Parties with respect to the quality assurance requirements of this deed, including any audit under Clause 5.4(c).
- (c) The Independent Certifier must:
 - (i) at the request of any Client Party in respect of the performance of the Independent Certifier's Obligations, allow any audit of its quality assurance system under this deed by a third party;
 - (ii) give that third party access to premises occupied by the Independent Certifier where the Independent Certifier's Obligations are being performed;
 - (iii) permit that third party to inspect applicable information relevant to the quality assurance audit; and
 - (iv) fully cooperate with that third party in respect of the carrying out of the quality assurance audit.

5.5 Progress Reports by the Independent Certifier

Throughout the performance of the Services, the Independent Certifier must provide a progress report every two months to the Client Parties by the seventh day after the end of each two month period and in such format as is required by the Client Parties, containing, identifying or setting out:

- (a) a description of the Services undertaken during the reporting period;
- (b) a list or schedule of surveillance, monitoring and audits undertaken by the Independent Certifier during the reporting period;
- (c) a comprehensive schedule of the status of all correspondence and documentation exchanged between the Independent Certifier and the Client Parties;
- (d) a summary of key risks and issues relating to the Project Costs;
- (e) details of the surveillance, monitoring and auditing proposed to be undertaken by the Independent Certifier in the upcoming reporting period.

5.6 Records, access and audit

- (a) The Independent Certifier must maintain for the Relevant Period a complete set of all Records that relate to the performance of the Independent Certifier's Obligations.
- (b) Without limiting its obligations under Clause 5.6(a), the Independent Certifier must comply with the requirements of the *State Records Act 2000 (WA)*, insofar as that Act applies to any of the Records.
- (c) At any time and from time to time during the Relevant Period, each Client Party has the right to inspect and audit the Records held and maintained by the Independent Certifier in accordance with this deed. Upon a Client Party's request, the Independent Certifier must make such Records available to that Client Party (including proper access to the Key Personnel or, as the case may be, replacement key personnel, and facilities) to enable that Client Party to perform any inspection and audit of such Records.

5.7 Confidentiality and publicity

- (a) The Independent Certifier must keep confidential details of this deed, the Development Agreement and all information and documents (including the Confidential Information) provided to, or by, the Independent Certifier in connection with the Services and not provide, disclose, or use such information or documents except:
 - (i) to the extent necessary for the purpose of performing the Independent Certifier's Obligations, provided that the persons to whom the information is disclosed are bound by the confidentiality obligations imposed on the Independent Certifier under this Clause 5.7;
 - (ii) as authorised in writing by the Minister and, if the information to be disclosed relates to the Developer, by the Developer;
 - (iii) as is required by a Law or to the extent required by a stock exchange, and no more; or
 - (iv) when required (and only to the extent required), to the Independent Certifier's professional advisers and the Independent Certifier must ensure that those professional advisers are bound by the confidentiality obligations imposed on the Independent Certifier under this Clause 5.7.
- (b) The Independent Certifier must not make or publicise any announcements, advertisements or releases relating to this deed or the Development without the prior approval of the Client Parties, except to the extent that the Independent Certifier is required by Law to make a statement, in which case the Independent Certifier must:
 - (i) first provide a draft of the proposed statement to the Client Parties; and
 - (ii) make such changes as the Client Parties may reasonably require (having regard to the nature and content of the requirement of Law to make the statement).

5.8 Public disclosure of deed details

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

6 OBLIGATIONS OF THE CLIENT PARTIES

6.1 No interference or influence

The Client Parties must not interfere with, or attempt to influence or direct, the Independent Certifier in the performance of any of the Services.

