
The Secretary to the Department of Infrastructure
for and on behalf of the Crown in right of the State
of Victoria

Kew Development Corporation Pty Ltd

Walker Group Holdings Pty Ltd

Kew Residential Services Development Agreement

[Notes: 1. This version incorporates all amendments up to and including the Fourth Deed of Variation.]

2. The Department of Infrastructure has changed its name since execution of the Development Agreement. The name of the Department is now the Department of Economic Development, Jobs, Transport and Resources.]

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Date

Parties

The Secretary to the Department of Infrastructure, a body corporate established under section 35 of the Project Development and Construction Management Act 1994 (Vic), acting pursuant to a nomination order issued in respect of the Project on 30 August 2005 by the Governor in Council on the recommendation of the Premier, for and on behalf of the Crown in right of the State of Victoria (**State**).

Kew Development Corporation Pty Ltd ACN 119 766 264 of Level 21, Governor Macquarie Tower, 1 Farrer Place, Sydney, NSW, 2000 (**Developer**)

Walker Group Holdings Pty Ltd ACN 001 215 069 of Level 21, Governor Macquarie Tower, 1 Farrer Place, Sydney, NSW, 2000 (**Guarantor**)

Background

- A. Under the RFP, the Secretary sought detailed and costed proposals from pre-qualified organisations to develop the Site and construct the Community Houses.
 - B. The Secretary has selected the Developer as the successful party to undertake the Project. A principal reason for selection of the Developer was the Developer's commitment to construct an established community by delivering Stage 1, Stage 2, the Community Houses and the remaining stages as a fully integrated build out development of the Site.
 - C. The Developer has agreed to undertake the Project in accordance with the terms and conditions of this Agreement including constructing the Community Houses as part of the initial construction and development of Stage 1 and Stage 2.
 - D. The Guarantor has agreed to guarantee the obligations of the Developer under this Agreement on the terms and conditions of the Guarantee and Indemnity.
-

Division of this Agreement into Parts

This Agreement is divided into Parts A, B, C, D and E as follows:

PART A: General Provisions

PART B: Site and Construction Provisions

PART C: Subdivision, sales and marketing

PART D: Financial and commercial arrangements

PART E: Guarantee and Indemnity

Part A – General Provisions

A1 Interpretation

A1.1 Definitions

In this document:

Additional Costs has the meaning in clause **A18A.2.6**.

Additional Sale Lots has the meaning in **clause C14**.

Affiliate means in relation to a person that is related to or associated with that first mentioned person within the meaning of the Corporations Act and any person:

- (a) in which that first mentioned person has a Controlling Interest; or
- (b) which has a Controlling Interest in that first mentioned person.

Agreed Principles means those principles established by the State in consultation with key stakeholders to guide those aspects of the Project that are relevant to the continuing interests of the existing and future KRS Residents remaining on the Site and which are included in **schedule 2**.

Agreement means this agreement and all Parts, annexures and schedules to this Agreement.

Annexure means an annexure to this Agreement.

Applicable Cure Period means:

- (a) in the case of a Community Houses Default, 20 Business Days;
- (b) in the case of a Health Safety and Environmental Default, 5 Business Days;
- (c) in the case of a Financial Default, 10 Business Days.

Approvals includes any permit, licence, consent, certificate or other approval obtained or required to be obtained from a Relevant Authority in relation to the Site or the Project.

Approval Period means unless otherwise specified, the period of 10 Business Days.

Arm's Length Transaction means a transaction where the End Purchaser under a Lot Sale Contract is not:

- (a) the Developer, the Guarantor or an Affiliate of any of them; or
- (b) a director, secretary or officer of one or more of the persons described in **paragraph (a)** or a spouse, child, beneficiary or Affiliate of any such director, secretary or officer.

Artefacts means any fossils, bones, artefacts, coins, articles of antiquity, structures or other remains or things of science, geological, historical, archaeological or aboriginal interest or things otherwise of value.

Attorney means any attorney appointed under this Agreement and any person who by delegation directly or indirectly derives a Right from an attorney.

Australian Standards means any standard prepared, approved and published by Standards Associations of Australia.

Authorisation means any permit, certificate, approval, authorisation, consent, exemption, filing, licence, notarisation, registration or waiver however described to be obtained from a Relevant Authority in relation to the Site or the Project and any renewal of or variation to any of them.

Award means an award or determination or an order or judgment of a court of competent jurisdiction.

Balance Payment Guarantee has the meaning in **clause A23.10**;

Bank Guarantee means an unconditional and irrevocable undertaking:

- (a) from a bank or financial institution authorised to carry on banking business in Australia under the Banking Act 1959;
- (b) in favour of the State;
- (c) in form and content reasonably satisfactory to the State; and
- (d) requiring the issuer to pay to the State on demand without prior notice to or approval of the Developer an amount payable by the Developer under this Agreement which the Developer fails to pay on the due date under this Agreement.

BBSW means the Bank Bill Swap Reference Rate being the official bank bill rate set by the Australian Financial Markets Association for one month and quoted by Bloomberg from time to time.

Body Corporate means the body corporate or owners corporation established under the Subdivision Act 1988 on registration of a Plan of Subdivision.

Body Corporate Rules means the rules of a Body Corporate which will come into force on registration of a Plan of Subdivision, which rules may be varied under **Part C**.

Building Surveyor means the building surveyor appointed by the Developer in relation to the Project.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday in Melbourne.

Car Park means the car park to be constructed in accordance with **clause B21**.

Car Park Plan means the plan attached as **schedule 20**.

Certificate of Completion means a certificate issued by the State's Representative in accordance with **clause B14** confirming that a Community House has achieved Completion.

Change in Law means any of the following that affects the Project:

- (a) the enactment or making of a new Law by the State (which expression includes a change of an existing Law) after the Operative Date with which the Developer is legally obliged to comply and which either:
 - (i) requires an addition or alteration to the Project; or
 - (ii) results in a substantial increase in the cost of the Project to the Developer;
 - (b) a change in the way a Law is interpreted or applied;
 - (c) a change in the Tax Act; or
 - (d) a change in Law which is within the category of risk assumed by the Developer in accordance with the terms of this Agreement,
- but does not include a Discriminatory Law.

Clean up includes all measures required to:

- (a) remove, disperse, destroy, dispose of, abate, neutralise, build over or treat any Hazardous Materials;
- (b) restore the Environment to a state as close as practicable to the state it was in immediately before:
 - (i) the discharge of any Hazardous Materials; or
 - (ii) the creation of an Environmental Hazard; and

assess the nature and extent of the damage and risk caused by any Hazardous Materials or Environmental Hazard;
- (c) take any measurement, recording or sample or to prepare any report, plan, drawing or other document, or to make any inspection, calculation, test or analysis;
- (d) retain any consultant, contractor, expert, agency or person at the cost of the Developer required for the purpose of taking any clean up measures;
- (e) comply with any notice or direction served by the EPA; and
- (f) determine the most appropriate action to take in relation to the measures set out in **paragraphs (a) to (e)**,

and **Cleaning Up** has a like meaning.

Claim includes any claim, action, demand or proceeding:

- (a) under, arising out of, or in any way in connection with, this Agreement;
- (b) arising out of, or in any way in connection with, the work under this Agreement or any party's conduct; or
- (c) otherwise at Law or in equity including:
 - (i) by statute;
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or

- (iii) for restitution, including restitution based on unjust enrichment.

Code of Practice means a code of practice as defined in, and approved under, the Information Privacy Act 2000 (Vic).

Common Property means the areas set aside as such on a Plan of Subdivision.

Community Houses means those houses to be constructed on the Public Land and owned by the State and to be designed and constructed in accordance with the Community Houses Specification and **Part B** including the Transitional Stage 1 Community Houses.

Community Houses Default means:

- (a) a failure by the Developer to achieve Completion of the Initial Community Houses so as to enable the State to complete commissioning of all of the Stage 1 Community Houses by the Stage 1 Date for Completion;
- (b) a failure by the Developer to complete Stage 1 by the Stage 1 Date for Completion;
- (c) deleted; and
- (d) a failure by the Developer to perform or observe all or any of the covenants and obligations in this Agreement relating to the design, construction and delivery of the Community Houses, Stage 1 or Stage 2.

Community House Lots means a Lot on which a Community House is to be constructed.

Community Houses Payment means the amount payable by the State to the Developer in accordance with **clause D1** and **Schedule 12** in relation to the construction of the Community Houses.

Community Houses Specification means the specifications applicable to the design, construction and delivery of the Community Houses as specified in part 1 and part 2 of **Schedule 2**.

Compensation means compensation for Loss suffered by a party as a result of a default or other failure to perform by the other party payable in accordance with this Agreement, as agreed between the parties, or pursuant to an Award.

Completion means:

- (a) in respect to each Community House when each Community House has been constructed to the stage specified in **schedule 2**;
- (b) in respect of Stage 1 or Stage 2 (as the case may be) when:
 - (i) each Community House is Complete and has been handed over to the State; and
 - (ii) all Construction Works applicable to that Stage have been completed;
 - (iii) a statement of compliance has been issued by the City of Boroondara in accordance with the Subdivision Act 1988 (Vic) in

respect to the Plan of Subdivision and an Occupancy Permit has been issued in respect to all Lots in the Stage or both would have been issued except for a delay by the City of Boroondara which is not caused or contributed to by a failure by the Developer to comply with the Building Act 1993 (Vic) or the Subdivision Act 1988 (Vic),

and “Completed” has a corresponding meaning.

Construction Works means all the works to be undertaken by the Developer to construct the Project in accordance with this Agreement.

Construction Works Program means the program contained in **schedule 8**.

Consultants Contracts means all contracts entered into by or on behalf of the Developer with any consultant in relation to the Project.

Contamination means the presence in, on, or under land of Hazardous Materials at a concentration above the concentration at which the substance is naturally present in, on, or under the land in the same locality.

Controlling Interest means, in relation to a corporation or managed investment scheme, an interest held by a person in the corporation if:

- (a) the corporation or its directors are accustomed to or under an obligation, whether formal or informal, to act in accordance with the directions, comments, instructions or wishes of that person or of that person in concert with others; or
- (b) the person has a relevant interest within the meaning of the Corporations Act 2001 (Cth) or would have that relevant interest if any rights to subscribe for, or acquire or convert into, shares, units or other interests which are issued or unissued, were exercised.

Corporations Act means the Corporations Act 2001 (Cth).

Crown means the Crown in right of the State of Victoria.

Cure Plan means a plan proposed by the Developer to remedy a Default Event which details:

- (a) the time required to cure the relevant Default Event; and
- (b) a work plan setting out each task to be undertaken to cure the relevant Default Event and the time for each task to be completed.

Dealing means a Sale relating to the Site or any part of the Site.

Default Event means:

- (a) a Health, Safety and Environment Default;
- (b) a Community Houses Default;
- (c) a Financial Default;
- (d) any other breach by the Developer of, or other failure by the Developer to comply with, an Obligation of the Developer under this Agreement

(including, without limitation, a breach by the Developer of **clause A18.1**);

- (e) a representation, warranty or statement made, given or repeated by the Developer in this Agreement being false or misleading when made, given or repeated;
- (f) a failure by the Developer to comply with a notice from the State not caused by an act or omission of the State; or
- (g) a failure by the Developer to obtain a necessary Authorisation not caused by an act or omission of the State.

Default Event Notice means a notice given in writing by the State under **clause A20.1**.

Defect includes any design error, construction fault, omission and other buildings or design defect in the Public Land Works.

Defects Liability Period means the period of 12 months after Completion of each Community House.

Demolition Contract means the contract entered into between the State and the Demolition Contractor for the demolition of existing buildings in Stage 1.

Demolition Contractor means City Circle.

Demolition Permit means permit no P9639 and permit P10367 issued by Heritage Victoria under the Heritage Act 1995 for the demolition of certain buildings on the Site, relocation of three memorials, removal of specified vegetation and approval of the layout for the Site and includes any subsequent or replacement permit required to enable the Developer to carry out the Construction Works necessary to enable delivery of the Project in accordance with the Development Plan and this Agreement.

Design Brief means the design and output requirements for the development and construction of the Community Houses as specified in **Part 2 of schedule 2**.

Design Documents means the drawings, specifications, software, data, methods of working or any other material or process and other information, samples, models, patterns and the like required by this Agreement and created (and including, where the context so requires, those to be created by the Developer or pursuant to any Consultants Contract) for the construction of the Community Houses.

Developer's Base Margin means an amount equal to 18% of Project Expenditure (excluding the Liquidated Damages and any Management and Overhead Costs included within Project Expenditure) incurred by the Developer.

[Note: In accordance with the Deed of Release and the First Deed of Variation:

- the amount of Liquidated Damages was agreed at \$915,747.45

- an amount of \$7,241,000 constituting Project Expenditure was agreed to be not taken into account for the purposes of calculating the Developer's Base Margin]

Developer's Infrastructure includes all services, means of access and other infrastructure necessary or desirable for the Project.

Developer means Kew Development Corporation Pty Ltd ACN 119 766 264.

Developer CFO Deed has the meaning in **clause A18.4(e)**.

Developer Interest Rate means 8 per centum per annum;

Developer Modifications means :

- (a) any proposal to alter the Lot layout of Stage 1 or Stage 2;
- (b) any proposal to reduce the standard and quality of residential development, landscaping or community infrastructure as reflected in the expected costs allocated for those items in the Financial Model;
- (c) any change in the number of Lots from 380 or any change in the construction mix from that reflected in the Land Payment Schedule in **schedule 12**.

Developer's Representative means the person appointed as the Developer's Representative in accordance with **clause A10.2** being initially the person referred to in **schedule 1**.

Development Budget means the budget for the construction of the Construction Works and delivery of the Project in accordance with this Agreement as set out in the Financial Model.

Development Plan means the detailed development plan attached as **schedule 6** as amended from time to time in accordance with this Agreement.

DHS means the Victorian Department of Human Services.

DHS Secretary means the Secretary to the Department of Human Services.

Discriminatory Law means the enactment or making of a new Law (which expression includes the change of an existing Law) by the State which is directed specifically and exclusively at the Project and which has adverse cost or revenue consequences for the Developer.

Dwelling has the same meaning as in the Planning Controls.

End Date means the date determined under **clause A5.1**, as extended in accordance with this Agreement.

End Purchaser means the purchaser or transferee pursuant to a Lot Sale Contract.

Environment means the physical factors of the surroundings of human beings including land, water, atmosphere or odours.

Environmental Complaint means any complaint, order, directive, Claim, citation or notice by any Relevant Authority or any person, authority or other

entity having jurisdiction in respect of the Site or by any other person with respect to:

- (a) air emissions;
- (b) spills, leaks, releases, escapes or discharges to soil or improvements located thereon, of surface water, of ground water to or from the sewer, septic system or waste treatment, storage or disposal systems servicing the Site;
- (c) noise emissions;
- (d) solid, gaseous or liquid waste disposal;
- (e) the use, analysis, manufacture, generation, storage, transportation or disposal of Hazardous Material; or
- (f) any other Environmental, health or safety matters affecting the Site.

Environmental Hazard means a state of danger to human beings or the Environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics.

Environmental Law means all Laws (whether Commonwealth or State) orders, notices, consents (including Authorisations), regulations, approvals and permits of any Relevant Authority issued to the Developer or the State or on its behalf relating to or dealing with:

- (a) planning;
- (b) the Environment;
- (c) Hazardous Materials;
- (d) the use, storage or transportation of Hazardous Materials;
- (e) the disposal, discharge or treatment of Hazardous Materials;
- (f) the spill, leakage, containment or remediation of Hazardous Materials; or
- (g) related lawful directions or conditions,

in so far as any of the above matters relate to the Project.

EPA means the Victorian Environment Protection Authority.

Existing Project Guarantee has the meaning in **clause A23.10**;

Expert Board means an expert appointed by the Panel for the resolution of a dispute in accordance with **clause A25**.

Extension Event means:

- (a) a State Delay Event;
- (b) the discovery of levels of Contamination on the Site which:
 - (i) are higher than the levels disclosed by the State to the Developer in the RFP; and

- (ii) cause a delay to the Construction Works which cannot reasonably be avoided by a change to the Construction Works Program;
- (c) a Force Majeure Event;
- (d) any delay in the Developer obtaining any Approvals required to undertake the Project in a timely manner;
- (e) any delay in handing over the site pursuant to **clause B4.1(b)**;
- (f) the Plan of Subdivision for Stage 1 not being certified by the City of Boroondara on or before the expiry of the prescribed time for certification under the *Subdivision Act 1988 (Vic)*, where that failure is not the result of any failure by the Developer to comply with the requirements of the *Subdivision Act 1988 (Vic)* including satisfying any requirements for variations or to supply further information requested in accordance with the *Subdivision Act 1988 (Vic)* in a timely manner.

Financial Default means:

- (a) the occurrence of an Insolvency Event in relation to the Developer, unless the Developer is able to demonstrate to the reasonable satisfaction of the State that the occurrence of the Insolvency Event will not have a Material Adverse Effect;
- (b) the occurrence of an Insolvency Event in relation to the Guarantor;
- (c) the failure of the Developer to pay any money which the Developer is obliged to pay to the State pursuant to this Agreement within 10 Business Days after the sum has become payable (whether formally demanded or not); and
- (d) the failure of the Developer to provide the Project Guarantee or any other Bank Guarantee by the date specified in accordance with this Agreement.

Financial Model means the Financial Model approved by the State on or before the Operative Date and attached as **schedule 9** and includes any modification to the Financial Model.

Financier means any financier nominated by the Developer in accordance with **clause A18.6**.

FIRB means the Treasurer of the Commonwealth of Australia exercising his or her functions under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* through the Foreign Investment Review Board.

FIRB Application means each application to be lodged with FIRB for a FIRB Approval.

FIRB Approval means an approval from FIRB in respect of the Project or part of the Project.

First Variation Date means 28 August 2009.

First Deed of Variation means the documents titled "Deed of Variation" and "Deed of Release" between the State, the Developer and the Guarantor and dated 28 August 2009.

Force Majeure Event means any event which is beyond the reasonable control of a party to this Agreement and which bona fide prevents that party from performing its Obligations or has a Material Adverse Effect on that party performing its Obligations relating to the completion of the Project where that event could not have been prevented, overcome, or remedied by the exercise of a standard of care and diligence consistent with that of a prudent person undertaking the Obligation, including the expenditure of all reasonable sums of money. **Force Majeure Event** includes:

- (a) fire, flood or explosion not arising from construction or other works being performed by the Developer on the Site, or hurricane, earthquake, natural disaster, radio active contamination or toxic or dangerous chemical contamination;
- (b) sabotage, act of public enemy, war (declared or undeclared), act of terrorism or revolution;
- (c) riot blockade or other civil commotion which is not related to industrial action or strikes;
- (d) any delay arising in consequence of the finding of any Artefacts or the making of a Native Title Application; or
- (e) shortage of critical materials, or industry wide industrial action or strikes, that are not Site specific or specific to the Developer.

Force Majeure Notice means a notice given by the State or the Developer under clause A24.1.

Fourth Deed of Variation means the document titled 'Fourth Deed of Variation' between the State, the Developer and the Guarantor ;

Government GST Margin Scheme means the margin scheme as defined in the GST Law.

GST means:

- (a) the same as in the GST Law; and
- (b) any other Goods and Services Tax, or any Tax applying to this transaction in a similar way.

GST Law means the same as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Guarantee and Indemnity means the guarantee and indemnity by the Guarantor set out in **Part E**.

Guaranteed Land Payment means the minimum amount to be retained by the State from the sale proceeds of all Lot Sale Contracts as calculated in accordance with **clause D1** and **schedule 12**. The Guaranteed Land Payment includes the payments to be retained pursuant to paragraphs 2.1(a) and (b) of **schedule 12**.