6.2 Cooperation

- (a) The Client Parties must:
 - (i) cooperate with the Independent Certifier;
 - (ii) provide the Independent Certifier with all information, documents and materials within its possession, custody or control reasonably requested by the Independent Certifier for the purpose of the performance of the Services or required to be provided to the Independent Certifier under this deed or the Development Agreement, at the times reasonably required by the Independent Certifier; and
 - (iii) provide the Independent Certifier with such support as is reasonable to facilitate the performance of the Services in accordance with this deed.
- (b) The Developer must provide the Independent Certifier with:
 - (i) the latest:
 - (A) Development Plans;
 - (B) bi-monthly progress report; and
 - (C) documents and information, including any other plans, required to be provided to the Independent Certifier in accordance with the Development Agreement and this deed,

as and when amended; and
 - (ii) access to the results of all relevant monitoring and tests conducted by the Developer in accordance with the Development Agreement and this deed.

6.3 Right to enter, inspect, monitor and test

- (a) The Independent Certifier (and any person authorised by the Independent Certifier) for the purposes of performing the Services may, at any time before the expiry of the Term, upon giving reasonable notice to the Client Parties, enter the Site and any other place where the Development or materials are being tested, manufactured or fabricated.
- (b) The Developer must give such assistance as is reasonably required by the Independent Certifier in respect of any inspection or certifying any testing under Clause 6.3(a).

6.4 Client Parties to have no liability

- (a) Each party acknowledges that neither of the Client Parties is liable, or may be taken to have assumed a liability, or to have become (on enforcement of any of their powers or otherwise) liable, for:
 - (i) the performance of any obligation of any other Client Party under this deed or the Development Agreement; or
 - (ii) any act or omission of the Independent Certifier or for any Claim or liability arising from the Independent Certifier's exercise of its functions, or failure to exercise its functions, under this deed.
- (b) Clause 6.4(a) does not apply to relieve any party from any obligation arising under this deed.

6.5 Change to Services

- (a) The Developer may, by written notice to the Independent Certifier, request the Independent Certifier to make a change to the Services (including an addition or omission) which is within the general scope of this deed.
- (b) Before issuing a notice to the Independent Certifier under Clause 6.5(a), the Developer must consult with the Minister regarding the proposed change to the Services and take into consideration any comments received from the Minister, but for the avoidance of doubt is not obliged to otherwise act upon those comments.

- (c) If the Developer issues a request under Clause 6.5(a), the Independent Certifier must respond in writing as soon as practicable (and in any event within 5 Business Days after receiving the direction) by submitting:
- (i) its proposal for adjustments to the Fee, calculated in accordance with Clause 6.5(e) or an explanation as to why the Schedule of Rates cannot be applied as the basis for calculation of any adjustment to the Fee; and
 - (ii) the effect, if any, on:
 - (A) the timing of anything required to be provided by the Independent Certifier; or
 - (B) any other responsibilities of the Independent Certifier, under this deed.
- (d) The Developer must as soon as practicable after receiving the Independent Certifier's response under Clause 6.5(c), either direct the Independent Certifier to proceed with the change to the Services or withdraw the request.
- (e) Any increase or decrease to the Fee will be calculated in accordance with the Schedule of Rates. However, where the Independent Certifier has notified the Developer that the Schedule of Rates cannot apply to the requested change to the Services, the Developer will determine a reasonable adjustment to the Fee.

6.6 Suspension of Services

- (a) The Developer may, by written notice to the Independent Certifier, direct the Independent Certifier to suspend any or all of the Services for the period specified in that notice.
- (b) The State's Representative may at any time give notice to the Independent Certifier to resume the Services and if the Independent Certifier receives such a notice it must immediately resume the Services.

6.7 Client Parties meeting

- (a) If the Developer is of the opinion that the Independent Certifier is not performing its Obligations in accordance with this deed, it may call a meeting between the State's Representative and the Developer's Representative, who must attend within 2 Business Days (or such other period as requested by the other party) to decide an appropriate action to resolve the issue.
- (b) The State's Representative and the Developer's Representative will consider at such meeting whether to resolve the issue referred to in Clause 6.7(a) by:
 - (i) requesting that the Independent Certifier comply with this deed;
 - (ii) changing the Services of the Independent Certifier in accordance with Clause 6.5(a);
 - (iii) suspending the Services of the Independent Certifier in accordance with Clause 6.6(a); or
 - (iv) terminating the appointment of the Independent Certifier in accordance with Clause 9.1.