Guarantor means Walker Group Holdings Pty Ltd

Handover means when the Developer makes a Community House available to the State for commissioning, being when the Community House has been constructed in accordance with the Design Documents for that Community House with the exception of:

- (a) minor external works, which do not impact on the ability of the State to commence commissioning; or
- (b) landscaping,

an Occupancy Permit has been issued for that Community House, and all Developer's Infrastructure reasonably necessary to enable access and use of the Community Houses in accordance with their intended purpose has been constructed.

Handover may occur prior to Completion of a Community House.

Hazardous Material includes:

- (a) all Prohibited Substances; and
- (b) all hazardous substances, or any pollutant or contaminant, which is, or may be, harmful to the environment, or the health or safety of any person or property, which is defined as such in (or for the purposes of) any federal, state or local Law regulating or imposing liability or standards of conduct concerning any such substance or material, save and except for any such substances or materials which are required by and approved under Industry Best Practice.

Health, Safety and Environment Default means any breach by the Developer of its Obligations under this Agreement which:

- (a) breaches an Environmental Law;
- (b) results in an Environmental Complaint;
- (c) in the State's opinion, has or will create a material risk of damage:
 - (i) to the health or safety of any person; or
 - (ii) to the Community Houses or the Environment.

Heritage Buildings means the buildings on the Site known as B1 Cottage, B3 School House (Parents Retreat/Chapel), B6 Dining Room (STAD) and their landscape setting, F1 Fire memorial column, F2 Long Term Residents Memorial and F3 Residents Sculpture which are included on the Heritage Register pursuant to the Heritage Act 1995 and referred to in the Demolition Permit and includes any additional buildings required to be retained pursuant to any further Demolition Permit.

Heritage Guarantee has the meaning in **clause A23.10**;

Heritage Building Repayment has the meaning in **clause B15**;

Heritage Permit has the meaning in **clause A23.10**;

Industry Best Practice means the practice of planning, designing, developing and constructing a residential property development and ancillary facilities to the standard achieved by developers of similar facilities (whether private or public) in Victoria.

Information means the contents of this Agreement together with all annexures and schedules.

Information Privacy Principles means the principles so identified and set out in the Information Privacy Act 2000 (Vic).

Initial Community Houses means the Community Houses (including the Transitional Stage 1 Community Houses) to be constructed and delivered as part of Stage 1.

Initial Community Houses Date for Completion means:

- (a) in relation to those Community Houses in Stage 1A – 1 July 2007;
 - (b) in relation to those Community Houses in Stage 1B – 1 August 2007;
 - (c) in relation to those Community Houses in Stage 1C – 1 September 2007,
- each as extended in accordance with this Agreement.

Initial Stage 2 Community Houses Payment Guarantee means the Project Guarantee for \$2,425,000 in favour of the State provided by the Developer in accordance with clause 2.1(p) of the Third Deed of Variation;

Insolvency Event means when:

- (a) an order is made that a corporation be wound up;
- (b) a corporation resolves that it be wound up;
- (c) a corporation is deregistered;
- (d) a person is or admits that it is insolvent;
- (e) a liquidator or provisional liquidator of a corporation is appointed;
- (f) an administrator of a corporation is appointed;
- (g) a person enters into, or resolves to enter into, a compromise, arrangement or deed of company arrangement with all or any of its creditors, except to reconstruct or amalgamate while solvent on terms approved by the State;
- (h) a natural person becomes insolvent within the meaning of section 95A of the Corporations Act or otherwise becomes bankrupt; or
- (i) a receiver, a receiver and manager or a controller of a person or of any material assets or undertaking of a person is appointed.

Key Personnel means the persons employed or contracted by the Developer to carry out the positions and roles described in **schedule 4**.

KRS means Kew Residential Services.

KRS Facilities means those parts of the Site as specified in the Community Houses Specification on which are constructed KRS Facilities which must be maintained in operation until the Completion of the Community Houses.

KRS Residents means those intellectually disabled residents currently living on the Site or who are to be housed in Community Houses as part of the Project, as the case requires.

Land Payment means the Guaranteed Land Payment and the Revenue Share Land Payment.

Latent Conditions means all conditions or characteristics of the Site and its surrounds including below ground conditions, all natural or artificial things, asbestos, Contamination, other Hazardous Substances and all other things above or below the surface of the Site or contained within any buildings or structures on the Site.

Law means any statute, ordinance, code, regulation, by-law, local law, official directive, order, instrument, undertaking, obligation or applicable judicial administrative or regulatory decree, judgment, Award or order.

Legislative Requirement includes any:

- (a) State and Commonwealth Law or Award;
- (b) Planning Approval;
- (c) Authorisation; or
- (d) Fees and charges payable in connection with the foregoing.

Liquidated Damages means the amount payable by the Developer to the State for a failure :

- (a) by the Developer to Complete the Initial Community Houses by the date necessary to enable the State to achieve commissioning of the Initial Community Houses by the Stage 1 Date for Completion; or
- (b) by the Developer to achieve Completion of Stage 1 by the Stage 1 Date for Completion,

being the relevant amount specified in part 5 of **schedule 2**.

[Note: In accordance with the Deed of Release, the amount of Liquidated Damages was agreed at \$915,747.45]

Loss means:

- (a) any cost, expenses, loss, damage or liability, but does not include loss of profit or consequential loss; and
- (b) without being limited to **paragraph (a)** and only to the extent not prohibited by Law, any fine or penalty under any Legislative Requirement.

Lot means a lot on a Plan of Subdivision forming part of the Site.

Lot Sale Contract means a contract for the Sale of a Lot to an End Purchaser.

Lot Vendor's Statement means a statement pursuant to section 32 of the Sale of Land Act 1962 (Vic) with respect to the Sale of a Lot.

LTO means the Victorian Land Titles Office.

Management and Overhead Costs comprise all indirect management and overhead costs of the Developer not wholly referable to the Project including senior management being all positions above Development Manager for the Project, head and state office overheads including rent, utility and other running costs and support and administrative staff, accounting services and other similar services.

Margin Scheme means the government margin scheme provisions contained at item 4 of section 75-10(3) of the GST Law.

Market Condition Change means a market condition which:

- (a) significantly affects the ability of the Developer to Sell any part of the Project on reasonable commercial terms (having regard to any materials or information which have previously been provided to the State); or
- (b) materially affects the ability of the Developer to obtain a level of pre-commitment to Sales for any Stage of the Project satisfactory to the Developer, acting reasonably;
- (c) affects the ability of the Developer to achieve an economic return from the Project consistent with the Financial Model; and
- (d) is beyond the reasonable control of the Developer.

Marketing means marketing, advertising, promotion and negotiation for the Sale of Lots.

Marketing and Sale Period means the period on commencing on the Operative Date and ending on the earlier of:

- (a) the date on which all Lots in the Project have been Sold; and
- (b) the expiration of the Project Term (as extended).

Material Adverse Effect means an event that materially affects the ability of the Developer to deliver the Project in accordance with this Agreement.

Materials means anything created, made, provided, produced or reproduced by or on behalf of the Developer or the Guarantor (including by or on behalf of any sub-contractor) in connection with this Agreement, including the Design Documents, the Development Plan, all Planning Consents, the Consultant's Contracts together with all information, records, documents and software (including source code) relating to such materials.

Monthly Report means the reports to be prepared by the Developer in relation to the implementation of the Project and containing the information specified in **schedule 16**.

Native Title Application means any claim or application under any Law or future Law relating to native title, including any application under section 61 of the Native Title Act 1993 (Cth), except for any such claim or application which

is in any way materially based or relied upon the existence of Artefacts on, under, near or around the Site.

New Project Guarantee has the meaning in **clause A23.10; Objectives** means the key objectives which the State seeks from the Project as set out in **clause A4**, which include the Agreed Principles.

Obligation includes any legal, equitable, contractual, statutory or other obligation, commitment or liability.

Occupancy Permit means an occupancy permit issued under the Building Act 1993 (Vic).

Operative Date means the date of execution of this Agreement.

Panel means the Panel established in accordance with **clause A25**.

Part means the relevant part of this Agreement.

Permitted Security Interest means:

- (a) a Security Interest to which the State has consented in writing; or
- (b) a lien or Right of set-off which arises solely by operation of Law in the ordinary course of ordinary business, where the amount secured is not overdue for payment or where the amount secured has not been contested on reasonable grounds in good faith.

Personal Information means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Plan Registration Date means the date on which a Plan of Subdivision is registered by the Registrar.

Plan of Subdivision means each plan of subdivision of the Site (or Lot on an earlier plan of subdivision) prepared by or on behalf of the Developer to subdivide the Site in accordance with the Subdivision Act 1988 (Vic).

Planning Approval has the meaning in **clause C14**.

Planning Consent means the approval of the Development Plan by the Minister for Planning under the Planning Scheme.

Planning Permit means any planning permit or other authorisation under the Planning Scheme or the Planning and Environment Act 1987 (Vic) required by the Developer to use, develop or subdivide the Site in accordance with the Development Plan.

Planning Scheme means Boroondara Planning Scheme

Planning Authority means (as applicable):

- (a) the Minister for Planning as the responsible authority for the Site under the Planning Scheme; and
- (b) the authority under the Planning Scheme responsible for certification of any Plan of Subdivision.

Pre-existing Matter means anything created, made or produced (other than by or on behalf of the State) before the Operative Date, which is provided to the State by or on behalf of the Developer in connection with Materials, or which is incorporated or used (in whole or in part) in Materials including methodologies, structure and general concepts.

Private Land means all of the Site excluding the Public Land.

Private Land Works means the design and construction by the Developer of the Private Housing, Community Facilities and the Developer's Infrastructure on the Private Land.

Prohibited Substance means:

- (a) any product used that may contain asbestos material or ceramic fibre; or
- (b) any equipment or materials used which contain polychloride biphenyls.

Project means the re-development of the Kew Residential Services Site generally in accordance with the Development Plan, the Demolition Permit and the Financial Model including the construction of the Community Houses and the Community Facilities.

Project Authorisation means all Authorisations and Planning Consents required for the Project.

Project Expenditure means all expenditure incurred by the Developer in respect of the design and construction of the Project or payable by the Developer in accordance with this Agreement (including Liquidated Damages) whether before or after the Operative Date including:

- (a) the Developer's employee costs that are wholly referable to the Project;
- (b) the costs incurred in constructing the Community Houses;
- (c) a charge of 2% of the above items for Management and Overhead Costs;

but excluding:

- (d) the Guaranteed Land Payments;
- (e) GST payable by the State on Lot Sale Contracts; and
- (f) GST paid by the Developer on items of Project Expenditure, except where the Developer is not entitled to or cannot recover an input tax credit for the GST paid.

The estimated Project Expenditure is set out in the Financial Model.

Project Guarantee means the Bank Guarantees or performance or other bonds for the amounts specified in **schedule 7** and includes the New Project Guarantee, Heritage Guarantee, the Initial Stage 2 Community Houses Payment Guarantee, Balance Payment Guarantee and Retention Guarantee.

Project Office Precinct has the meaning in **clause C14**;

Project Quality Assurance Plan means the project quality assurance plan which forms part of the Quality Assurance Plan.

Project Revenue means the sum of:

- (a) the Lot Sale price (exclusive of GST) for all Lots Settled;
- (b) any Community House Payments received by the Developer net of GST;
and
- (c) any lease or other income generated from Lots net of GST,
less
- (d) the Guaranteed Land Payments.

Project Term means the period from the Operative Date and expiring on the End Date.

Proper Building Procedures includes practices followed when work is undertaken in accordance with suitable or proper building industry practice for the type of building or location and:

- (a) in a proper and workmanlike manner;
- (b) with due care and skill and the application of nationally accepted urban design and building design, engineering, construction and management procedures;
- (c) in a manner which allows for the works to be efficiently performed;
- (d) using new materials of merchantable quality which are wholly suitable for their intended purpose; and
- (e) not using any Prohibited Substance.

Public Land means those parts of the Site to be developed as Community Houses as noted on the Site Plan.

Public Land Works means the design and construction of the Community Houses and the Developer's Infrastructure on the Public Land in accordance with the Community Houses Specification.

Public Purposes Lot means a Lot or other part of the Site which is:

- (a) reserved, set aside or appropriated for public purposes;
- (b) not part of any Common Property; and
- (c) not a Sale Lot or a Community House Lot.

Quality Assurance Plan means the quality assurance plan included in schedule 17.

Quantity Surveyor means a qualified quantity surveyor appointed by the State.

Rates and Taxes means all rates, charges, assessments, duties and levies imposed by any Relevant Authority including land tax at the rate actually assessed but excluding Utilities.

Registrar means the Registrar of the LTO.

Relevant Authority means any government or any governmental, municipal, statutory or public department, agency or body or any similar entity which has legal authority in relation to the use or occupation of or a service provided to the Site.

Reorganisation includes:

- (a) any issue by way of capitalisation of profits or reserves;
- (b) any consolidation or, subdivision or, reduction of capital or capital dividend or other reconstruction or adjustment relating to share capital;
- (c) any amalgamation or reconstruction affecting share capital;
- (d) any issue of rights, options or other interest to shareholders or stockholders;
- (e) any issue by way of rights; and
- (f) any scheme of arrangement.

Representative of a person means that person's officers, employees, consultants, contractors and agents.

Requirement means any notice, order, direction, statute, ordinance, proclamation, regulation, scheme, permit, by-law or other regulatory requirement (present or future) affecting or relating to the Site or the Project, or the use or development of the Project, irrespective of whether the requirement is addressed to the State, the Developer or any other person.

Resolution Period means 10 Business Days after a referral notice is given under **clause A25.1(a)**, or any longer period agreed in writing by the Panel or by the State and the Developer.

Retention Guarantee has the meaning in **clause A23.10**;

Revenue Share Land Payment means the amount payable by the Developer to the State in respect to the Site as calculated in accordance with **clause D1.2** and **schedule 12**.

Revised Developer Payment Date means 30 October, 2015.

RFP means the Request for Proposals for the Project issued on 18 May, 2004, including all attachments.

RFP Response means the Developer's response to the RFP, including all attachments.

Right includes any authority, benefit, power, privilege, remedy and cause of action.

Sale Lot means any Lot which is sold or intended to be sold by the State to an End Purchaser in accordance with **Part C**, not being a Community House Lot or a Public Purpose Lot.

Sale Procedures means the procedures for Sales set out in **schedule 11**

Schedule means a schedule to a part of this Agreement.

Second Deed of Variation means the document titled "Second Deed of Variation" between the State, the Developer and the Guarantor and dated 13 June 2012.

Security Interest means:

- (a) any bill of sale, mortgage, charge, pledge, hypothecation, title retention arrangement, trust or power as, or in effect as, security for the payment of a monetary obligation or the observation of any other Obligation;
- (b) any lien, profit a prendre, easement, restrictive covenant, any equity or interest in the nature of an encumbrance, garnishee order, writ of execution, right of set-off, lease, licence or agreement to use or occupy, assignment by way of security of income or monetary claim; and
- (c) an agreement to create or give any arrangement referred to in **paragraphs (a) or (b)** of this definition.

Sell means to sell, agree to sell or grant any option to purchase the freehold interest in a Lot to an End Purchaser and **Sale** and **Sold** have corresponding meaning.

Services means any service or item of infrastructure to, from or of the Site (including water, electricity, gas and other like services) and any plant, equipment or other item relating to them.

Settlement means the date on which the End Purchaser becomes registered or entitled to be registered as the proprietor of a Lot under a Lot Sale Contract and **Settle** has a corresponding meaning.

Site means the Kew Residential Services site, Princess Street, Kew as described in the Site Plan.

Site Conditions means the following conditions relating to the Site:

- (a) groundwater, groundwater hydrology and the effects of any de-watering;
- (b) conditions above, on and below the Site, including any Contamination or fill;
- (c) the existing structure to be refurbished or extended for the Project;
- (d) topography over the Site's surface and sub-surface conditions and geology, including rock or other materials encountered at the Site;
- (e) availability, condition, sufficiency and efficiency of roads, access, egress and all Utilities servicing, or required to service, the Community Houses and the Project;
- (f) rain surface water run-off and drainage, water seepage, wind, wind-blown dust and sand in seasons;
- (g) all existing systems, Utilities and services above or below the surface of the Site and the location of all facilities with which such systems, Utilities and services are connected;
- (h) Latent Conditions; and

- (i) all other physical conditions and characteristics of the Site above, on or below the surface which may affect the Project or the performance by the Developer of its obligations under this Agreement.

Site Plan means the plan, a copy of which is set out in **schedule 5**.

Stage means part of the Site nominated for development as a parcel substantially in accordance with the Development Plan.

Stage 1 means Stage 1A, 1B and 1C as denoted on the Stage 1 plan in **schedule 6** including the subdivision, development, provision of infrastructure, construction of the Initial Community Houses and all other works required to be carried out by the Developer in order to Complete Stage 1.

Stage 2 means the stage of the Project described as Stage 2 in the Staging Plan including the subdivision, development, provision of infrastructure, construction of houses and all other works required to be carried out by the Developer in order to Complete Stage 2.

Stage 8 means Stage 8 on the Development Plan, being the development of the Project Office Precinct;

Stage 2 Community Houses Payment means the amount payable by the Developer to the State in accordance with **clause D1.2(c)** and **clause 2.5** of **schedule 12**.

Stage 1 Cut Off Date means 31 March 2008 (as extended in accordance with this Agreement).

Stage 1 Date for Completion means 30 November 2007 (as extended in accordance with this Agreement).

Stage 2 Date for Completion means 31 December 2011 (as extended in accordance with this Agreement).

Staging Plan means the plan contained in **schedule 2**.

State means the Secretary to the Department of Infrastructure, a body corporate established under section 35 of the Project Development and Construction Management Act 1994 (Vic), acting pursuant to a nomination order issued in respect of the Project on 30 August 2005 by the Governor in Council on the recommendation of the Premier, for and on behalf of the Crown in right of the State of Victoria and (where applicable) includes the DHS Secretary, any Minister, delegate or authority of the State given responsibility for the Project or a relevant part of the Project.

State Breach means a failure by the State to perform or observe all or any of the covenants and Obligations imposed on the State under this Agreement.

State Cure Period means the period within which the State must cure a State Breach as specified in **clause A20.6**.

State Default Notice means a notice given in writing by the Developer under **clause A20.5**.

State Delay Event means:

- (a) a failure by the State to perform or observe all or any of the covenants and Obligations imposed on the State under this Agreement in relation to the delivery and construction of the Community Houses;
- (b) any other risk for which the State is responsible under this Agreement and which delays delivery and construction of the Community Houses.

State Modifications means any alteration, addition, amendment or change to the Design Documents, the Community Houses Specifications, the Public Land Works or the Community Facilities by the State pursuant to **clause B13.3** other than those of a minor nature made as part of the normal design and development process.

State Representative means the person appointed as the State Representative in accordance with **clause A10.1** being initially the person referred to in **schedule 1**.

Step-in Notice means a notice served in accordance with **clause A21.1**.

Step-in-Rights means the rights specified in **clause A21.1**.

Step-out Date means the date specified in **clause A21.6(c)**.

Step-out Notice means a notice served in accordance with **clause A21.6(b)**.

Subdivision Plan means a Plan of Subdivision.

Substantially Commenced means the commencement of civil engineering works on a Stage in accordance with a certified Plan of Subdivision for that Stage or the entry into Dealings in respect to more than 25% of the Lots in a Stage.

Tax includes:

- (a) all taxes levied, imposed or assessed under the Tax Act or any other statute, ordinance or Law in Australia or elsewhere; and
- (b) taxes in the nature of sales taxes, consumption tax, value added tax, payroll tax, group tax, PAYE, PAYG, undistributed profits, fringe benefits tax, recoupment tax, withholding tax, land tax, water rates, municipal rates, stamp duties, gift duties or other state, territorial, Commonwealth or municipal charges or impositions levied, imposed or collected by any governmental body

together with any additional tax, interest, penalty, charge, fee or other amount of any kind assessed, charged or imposed in relation to the late or short payment of the same or the failure to file any return.