6.8 State's Representative

- (a) The Minister will appoint a person to be the State's Representative for the purposes of this deed and must give notice of that appointment (and any subsequent change) to the other parties. At the date of this deed, the State's Representative is Jennifer Anne McGrath, Deputy Director General of the Department of Education.
- (b) The role of the State's Representative is to:
 - (i) carry out the functions allocated to the State's Representative under this deed or otherwise delegated to the State's Representative by the Minister; and
 - (ii) give any directions as may be required for the purposes of this deed.

- (c) The State's Representative may from time to time appoint individuals to exercise any functions of the State's Representative but no more than one delegate may be delegated the same function at the same time. The appointment of a delegate does not prevent the State's Representative from exercising any function.
- (d) The State's Representative must immediately give notice to the other parties of:
 - (i) the appointment and name of any delegate and the functions delegated to the delegate; and
 - (ii) the termination of the appointment of a delegate.

6.9 Site Office and Facilities

The Independent Certifier is entitled to use the site office and facilities of the Developer.

7 INSURANCE

7.1 Insurance Policies

- (a) **(Public Liability Policy):** The Independent Certifier must maintain a public liability policy. The public liability policy must:
 - (i) cover liability for loss of, or damage to, property and the death or sickness of, or injury to, any person (other than liability which is required by Law to be insured under a workers' compensation policy of insurance);
 - (ii) be endorsed to cover:
 - (A) the use of unregistered motor vehicles and plant and equipment; and
 - (B) sudden and accidental pollution; and
 - (iii) be for an amount of \$20 million in respect of any one occurrence and unlimited in the aggregate during any one 12 Month period of insurance.
- (b) **(Professional Indemnity Policy):** The Independent Certifier must maintain a professional indemnity policy. The professional indemnity policy must:
 - (i) be for an amount of \$20 million in respect of any one claim and in the aggregate during any one 12 Month period of insurance;
 - (ii) cover liability arising from any act, error or omission in connection with, or arising out of, the professional activities and duties under this deed;
 - (iii) cover claims in respect of this deed under the *Competition and Consumer Act 2010* (Cth), *Fair Trading Act 2010* (WA) and any similar legislation in any other State or Territory insofar as they relate to the provision of professional advice; and
 - (iv) include one full automatic reinstatement of the limit of liability in each 12 Month period of insurance.
- (c) **(Insurance of employees):** The Independent Certifier must insure against liability for death of, or injury to, natural persons employed or engaged by the Independent Certifier including liability by statute and at common law. This insurance cover must:
 - (i) to the extent permitted by Law, be extended to indemnify the Client Parties for their statutory and common law liability to natural persons employed or engaged by the Independent Certifier; and
 - (ii) be for not less than \$50 million common law liability in respect of any one event.

7.2 General

- (a) The Independent Certifier must, at its own cost and expense, as a minimum, effect and maintain the Insurance Policies set out in Clause 7.1:
 - (i) on the terms and conditions set out in Clause 7.1 and otherwise on terms acceptable to the Client Parties, acting reasonably; and

- (ii) from insurers with a credit rating of A- or better with Standard and Poors, which either:
 - (A) carry on business in Australia and are authorised by the Australian Prudential Regulation Authority; or
 - (B) if overseas insurers, cover claims lodged and determined in the jurisdiction of Australia. Any limitations regarding this requirement must be notified to, and agreed to by, the Client Parties.
- (b) The Client Parties must not unreasonably withhold or delay their approval of an insurer or the terms and conditions of the Insurance Policies.
- (c) Without limiting Clause 7.2(a), the Independent Certifier must:
 - (i) pay all premiums and all deductibles applicable to the Insurance Policies when due; and
 - (ii) promptly reinstate any insurance required under this Clause 7 if it lapses or if cover is exhausted.
- (d) To the extent appropriate, the Insurance Policies must state they are governed by the laws of Western Australia and that each insurer irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia.
- (e) The effecting and maintaining of insurance by the Independent Certifier does not, in any way, affect or limit the liabilities or obligations of the Independent Certifier under this deed.