Tax Act means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth).

Termination Events means:

- (a) a failure by the Developer to achieve Completion of Stage 1 by 30 June 2008 (as extended in accordance with this Agreement);

- (b) a failure by the Developer to achieve Completion of Stage 2 by the Stage 2 Date for Completion (as extended in accordance with this Agreement);
- (c) the Developer wholly or substantially abandons the Project;
- (d) the Developer fails to cure any Default Event within any Applicable Cure Period;
- (e) any other event occurs which is described in this Agreement as a Termination Event;
- (f) the Developer breaches clause A18.1.

Termination Notice means a notice in accordance with **clause A22.2**.

Third Deed of Variation means the document titled "Third Deed of Variation" between the State and the Guarantor and dated or on about the 8th day of April 2013.

Transitional Stage 1 Community Houses means the four transitional Community Houses to be constructed in Stage 1 as described in the Community Houses Specification.

Utilities means gas, water (hot and cold), sewerage, drainage, electricity, telecommunications and other services or items of infrastructure to, from or of the Site and any plant, equipment or other item relating to them.

Vacant Land means a Lot or part of the Site:

- (a) on which there are no improvements; and
- (b) in respect of which there is no binding contract between the Developer and an End Purchaser to construct improvements.

Valuer General means the Valuer General of the State of Victoria or its successor body.

VGPG means the Victorian Government Property Group.

VIPP means the Victorian Industry Participation Policy of the Government as announced from time to time encouraging the use of Victorian, Australian and New Zealand suppliers by contractors to Government, while ensuring value for money outcomes for Government projects.

VIPP Agency means the Government agency charged from time to time with maintaining a VIPP Register.

VIPP Outcomes means the outcomes specified in the VIPP Statement.

VIPP Register means the register of compliance by contractors to Government with the VIPP.

VIPP Statement means the Victorian Industry Participation Policy Statement which appears in **schedule 10**.

A1.2 **Construction**

Unless expressed to the contrary, in this document:

- (a) words in the singular include the plural and vice versa;

- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) “includes” means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person’s legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;.
 - (v) a right includes a benefit, remedy, discretion and power;
 - (vi) time is to local time in Melbourne;
 - (vii) “\$” or “dollars” is a reference to Australian currency;
 - (viii) this or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;
 - (ix) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmission; and
 - (x) this Agreement includes all schedules and annexures to it
- (g) if the date on or by which any act must be done under this document is not a Business Day, the act must be done on or by the next Business Day; and
- (h) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

A1.3 Severability

- (a) Subject to **clause A1.3(b)**, if a provision of this Agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the

purposes of that jurisdiction without affecting the enforceability of the other provisions of this Agreement.

- (b) Clause A1.3(a) does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this Agreement; or
 - (B) the relative commercial or financial positions of the parties;
or
 - (ii) would be contrary to public policy.

A1.4 **State Approval**

In any case where pursuant to this Agreement the doing or executing of any act, matter or thing by the Developer is dependent on the granting of consent or approval by the State, the State must act reasonably in giving or withholding that consent unless otherwise provided in this Agreement.

A1.5 **Covenants to bind representatives**

Where this Agreement provides that a party covenants or agrees to perform some act or thing, or to refrain from performing some act or thing, the covenant or agreement shall be read and construed as including the provision that the party shall procure that its Representatives perform the act or thing, or refrain from performing the act or thing, respectively.

A1.6 **Consistency**

- (a) If an inconsistency arises under this Agreement the following provisions will apply:
 - (i) if an inconsistency arises between this Agreement and any schedule to this Agreement, this Agreement will prevail in respect of the legal rights and obligations of the parties and remedies arising from that inconsistency, and the schedule will prevail in respect of technical requirements and specifications;
 - (ii) if an inconsistency arises between two or more schedules to this Agreement, the inconsistency must be resolved by the parties and, failing agreement, shall be determined in accordance with **clause A25**;
 - (iii) if an inconsistency arises between this Agreement and any other agreement, this Agreement will prevail in respect of any matters relating to construction, operation and maintenance of the Project, and any other inconsistencies must be resolved by the parties and, failing agreement, shall be determined in accordance with **clause A25**.
- (b) In determining the inconsistency, the parties and any independent expert must have express regard to the Objectives, the terms and conditions of this Agreement and (if necessary) the RFP and the RFP Response.

A1.7 No financial or commercial detriment

An Obligation to act reasonably does not impose on a party an Obligation to incur costs or financial or commercial detriment that would be disproportionate to its other Obligations, which would not be within its contemplation or would otherwise be unreasonable in the circumstances.

A1.8 Acting reasonably

When a party is required by this Agreement to act reasonably, subject to **clause A1.7** it must:

- (a) devote expertise and resources where appropriate or necessary;
- (b) cooperate with the other parties and provide information and assistance to them as and when reasonably requested;
- (c) act in good faith; and
- (d) promptly resolve any difficulties or differences including, if necessary, resolving any dispute in accordance with **clause A25**.

A1.9 State not obliged to pass laws

Nothing in this Agreement imposes any Obligation on the State to pass or procure the passing of any Law.

A1.10 State's capacity

The State enters into this document on behalf of the Crown in right of the State of Victoria and an Obligation or power of the State under this document is an Obligation or power of the State in that capacity.

A1.11 Delegation

- (a) The State may delegate any power, function or responsibility which the State has under this document.
- (b) Any such delegation may be:
 - (i) revoked, changed or delegated; and
 - (ii) limited or subject to such conditions as the State determines from time to time.
- (c) Any person to whom a power, function or responsibility is delegated by the State has, to the extent of that delegation and subject to compliance with the terms and conditions of that delegation, full power and authority to act for and on behalf of and to bind the State under this Agreement.

A1.12 Developer's Cost

Except where provided to the contrary in this Agreement, if this agreement refers to an action being undertaken by the Developer or "at the Developer's cost", any cost incurred by the Developer in undertaking that action will comprise Project Expenditure.

A2 Deleted

A3 Appointment, consideration and capacity

A3.1 **Appointment**

The State appoints the Developer to undertake the Project in accordance with this Agreement.

A3.2 **Acceptance of appointment**

The Developer accepts the appointment described in **clause A3.1**.

A3.3 **Consideration**

Each party acknowledges to each other party that it enters into this Agreement and incurs Obligations under this Agreement and gives Rights under this Agreement for valuable consideration received from the other parties.

A3.4 **Capacity of developer**

The Developer warrants to the State that, in entering into this Agreement, it does so in its own personal capacity and is not acting as trustee of any trust or settlement or as an agent on behalf of any other entity except as otherwise previously disclosed in writing to the State.

A4 Objectives and intent of the parties

A4.1 **Key objectives of Project**

The parties agree that the following comprise the key objectives of their agreement for the Project:

- (a) the Developer must carry out the Project and construct the Community Houses, and in particular, must, in accordance with the terms of this Agreement:
 - (i) create a new and integrated residential neighbourhood which complies with the Development Plan and achieves the planning amenity and commercial outcomes merited by the Site as demonstrated by the standard and quality of residential development, landscaping and community infrastructure reflected in the expected costs allocated for those items in the Financial Model;
 - (ii) construct new Community Houses and ancillary facilities for those existing KRS Residents who will remain on the Site which complies with the Community Houses Specification, by the Initial Community Houses Date for Completion or such later date as will enable the State to complete commissioning of all Stage 1 Community Houses by the Stage 1 Community Houses Date for Completion;
 - (iii) construct an established community by delivering Stage 1, Stage 2, the Community Houses and the remainder of the Site as a fully constructed, integrated and occupied development;

- (iv) minimise disturbance and disruption to KRS Residents during construction of the Public Land Works and Private Land Works;
- (v) comply with the Planning Scheme; and
- (vi) maximise the sale revenue of the Site and the Revenue Share Land Payment giving due consideration to the considerations in **sub-paragraphs (i), (ii) and (iii)** and prevailing market conditions.

A4.2 Interpretation of agreement

The Obligations of the Developer and the State under this Agreement shall be construed and interpreted having regard to the Objectives.

A5 Project term

A5.1 Project term

- (a) The Project Term commences on the Operative Date and, subject to **clause A5.2**, expires on the earliest to occur of:
 - (i) the date when all Sale Lots forming part of the Project are the subject of a Dealing and the State has received the Guaranteed Land Payment and Revenue Share Land Payment in respect of all Dealings in accordance with **Part D**;
 - (ii) an agreement between the parties to end the Project Term; and
 - (iii) the date being 10 years from the Operative Date.
- (b) For avoidance of doubt, 'Sale Lots' include Additional Sale Lots on a Plan of Subdivision of Stage 8 registered prior to the date referred to in **clause A5.1(a)(iii)**.

A5.2 Extension of Project Term

The Project Term may only be extended in accordance with **clause A5.3**.

A5.3 Extensions of Time

- (a) If the Developer considers that a delay in the progress of the Construction Works has occurred or will occur, the Developer must immediately notify the State stating the nature and cause of the delay or likely delay and whether the Developer considers that the cause of the delay is an Extension Event (**Delay Notice**). To the extent possible, the Developer must advise the State of a likely delay in sufficient time to enable action to be taken to avoid the delay.
- (b) As soon as practicable but not later than 5 Business Days after a Delay Notice is given to the State, the Developer must give further notice to the State (as often as necessary) with supporting evidence (including details of the activities affected by the Extension Event) stating a fair and reasonable period by which, in the Developer's opinion:
 - (A) an Initial Community Houses Date for Completion;

- (B) the Stage 1 Date for Completion;
- (C) the Stage 2 Date for Completion;
- (D) the End Date;
- (E) the Stage 1 Cut Off Date; or
- (F) the date in **paragraph (a)** of the definition of Termination Events,

should be extended.

- (c) Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them is an Extension Event, then to the extent that the delays are concurrent, the Developer shall not be entitled to an extension of time for more than one of the Extension Events, being the longest running of them.
- (d) The State must within 10 Business Days of receipt from the Developer of the Delay Notice give the Developer written notice of its decision to grant or refuse to grant an extension of time.
- (e) A delay by the State in granting, or the failure of the State to grant, a reasonable extension of time or to grant an extension of time in accordance with **clause A5.3(d)** shall not cause an Initial Community Houses Date for Completion, the Stage 1 Date for Completion, the Stage 2 Date for Completion or the End Date to be set at large.
- (f) Where the Developer fails to comply with any requirement of this **clause A5.3**, the Developer shall not be entitled to an extension of time for the relevant event or delay.
- (g) The State acknowledges that if there is an extension to an Initial Community Houses Date for Completion the consequence will be that the Developer is delayed in achieving Completion of the Initial Community Houses or Completion of Stage 1 by the Stage 1 Date for Completion, and:
 - (i) the Stage 1 Date for Completion;
 - (ii) the Stage 1 Cut Off Date; and
 - (iii) the date in **paragraph (a)** of the definition of Termination Events,

will be extended for a period commensurate with the extent of the delay.
- (h) Subject to **paragraph(h)**, the Developer shall not be entitled to any payment from the State, including a payment by way of damages for breach of contract or other obligation where that payment relates to any delay or disruption which the Developer may have encountered, irrespective of the cause of the delay or disruption, and including any delay or disruption caused by a State Delay Event.
- (i) The State:

- (i) acknowledges that any additional costs incurred by the Developer and directly attributable to a State Delay Event (not being a cost for which the State is liable in respect to Artefacts under **clause B1.4**, Native Title under **clause B1.5** or Planning under **clause B3**) forms part of the Project Expenditure;
 - (ii) must bear any costs for which the State is liable in respect to Artefacts under **clause B1.4**, Native Title under **clause B1.5** or Planning under **clause B3**;
 - (iii) accepts that the Revenue Share Land Payments payable to the State under **Part D** may reduce in consequence of **sub-paragraph (A)**; and
 - (iv) accepts the risk described in **sub-paragraph (C)**.
- (j) Notwithstanding any other provisions of this **clause A5.3**, the only grounds on which the Developer may claim an extension to the Stage 2 Date for Completion, and/or the Community Facilities Date for Completion is:
- (i) the occurrence of an event within paragraph (a), (b), (c), (d) or (e) of the definition of "Extension Event" and, in respect of the Community Facilities, also includes delays in complying with conditions of Approvals or the requirement of any Relevant Authority; or
 - (ii) in accordance with clause A5.5.

A5.4 **Market Condition Change**

- (a) Subject to **clause A5.4(b)**, on receipt of a written application from the Developer, the State will allow an extension of time to the End Date where the Developer can demonstrate to the State's reasonable satisfaction that a Market Condition Change has occurred.
- (b) The State will only be obliged to agree to an extension to the End Date under this **clause A5.4** if:
 - (i) the Developer has provided to the State all reasons and relevant information (including details of the nature of the Market Condition Change relied upon and supporting evidence from reputable independent experts) and the State is satisfied (acting reasonably) that an extension to the End Date is a feasible solution to the Market Condition Change;
 - (ii) the total amount of extensions sought as a consequence of Market Condition Change does not exceed 24 months;
 - (iii) the Developer has acted prudently and has not wilfully, artificially or arbitrarily delayed completion of the Project by the End Date in such a way as to contribute to the impact of the Market Condition Change;

- (iv) there is no subsisting Default Event in respect of which the Developer has been given a Default Notice at the date of the application or existing before the State's decision is communicated to the Developer;
 - (v) the State (acting reasonably) is otherwise satisfied with the Developer's performance of its obligations under this Agreement up to the date of the Developer's application under **clause A5.4(a)**; and
 - (vi) the State (acting reasonably) is otherwise satisfied that having regard to the performance of the Developer and prevailing economic and market conditions it is in the commercial interest of both the Developer and the State to grant an extension.
- (c) The Developer may make multiple applications for extensions and the State may grant more than one extension provided that no extension under this or any other provision will be granted where the extension would or may have the effect of extending the End Date by more than 24 months or such later date as may be agreed by the State.

A5.5 **Market Condition Change – Stage 2**

- (a) Subject to **clause A5.5(b)**, on receipt of a written application from the Developer, the State will allow an extension of time to the Stage 2 Date for Completion where the Developer can demonstrate to the State's reasonable satisfaction that a Market Condition Change has occurred.
- (b) The State will only be obliged to agree to an extension to the Stage 2 Date for Completion under this **clause A5.5** if:
 - (i) the Developer has provided to the State all reasons and relevant information (including details of the nature of the Market Condition Change relied upon and supporting evidence from reputable independent experts) and the State is satisfied (acting reasonably) that an extension to the Stage 2 Date for Completion is a feasible solution to the Market Condition Change;
 - (ii) the total amount of extension sought as a consequence of Market Condition Change does not exceed 12 months for Stage 2;
 - (iii) the Developer has acted prudently and has not wilfully, artificially or arbitrarily delayed completion of Stage 2 by the Stage 2 Date for Completion in such a way as to contribute to the impact of the Market Condition Change;
 - (iv) there is no subsisting Default Event in respect of which the Developer has been given a Default Notice at the date of the application or existing before the State's decision is communicated to the Developer;
 - (v) the State (acting reasonably) is otherwise satisfied with the Developer's performance of its obligations under this Agreement up to the date of the Developer's application under **clause A5.5(a)**; and

- (vi) the State (acting reasonably) is otherwise satisfied that having regard to the performance of the Developer and prevailing economic and market conditions it is in the commercial interest of both the Developer and the State to grant an extension.
- (c) The Developer may make multiple applications for extensions and the State may grant more than one extension provided that no extension under this clause will be granted where the extension would or may have the effect of extending the Stage 2 Date for Completion by more than 12 months or such later date as may be agreed by the State.

A6 Cooperation

A6.1 Parties to cooperate

Without limiting any other Obligation under this Agreement, each party must:

- (a) cooperate fully with each other; and
- (b) provide all assistance reasonably required by the others,

for the purpose of ensuring the timely performance and progress of the matters contemplated by this Agreement.

A6.2 Limitations

Nothing in **clause A6.1**:

- (a) requires any party to perform any act or undertake any Obligation which is the responsibility of another party under this Agreement;
- (b) subject to **clauses A1.7 and A1.8**, imposes on a party any Obligation to incur costs or financial or commercial detriment that would be disproportionate to its Obligations, would not be within its contemplation or could otherwise be unreasonable in the circumstances; or
- (c) imposes any Obligation on the State to pass or procure the passing of any Law.

A7 Representations warranties and acknowledgement of Developer

A7.1 Representations and warranties

The Developer represents and warrants to the State that:

- (a) **(status)** it is a company limited by shares incorporated, or taken to be incorporated, and existing under the Corporations Act and is not in liquidation, provisional liquidation or receivership, or under administration, and no matter relating to it or any of its subsidiaries is the subject of a direction under, or having effect as if it were a direction under, section 14 of the Australian Securities Commission Act 1989, or the subject of any investigation under, or taken to be under, the Australian Securities Commission Act 1989;

- (b) **(power)** it has full legal capacity and power:
 - (i) to own its property and assets and carry on its business as it is now being conducted; and
 - (ii) to enter into, exercise its rights and perform its obligations under this Agreement;
- (c) **(authorisation)** all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary Authorisations) in order:
 - (i) to enable it lawfully to enter into, and exercise its rights and perform its obligations under this Agreement; and
 - (ii) to make this Agreement admissible in evidence in the courts specified in **clause A30.13**,

have been fulfilled or done;

- (d) **(obligations binding)** this Agreement constitute its valid and legally binding obligations, enforceable against it in accordance with their respective terms;
- (e) **(no contravention)** neither its execution of, nor its exercise of its rights or performance of its obligations under this Agreement does or will:
 - (i) materially contravene any applicable law to which it or any of its property is subject, or any order of any Relevant Authority binding on it or any of its property;
 - (ii) materially contravene any Authorisation, or require that any Authorisation be obtained which at the time the obligation is required to be performed will not have then been obtained;
 - (iii) materially contravene any undertaking or instrument binding on it or any of its property; or
 - (iv) contravene any provision of its constitution;
- (f) **(no litigation)** no litigation, arbitration or administrative proceedings are taking place, pending or, to the knowledge of any of its officers, threatened against it or any of its subsidiaries, or any of its or their property;
- (g) **(no filings or Taxes)** it is not necessary to ensure the legality, validity, enforceability or admissibility in evidence of this Agreement that this Agreement or any other instrument be filed or registered with any Relevant Authority or that any Tax be paid;
- (h) **(no defaults)** no Default Event has occurred and is continuing;
- (i) **(no Security Interests)** none of its property, and no property of any of its subsidiaries, is subject to any Security Interest, other than a Permitted Security Interest;

- (j) **(trust)** in entering into this Agreement, it is not acting as trustee of any trust or settlement or as an agent on behalf of any other entity except as otherwise disclosed in writing to the State; and
- (k) **(capacity)** it has or has access to the technical and financial capacity to carry out the Project in the manner referred to in this Agreement.

A7.2 **Repetition of Representations and Warranties**

The representations and warranties in this clause are taken to be repeated by the Developer on each anniversary of the Operative Date, with reference to the facts and circumstances subsisting at that date. The Developer may, on each such anniversary, give notice to the State of any fact or circumstance existing at that time which qualifies any of the representations and warranties contained in this clause.

A7.3 **Reliance on Representations and Warranties**

- (a) The Developer acknowledges that the State has entered into this Agreement in reliance on the representations and warranties in this clause.
- (b) Without limiting the State's remedies elsewhere in this Agreement, the State shall be entitled to claim Compensation for any Loss, damage, cost and expense whatsoever arising from a breach of any representation and warranty by the Developer.