7.3 Term of the Insurance Policies

- (a) The Insurance Policies must come into effect on or before the commencement of the Independent Certifier's Obligations under this deed or before the Independent Certifier first comes onto Site, whichever is the earlier.
- (b) Subject to Clause 7.3(c), the Insurance Policies must be maintained until the Independent Certifier has fully complied with and discharged all the Independent Certifier's Obligations or the end of the Term or any extension of the Term, whichever is the later.
- (c) If the wording of any Insurance Policy required by this Clause 7 is constructed on a claims made basis, the insurance must be renewed or otherwise maintained without interruption for a period of 7 years after the expiration or termination of this deed.

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

The proposed terms and conditions of the Insurance Policies must be provided by the Independent Certifier to the Client Parties for approval:

- (a) at least 5 Business Days before the date of execution of this deed (or such other period as may be agreed to by the Client Parties); and
- (b) within 20 Business Days of the date set for each annual renewal with respect to the Services.

7.5 Proof of Insurance Policies

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

7.6 Failure to produce proof of Insurance Policies

- (a) If, after being requested in writing by the Client Parties to do so, the Independent Certifier fails to produce evidence of compliance with its insurance obligations under this Clause 7 to the satisfaction and approval of the Developer within 10 Business Days of the request, then the Developer may:
 - (i) exercise its rights under Clause 9;

- (ii) arrange for the relevant Insurance Policies to be procured and maintained for and on behalf of the Independent Certifier and recover the costs of, and incidental to, procuring those policies as a debt due and payable by the Independent Certifier; or
 - (iii) refuse payment of any amount due to the Independent Certifier until evidence of insurance required by this Clause 7 is produced to the Client Parties.
- (b) The rights given to the Developer by this Clause 7.6 are in addition to any other rights the Developer may have.

7.7 Independent Certifier's further obligations

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

7.8 Insurance Policies primary

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

8 LIABILITY AND INDEMNITIES

8.1 References to Independent Certifier

For the purposes of this Clause 8, any act, error or omission caused by the Independent Certifier's officers, directors, employees or contractors is deemed to be an act, error or omission of the Independent Certifier.

8.2 General indemnity

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

8.3 Exclusion

Each of the Client Parties, separately, are not entitled to recover Loss under the indemnity in Clause 8.2 to the extent that party has caused or contributed to the Loss.

8.4 Limitation of liability

- (a) Subject to Clause 8.4(b), the Independent Certifier's liability under this deed, from all claims howsoever arising (including negligence and breach of statutory duty) will be limited to \$20 million.
- (b) The limitation of liability in Clause 8.4(a) does not apply to any claims arising out of or in connection with any of the following on the part of the Independent Certifier or any of its officers, directors, employees or contractors:
 - (i) fraud or criminal conduct;

- (ii) willful misconduct;
- (iii) gross negligence; or
- (iv) a breach of the confidentiality obligations under Clause 5.7.

9 TERMINATION AND CONSEQUENCES

9.1 Termination for breach

The Developer may terminate this deed immediately by written notice to the Independent Certifier if:

- (a) the Independent Certifier is in material breach of the terms of this deed and the breach is, in the reasonable opinion of the Client Parties, not remediable;
- (b) the Independent Certifier is in material breach of the terms of this deed and the breach is, in the reasonable opinion of the Client Parties, remediable and such breach has not been remedied within 10 Business Days after service by the Developer of a notice specifying the breach and requiring it to be remedied;
- (c) the Independent Certifier fails to provide proof of the Insurance Policies under Clause 7.5;
- (d) an Insolvency Event occurs; or
- (e) there is a Change in Control of the Independent Certifier without the consent of the Client Parties under Clause 13.8(b)(i).

9.2 Termination for Convenience

The Developer may, in its absolute discretion but with the agreement of the State's Representative, terminate this deed at any time and without any effect on the Client Parties' accrued rights or remedies, by giving not less than 20 Business Days written notice of termination for convenience to the Independent Certifier.

9.3 Termination of Development Agreement

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

9.4 Termination of appointment of Independent Certifier

- (a) The appointment of the Independent Certifier will terminate on the date specified in the notice of termination under Clause 9.1 or 9.2, in accordance with Clause 9.3 or the expiry of the Term, whichever is earlier.
- (b) the Developer must pay the Fee for the Services up to the date of termination in accordance with Clause 9.7.

9.5 Delivery of documents

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

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

9.6 Reasonable assistance

Where the Developer gives a notice under Clause 9.1 or 9.2, of the termination of the appointment of the Independent Certifier, the Independent Certifier must provide full assistance to the Client Parties and any replacement for the Independent Certifier appointed, in order to enable such replacement to be in a position to perform the Services with effect from the appointment of such replacement.

9.7 Payment until date of termination

- (a) Subject to Clause 9.7(b), if the appointment of the Independent Certifier is terminated under this deed, the Independent Certifier is only entitled to be paid the proportion of the Fee for the Services performed up to the date of the termination.
- (b) If the appointment of the Independent Certifier is terminated under Clause 9.2 or 9.3, the Independent Certifier may recover from the Developer:
 - (i) the proportion of the Fee performed up to the date of the termination, in accordance with Clause 3.2; and
 - (ii) its reasonable costs arising out of the termination, determined in accordance with Clause 3.2 as if those costs formed part of the Fee.

9.8 Termination without prejudice

Termination of this deed under this Clause 9 will be without prejudice to:

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

10 DISPUTE RESOLUTION

10.1 Dispute

If a Dispute arises and is unable to be resolved, then:

- (a) the Dispute must be resolved in the same manner that disputes or differences of opinion are resolved in accordance with the Development Agreement; and
- (b) accordingly, the provisions of Clause 17 (Determination of Disputes) of the Development Agreement are incorporated into this document as if the only persons party to the Development Agreement, and the only persons party to the relevant Dispute or difference of opinion, are the parties to this deed.

10.2 Injunctive or urgent relief

Nothing in this Clause 10 prejudices any party's right to institute proceedings to seek injunctive or urgent declaratory relief in respect of a Dispute or any other matter arising under this deed.

10.3 Related Disputes

If and to the extent that a Dispute arises that relates to, or affects or concerns, any dispute or difference arising between the Minister and the Developer under or in connection with the Development Agreement (**Related Dispute**), the Independent Certifier:

- (a) agrees that the Dispute will not be progressed while the Related Dispute is in progress; and
- (b) agrees that its rights and obligations will be determined in accordance with, and agrees to be bound by, any resolution or determination made pursuant to the dispute resolution process under the Development Agreement in respect of the Related Dispute, provided that the Developer keeps the Independent Certifier reasonably informed of the resolution of the relevant Related Dispute.

11 GOODS AND SERVICES TAX

- (a) (**Construction**): In this Clause 11:
 - (i) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
 - (ii) words and expressions which are not defined in this deed but which have a defined meaning in GST Law have the same meaning as in the GST Law; and

- (iii) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.
- (b) **(Additional amount):** Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided in accordance with this deed are exclusive of GST.
- (c) **(Payment of GST):**
 - (i) If GST is payable on any supply made by a party (**Supplier**) under or in connection with this deed, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.
 - (ii) The recipient will pay the amount referred to in Clause 11(c)(i) in addition to, and at the same time that, the consideration for the supply is to be provided in accordance with this deed.
- (d) **(Tax invoices):**
 - (i) The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under Clause 11(c).
 - (ii) The recipient can withhold payment of any amount payable in accordance with this Clause 11 until the Supplier provides a tax invoice or an adjustment note, as appropriate.
- (e) **(Adjustment event):** If an adjustment event arises in connection with a taxable supply made by a Supplier in accordance with this deed, the amount payable by the recipient in accordance with this Clause 11 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient, as the case requires.
- (f) **(Reimbursements):** Where a party is required, in accordance with this deed, to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
 - (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
 - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.