A7.4 **Own enquiries**

The Developer acknowledges and agrees that:

- (a) the Developer enters into this Agreement with knowledge and on the basis of the present condition of the Site (including the Site Conditions);
- (b) the Developer is not entitled to make any Claim for Compensation in respect of any matter relating to the Site Conditions;
- (c) the decision to enter into this Agreement and commit to the Project was based on the Developer's own investigations;
- (d) save for any express warranties in this Agreement, the State and its Representatives have not provided any information or made any representations or warranties as to the condition of the Site, that the Project is suitable for the purposes intended or the viability and profitability of the Project; and
- (e) save for any express warranties in this Agreement:
 - (i) the State does not warrant, guarantee, assume any duty of care or other responsibility for, or make any representation about, the accuracy, adequacy, suitability or completeness of the RFP; and
 - (ii) insofar as it is permitted by Law, the State will not be liable for any Claim by the Developer arising out of or in any way connected with:
 - (A) the RFP; or

- (B) a failure by the State to provide any information to the Developer.

A8 General undertakings of Developer

A8.1 Negative pledge

The Developer must not:

- (a) create or allow to exist, any Security Interest on the whole or any part of its present or future property in the Site, except in favour of the Guarantor or the Financier as the case may be, without the State's prior written consent, which consent will not be unreasonably withheld; or
- (b) enter into any Dealing unless permitted under this Agreement.

A8.2 Maintenance of status

The Developer must at all times during the Project Term:

- (a) do everything necessary to maintain its corporate existence and good standing; and
- (b) have the right and be duly qualified to conduct its business as it is presently conducted and obtain and maintain all licences, franchises and Rights necessary for the conduct of its business.

A8.3 Key Personnel

The Developer must employ or contract with suitable individuals to occupy the positions and perform the roles of the Key Personnel during the term of this Agreement.

A8.4 Devote sufficient time

The Developer must ensure that the Key Personnel (including any replacements) devote sufficient time to the services they are retained to do so that the Project is completed efficiently and in accordance with the provisions of this Agreement.

A8.5 Replacement of Key Personnel

- (a) If at any time the Developer wishes to replace any Key Personnel, the Developer must:
 - (i) promptly notify the State in writing;
 - (ii) promptly take steps to replace that person with a person or persons having the relevant skills required to perform the functions allocated to them in **schedule 4**; and
 - (iii) notify the State in writing of the name and qualifications of the proposed replacement person.
- (b) If the State is not reasonably satisfied that the replacement person nominated by the Developer has the relevant skills required to perform

the functions allocated to them in **schedule 4**, the State must notify the Developer in writing, with reasons, within 5 Business Days following receipt of a notice pursuant to **paragraph (a)**.

- (c) If the State and the Developer are unable to agree on any replacement person to perform the role of Key Personnel within 5 Business Days following service of a notice by the State pursuant to **paragraph (b)**, there shall be deemed to be a dispute which shall be resolved in accordance with **clause A25**.

A8.6 Removal of Key Personnel

- (a) Without prejudice to any of its other rights under this Agreement, the State may at any time notify the Developer that it considers that any one or more of the Key Personnel or any other employee of the Developer engaged in the Project are not performing or are not adequately performing the Project in accordance with this Agreement. The notice may require the Developer to, at its own cost:
 - (i) ensure that the Key Personnel in the performance of the Project comply with the obligations of the Developer under this Agreement;
 - (ii) if the State has previously served a notice under this clause in relation to the Key Personnel the subject of the notice, remove or replace the Key Personnel with another person or persons with comparable experience and qualifications approved by the State; or
 - (iii) take whatever other necessary action may be requested by the State, acting reasonably.
- (b) The Developer shall within a reasonable period (and, in any event, no later than 7 days in the case of **clause A8.6(a)(i)** or 14 days in the case of **clauses A8.6(a)(ii)** and **(iii)**) comply with the requirements of any notice so given by the State.

A9 Probity checks

A9.1 State may require

The Developer acknowledges that the State may require probity, security and accreditation checks to be carried out on the Developer on an ongoing basis.

A9.2 Provision of information

The Developer agrees to provide promptly to the State all information and, to the extent it is able to, consents of its employees, agents and contractors requested by the State in writing and which the State, acting reasonably, considers necessary to facilitate the carrying out of any probity, security and accreditation checks except where to do so would result in the Developer being in breach of a Legislative Requirement.

A10 Representatives of the parties

A10.1 Appointment of State's Representative

- (a) The State must appoint a suitably qualified and experienced natural person to be the State's Representative for the period from the Operative Date until the expiration of the Project Term. The State shall cause, and authorise, the State's Representative:
 - (i) so far as the State is empowered to authorise, to act as the representative of the State in all matters arising in relation to the Project;
 - (ii) to act fairly; and
 - (iii) to be a conduit of all communications from the State to the Developer and from the Developer to the State.
- (b) The State must notify the Developer in writing of the name, contact phone number, facsimile number and address of the State's Representative appointed from time to time. The initial details of the State's Representative are specified in **schedule 1**.
- (c) The State may replace the nominated State's Representative at any time. If the State's Representative is replaced, the State must advise the Developer as soon as practicable of the details of the replacement State's Representative in accordance with **clause A10.1(b)**.
 - (i) The State's Representative may from time to time:
 - (A) appoint one or more individuals to assist the State's Representative in exercising his or her powers, duties, discretions or authorities; or
 - (B) vary or terminate, in whole or in part, the appointment of, or the powers, duties, discretions or authorities of such individuals.
 - (ii) The appointment of an individual by the State's Representative does not prevent the State's Representative from exercising any of his or her powers, duties, discretions and authorities.
 - (iii) The State's Representative must, as soon as practicable, notify the Developer Representative of the appointment of an individual in accordance with **sub-paragraph (i)** and the extent of that appointment.

A10.2 Appointment of Developer's Representative

- (a) The Developer must appoint a suitably qualified and experienced natural person to be the Developer's Representative for the period from the Operative Date until the expiration of the Project Term. The Developer shall cause, and authorise, the Developer's Representative:

- (i) to act as agent for the Developer in all matters arising in relation to the Project, including the authority to do anything the Developer is empowered to do in accordance with the Transaction Documents;
 - (ii) to act fairly; and
 - (iii) to be a conduit of all communications from the Developer to the State and from the State to the Developer.
- (b) The Developer's Representative must be reasonably acceptable to the State. If the Developer appoints a person who is not reasonably acceptable to the State, the parties shall discuss and resolve whether a suitable replacement should be substituted.
- (c) The Developer must notify the State in writing of the name, contact phone number, facsimile number and address of the Developer's Representative appointed from time to time. The initial details of the Developer's Representative are specified in **schedule 1**.
- (d) If the Developer's Representative's appointment is terminated or expires for any reason, the Developer must appoint a replacement Developer's Representative as soon as possible after that appointment is terminated or expires. As soon as practicable after appointment of the replacement Developer's Representative, the Developer must provide the State with details regarding the replacement Developer's Representative in accordance with **clause A10.2(c)**.
- (e) The Developer's Representative may from time to time:
 - (i) appoint one or more individuals to assist the Developer's Representative in exercising his or her powers, duties, discretions or authorities; or
 - (ii) vary or terminate, in whole or in part, the appointment of, or the powers, duties, discretions or authorities of such individuals.
- (f) The appointment of an individual by the Developer's Representative does not prevent the Developer's Representative from exercising any of his or her powers, duties, discretions and authorities.
- (g) The Developer's Representative must, as soon as practicable, notify the State's Representative of the appointment of an individual in accordance with **paragraph (e)** and the extent of that appointment. **Paragraph (b)** will apply to any individual appointed in accordance with **paragraph (e)**.

A10.3 Dealings in relation to the project

All formal dealings by the Developer with the State in relation to the Project must be conducted solely with or through the State's Representative, or as the State's Representative directs, in accordance with the Transaction Documents.

A11 Project liaison group

A11.1 Creation of project liaison group

The parties must establish a project liaison group which shall provide for consultation between the State and the Developer with a view to coordinating the efficient implementation and monitoring of the Project.

A11.2 Constitution of project liaison group

(a) The project liaison group shall initially consist of 4 members, 2 appointed by the State and 2 appointed by the Developer. The first nominated members of the project liaison group are:

(i) For the State:

Ian Leong and David Hodge

(ii) For the Developer:

Kevin Hunt and Mike Randall

The project liaison group will be chaired by one of the State appointees as nominated by the State from time to time. The chairman will not have any independent voting rights or casting vote

(b) The State or the Developer may change a member at any time by written notice to the other.

(c) The State and the Developer may alter the constitution of the project liaison group by agreement from time to time.

A11.3 Proceedings of project liaison group

(a) The quorum necessary for the transaction of the business of the project liaison group shall be two, being one of the State's members and one of the Developer's members.

(b) Meetings of the project liaison group will be held every month or at other intervals the project liaison group for the time being decides to meet.

(c) The project liaison group may invite any other person to attend and report to a meeting.

(d) The State or the Developer may call an extraordinary meeting of the project liaison group at any time by giving each member at least two Business Days notice in writing.

(e) At least two Business Days before each project liaison group meeting (excluding meetings convened under **paragraph (d)**):

(i) the State must prepare and circulate to the members of the project liaison group an agenda in relation to matters to be discussed at the meeting; and

(ii) the Developer must prepare and circulate to the members of the project liaison group the Monthly Report.

- (f) Within five Business Days after each meeting, the State members shall circulate minutes for approval by all members on the project liaison group. If a member does not agree with the minutes so circulated, he or she must inform the other members within three Business Days after receipt of the minutes and raise the matter formally at the next project liaison group meeting.
- (g) The project liaison group shall:
 - (i) consider any issues relating to the construction and delivery of the Community Houses and completion of Stage 1 and Stage 2;
 - (ii) be kept informed about the progress of the Project and any issues relating to the Project; and
 - (iii) have no power to and shall not purport to derogate from the provisions of this Agreement.
- (h) Notice of a meeting of the project liaison group (excluding meetings convened under **paragraph (d)**) may be given at any time by any member giving not less than four Business Days notice of the proposed meeting. Notices of any meeting may be dispensed with if so agreed by the members of the project liaison group.
- (i) If a dispute or difference arising between the members is unresolved for five Business Days, the dispute or difference shall be determined in accordance with **clause A25**.

A11.4 **Operation of project liaison group**

The State and the Developer agree that:

- (a) they will require their nominated members who are members of the project liaison group to at all times act in good faith with a view to ensuring the proper and most efficient and effective implementation and delivery of the Project;
- (b) the establishment and operation of the project liaison group as required by this Agreement is without prejudice to the right of senior management of either the State or the Developer to discuss any matter with senior management of the other party, and the parties shall require that their respective senior managements will, at all reasonable times and upon reasonable notice, meet and discuss all or any matters pertaining to the operation of this Agreement (including the project liaison group); and
- (c) they shall require their respective members on the project liaison group to:
 - (i) meet, liaise and communicate with each other as and when required to ensure the effective and efficient operation of the project liaison group as contemplated by this Agreement; and
 - (ii) act reasonably.

A11.5 **Costs of project liaison group**

The State shall bear its own costs in the establishment and operation of the project liaison group. Any costs incurred by the Developer in the establishment and operation of the project liaison group will constitute Project Expenditure.

A11.6 **Monthly reports – Stage 1 and Stage 2**

At meetings of the project liaison group conducted prior to the completion of Stage 1 and Stage 2, the Developer must provide to the State 2 copies of the Monthly Report containing the information applicable to Stage 1 and Stage 2 as specified in **schedule 16**.

In addition to the Monthly Report, the Developer must provide the State with any additional information in respect to the Project which the State's Representative reasonably requires.

A11.7 **Monthly reports - post Stage 2**

At meetings of the project liaison group following completion of Stage 2, the Developer must provide to the State 2 copies of the Monthly Report containing the information applicable to post Stage 2 as specified in **schedule 16**.

A12 **VIPP statement**

A12.1 **Compliance with VIPP statement**

The Developer must use its reasonable endeavours to comply with the VIPP Statement and to ensure that the VIPP Outcomes are achieved.

A12.2 **Use of VIPP statement information**

The information contained in the VIPP Statement may be provided to the VIPP Agency to be included in the VIPP Register. That information will be made available to departments and agencies of the Government to be used in assessing other tender proposals for VIPP purposes.

A12.3 **Monitoring of performance**

- (a) The State will monitor the Developer's performance in accordance with any monitoring provisions in the VIPP Statement and measured against the VIPP Outcomes as out in the VIPP Statement.
- (b) The Developer will allow the State to have access to and obtain information from the Developer's records and staff.
- (c) The Developer will provide authorisation for the State to obtain information from the persons, firms or corporations nominated in the VIPP Statement as to compliance with the VIPP Statement.

A12.4 **Failure to comply**

Should the Developer fail to comply with its Obligations under **clause A12.1** on or before the due date for such compliance in the VIPP Statement:

- (a) the State may advise details of the Developer's non-compliance with such Obligations to the VIPP Agency;
- (b) the Developer agrees that such non-compliance with the Developer's Obligations under **clause A12.1** will (unless the VIPP has materially changed since execution of this Agreement, then only to the extent of manifest incompatibility between the Developer's obligations under **clause A12.1** and such changed provisions to the VIPP), amount to non-compliance with the VIPP Statement; and
- (c) the Developer agrees to the publication of details of the Developer's non-compliance of its Obligations under **clause A12.1**, or to the publication of its failure to comply with the VIPP Statement (as the case may be) in the VIPP Register, or in such other manner as the State or the VIPP Agency may determine.

A12.5 Consent to publication

The Developer consents to the publication of the VIPP Statement, and the information contained in the VIPP Statement by the VIPP Agency and the VIPP Register, or in such other manner as the State or the VIPP Agency may determine.

A12.6 Review of performance

The State will exercise its reasonable discretion in assessing the Developer's performance under this **clause A12**, and will take into account any issue raised by the Developer which fairly represents a cause of failure to comply beyond the Developer's reasonable control.

A13 Risk

A13.1 Risks assumed

The risk in respect of this Agreement will be borne by the parties as they have been expressly provided for in this Agreement.

A13.2 Acceptance by Developer

Without limiting any other provision of this Agreement, the Developer expressly accepts, and will not make any Claim against the State in respect of:

- (a) full responsibility for all costs and all risks of constructing, operating and maintaining the Project, and of observing and performing the Obligations of the Developer under this Agreement, including:
 - (i) the risk of a lack of utilisation of the Project;
 - (ii) the risk of financing the Project, (both debt and equity); and
 - (iii) the risk of Changes in Law affecting the Project,

provided that the responsibility of the Developer to operate and maintain the Project ends in respect of:

- (iv) a Community House Lot, when the State's Representative issues a Certificate of Completion in respect of the Community House constructed on that Community House Lot under **clause B14.6** and that Community House has been handed over to the State in accordance with this Agreement;
 - (v) a Sale Lot when a Settlement occurs in relation to that Sale Lot; and
 - (vi) a Public Purpose Lot, when the Public Purpose Lot is transferred to or vested in the appropriate Relevant Authority under **clause C3**;
- (b) the risk of a reduction in economic activity or a demographic or socio-economic change affecting demand;
 - (c) the risk that the actual costs of the Project are greater than the costs of the Project as estimated by the Developer (including as a result of movements in interest rates or inflation); and
 - (d) the risk that the actual revenue and profit derived from the Project may be less than the revenue and profit of the Project estimated by the Developer,

except to the extent that this Agreement expressly provides for the State to assume Obligations or risk in respect of these matters. Any costs incurred by the Developer in satisfying its obligations under this **clause A13.2** will form part of the Project Expenditure.

A13.3 **Acceptance by State**

Without limiting any other provision of this Agreement, the State expressly accepts: :

- (a) that the Revenue Share Land Payments payable to the State under **Part D** may reduce in consequence of the risks assumed by the Developer under **clauses A13.2(b), (c) and (d)**; and
- (b) the risk described in **paragraph (a)**.

A14 **Intellectual Property**

A14.1 **Developer warranties**

The Developer warrants that:

- (a) the Developer has the authority to grant the Rights in relation to the Materials created or produced by the Developer or the Guarantor and granted by the Developer to the State under this Agreement;
- (b) the Developer is entitled to use the Materials on a non-exclusive basis for the purposes of the Project; and
- (c) neither the provision to, nor the use by, the Developer or the State or anyone authorised by the State, of the Materials or the Pre-existing

Matter or any rights in respect of the Materials or the Pre-existing Matter, created or produced by the Developer or the Guarantor and for the purposes of the Project will give rise to any Obligation on behalf of the State to pay compensation or a royalty to any person.

A14.2 Repetition of representation and warranties

- (a) The representations and warranties in this **clause A14** are taken to be repeated by the Developer on each anniversary of the Operative Date, with reference to the facts and circumstances subsisting at that date.
- (b) The Developer may, on each such anniversary, give notice to the State of any fact or circumstance existing at that time which qualifies any of the representations and warranties contained in this **clause A14**.

A14.3 Licence to State

- (a) The Developer:
 - (i) grants to the State; and
 - (ii) must do all things reasonably necessary to give effect to the grant to the State of,

an irrevocable, non exclusive, perpetual, transferable, royalty-free licence (including the right to sub-licence) of all of the Developer's right title and interest to use and exercise for the purposes for which the relevant Materials and Pre-Existing Matter in or used in, relation to the Project for the purpose of the design, construction and completion of the Project;
 - (iii) in the exercise of the rights of the State under this Agreement including the State's Step-in-Rights; and
 - (iv) following the termination of this Agreement.
- (b) The licensed rights granted pursuant to **paragraph (a)** will survive:
 - (i) fundamental breach, repudiation, rescission, frustration, suspension or termination or expiry of this Agreement; and
 - (ii) works being taken out of the hands of the Developer pursuant to the exercise of the State's Step-in-Rights.
- (c) The Developer must sign all documents and do anything reasonably required by the State to give to effect to the licence in **paragraph (a)**.

A14.4 DKO Consent

Without limitation to its obligations under **clause A14.5** and **A14.6**, the Developer must procure DKO Architecture Pty Ltd to provide to the State a letter substantially in the form of **schedule 3** on or prior to the Operative Date.

A14.5 **Novation**

- (a) Without limitation to its obligations under **clauses A14.3** and A14.4, the Developer will take all reasonable action and provide all reasonable assistance to assist the State:
 - (i) to novate to the State (where contractually permitted) any Consultants Contract where in the opinion of the State this is necessary or desirable to facilitate the Project; or
 - (ii) if novation is not contractually permitted but the State wants to procure continuing ongoing supply or performance by the contractor, to procure a separate contract in favour of the State on the same terms and conditions as the Consultants Contract unable to be novated.
- (b) The obligations in **paragraph (a)** survive:
 - (i) fundamental breach, repudiation, rescission, frustration, suspension or termination or expiry of this Agreement; and
 - (ii) works being taken out of the heads of the Developer pursuant to the exercise of the State's Step-in-Rights.

A14.6 **Reasonable Endeavours**

Without limitation to its obligations under **clause A14.3, A14.4** and **A14.5**, the Developer will use its reasonable endeavours to obtain written confirmation (in a form to be agreed with the State, acting reasonably) from each relevant consultant that if this Agreement is terminated or the State exercises the State's Step-in-Rights, the relevant consultant will if requested by the State:

- (a) novate to the State any Consultant's Contract with the Developer or the Guarantor in relation to the Project; and
- (b) grant to the State a licence to use any Materials prepared by the relevant consultant or over which the relevant consultant has intellectual property rights for the purposes of the design, construction and completion of the Project on the same terms and conditions as the relevant consultant has contracted to supply the Materials to the Developer or the Guarantor.

A15 **Compliance with laws**

A15.1 **Complying with legislative requirements**

- (a) The Developer must satisfy all Legislative Requirements relating to the Project or performance of the Developer's obligations under this Agreement.
- (b) If a Legislative Requirement is at variance with a provision of this Agreement, the Developer must notify the State in writing as soon as the Developer discovers the variance and specify the difference.

- (c) The Developer is not entitled to any Compensation or to make any Claim for any Loss in connection with the satisfaction of any Legislative Requirements.

A15.2 Obtain Project Authorisations

Without limiting **clause A15.1**, but subject to **clause B3.1** the Developer must expeditiously apply for and obtain from each Relevant Authority all Project Authorisations.

A16 Quality assurance and control

A16.1 Quality assurance plan

- (a) The Developer must perform and observe all obligations required of the Developer under the Quality Assurance Plan, up to and including Completion of Stage 2.
- (b) The Quality Assurance Plan must not be amended or otherwise modified by the Developer without the approval in writing of the State's Representative, which approval must not be unreasonably withheld or delayed.

A16.2 Review of quality assurance plan

At the expiration of each period of 3 years following the Operative Date up to and including Completion of Stage 2, the Developer must review the Quality Assurance Plan, and amend or update the Quality Assurance Plan, as required to ensure that the Quality Assurance Plan continues to comply with all applicable Laws and regulatory controls and Industry Best Practice.

A16.3 Subordinates

The Developer must ensure that any party to whom the Developer sub-contracts any work or other of its obligations pursuant to this Agreement, complies with the Quality Assurance Plan up to and including Completion of Stage 2.

A17 Release and indemnity

A17.1 Release of the State

- (a) The Developer releases, to the full extent permitted by Law, the State and all the State's Representatives from all Claims and Loss directly resulting from any accident, damage, death or injury occurring on the Site (including in, on or from the Project):
 - (i) while the Site (or any relevant part of the Site) is under the control or supervision of the Developer; or
 - (ii) in the execution of the Construction Works.

- (b) The release under **paragraph (a)** is absolute except to the extent that the accident, damage, death or injury is caused or contributed to by the negligence, omissions or wilful misconduct of or breach of this Agreement (including a breach of **clause B9.4**) by the State or the State's Representatives.

A17.2 Indemnity from Developer

- (a) The Developer indemnifies and agrees to keep each of the State and the State's Representatives indemnified against, and shall pay the State on demand the amount of, all Claims and Losses, (including legal expenses on a full indemnity basis) and Taxes for which the State or the State's Representatives are or may be or become liable, in respect of or arising from:
 - (i) the occurrence of any breach of this Agreement by the Developer; and
 - (ii) the enforcement or preservation of any Rights of the State under this Agreement.
- (b) The indemnity given by the Developer under **paragraph (a)** is reduced to the extent that such Claim, or Loss, is caused or contributed to by the negligence, omission or wilful misconduct of, or breach of this Agreement (including a breach of **clause B9.4**) by the State or the State's Representatives.
- (c) For the purposes of **paragraph (b)**, any action by a person (not including the State Representative) is not conduct for which the State is responsible, unless that conduct was authorised or approved by the State or the person responsible was acting under the direct or ostensible supervision and control of the State when the conduct occurred.

A17.3 Specific indemnities

For so long as the Developer is in occupation or control of the Site or any part of the Site (in which case this clause applies to that part), the Developer agrees to keep each of the State and the State's Representative indemnified from and against all Loss incurred by the State in respect of or arising from:

- (a) the negligent use or misuse, waste or abuse by the Developer of the Utilities and installations in the facilities on the Site, or arising from any faulty plant, equipment, fittings or fixtures of the Developer;
- (b) overflow or leakage of water (including rain water) in or from the Site caused or contributed to by any act or omission on the part of the Developer, its contractors or representatives;
- (c) any damage whatsoever to property or person caused or contributed to by the use of the Site by the Developer, its contractors or representatives, notwithstanding that the use may be within the scope of the Project;

- (d) any damage whatsoever to the Site or the Project or any property or person within or outside the Site occasioned or contributed to by any act, neglect, omission, default or misconduct by the Developer, its contractors or Representatives;
- (e) any injury, loss or damage of any kind to any property real or personal, where the injury, loss or damage arises out of or in the course of or is caused by the execution of the Construction Works;
- (f) any personal injury to or death of any person arising out of or in the course of or caused by the execution of the Construction Works;
- (g) the execution of the Construction Works (other than as described in **paragraphs (e) or (f)**);
- (h) any act, error or omission or negligence of the Developer in execution of the Construction Works; or
- (i) any Default Event under this Agreement to the extent that such Default Event relates to the execution of the Construction Works or the performance of the Developer's Obligations under **Part B**; or
- (j) the enforcement or preservation of any rights under this Agreement to the extent that the rights relate to the execution of the Construction Works or the performance of the Developer's Obligations under **Part B**,

except to the extent that the Loss is caused or contributed to or results from the negligence or wilful misconduct of, or breach of this Agreement (including a breach of **clause B9.4**) by the State or the State's Representatives.

A17.4 **Release of the Developer**

- (a) The State releases, to the full extent permitted by Law, the Developer and all the Developer's Representatives from all claims and losses directly resulting from any accident, damage, death or injury occurring in any part of the Public Land Works following handover of that part of the Public Land Works by the Developer to the State in accordance with this Agreement.
- (b) The release under **paragraph (a)** is absolute except to the extent that the accident, damage, death or injury is caused or contributed to by the negligence, omissions or wilful misconduct or breach of this Agreement by the Developer or the Developer's Representatives.

A18 **Assignment**

A18.1 **Consent required**

The Developer shall not assign, novate or transfer all or any part of its Rights or Obligations relating to the Project under this Agreement without the prior written consent of the State, which consent shall not be unreasonably withheld provided the Developer complies with **clause A18.4**.

A18.2 Deemed assignment

A change in the Controlling Interest of the Developer without the prior written consent of the State (whether occurring at the one time or through a series of transactions) will be and be deemed to be an assignment for the purposes of this **clause A18** unless the occurrence arises solely as a result of the transfer of shares in the Developer or its respective shareholders on the Australian Stock Exchange or other international stock exchange or the listing of the Developer on the Australian Stock Exchange or other international stock exchange.

A18.3 Continuing obligations

Any assignment, novation, transfer or sub-contracting shall not release the Developer from its Obligations under this Agreement.

A18.4 Consent to dealings

The State will not unreasonably withhold its consent to an assignment under **clause A18.4(b)** if:

- (a) the assignee is an experienced developer which has the demonstrated financial capacity and expertise to achieve Completion of the Project in accordance with this Agreement;
- (b) the assignee enters into a deed of covenant in a form satisfactory to the State, acting reasonably, under which the assignee agrees to observe the Obligations of the Developer under this Agreement, subject to any Claim against the Developer which arises before the release provided that:
 - (i) the State must receive a Project Guarantee for the amount specified in **schedule 7** as at the date of assignment either by:
 - (A) the assignee providing a new Project Guarantee (in replacement for the Project Guarantee provided by the Developer); or
 - (B) the State being satisfied that the Project Guarantee provided by the Developer remains in full force and effect;
- (c) satisfactory probity investigations of the relevant third parties are completed including investigations of any criminal records, involvement or activities;
- (d) the relevant assignee executes a confidentiality deed in the form reasonably acceptable to the State;

and the State (acting reasonably) may impose conditions on the assignment including:

- (e) restrictions or conditions on the rights of access of third parties to the Project having regard to the nature of access required by the third parties; and
- (f) restrictions on further assignment.

A18.5 Approvals

Any approval given by the State under this Agreement, whether that approval is required to be given or deemed to be given, shall not in any way reduce or affect the Obligations of the Developer under this Agreement, except to the extent specified in that approval.

A18.6 Consent to Financing

- (a) Subject to **clause A18.6(b)**, the Developer may appoint a Financier (and replace it from time to time) to provide finance for the Project and assign the Rights to the Financier.
- (b) If the Developer elects to appoint a Financier for the Project the parties will negotiate and agree a tripartite agreement with the Financier on the following terms and conditions:
 - (i) the Financier will have no entitlement to register a mortgage or other security over the Site or any part of the Site;
 - (ii) the Step-in Rights of the State will be recognised and preserved;
 - (iii) the Financier will have no greater rights (including rectification of Default Events) than apply to the Developer under this agreement; and
 - (iv) the tripartite agreement will otherwise be on standard commercial terms and conditions as apply to similar projects including the Financier having standard default and step-in-rights in the event of a default by the Developer.
- (c) The parties must endeavour to negotiate the tripartite agreement as soon as practicable after the Developer notifies the State that it proposes to appoint a Financier for the Project.

A19 FIRB approvals

A19.1 Developer warranty

The Developer warrants that it does not, as at the Operative Date, require FIRB Approval for any part of the Project.

A20 Default

A20.1 Occurrence of Developer default

If a Default Event occurs, the State may give the Developer a Default Event Notice specifying that a Default Event has occurred.

A20.2 Cure period

- (a) On receipt of a Default Event Notice in respect of a Default Event other than a Community Houses Default, the Developer must provide to the

State's Representative within 10 Business Days a written response setting out:

- (i) the reason the Default Event occurred; and
 - (ii) a Cure Plan.
- (b) On receipt of a Default Event Notice in respect of a Default Event which is a Community Houses Default, the Developer must provide to the State's Representative within 5 Business Days a written response setting out:
- (i) the reason the Default Event occurred;
 - (ii) any impact the Default Event will have on achieving Completion of Stage 1 by the Stage 1 Date for Completion or Stage 2 by the Stage 2 Date for Completion; and
 - (iii) a Cure Plan.
- (c) Subject to **clause A21**, the Developer must cure a Default Event within the Applicable Cure Period.
- (d) The Developer must comply with and implement the Cure Plan and any amended Cure Plan.
- (e) If the Developer determines that it requires the benefit of an extension to the Applicable Cure Period under **clause A20.2(c)**, it must, as soon as possible (but no later than the expiration of the current Applicable Cure Period) submit to the State:
- (i) an amended Cure Plan;
 - (ii) evidence that the Developer has diligently pursued and is continuing to diligently pursue a cure, but that the Default Event cannot, with reasonable diligence, be cured within that period; and
 - (iii) if the Default Event relates to a Community Houses Default, a new construction works program, including identification of any critical path activities and proposed acceleration of the Public Land Works which will ensure that Completion of the Initial Community Houses and Stage 1 and Stage 2 is achieved as soon as practicable.
- (f) Subject to **clause A21** the State shall not unreasonably refuse to grant an extension to the Applicable Cure Period where the Developer has satisfied the requirements of this clause.
- (g) The Developer may, unless the State otherwise agrees in the State's sole discretion, only apply once for an extension to the Applicable Cure Period in respect of the Default Event specified in a Default Event Notice.
- (h) A Financial Default being a default in the payment of money can only be cured by payment of the amount then owing (including any interest accrued on that amount) in respect of the Financial Default.

- (i) A Default Event which is a breach by the Developer of **clause A18.1** can not be cured.
- (j) The Developer may request the State to confirm at any time after the issue of a Default Event Notice that the Default has been cured. The State must respond to this request as soon as reasonably possible and, where the State considers the Default has not been cured or remedied, set out the matters that still require cure by the Developer.

A20.3 **Failure to remedy default**

If:

- (a) the Developer fails to remedy a Default Event within the Applicable Cure Period or any extension to the Applicable Cure Period granted by the State pursuant to **clause A20.2(f)**; or

- (b) the Default Event is not capable of being remedied,

then the State may exercise all or any of the following Rights:

- (c) enforce its Rights under this Agreement and any other Rights which may be available to the State;
- (d) demand Compensation from the Developer to adequately redress the Default Event, and the Developer shall pay the Compensation. In the case of a Default Event being a failure to Complete the Initial Community Houses and Stage 1 by the Stage 1 Date for Completion, the amount of Compensation payable will be the amount of Liquidated Damages payable in respect to the Default Event;
- (e) issue reasonable requirements to the Developer in relation to the Default Event, and the Developer shall comply with those requirements at its cost;
- (f) require the Developer to, where the Developer is lawfully permitted to do so, replace the applicable contractor or sub-contractor performing the obligations of the Developer to which the Default Event relates with a competent and experienced person acceptable to the State (acting reasonably) within the timeframe notified to the Developer by the State, in which case the replacement of the applicable sub-contractor will be at the Developer's cost and:
 - (i) the State is not obliged to increase any payment payable by and under this Agreement;
 - (ii) the Developer's Obligations under this Agreement are in no way limited or changed;
 - (iii) the Developer will not be relieved of any of its liabilities under this Agreement; and
 - (iv) the Developer will not be entitled to make any Claim,

as a result of or in connection with the replacement of the applicable sub-contractor;

- (g) exercise any rights pursuant to any Project Guarantees held by the State pursuant to **clause A23**;
- (h) exercise its Step-in-Rights under clause A21;
- (i) sue the Developer in relation to a Default Event or exercise any available legal or equitable Rights or remedies in relation to the Default Event in accordance with this Agreement; and
- (j) if the Default Event is a Termination Event, terminate this Agreement pursuant to **clause A22**.

A20.4 **Equitable relief**

The Developer acknowledges that damages may not be an adequate remedy for any breach by the Developer of, or failure by the Developer to comply with, this Agreement. The Developer agrees that without limiting any other Right, remedy or action open to the State in connection with any actual or threatened breach or failure to comply with this Agreement, the State is entitled to seek equitable relief (including specific performance or injunctive or declaratory relief) to restrain any actual or threatened breach or failure to comply and that the Developer must not oppose the granting of such relief on the basis that no actual loss or damage has been or will be sustained by the State.

A20.5 **State default**

If a State Breach occurs, the Developer may give the State a State Default Notice specifying that a State Breach has occurred.

A20.6 **Cure Period**

Upon receipt of a State Default Notice, the State shall have:

- (a) in the case of a default resulting from a failure by the State to pay moneys owing to the Developer under this Agreement as and when due under this Agreement, 20 Business Days to rectify the State Breach; and
- (b) in the case of any other default, 20 Business Days or such longer period as is reasonable in the circumstances to rectify the State Breach.

A20.7 **Remedies**

- (a) If a State Breach has occurred and is not remedied within the State Cure Period, the Developer's sole rights in respect of that State Breach are:
 - (i) in the case of a failure by the State to pay moneys owing to the Developer, to exercise all legal and equitable remedies to recover those moneys together with interest;
 - (ii) in the case of any other State Breach:
 - (A) to claim an extension of time in accordance with **clause A5.3** (if applicable); or

- (B) terminate this Agreement.
- (b) If this Agreement is terminated by the Developer under **paragraph (a)(ii)(B)**, the Developer may exercise any legal or equitable Rights available to it in respect to the State Breach.

A21 Step in

A21.1 Generally

If:

- (a) a Community Houses Default occurs;
- (b) the State gives the Developer a Default Event Notice; and
- (c) the Developer:
 - (i) fails to provide a written response under **clause A20.2(a)** or **(b)** (whichever is applicable) within the specified period;
 - (ii) sets out a Cure Plan which, in the State's reasonable opinion, causes there to be a material risk that Completion of Stage 1 or Stage 2 will not occur by the Stage 1 Date for Completion or the Stage 2 Date for Completion respectively; or
 - (iii) fails to cure the Community Houses Default Event within the Applicable Cure Period,

the State may, in its sole and absolute discretion, and without limiting any other Right or remedy of the State under this Agreement, elect to personally, or through its agent or nominee, exercise any or all of the rights and perform the Obligations of the Developer under this Agreement ("**Step-in Rights**") by giving written notice to the Developer to that effect ("**Step-in Notice**").

A21.2 Step-in Date

A Step-in Notice will be effective from the date of that notice ("**Step-in Date**").

A21.3 Developer must assist the State

If the State elects to exercise its Step-in Rights pursuant to **clause A21.1**, the Developer must provide all assistance reasonably required to the State at the Developer's cost.

A21.4 Developer's Rights and Obligations suspended

The Developer's Rights and the Developer's Obligations which the Developer cannot practically perform under this Agreement will be suspended to the extent practicable or necessary to permit the State to exercise its Step-in Rights.

A21.5 Attorney

The Developer:

- (a) irrevocably appoints the State, and such persons as are from time to time nominated by the State, jointly and severally as its attorney with full power and authority to exercise its Step-in Rights; and
- (b) subject to **clause A21.10**, agrees to ratify and confirm whatever action an attorney appointed under **clause A21.5(a)** takes in accordance with that clause.

A21.6 **Step-out**

- (a) The State may cease to exercise its Step-in Rights at any time and in any event will cease to exercise its Step-in Rights as soon as the relevant material risk is averted or overcome, or where it has materialised, its consequences have been mitigated or otherwise dealt with to the State's reasonable satisfaction.
- (b) The State must give the Developer not less than 14 days notice in writing of its intention to cease to exercise its Step-in Rights ("**Step-out Notice**").
- (c) A Step-out Notice will be effective from the date specified in the notice ("**Step-out Date**").

A21.7 **Developer must re-commence performance**

On and from the Step-out Date:

- (a) the Developer must immediately recommence performance of the Developer's Obligations which were suspended pursuant to **clause A21.4**; and
- (b) the State will, at the Developer's cost, provide all assistance reasonably required by the Developer to ensure that the process of the State ceasing to exercise Step-in Rights and the Developer re-commencing its performance of its suspended Obligations is effected as smoothly as possible.

A21.8 **No liability or Obligation**

- (a) Subject to **clause A21.10**, the State will not have any Liability to the Developer, and the Developer will not be entitled to make any Claim, arising out of or in connection with the exercise of Step-in Rights by the State unless or to the extent that the State acts negligently, unlawfully or in bad faith in the exercise of those Step-in Rights.
- (b) Following the Step-out Date, the Developer must assume any Obligations the State enters into in relation to the Project in the exercise of its Step-in Rights unless or to the extent that it is not proper or reasonable for those Obligations to be assumed by the Developer.
- (c) Notwithstanding this **clause A21**, the State is not obliged to remedy any Default Event or Termination Event or to overcome or mitigate any risk or risk consequences in respect of which the State exercises Step-in Rights.

A21.9 **Release**

Subject to **clause A21.10**, the Developer releases the State from all Claims and Loss arising from or in connection the State's exercise of its Step-in Rights to the maximum extent permitted by Law unless or to the extent that the State acts negligently, unlawfully or in bad faith in the exercise of those Step-in Rights.

A21.10 **State's Obligations**

The State:

- (a) must act reasonably in exercising its Step-in Rights under this **clause A21**, having regard to the Developer's Obligations under this Agreement and in particular the Obligations under **clause A21.7**; and
- (b) is liable for any Construction Works carried out by the State during the period in which the State exercises its Step-In Rights.

A21.11 **No Prejudice to Other Rights**

The Step-in-Right is without prejudice to the State's other Rights in respect of a Default Event.

A21.12 **Payment of Costs**

The Developer must pay to the State on demand all costs and expenses (including legal costs and expenses on a full indemnity basis) reasonably incurred by the State in exercising the Step-in-Rights.

A21.13 **Survival**

This **clause A21** survives the termination of this Agreement.

A22 **Termination**

A22.1 **No Other Right to Terminate**

Notwithstanding any rule of Law or equity to the contrary, this Agreement may not be terminated except in accordance with this **clause A22**.

A22.2 **Termination by State**

If a Termination Event occurs, the State may terminate this Agreement by written notice to the Developer (**Termination Notice**). This Agreement will terminate on the date specified in the Termination Notice.