12 NOTICES

12.1 Procedure for sending Notices

- (a) Any notice, consent, approval or other communication (a "**Notice**") given or made under this deed must be in writing and signed by the person duly authorised by the sender.
- (b) A Notice given or made under this deed must be delivered to the intended recipient by:
 - (i) prepaid post (if posted to an address in another country, by registered airmail);
 - (ii) hand; or
 - (iii) subject to Clause 12.1(c), email, provided:
 - (A) the Notice is sent as a pdf attachment to the email and is not sent as a temporary file or link; and
 - (B) the size of the email is less than 10MB,
 to the address or email address listed in Clause 12.2 below or the address or email address last notified by the intended recipient to the sender.
- (c) Notices given or made under Clauses 9.1 or 10.1 may not be delivered by email and must be delivered by prepaid post or hand in accordance with Clause 12.1(b).

- (d) A Notice will be conclusively taken to be duly given or made:
- (i) in the case of delivery in person, when delivered;
 - (ii) in the case of delivery by post, 2 Business Days after the date of posting (if posted to an address in Australia) or 7 Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of email, the earlier of:
 - (A) the time the sender receives an automated message from the intended recipient's information system confirming delivery of the email;
 - (B) the time the email is first opened or read by the intended recipient, or an employee or officer of the intended recipient; and
 - (C) 24 hours after the time the email is sent (as recorded on the device from which the sender sent the email), unless the sender receives, within that 24 hour period, an automated message that the email has not been received,

but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day or is later than 5pm (local time) it will be conclusively taken to have been duly given or made at the start of business on the next Business Day.

- (e) The Minister, the Developer and the Independent Certifier each must:
- (i) monitor the information system on which the mailbox for its email address resides on a frequent and regular basis;
 - (ii) immediately notify the other parties if it discontinues the use of, or changes, its email address, or if it is unable to access its email address for a period longer than 24 hours;
 - (iii) ensure it is able to receive Notices to its email address, including by ensuring that sufficient storage capacity is available at all times;
 - (iv) ensure its firewall and/or mail server (as applicable):
 - (A) allows messages of up to 10MB to be received; and
 - (B) does not trap any messages in the spam filter that have been sent from the Minister, the Developer's or the Independent Certifier's domain (as relevant); and
 - (v) ensure its system automatically sends a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

12.2 Party details

- (a) Minister's notice details are as follows:
 Address: 151 Royal Street, East Perth WA 6004
 Email address: c/o: paul.hemmings@education.wa.gov.au
 Attention: Jay Timothy Peckitt, Deputy Director General
- (b) The Developer's notice details are as follows:
 Address: 8 Vasey Street Jerramungup
 Email address: []
 Attention: []
- (c) The Independent Certifier's notice details are as follows:
 Address: []
 Email address: []
 Attention: []

13 GENERAL

13.1 Relationship of the parties

- (a) Nothing in this deed gives a party authority to bind the other party in any way.
- (b) The Independent Certifier is an independent contractor. The Independent Certifier's Representative and the Key Personnel will not be deemed to be employees, agents, subcontractors or consultants of the Client Parties.
- (c) Each party must pay all costs associated with its employees.
- (d) Neither this deed, nor the relationship created by it, is intended to create, and will not be construed as creating, any partnership, joint venture or fiduciary obligation with regard to, or as between, the parties.

13.2 Entire agreement

This deed states all the express terms of the agreement between the parties in respect of its subject matter and it supersedes any prior agreement (whether in writing or not), negotiations, discussions, understandings and agreements between the parties in relation to the subject matter of this deed.

13.3 Counterparts

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

13.4 Governing law

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

13.5 Waiver and estoppel

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this deed.
- (b) A waiver given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this deed operates as a waiver of any other breach of that term or of a breach of any other term of this deed.
- (d) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this deed by the Developer does not preclude, or operate as an estoppel of any form of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this deed.

13.6 Variations and waivers

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

13.7 Amendments to this deed

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

13.8 No dealing

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

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

13.9 Joint and several liability

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

13.10 Indemnities

- (a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination or expiration of this deed.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this deed.
- (c) A party must pay on demand any amount it must pay in accordance with an indemnity in this deed.
- (d) The Minister, the Independent Certifier and the Developer agree that:
 - (i) each indemnity or promise referred to in this deed in favour of indemnified persons is held on trust by the Developer for the benefit of any of the indemnified persons; and
 - (ii) the consent of the indemnified persons referred to in Clause 13.10(d)(i) will not be required for any amendment to, or waiver of rights in accordance with this deed.

13.11 Clauses to survive termination

- (a) Clauses 1 (Definitions and interpretation), 5.6 (Records, access and audit), 5.7 (Confidentiality and publicity), 7 (Insurance), 8 (Liability and indemnities), 9 (Termination and consequences), 10 (Dispute resolution), 12 (Notices) and 13 (General) survive termination of this deed and will continue in full force and effect.
- (b) Nothing in this Clause 13.11 prevents any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this deed. All rights and obligations in accordance with this deed survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this deed.

13.12 Costs and expenses

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

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

13.13 Further acts and documents

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

13.14 Severability of provisions

Any provision of this deed that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this deed nor affect the validity or enforceability of that provision in any other jurisdiction.

Executed as a deed.

SIGNED for and on behalf of the)
MINISTER FOR EDUCATION by)
JAY TIMOTHY PECKITT)
A/Deputy Director General of the)
Department of Education,)
the officer delegated this authority)
pursuant to sections 224 and 225)
of the *School Education Act 1999 (WA)*)
in the presence of)

____/____/____

Witness signature

Witness Full Name (Please print)

Witness address (Please print)

Witness occupation (Please print)

THE COMMON SEAL of the)
SHIRE OF JERRAMUNGUP)
was hereunto affixed in the presence of:)

Shire President

Chief Executive Officer

Print full name

Print full name

____/____/____

[Add execution clause for independent certifier]

Schedule 1 – Key Personnel

Schedule 2– Services

The Independent Certifier must discharge the following functions, duties and services:

- (a) independently certify in accordance with this deed that:
 - (i) the Works comply with the requirements of the Development Plans and Specifications;
 - (ii) Practical Completion has been achieved; and
 - (iii) all defects have been rectified within the Defects Liability Period;
- (b) provide the State's Representative with a written report on any matter required by the State's Representative in relation to any compliance certificate; and
- (c) perform all other functions in accordance with this deed or requested and agreed by the Client Parties.

Schedule 3– Payment Schedule

1. PAYMENT CLAIM

- (a) The Fee payable by the Developer to the Independent Certifier for the provision of the Services will be calculated on a Monthly basis, as specified in Section 6 of this Schedule 3.
- (b) Subject to Section 1(d), the Independent Certifier must, at least 3 Business Days before the end of each Month and upon termination of this deed, submit to the Developer a Payment Claim setting out the Fee:
 - (i) for the Services performed in accordance with this deed since the last account; and
 - (ii) calculated in accordance with this Schedule 3,

(Payment Claim).