A22.3 **Consequences of Termination**

- (a) If the State terminates this Agreement, it may:
 - (i) require the Developer to cease work immediately;
 - (ii) resume possession of the Site;
 - (iii) exercise all legal and equitable Rights available to the State; and
 - (iv) require the Developer to:

- (A) novate or assign to the State or its nominee without payment any agreement or the benefit of any agreement for the supply of materials or goods or for the execution of any Public Land Works or Developer's Infrastructure;
 - (B) deliver all documentation necessary to enable the State to perform the Developer's Obligations under this Agreement; and
 - (C) comply with the provisions of **clauses A14.3, A14.5 and A14.6.**
- (b) For the purposes of any assignment under this **clause A22**, the Developer irrevocably appoints the State as its attorney with full power and authority to execute that assignment on behalf of the Developer.
 - (c) If this Agreement is terminated in accordance with this **clause A22**, the Rights and liabilities of the parties are the same as at common law if the Developer had wrongfully repudiated this Agreement and the State had elected to treat this Agreement as at an end and recover damages.
 - (d) All Loss suffered or incurred by the State in or in relation to the Termination Event and performing the Developer's Obligations under this Agreement are due and payable on demand by the State.

A22.4 Compensation to Developer

If this Agreement is terminated in accordance with this **clause A22**, the State must compensate the Developer for the Project Expenditure incurred by the Developer in carrying out any Construction Works which are completed as audited in accordance with **Clause D3**, after deduction of any loss or damages incurred by the State.

A22.5 Interest and compensation on default

Without limiting the other Rights and remedies of the State under this Agreement, the Developer must:

- (a) pay to the State interest on any moneys due and unpaid under this Agreement calculated on a daily basis in accordance with **clause A27** on demand, and interest shall apply from the due date for payment until the date of payment; and
- (b) pay or reimburse to the State the State's reasonable legal costs and disbursements calculated on a solicitor-own client basis and the State's reasonable administration expenses (including compensation for staff time) incurred as a consequence of or incidental to any moneys being in arrears or other default on demand.

A23 Security

A23.1 Guarantees

The Developer must provide each Project Guarantee on the date specified in schedule 7.

A23.2 Failure to Provide Security

- (a) If the Developer does not provide each Project Guarantee on the date specified in schedule 7, the State may by written notice terminate this Agreement.
- (b) If the State terminates this Agreement in accordance with this **clause A23.2**, the State will not be liable to pay any Compensation or other moneys to the Developer, other than reimbursement for any Project Expenditure incurred by the Developer whether before or after the Operative Date up to the date of termination.
- (c) Any termination of this Agreement by the State under this **clause A23.2**, will:
 - (i) not in any way prejudice the State's Rights to claim and recover damages for any breach of contract by the Developer; and
 - (ii) entitle the State to recover all Loss that the State may suffer in connection with the termination of this Agreement.

A23.3 Release of Project Guarantee

- (a) Each Project Guarantee shall be released to the Developer on the date specified in schedule 7.
- (b) Subject to **clause A23.3(c)**, at the end of an Applicable Cure Period, if a Default Event has not been cured or deemed to have been cured, the State may deduct from the Project Guarantee any amounts:
 - (i) for which the Developer must pay or reimburse the State;
 - (ii) which the State has paid or will pay on the Developer's behalf; or
 - (iii) which the Developer owes to the State under or arising from a breach of this Agreement,including, without limitation, the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount.
- (c) Notwithstanding any other provision of this Agreement, if the Developer fails to pay the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount on the due date for payment under this Agreement:
 - (i) the State is not required to issue a Default Event Notice with respect to that default in accordance with **clause A20**;
 - (ii) the Developer does not have an Applicable Cure Period with respect to that default in accordance with **clause A20**; and

- (iii) the State is not required to provide notice to the Developer of its intention to deduct amounts from the Project Guarantee in accordance with **clause A23.3(d)** before doing so.
- (d) Subject to **clause A23.3(c)** where the State intends to deduct any amounts from the Project Guarantee pursuant to paragraph (b), the State shall provide notice of such intention to the Developer not less than 1 Business Day before such deduction is to be made.

A23.4 Replacement Guarantees

- (a) The Developer must give a further or replacement Project Guarantee to the State when the State demands a payment under the Project Guarantee to replace the amount demanded or used. The State must give a notice to the Developer stating the amount of the further or replacement Project Guarantee required, and the State's determination is final and binding on the parties unless manifestly wrong. The Developer must give the further or replacement Project Guarantee to the State within 10 Business Days after the State gives a notice to the Developer.
- (b) A failure by the Developer to provide a further or replacement Project Guarantee in accordance with paragraph (a) will constitute a Termination Event.

A23.5 Developer not to injunct

The Developer must not take any steps to injunct or otherwise restrain:

- (a) any issuer of the Project Guarantee provided under this **clause A23** from paying the State pursuant to the Project Guarantee;
- (b) the State from taking any steps for the purpose of making demand under the Project Guarantee, or receiving payment under the Project Guarantee; or
- (c) the State using the money received under the Project Guarantee, unless the State seeks to exercise its rights to call up the Project Guarantee other than in accordance with the terms of this Agreement.

A23.6 Developer's Rights

If the State makes demand or receives payment under the Project Guarantee and is not entitled to do so under this Agreement, the Developer may exercise any legal or equitable Rights available to it in respect of that demand or receipt of payment.

A23.7 Heritage Guarantee

- (a) The Developer agrees that the State has returned the Existing Project Guarantee to the Developer in return for the Developer:
 - (i) delivering the New Project Guarantee to the State; and
 - (ii) delivering the Heritage Guarantee to Heritage Victoria in satisfaction of condition 1 of the Heritage Permit.

- (b) The State and the Developer agree that if the State is unable to procure the return of the Heritage Guarantee from Heritage Victoria in accordance with **clause B15(h)**:
 - (i) the Developer will not seek the return of the Heritage Guarantee from Heritage Victoria or reach any agreement with Heritage Victoria for the return of the Heritage Guarantee to the Developer except with the prior written consent of the State;
 - (ii) the Developer will direct Heritage Victoria that on the Heritage Guarantee Satisfaction Date the Heritage Guarantee is to be delivered to the State and not returned to the Developer;
 - (iii) notwithstanding **clauses A23.7(b)(i)** and **(ii)**, if Heritage Victoria returns the Heritage Guarantee to the Developer without the prior written consent of the State, the Developer will immediately deliver the Heritage Guarantee to the State.
- (c) If Heritage Victoria delivers the Heritage Guarantee to the State or the Developer in accordance with **clause A23.7(b)** the Developer must immediately deliver to the State a replacement bond in favour of the State on the same terms and conditions as the New Project Guarantee except that the amount of the bond will be an amount of \$800,000 ('**Replacement Bond**').
- (d) On receipt of the Replacement Bond, the State will return the Heritage Guarantee to the Developer.

A23.8 **Balance Payment Guarantee**

On the date specified in schedule 7, the Developer must deliver to the State the Balance Payment Guarantee.

A23.9 **Retention Guarantee**

- (a) Subject to **clause A23.9(b)** on the date specified in schedule 7, the Developer must deliver to the State the Retention Guarantee.
- (b) If the End Date has occurred on or before the date specified in schedule 7 for the delivery of the Retention Guarantee, the Developer will not be required to deliver the Retention Guarantee to the State, and **clause A23.9(a)** will not apply.

A23.10 **Definitions**

In this **clause A23**:

Existing Project Guarantee means the Project Guarantee in the amount of \$5,000,000.00 provided by the Developer on the Operative Date.

Heritage Guarantee means the insurance bond VPFB-M60-248 in the amount of \$800,000.00 provided by the Developer to Heritage Victoria as security for the performance of the Developer's obligations under the Heritage Permit and, to the extent applicable, includes the Replacement Bond to be provided by the Developer in accordance with **clause A23.7**.

Heritage Permit means Heritage Permit P18328 issued by Heritage Victoria.

Heritage Guarantee Conditions means those heritage works which must be satisfactorily completed by the Developer under the Heritage Permit prior to release of the Heritage Guarantee by Heritage Victoria.

Heritage Guarantee Satisfaction Date means the date on which Heritage Victoria confirms that all of the Heritage Guarantee Conditions have been satisfied and the Heritage Guarantee may be released.

New Project Guarantee means the Project Guarantee VPFB-M60-249, in the amount of \$4,200,000.00 provided by the Developer in accordance with **clause A23.7(a)**.

Retention Guarantee means the Project Guarantee for \$1,000,000 in favour of the State to be provided by the Developer in accordance with **clause A23.9**.

Balance Payment Guarantee means the Project Guarantee for \$1,700,000 in favour of the State to be provided by the Developer in accordance with **clause A23.8**.

A23.11 **Alternative Security**

- (a) At any time prior to the Revised Developer Payment Date, the Developer may request in writing that the State substitute one or more Project Guarantees for an alternative form of security granted over the Stage 8 Sale Lots (**Alternative Security**).
- (b) The State will discuss in good faith with the Developer the terms and conditions of any Alternative Security. Without limiting the State's right in relation to the Alternative Security, the State may require as a condition of agreeing to any Alternative Security that:
 - (i) the State retain one or more Project Guarantees until the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) is paid in full;
 - (ii) the State retain the proceeds from the sale of some or all of the Stage 8 Sale Lots (including any deposits) until the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) is paid in full;
 - (iii) when the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) is paid in full, the proceeds from any Stage 8 Sale Lots will be distributed in accordance with **clause D1** and **clause 2** of schedule 12; and
 - (iv) the State and the Developer enter into a deed amending the Development Agreement to incorporate the terms and conditions governing the provision of any Alternative Security.

- (c) The State is not required to agree to any request to the provision of Alternative Security unless the State is satisfied (in its absolute discretion) that the proposed Alternative Security provides equivalent security for the repayment of the Stage 2 Community Houses Payment, the Heritage Building Repayment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) as provided to the State by the Project Guarantees.

A24 Force Majeure

A24.1 Notice of Force Majeure event

- (a) If the State or Developer becomes aware of any matter likely to constitute a Force Majeure Event, it must immediately give notice of that matter and all relevant particulars to the other.
- (b) Within 5 Business Days after a Force Majeure Event occurs, the State and the Developer must give the other a written notice (“**Force Majeure Notice**”) specifying:
 - (i) details of the Force Majeure Event;
 - (ii) details of their respective Obligations under this Agreement affected by the Force Majeure Event;
 - (iii) details of the action it has taken and proposes to take to mitigate or overcome the effect of the Force Majeure Event;
 - (iv) an estimate of the time during which it will be unable to carry out the Obligations affected by the Force Majeure Event; and
 - (v) details of all insurance policies upon which it will be able to rely in making good Loss caused by the Force Majeure Event.
- (c) From the date a Force Majeure Event occurs, the State and the Developer must report to the other regularly (and in any event as often as a party reasonably requires) on the matters described in **clause A24.1(b)(iii)** to (iv) inclusive and any other matters reasonably required by the other.

A24.2 Suspension of obligations

A party’s Obligations under this Agreement will be suspended to the extent, and for so long as, those Obligations are genuinely affected by a Force Majeure Event.

A24.3 Mitigation

- (a) The Developer must use its reasonable endeavours (including, without limitation, incurring any reasonable expenditure of funds and reasonable rescheduling of manpower and resources) to remove the effect of each Force Majeure Event affecting its performance under this Agreement.

- (b) During the suspension of any Obligation with respect to the Public Land Works, the State may make alternative arrangements for the performance, whether by another person or otherwise, of any Obligation so suspended without incurring any liability to the Developer.

A24.4 **Cessation of Force Majeure event**

The Developer must give immediate notice to the State of the cessation of a Force Majeure Event and must, as soon as reasonably possible after cessation of that Force Majeure Event, resume performance of any obligation suspended as a result of it.

A24.5 **Review of Obligations**

As soon as practicable after the occurrence of the Force Majeure Event, the State and the Developer must negotiate in good faith in an attempt to agree a reasonable or modified basis for delivery of the Project if it is reasonable to do so having regard to **clause A24.3** and any adjustments to this Agreement to take account of the agreed alternative or modified basis for performance.

A25 Disputes

A25.1 **Establishment of Panel**

- (a) If any dispute arises between the State and the Developer (other than a dispute in connection with the choice of Rights, remedies or powers of the State arising from or in connection with a Default Event, but including a dispute as to whether a Default Event is capable of cure or remedy), including a dispute about the meaning or effect of a provision included in this Agreement or a dispute referred to this **clause A25** under another provision of this Agreement, any party to the dispute may by a referral notice to the other parties refer the dispute to the Panel for resolution. The referral notice must specify in reasonable detail the nature of the dispute.
- (b) The Panel in respect of a dispute shall consist of:
 - (i) one representative appointed by the State, who shall have the power and be authorised to resolve the dispute on behalf of the State; and
 - (ii) one representative appointed by the Developer, who shall have the power and be authorised to resolve the dispute on behalf of the Developer.
- (c) The Panel shall determine its own procedures for meetings and, unless the Panel otherwise determines, all meetings shall be held in Melbourne.
- (d) Decisions of the Panel may only be made by the unanimous agreement of the members of the Panel.
- (e) If a dispute is referred to the Panel, the Panel shall meet to resolve the dispute. The Panel must attempt to resolve the dispute having regard to the provisions of this Agreement and **clause A4.1** in particular.

- (f) Any decision of the Panel shall be binding on the parties.
- (g) If the Panel does not resolve the dispute within the Resolution Period, the Panel shall either:
 - (i) refer the dispute to expert determination under **clause A25.3**; or
 - (ii) refer the dispute to resolution by some other dispute resolution procedure,

within 2 Business Days after the expiration of the Resolution Period.

- (h) If the Panel:
 - (i) cannot agree within 2 Business Days after the expiration of the Resolution Period on:
 - (A) whether the dispute should be referred to expert determination or some other dispute resolution procedure; or
 - (B) the expert to be appointed for the dispute resolution process; or
 - (ii) does not:
 - (A) meet before the expiry of the relevant Resolution Period; or
 - (B) within the period referred to in **paragraph (h)(i)** refer the dispute for resolution in accordance with **paragraph (g)**,

then within 5 Business Days either party may refer the determination of the process for resolution of the dispute or the appointment of the expert for the dispute resolution process (as the case may be) to the President of the Institute of Arbitrators and Mediators Australia Inc. or his or her nominee. The President or his or her nominee must decide within 5 Business Days after the referral.

A25.2 Commencement of legal proceedings

A party shall not commence legal proceedings including any application under section 55 of the Domestic Building Contracts Act 1995 (Vic) in respect of a dispute except:

- (a) a dispute in connection with the choice of Rights, remedies or powers of the State arising from or in connection with a Default Event, but shall not commence legal proceedings in respect of a dispute as to whether a Default Event is capable of cure or remedy; or
- (b) an application to a court for urgent injunctive, interlocutory or declaratory relief.

A25.3 Expert determination

- (a) If a dispute is referred to expert determination in accordance with **clause A25.1(g)(i)** then the Panel shall appoint an expert in relation to that dispute, being a qualified person considered appropriate by the Panel.

- (b) The expert appointed under this clause or **clause A25.1** shall constitute the Expert Board.
- (c) The Expert Board shall:
 - (i) initiate such enquires and investigations as it considers necessary or desirable for the purposes of performing its functions; and
 - (ii) determine and inform the parties to the dispute of a time for presentation to the Expert Board by the parties of their respective positions. Unless the Panel otherwise agrees, the presentation must be no later than 5 Business Days after the constitution of the Expert Board.
- (d) Each party to the dispute shall be permitted to be represented by a legal practitioner, call witnesses and present evidence before the Expert Board.
- (e) The Expert Board must make its determination or findings in respect of the dispute within 15 Business Days after the presentation referred to in **paragraph (c)**. Any determination of a dispute by the Expert Board shall include a determination as to the award of costs. The Expert Board shall not tax the costs of a party. The fees and expenses of the members of the Expert Board shall be borne by the parties equally.
- (f) Any determination made by the Expert Board shall be binding on all parties.
- (g) The Expert Board shall act as an expert and not an arbitrator.
- (h) Each member of the Expert Board shall keep confidential all materials and information made available to that member in respect of the dispute.

Each member of the Expert Board is released by the parties to this Agreement from liability (other than for fraud) in acting as an expert.

A25.4 Deleted

A25.5 Continued performance of obligation pending resolution of dispute

- (a) Prior to resolution of a dispute, the parties shall continue to perform their respective Obligations under this Agreement.
- (b) Pending resolution of the dispute, whether or not the dispute relates to payment of money, each party shall pay all amounts under this Agreement when due in accordance with this Agreement without regard to the pending dispute.

A26 GST

A26.1 Amounts exclude GST

Amounts exclude GST except as expressly stated otherwise in this Agreement, and all amounts payable or consideration to be provided under this Agreement are exclusive of GST.

A26.2 Responsibility for GST

- (a) Despite any other provision of this Agreement, if GST is imposed on any supply made by the supplier under this Agreement, the recipient must pay to the supplier an amount equal to the GST payable on the supply.
- (b) The recipient must pay an amount equal to the GST payable on the supply at the same time that payment for the supply must be made under this Agreement and must pay the amount in addition to all other amounts payable by the recipient under this Agreement.

A26.3 Tax invoice

If the supplier makes a taxable supply to the recipient under this Agreement, the supplier must provide a tax invoice to the recipient at or before the time of the payment of the amount.

A26.4 Adjustments

If at any time an adjustment event arises in respect of any supply made by the supplier under this Agreement, the supplier must provide the recipient with an adjustment note immediately upon becoming aware of the adjustment event. Where an adjustment event arises, a corresponding adjustment will be made between the supplier and the recipient in respect of any amount paid by the recipient to the supplier under this Agreement and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

A26.5 Margin Scheme

- (a) Subject to **clause A26.6**, the State and the Developer agree that the State shall apply the Margin Scheme to the taxable supply of all Lots and the Site generally, unless they agree otherwise with respect to any part of the Site. The State and the Developer agree that for the purposes of the Margin Scheme, the value of the Site as at 15 March 2007 (excluding the Community Houses) is \$90.2 million in accordance with the 'value at transfer date' valuation prepared by RM2 Rogers Milne Marshall as delegated contract valuer for the Valuer General and dated 14 March 2013 (**GST Valuation**).
- (b) The State shall seek a refund for the overpayment of GST paid by the State in relation to Stages 1, 2, 3A and 3B as a consequence of the value of the Site used by the State for the purposes of the Margin Scheme being lower than the GST Valuation.
- (c) If the State obtains a refund of any overpayment of GST from the Commonwealth as a consequence of the State using the GST Valuation

for the purposes of calculating the GST payable on the supply of all Lots and the Site generally (**GST Valuation Refund**), the GST Valuation Refund will be paid to the Developer and will constitute Project Revenue.

- (d) The State is liable for any additional GST payable by the State if:
 - (i) the valuation of the Site as at 1 July 2001 (excluding the Community Houses) is less than \$50 million; or
 - (ii) the State fails to comply with any Margin Scheme requirements under the GST law.

A26.6 **Government GST Margin Scheme**

- (a) Notwithstanding **clause A26.5**, the State and the Developer agree that in accordance with the process outlined in this **clause A26.6**, the State will investigate whether the Government GST Margin Scheme is eligible to be applied to the taxable supply of all Lots and the Site generally in lieu of the Margin Scheme.
- (b) The State will undertake an initial assessment to determine whether the State considers it is eligible to apply the Government GST Margin Scheme to the taxable supply of all Lots and the Site generally in lieu of the Margin Scheme.
- (c) If the State determines that the State is eligible to use the Government GST Margin Scheme and there are benefits from electing to do so, the State will engage by tender an external qualified consultant to undertake all work required to obtain a refund from the Commonwealth of any overpayment of GST as a consequence of the State using the Government GST Margin Scheme in lieu of the Margin Scheme.
- (d) Subject to paragraph (f), the State will be solely responsible for:
 - (i) undertaking the initial assessment in accordance with paragraph (b);
 - (ii) appointing an external consultant in accordance with paragraph (c);
 - (iii) managing the process for obtaining a refund (if applicable) in accordance with paragraph (c); and
 - (iv) paying all costs incurred by the State in accordance with paragraphs (b) and (c).
- (e) The State may at any time determine in its absolute discretion to cease any further action in accordance with this **clause A26.6** and continue use of the Margin Scheme in accordance with **clause A26.5**
- (f) If the State elects to apply the Government GST Margin Scheme in lieu of the Margin Scheme and obtains a refund of any overpayment of GST from the Commonwealth (**Government GST Margin Scheme Refund**) as a consequence, then the Government GST Margin Scheme Refund will be distributed as follows:

- (i) firstly, all costs incurred by the State under this **clause A26.6** will be reimbursed to the State from the Government GST Margin Scheme Refund. The State will provide the Developer with a written summary of all costs incurred by the State and which are to be repaid from the Government GST Margin Scheme Refund;
 - (ii) secondly, the Developer will be entitled to be paid that proportion of the Government GST Margin Scheme Refund (if any) representing the GST Valuation Refund in accordance with **clause A26.5** (to the extent not already paid under **clause A26.5**); and
 - (iii) the balance of the Government GST Margin Scheme Refund (after deduction of the amounts payable under subparagraphs (i) and (ii)) will be paid equally to the State and the Developer.
- (g) If the State elects to apply the Government GST Margin Scheme in lieu of the Margin Scheme in accordance with this **clause A26**, the State and the Developer agree that for the purposes of **clause A26.5** the State shall apply the Government GST Margin Scheme and not the Margin Scheme and the principles in subparagraphs (f) (ii) and (iii) will apply to any GST savings made as a consequence.

A26.7 Definitions

All items used in this **clause A26**, which are defined in GST Law have the meaning ascribed to them in that Act.

A27 Interest on overdue amounts

Interest on any amount which has become due and payable pursuant to this Agreement by a party shall accrue from day to day from and including the due date for payment up to the actual date of payment at the rate being 2% higher than the then BBSW bid rate for a bill facility for one month or, if there is no such rate, the rate specified under the Penalty Interest Rates Act 1983.

A28 Confidentiality and publicity

A28.1 Confidential

The parties acknowledge and agree that the Information is confidential and sensitive commercial information.

A28.2 Keep confidential

Subject to **clauses A28.3** and **A28.6**, the parties must keep the Information confidential until otherwise agreed by them.

A28.3 Permitted disclosure

The parties will not be in breach of their Obligations pursuant to this **clause A28** if the Information is disclosed:

- (a) in compliance with Legislative Requirements (including Australian Stock Exchange listing rules and the provisions of the Freedom of Information Act 1982 (Vic));
- (b) to an agent or professional adviser of the parties, an employee of the parties, a financier of a party, a prospective joint venturer with the Developer, a prospective purchaser of the Project or an actual or prospective shareholder of a party, and it is reasonably necessary to disclose the Information to any one of those persons provided those persons have executed a deed undertaking to keep the Information confidential in accordance with this **clause A28**;
- (c) the Information is disclosed as required by statute, any court or in consequence of the provisions of the Information;
- (d) to any Minister of the Crown;
- (e) by way of publication on the Victorian Government contract publishing system; or
- (f) for the purposes of the State or the Developer complying with section 32 of the Sale of Land Act (Vic).

A28.4 **Continual obligation**

If a party discloses any part of the Information in accordance with this **clause A28**, the party who discloses the Information must use its reasonable endeavours to ensure that the person who receives the Information keeps the Information confidential.

A28.5 **No public announcement without consent**

- (a) Subject to **clause A28.6** and except in compliance with Legislative Requirements (including Australian Stock Exchange listing rules and the provisions of the Freedom of Information Act 1982 (Vic)), no party may make any public announcement or press release relating to the negotiations of the parties or the existence or subject matter or terms of the Information without the prior written consent of the other parties.
- (b) Nothing in this **clause A28** requires prior State consent to any Marketing of the Lots by the Developer except to the extent specified in **Part C**.

A28.6 **Publication by State**

- (a) The Developer consents to the State publishing on the Victorian Government contract publishing system the terms and conditions of this Agreement.
- (b) Nothing in this **clause A28** operates to restrict the State or any Minister making any public announcement or press release relating to this Agreement or the Project.

A29 Communications

A29.1 General

A notice, demand, certification, process or other communication relating to this Agreement must be in writing in English and may be given by an agent of the sender.

A29.2 How to give a communication

In addition to any other lawful means, a communication may be given by being:

- (a) personally delivered;
- (b) left at the party's current address for notices;
- (c) sent to the party's current address for notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by fax to the party's current fax number for notices.

A29.3 Particulars for delivery of notices

- (a) The particulars for delivery of notices are initially those set out in **schedule 1**.
- (b) Each party may change its particulars for delivery of notices by notice to each other party.

A29.4 Communications by post

Subject to **clause A29.6**, a communication is given if posted:

- (a) within Australia to an Australian address, three Business Days after posting; or
- (b) in any other case, 10 Business Days after posting.

A29.5 Communications by fax

Subject to **clause A29.6**, a communication is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

A29.6 After hours communications

If a communication is given:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or bank or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or bank or public holiday in that place.

A29.7 Process service

Any process or other Agreement relating to litigation, administrative or arbitral proceedings relating to this Agreement may be served by any method contemplated by this **clause A29** or in accordance with any applicable Law.

A30 Miscellaneous

A30.1 Entire agreement

- (a) This Agreement embodies the entire understanding and agreement between the parties as to the subject matter of this Agreement and the Project.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Agreement and the Project are merged in and superseded by this Agreement and are of no force or effect whatever and no party is liable to any other party in respect of those matters.
- (c) No oral explanation or information provided by any party to another prior to the date of this Agreement:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the parties.

A30.2 Duty

- (a) As between the parties, the Developer is liable for and must pay all duty (including any fine or penalty except where it arises from default by the other party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If the State pays any duty (including any fine or penalty) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it for which the Developer is liable, the Developer must pay that amount to the State on demand.

A30.3 Legal costs

Except as otherwise expressly provided, each party shall pay their own legal costs in relation to this Agreement.

A30.4 Amendment

This Agreement may only be varied or replaced by a document in writing duly executed by the parties.

A30.5 Waiver and exercise of rights

- (a) A single or partial exercise or waiver of a Right relating to this Agreement does not prevent any other exercise of that Right or the exercise of any other Right.

- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a Right.

A30.6 Set off

- (a) The State may set off any amount owing by the Developer to the State under this Agreement against any amount owing by the State to the Developer.
- (b) The Developer may set off any amount owing by the State to the Developer under this Agreement against any amount owing by the Developer to the State.

A30.7 Rights cumulative

Subject to any express provision in this Agreement to the contrary, the Rights of a party under this Agreement are cumulative and are in addition to any other Rights of that party.

A30.8 Further assurance

Each party shall promptly execute all documents and do all things that any other party from time to time reasonably requires of it to effect, perfect or complete the provisions of this Agreement and any transaction contemplated by it.

A30.9 Liability

An Obligation of two or more persons binds them separately and together.

A30.10 Counterparts

This Agreement may consist of a number of counterparts and if so the counterparts taken together constitute one and the same instrument.

A30.11 Attorneys

Each attorney who executes this Agreement on behalf of a party declares that the attorney has no notice of the revocation or supervision by the grantor or in any manner of the power of attorney under the authority of which the attorney executes this Agreement.

A30.12 Relationship of parties

- (a) This Agreement is not intended to create, and nothing in this Agreement shall be considered or interpreted as constituting:
 - (i) the relationship of the State and any other parties as a partnership (whether a partnership at general law or otherwise), association, joint venture or any form of fiduciary or other relationship between the parties in which any one or more of the parties may be liable generally for the acts or omissions of another party; or
 - (ii) any party as the agent or representative of another party, with the exception of the agency arrangements and powers of attorney specifically granted or contemplated by this Agreement.

- (b) Without limiting **paragraph (a)**, the parties expressly acknowledge and agree that:
 - (i) their relationship is not a general law or tax partnership;
 - (ii) the Site is not trading stock on hand of the parties;
 - (iii) except where specifically contemplated by this Agreement, their relationship is not one in which any one or more of the parties may be liable for the acts or omissions of another party; and
 - (iv) except where expressly stated otherwise, the Site is not held in trust by the State.

A30.13 Governing law and jurisdiction

- (a) This Agreement is governed by and is to be construed in accordance with the laws in force in Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts, and waives any Right to object to any proceedings being brought in those courts for any reason.

A30.14 Information Privacy

- (a) The Developer agrees in respect of Personal Information held in connection with this Agreement:
 - (i) that it shall be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Developer for the purposes of this Agreement, in the same way and to the same extent as the State would have been bound by the Information Privacy Principles and any applicable Code of Practice in respect of that act or practice had it been directly done or engaged in by the State; and
 - (ii) to immediately notify the State where it becomes aware of a breach of **clause A30.14** by it or any of its agents or employees;
- (b) This **clause A30.14** shall continue to have effect after the termination or expiration of this Agreement.

Part B – Site and construction provisions

B1 Site and Site Conditions

B1.1 Condition of Site

- (a) The State makes no representations and gives no warranty to the Developer in respect of:
 - (i) the condition of:
 - (A) the Site (including the Site Conditions); or
 - (B) any structures or other things on, above or adjacent to, or under the surface of, the Site; or
 - (ii) the existence, location, condition or availability of Services in respect of the Site.
- (b) The Developer must accept:
 - (i) the Site (including the Site Conditions);
 - (ii) any structures or other things on, above or adjacent to, or under the surface of the Site; and
 - (iii) the Services,in their present condition and subject to all defects.
- (c) Subject to **clauses B1.5** and **B1.6**, the Developer is responsible for, and assumes the risk of, all loss, or delay or disruption it suffers or incurs, arising out of or in connection with:
 - (i) the condition of:
 - (A) the Site (including the Site Conditions); and
 - (B) any structures or other things on, above or adjacent to, or under the surface of the Site; or
 - (ii) the existence, location, condition or availability of Services in respect of the Site.
- (d) The Developer agrees:
 - (i) to perform all work and provide all materials as necessary to overcome any Site Condition so that the Public Land Works and Private Land Works are completed without any claim for Compensation; and
 - (ii) the Developer shall not have any entitlement arising from the existence of any Site Condition, whether or not the Site Condition would have been reasonably anticipated.

B1.2 Contamination

- (a) The Developer assumes responsibility for:
 - (i) all Contamination on each part of the Site on and from the date on which possession of that part of the Site is handed over by the State to the Developer under **clause B4**; and
 - (ii) any remediation necessary in consequence of any identified Contamination of the Site to enable the Project to be undertaken and completed in accordance with this Agreement.

Subject to **paragraph (h)**, the Developer is only required to remediate the Site to the standard required so as to allow the Project to be undertaken and completed in accordance with this Agreement.

- (b) The remediation carried out by the Developer in accordance with **paragraph (a)** must comply with the contamination management strategy outlined in the report by Golder Associates Pty Ltd titled "Stage 2 Environmental Assessment Kew Residential Services Development" and dated 30 May 2005. On completion of the remediation, the Developer must provide to the State a report from a qualified environmental engineer confirming that the Site has been remediated to the standard required so as to allow the Project to be undertaken and completed in accordance with this Agreement.
- (c) Subject to **paragraph (h)**, any costs and expenses incurred by the Developer in dealing with the Contamination or carrying out any remediation under **paragraph (a)** will be paid by the Developer and will form part of the Project Expenditure.
- (d) Subject to **clause B1.2(e)**, the State:
 - (i) acknowledges that the costs incurred by the Developer under **paragraph (c)** form part of the Project Expenditure;
 - (ii) accepts that the Revenue Share Land Payments payable to the State under **Part D** may reduce in consequence of **sub-paragraph (i)**; and
 - (iii) accepts the risk described in **sub-paragraph (ii)**.
- (e) The Developer:
 - (i) assumes responsibility for all Contamination in, on or under the Site (and any Clean Up of that Contamination) which is caused or contributed to by the Developer or any agent, contractor or other person under the supervision or control of the Developer; and
 - (ii) acknowledges that any costs and expenses incurred by the Developer in dealing with the Contamination or carrying out any Clean Up under **sub-paragraph (i)** are for the account of the Developer and must not form part of or be included in the Project Expenditure.

- (f) The Developer indemnifies and holds the State indemnified against:
 - (i) any Contamination on the Site of the kind described in **paragraph (e)**;
 - (ii) any Claims and Losses which the State is or may be or become liable in respect of or arising from that Contamination; or
 - (iii) the requirement to carry out any Clean Up to remediate any Contamination in accordance with **paragraph (e)**.
- (g) The responsibility of the Developer under **paragraph (a)** ends in respect of:
 - (i) a Community House Lot, when the Community House constructed on that Community House Lot has been Completed and that Community House has been handed over to the State in accordance with this Agreement;
 - (ii) a Sale Lot, when a Settlement occurs in relation to that Sale Lot; and
 - (iii) a Public Purpose Lot, when the Public Purpose Lot is transferred to or vested in the appropriate Relevant Authority under **clause C3.1**.
- (h) The State may by notice in writing to the Developer require the Developer to remediate the Site to a standard exceeding that required by **paragraph (a)**. The State will indemnify the Developer for any costs the Developer incurs in carrying out a remediation to a standard higher than required by **paragraph (a)** at the request of the State.

B1.3 Services/infrastructure

- (a) The Developer:
 - (i) must obtain and pay for any Services and all connections for all Services it needs to perform its obligations under this Agreement;
 - (ii) must investigate, protect, relocate, modify and provide for all Services necessary for it to comply with its obligations under this Agreement;
 - (iii) assumes the risk of the existence, location, condition and availability of Services; and
 - (iv) indemnifies the State from and against any Claim or Loss the State suffers or incurs arising out of or in connection with:
 - (A) any damage or disruption to any Services; or
 - (B) a failure by the Developer to comply with any obligation under this Agreement with respect to Services.
- (b) The Developer's obligations in relation to services comprising the Public Land Works and the indemnity in **clause B1.3(a)(iv)** in relation to the

Public Land Works ceases in respect to each Community House when that Community House is Completed.

- (c) If requested by the Developer, the State will provide all reasonable assistance to the Developer to enable the Developer to obtain any Approvals required in respect to the Services.

B1.4 Artefacts

- (a) All Artefacts discovered on or under the surface of the Site will, as between the State and the Developer, be the absolute property of the State.
- (b) The Developer will:
 - (i) at all times permit and allow the State or any person authorised by the State to watch or examine any excavation on the Site subject to any such person complying with the Developer's health and safety procedures and carrying out its role at its own risk;
 - (ii) take every reasonable precaution to prevent Artefacts being damaged or removed until appropriate arrangements for removal have been made; and
 - (iii) immediately upon discovery of any Artefact notify the State's Representative of such discovery and comply at its expense with any directions or orders imposed by any relevant Authority upon the State, the Developer or the State's Representative in respect of such Artefact.
- (c) The Developer is not entitled to any compensation or to make any Claim for any Loss in connection with the discovery of any Artefact on or under the surface of the Site.

B1.5 Native Title

- (a) If there is a Native Title Application with respect to the Site or any part of it, the Developer must continue to perform the work under this Agreement, unless otherwise:
 - (i) directed by the State;
 - (ii) ordered by a court or tribunal; or
 - (iii) required by Law.
- (b) For the purposes of **clause B1.5(a)(i)**, the State may by written notice direct the Developer to suspend any or all of the work under this Agreement until such time as the State gives the Developer further written notice.
- (c) If the Developer is directed, ordered or required as referred to in **clause B1.5(a)** to cease to perform the work under this Agreement:
 - (i) The State will pay the Developer Compensation for any Loss arising as a result of such direction, order or requirement; and

- (ii) the Developer must:
 - (A) take all reasonable steps to mitigate such Loss; and
 - (B) for this purpose, comply with all reasonable directions of the State concerning the Native Title Application and the consequences thereof.

B2 Restrictions on use and development of Site

- (a) Subject to **paragraph (b)**, except where this Agreement provides otherwise, neither the State or the Developer may use or develop the Site or allow it to be used or developed for any purpose:
 - (i) not connected with the Project;
 - (ii) which is inconsistent with the Development Plan; or
 - (iii) which is inconsistent with the Objectives.
- (b) If this Agreement is terminated by the State, the State may then use or develop the Site for such purposes and in such manner as the State thinks fit.
- (c) Without limiting **paragraph (a)**, the State must not use or allow others to use any part of the Site under its control from time to time in a manner inconsistent with this Agreement or which will increase the cost of carrying out the Project. The Developer acknowledges that the State will continue to use parts of the Site for housing KRS Residents and performing ancillary services in accordance with the Community Houses Specification.

B3 Planning

B3.1 Developer to obtain Planning Permits

- (a) The parties agree that the Developer must make all necessary applications for all Planning Permits and a further Demolition Permit as required to undertake the Project in accordance with this Agreement (including making all necessary applications, supplying all requested information and prosecuting all applications with due diligence). The Developer must obtain the consent of the State to the form and content of any application for Planning Permit or, further Demolition Permit prior to submission to the Planning Authority.
- (b) The State must use its reasonable endeavours to assist the Developer to obtain the Planning Permits and the further Demolition Permit. Nothing in this paragraph imposes any Obligation on the State as Planning Authority to grant or approve any Planning Permit application.

- (c) The State bears the risk should the Developer not obtain all Planning Permits including any further Demolition Permit required to undertake the Project in accordance with this Agreement.

B3.2 Application for Planning Permit by Developer

Except with the prior written consent of the State, the Developer must not make an application for a Planning Permit where the proposed subdivision, use or development:

- (a) is not consistent with the Development Plan; or
- (b) would, if permitted, be inconsistent with or materially alter the Project or result in the Objectives not being achieved.

B3.3 Section 173 Agreement

Without limiting **clause B3.2**, the State shall not execute any agreement pursuant to section 173 of the *Planning and Environment Act 1987* in relation to the Site other than as required as a condition of the Planning Consent, a Planning Permit or the Demolition Permit without the prior written consent of the Developer, which consent shall not be unreasonably withheld.

B3.4 Demolition Permit

The Developer agrees that it will comply with the terms and conditions of the further Demolition Permit.

B4 Access to Site by Developer

B4.1 Access

- (a) Subject to **clause B4.2** the State must deliver possession of the Site to the Developer as follows:
 - (i) Stage 1 from the Operative Date;
 - (ii) the balance of the Site (or parts thereof) from the dates notified in writing by the Developer.
- (b) Any delay in handover of the Site to the Developer will constitute an Extension Event.

B4.2 Effect of possession

The granting of possession of the Site under **clause B4.1**:

- (a) confers on the Developer a Right only to such use, occupation and control as is necessary to enable the Developer to perform its Obligations and exercise its Rights under this Agreement; and
- (b) does not confer on the Developer any proprietary right, title or interest in the Site except as provided for in this Agreement.

B4.3 Access to adjoining properties

The Developer must, at its own cost and expense:

- (a) obtain any necessary or appropriate permission to work upon, to, in over or under any adjoining or neighbouring site or property and the State must assist the Developer where practicable and acting reasonably;
- (b) make all arrangements for any access to or over or under or use of any adjoining or neighbouring site or property, subject to any provision to the contrary in this Agreement;
- (c) comply with all conditions attaching to such permission or access; and
- (d) make good any damage to adjoining properties arising out of its operations,

which the nature of the Private Land Works or the Public Land Works requires or which it may otherwise require for any purpose relating to this Agreement.

B4.4 Restrictions on access

The Developer must not grant access rights to the Site to any person:

- (a) for any purpose other than the purposes for which it is entitled to access under this Agreement; or
- (b) for any period beyond the period during which it is entitled to access to the Site.

B4.5 Access Payments

No payment is payable by the Developer to the State for access to the Site in accordance with this **clause B4** other than any payment due pursuant to **Part D**.

B4.6 Use of Site by State

The State must not use any part of the Site in any way which will interfere with the Project or increase the cost to the Project. The Developer acknowledges that the State will continue to use parts of the Site for housing KRS Residents and performing ancillary services in accordance with the Community Houses Specification.