- (c) A Payment Claim submitted under Section 1(b) of this Schedule 3 must include:
 - (i) a detailed breakdown of work completed and, if applicable, the calculation of amounts claimed to which rates apply;
 - (ii) any invoices or receipts necessary to substantiate calculation of amounts claimed to which rates apply;
 - (iii) if requested by the Developer's Representative, a statutory declaration or other evidence satisfactory to the Developer (acting reasonably) that no moneys payable to the Independent Certifier's Key Personnel were overdue as at the date of the Payment Claim; and
 - (iv) any other information reasonably required by the Developer.
- (d) Once the Independent Certifier has received 90% of the Fee payable under this deed it cannot claim any further portion of the Fee until:
 - (i) it is confirmed that all records, documents and other material have been handed over to the State's Representative; and
 - (ii) the Independent Certifier has, in the opinion of the Minister formed at the relevant time, met all of its obligations detailed in Schedule 2 (Services).
- (e) Once the requirements in Section 1(d)(i) and (ii) are met, the Independent Certifier can submit its final Payment Claim.

2. PAYMENT CERTIFICATE

- (a) Within 5 Business Days of receipt of a Payment Claim under Section 1(b) of this Schedule 3, the Developer, acting reasonably, by notice to the Independent Certifier must:
 - (i) advise that the Developer intends to make the payment set out in the Payment Claim and deliver a Payment Certificate to the Independent Certifier for the amount of its Payment Claim; or
 - (ii) advise that the Developer does not intend to make all or part of the payment set out in the Payment Claim, providing the reasons for its decision, and deliver a Payment Certificate to the Independent Certifier for any amounts to which the Developer maintains that the Independent Certifier is entitled (if any).
- (b) The amount set out by the Developer in its Payment Certificate under Section 2(a) of this Schedule 3 will be adjusted by:
 - (i) any amounts which the Developer is owed or entitled to deduct or has deducted under this deed; and
 - (ii) any correction or modification to previous Payment Certificates issued under Section 2(a) of this Schedule 3.
- (c) the Developer may for any reason in any Payment Certificate:

- (i) correct any error in any of the previous Payment Certificates; or
- (ii) acting reasonably, modify any of the previous Payment Certificates, previously issued by the Developer.

3. TAX INVOICE

- (a) Within 1 Business Day of receipt of a Payment Certificate, the Independent Certifier must provide a tax invoice in a form approved by the Developer and any other documentation necessary for the Developer to be able to claim any applicable GST or have payment of any GST recognised under the applicable GST legislation.
- (b) The amount in the tax invoice must be the same as the amount in the Payment Certificate.

4. PAYMENT

- (a) Within 20 Business Days of receiving a tax invoice from the Independent Certifier under Section 3(a) of this Schedule 3 and any other documentation the Developer requires, the Developer must pay the Independent Certifier or the Independent Certifier must pay the Developer the amount shown in the Payment Certificate (as adjusted under Section 2(c) of this Schedule 3).
- (b) Any Payment Certificate under Section 2(a) of this Schedule 3 or payment of moneys under Section 4(a) of this Schedule 3 is not:
 - (i) evidence of the value of work or services or that work or services have been satisfactorily performed in accordance with this deed;
 - (ii) an admission of liability; or
 - (iii) approval by the Developer of the Independent Certifier's performance or compliance with this deed,
 but is only to be taken as payment on account.

5. CONDITIONS FOR PAYMENT

Notwithstanding anything else in this deed and without limiting any other right or remedy of the Developer, the Developer will not be required to make all or any part of payment to the Independent Certifier required under this deed unless the Independent Certifier has properly performed all of the Services under this deed for which the Payment Claim has been issued.

6. MONTHLY PAYMENT SCHEDULE

For the purposes of Section 1 of this Schedule 3 and subject to Clause 6.5 of this deed, the Fee in respect of each of the Services, excluding the services carried out under the Schedule of Rates as listed in Section 7 of this Schedule 3, is as follows:

Month	Payment
	\$
TOTAL FEE:	\$

provided however that the Independent Certifier is not entitled to make a Claim for payment to the extent that the Services have not been carried out for the Month in question, whether as a result of suspension under Clause 6.5 of this deed or otherwise. The Monthly payment schedule above will be agreed in writing between the parties and updated accordingly.