B5 Design Development – Community Houses

B5.1 Application

- (a) The Design Documents included in **part 3** of **schedule 2** are agreed at the Operative Date and comply with the Design Brief and the Community Houses Specifications.
- (b) This **clause B5** applies to any Design Documents for the Community Houses which have not been agreed as at the Operative Date.

B5.2 Co-operation

- (a) The State and the Developer must co-operate in the development of the Design Documents for the Community Houses.

- (b) The final form of the Design Documents relating to the Community Houses must be agreed between the State and the Developer as soon as practicable so as to allow the Construction Works Program to be met. When agreed, the agreed form of the Design Documents will be signed by the Developer and the State and be incorporated in and form part of **schedule 2** which will be confirmation that the Design Documents comply with the Design Brief and the Community Houses Specification.

B5.3 Design development

- (a) The Developer must:
 - (i) deliver for the endorsement of the State's Representative the Design Documents prepared for the Community Houses;
 - (ii) if requested by the State's Representative, make available at the cost of the Developer the design team personnel to explain the Design Documents or provide information on such matters to the State's Representative, in such form as the State's Representative may from time to time reasonably request.
- (b) If the State's Representative:
 - (i) endorses the Design Documents; or
 - (ii) does not endorse the Design Documents within the Approval Period,

they shall be deemed to be approved Design Documents, unless the State's Representative refuses to endorse the Design Documents or gives a qualified endorsement within the Approval Period, in which case **paragraph (c)** will apply.
- (c) If the State's Representative within the Approval Period refuses to endorse the Design Documents or gives a qualified endorsement, the State's Representative and the Developer's Representative shall confer to establish the amendments required to them. If the State's Representative and the Developer's Representative agree, or the matter is resolved pursuant to **clause A25**, those Design Documents shall be endorsed Design Documents.
- (d) In endorsing, not endorsing or giving qualified endorsement to the Design Documents under this clause, the State's Representative:
 - (i) may only withhold endorsement or give qualified endorsement if:
 - (A) the Design Documents submitted are inconsistent with the then current Design Documents and Design Brief or this Agreement;
 - (B) the then current Design Documents and Design Brief is ambiguous or silent on any matter relating to the Design Documents submitted, and the Design Documents submitted are inconsistent with the RFP; or

- (C) the Design Documents submitted do not comply with Legislative Requirements or Australian Standards; and
- (ii) may only require changes or alterations to remedy any of the matters referred to in **paragraphs (d)(i)(A) to (C)** which are within the scope of the Design Documents or, if the Design Documents and Design Brief are ambiguous or silent on any matters, then the RFP.
- (e) No changes or alterations other than those referred to in **paragraph (d)(ii)** can be requested unless the State's Representative utilises the provisions of **clause B13**.
- (f) Where the State's Representative does not endorse any Design Documents, or gives qualified endorsement to Design Documents submitted by the Developer, the State's Representative, in giving such qualified endorsement or withholding such endorsement, must specify in reasonable detail to the Developer why the Design Documents submitted are not endorsed or are only given qualified endorsement, having regard to the criteria set out in **paragraph (d)** above.

B5.4 No alterations

- (a) Following approval of the Design Documents the Developer must not change the Design Documents and Design Brief without the prior written consent from the State's Representative, which may be given or withheld in the State's Representative's absolute discretion, or given subject to such conditions as the State's Representative considers necessary.
- (b) If any alterations are made to the Design Documents endorsed by the State's Representative (including any alterations arising from any Modification implemented in accordance with **clause B13**), the Developer must provide the State's Representative with an amended set of Design Documents.

B5.5 Act reasonably

The State's Representative shall:

- (a) act reasonably and promptly; and
- (b) subject to the overall responsibilities of the Developer, procure the cooperation and assistance of such design consultants as may be engaged to represent the interests of the State in the coordination and endorsement of the design, design development and documentation of the Project.

B6 Demolition of existing buildings and Services

- (a) Subject to **paragraph (b)** demolition of all existing buildings and Services on the Site as necessary to facilitate the Project is the sole responsibility of the Developer and must be carried out by the Developer at the Developer's cost (which cost forms part of the Project Expenditure).

- (b) The Developer acknowledges that the State has entered into the Demolition Contract with the Demolition Contractor. The costs payable by the State to the Demolition Contractor under the Demolition Contract comprise Project Expenditure and must be reimbursed by the Developer to the State. The State will invoice the Developer for the costs incurred by the State under the Demolition Contract and the Developer must pay or reimburse those costs to the State within 60 days following the Operative Date.

B7 Construction and works program

B7.1 Construction Works Program

The Developer must comply with the Construction Works Program.

B7.2 Revision

- (a) The Developer may from time to time submit a revised Construction Works Program (which must nonetheless comply with Completion of the Initial Community Houses and Stage 1 by the Stage 1 Date for Completion, Completion of Stage 2 by the Stage 2 Date for Completion, and the Completion of the Project by the End Date) for endorsement by the State's Representative (which endorsement shall not be unreasonably withheld and must be given or withheld within the Approval Period).
- (b) The program submitted by the Developer as the Construction Works Program which is endorsed by the State's Representative from time to time shall constitute the Construction Works Program.

B7.3 Updated Construction Works Program

Following Completion of Stage 1 and Stage 2, the Developer must update the Construction Works Program in relation to the remainder of the Project (other than the Public Land Works Stage 1 and Stage 2) whenever there is a material change to the Construction Works Program, which update may be indicative only.

B8 Construction obligations

B8.1 Developer's primary obligation

The Developer must design, construct and commission the Construction Works in accordance with the requirements of this Agreement.

B8.2 Fit for purpose

The State is relying on the skill and judgment of the Developer to design, construct and commission the Construction Works and the Project so that they are fit for the purpose required by this Agreement.

B8.3 Construction obligations

The Developer must, in a timely and professional manner, and in accordance with the requirements of this Agreement:

- (a) procure the completion of all design and documentation of the Construction Works, including drawings, programs, specifications and schedules of finishes;
- (b) prosecute the construction of the Construction Works regularly, diligently and in a thorough and workmanlike manner with all reasonable expedition in accordance with Industry Best Practice and the requirements of the Design Documents and the Construction Works Program;
- (c) bring Stage 1 to Completion by the Stage 1 Date for Completion and Stage 2 to Completion by the Stage 2 Date for Completion;
- (d) bring the Construction Works to completion by the End Date;
- (e) ensure the Construction Works are constructed on the Site;
- (f) ensure no permanent works other than the Construction Works are constructed on any part of the Site which:
 - (i) has been handed over to the Developer under the Site Handover Program; or
 - (ii) is under the control or supervision of the Developer;
- (g) in respect of plant and materials incorporated in the Construction Works, use plant and materials that:
 - are of a kind which are suitable for their purpose and consistent with the nature and character of that part of the Construction Works for which they are used; and
 - are new, of first quality or as otherwise agreed, and are not of an inherently hazardous or dangerous nature and comply with all relevant Australian Standards;
- (h) liaise with all Relevant Authorities and seek and obtain all requisite Approvals and Authorisations for the Construction Works;
- (i) implement and maintain the relevant Quality Assurance Plan;
- (j) initiate and maintain appropriate safety precautions and programs in connection with the execution of the Construction Works including appropriate traffic management plans for all roads within the Site used for access to the Construction Works;
- (k) not incorporate or allow to be incorporated in the Construction Works or the Project any Hazardous Material;
- (l) perform all project management, supervisory services and complete all other obligations not otherwise specified which are incidental and

necessary to the proper professional development and construction of the Construction Works and the Project; and

- (m) minimise any disturbance to surrounding residents in undertaking the Construction Works.

B8.4 Developer's risks

- (a) Subject to **clause A5.3**, the Developer is responsible for and accepts all risks relating to:

- all construction means, methods and techniques used to carry out the Construction Works and the Project;

- the risk of industrial action, and any delay in the Construction Works caused by off-site industrial action;

- inclement weather causing the incurring of delay, increased cost or deferred payments;

- delay by any Relevant Authorities granting Approvals, causing the incurring of delay, increased cost or deferred payments except where the risk of obtaining those Approvals is a State risk under this Agreement; and

- any ground or other physical conditions and existing Services or structures encountered, causing the incurring of delay, increased cost or deferred payments.

- (b) The State expressly accepts:

- (i) that the Revenue Share Land Payments payable to the State under **Part D** may reduce in consequence of the risks assumed by the Developer under **paragraph (a)**; and

- (ii) the risk described in **sub-paragraph (i)**.

B8.5 Standard of care

The Developer must perform the Construction Works:

- (a) in a commercial, prudent and reasonable manner;
- (b) in accordance with suitable methods and practices for the provision of the Construction Works;
- (c) where relevant in accordance with the Quality Assurance Plan, occupational health and safety plan and traffic management plan; and
- (d) with the degree of professional skill, care and diligence which may reasonably be expected of a skilled and professional person suitably qualified and experienced in the performance of services similar to the Construction Works so that the Construction Works when completed will:
 - (i) be fit for their stated purposes; and

- (ii) comply with all the requirements of this Agreement and all Legislative Requirements.

B8.6 Suspension of works

The Developer shall not suspend construction of Stage 1 and Stage 2 without the prior written consent of the State's Representative unless otherwise permitted in accordance with this Agreement.

B8.7 Materials, Labour and Constructional Plant

The Developer shall supply everything necessary for execution of the Construction Works and the proper performance of the Developer's obligations and discharge of the Developer's liabilities in relation to the Construction Works in accordance with this Agreement.

B8.8 Cleaning Up

The Developer shall keep the Site and the work clean and tidy. The Developer shall regularly remove all debris, rubbish and surplus material.

B8.9 Domestic Building Contracts Act

The State and the Developer acknowledge and agree that the Domestic Building Contracts Act 1996 (Vic) applies to the Construction Works and that additional clauses dealing with the requirements of the Domestic Building Contracts Act 1995 (Vic) are set out in **schedule 13**.

B9 Protection of people and property

B9.1 Compliance with Protection Measures

The Developer must when carrying out work under this Agreement:

- (a) provide all things and take all measures necessary to protect people and property recognising the presence of KRS Residents and the continued operation of KRS at the Site until Completion of all Community Houses;
- (b) avoid unnecessary interference with the passage of people and vehicles;
- (c) minimise nuisance, dust and unreasonable noise and disturbance to the extent reasonable having regard to the nature and extent of the Construction Works; and
- (d) strictly comply with all requirements of this Agreement in connection with protection of people and property.

B9.2 Specific obligations

Without limiting the generality of the Developer's obligations under **clause B9.1(b)**, the Developer must, at its own cost, provide for barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of Services in accordance with Industry Best Practice.

B9.3 General provisions

- (a) If the Developer or the employees or agents of the Developer damage property, including property on or adjacent to the Site, the Developer must promptly make good any damage and pay any compensation which the Law requires the Developer to pay.
- (b) If the Developer fails to comply with an obligation under this **clause B9.3**, in addition to any other remedies of the State, the State may after giving reasonable notice in writing to the Developer, have the subject work carried out by other persons and the reasonable cost incurred by the State will be a debt due from the Developer to the State.

B9.4 State Obligation

Without limiting the specific Obligations of the Developer in this **clause B9**, the State must procure that DHS takes all reasonable actions as necessary or appropriate to ensure the protection and safety of the KRS Residents during construction of the Construction Works.

B10 Workplace Relations

B10.1 Management of Workplace Relations

The Developer must:

- (a) appoint a representative to manage workplace relations; and
- (b) implement and maintain an effective workplace relations programme.

B10.2 Workplace Relations

The Developer must:

- (a) assume sole responsibility for and manage all aspects of workplace relations in relation to the Construction Works; and
- (b) keep the State's Representative fully and promptly informed of any workplace relations problems or issues which materially affect or are likely to materially affect the work under the Construction Works and the actions proposed to be implemented by the Developer to address those problems or issues.

B10.3 Employment policy

The Developer must and must ensure that its subcontractors apply the principles of the Code of Practice for the Building and Construction Industry, prepared by the Department of Infrastructure for the Victorian Government, March 1999.

B11 Environmental monitoring

B11.1 Developer's Obligations

During the carrying out of the Construction Works, the Developer must:

- (a) comply with Environmental Law;
- (b) comply with any reasonable direction or request by the State relating to the environmental performance of the Site and any other part of the Site which may be affected by the Construction Works;
- (c) provide access to the State and its employees, agents, assigns and contractors at reasonable times and upon reasonable notice to inspect the Site and monitor the environmental performance of the Site subject to any such person complying with the Developer's health and safety procedures and carrying out any inspection at its own risk;
- (d) upon becoming aware immediately:
 - notify the State of any Environmental Hazard or breach of any Environmental Law arising in connection with the Site; and
 - remedy the hazard, breach or requirement to the satisfaction of the Relevant Authority; and
- (e) keep all environmental data confidential and obtain the written consent of the State prior to releasing any data (environmental or otherwise) about the Site or any part of the Site.

B11.2 Obligations Cease

The Developer's obligations under this **clause B11** cease in respect to any part of the Site when:

- (a) In the case of a Community House, that Community House is Completed; and
- (b) In the case of any Private Land Works, when any Sale Lot has been sold to an End Purchaser and the End Purchaser has taken a transfer of ownership of the Lot.

B12 Insurance and Indemnity

B12.1 Types of insurance

- (a) The Developer must, in respect of the Construction Works, maintain the following insurance policies with insurers approved by the State (such approval not to be unreasonably withheld) from the Operative Date until Completion:
 - (i) contractors all risk insurance on terms and conditions (including, without limitation, any exclusions or excesses) reasonably required by the State for the whole of the Development (including, without limitation, the Community Houses, any associated temporary works, material incorporated or to be incorporated in the Development and the property of the Developer or for which they are responsible and any insurance required by the Building Act 1993) concerning loss or destruction of or damage to the property insured (whether caused by the Developer, the State or any other person) for its full reinstatement and replacement cost;

- (ii) public liability insurance for liability to all persons (including the State) for a sum of not less than \$20 million for any one event (and unlimited in the aggregate) concerning personal injury to or death arising by accident of any person (not being a person who at the time of the accident is defined as a worker of the Developer under any Law concerning worker's compensation insurance) and concerning any injury, loss or damage to any property (real or personal) caused (directly or indirectly) by the execution of the Development (whether by the Developer, the State, a subcontractor or any other person);
 - (iii) insurance for the sum required by Law against any loss, cost, damage, liability or other detriment (whether arising under a Law concerning workers' compensation or employers' liability or at common law) suffered or incurred by any of its employees in or about the execution of the Development. The Developer shall ensure that all sub contractors have similarly insured their employees; and
 - (iv) professional indemnity insurance for a sum not less than \$10 million for any one claim and not less than \$10 million in aggregate for claims made in any year.
- (b) In respect of the insurances required by **clause B12.1(a)**:
- (i) deposit with the State's Representative copies of the certificates of insurance containing detail of the period and cover effected;
 - (ii) pay each premium on or before its due date and, when asked by the State's Representative, produce receipts for payments;
 - (iii) immediately rectify anything which might prejudice any insurance and reinstate the insurance if it lapses; and
 - (iv) notify the State's Representative immediately when an event occurs which gives rise or might give rise to a claim in excess of \$50,000 under an insurance policy, or which could prejudice a policy of insurance, or if any policy of insurance is cancelled.
- (c) In respect of the insurances required by **clause B12.1(a)** ensure that:
- (i) the State is noted as a co-insured party in respect of insurances effected pursuant to **clause B12.1(a)(i)** and **(ii)**;
 - (ii) they each have a cross-liability clause approved by the State's Representative, such approval not to be unreasonably withheld and;
 - (iii) they each contain a clause to the effect that a breach of a policy condition or requirement by one party shall not diminish the rights and ability of other insured parties to claim under the policy.

B12.2 Damage prior to Completion

- (a) If following handover of the relevant part of the Site to the Developer the Public Land Works are destroyed or damaged (whether wholly or in part) prior to Completion the Developer must, subject to **paragraph (c)**:
 - (i) fully reinstate the Public Land Works and resume construction of the remainder of the Construction Works as soon as possible after the damage is caused; and
 - (ii) apply any insurance proceeds it receives under any policy referred to in **clause B12.1(a)** in relation to the damage to reinstate the Public Land Works and for no other purpose.
- (b) Nothing in this clause has the effect of varying, waiving or otherwise restricting any of the State's rights under this Agreement arising as a result of, or in relation to, the destruction or damage to the Construction Works or otherwise.
- (c)
 - (i) Where any damage is caused to the Public Land Works (whether directly or indirectly) following hand over of the relevant part of the Site to the Developer and prior to Completion of the Public Land Works and, for whatever reason, no or insufficient insurance proceeds are available, then the Developer must use its own funds to make up any shortfall in insurance money received (if any) to reinstate the Public Land Works and must apply those funds to reinstate the Public Land Works. If it does not, the State may elect to cause the reinstatement works to be carried out and, subject to **paragraph (ii)**, may deduct the costs of those works from any Project Guarantee by the State.
 - (ii) If the State elects to carry out the reinstatement works under **paragraph (i)**, and the scope of those works exceeds the scope of the relevant original Public Land Works that are being reinstated ("**Additional Works**"), the State must bear the cost of the Additional Works.
- (d) If the Developer:
 - (i) fails to notify the State's Representative of whether or not it intends to reinstate the Public Land Works, within 30 days of the Developer receiving a loss assessor's report on the relevant damage, or within 60 days of the occurrence of the event that caused the damage, whichever occurs first; or
 - (ii) notifies the State's Representative that it intends to remedy the Public Land Works and fails to take preliminary steps to commence reinstatement of the Public Land Works as required under this clause within 30 days of that notice; or
 - (iii) notifies the State's Representative that it does not intend to reinstate the Public Land Works as required by this clause,

the Developer shall be deemed to have committed a Default Event and the State may immediately exercise any of the remedies set out in **clause A21**, including the right to terminate this Agreement.

B12.3 Annual Review of Insurances

- (a) On each anniversary of the Operative Date, the State may review (“**Review**”) the terms of, and the level of coverage and excesses provided for in the insurance policies referred to in **clause B12.1(a)** (“**Policies**”).
- (b) In conducting the Review, the State may seek advice from such consultants or experts as the State considers appropriate.
- (c) If as a result of the Review, the State considers that any of the terms of, or the level of coverage or excesses provided for in any Policy is inadequate, taking into account increases in construction costs and the type and cost of insurances then commercially available, the State may give a written notice to the Developer specifying the nature and the extent of the inadequacy and require the Developer to have the relevant Policy amended to meet the State’s requirements as specified in the notice.
- (d) Within 30 Business Days of receiving the notice referred to in **paragraph (c)**, the Developer must, at the Developer’s cost, procure that the relevant amendments are made to the existing policies, or new policies are issued, that meet the requirements set out in the notice.
- (e) The Developer will be entitled to request an extension of the timeframe specified in **paragraph (d)** of up to another 30 Business Days and the State will agree to the request if the Developer demonstrates that it has been diligently pursuing procurement of the relevant amendments.

B12.4 Settlement of Claims

The Developer may enforce, conduct, settle or compromise claims it has under any policy of insurance required by **clause B12.1(a)** whether or not that policy also covers other property and whether or not the State is also making a claim that the State has under any insurance policy described in **clause B12.1(a)**, provided that the Developer must, within 10 Business Days of the occurrence of the relevant incident, give notice to the State’s Representative of each insurance claim in excess of \$50,000 and of the circumstances surrounding the incident giving rise to the insurance claim.

B12.5 Not to Void Insurance

The Developer must not do or permit any act, matter or thing to be done which may invalidate any insurance or make any insurance void or voidable.

B13 Modifications/Variations

B13.1 Restrictions on Developer Modifications

The Developer must not make any Developer Modifications except as provided for in **clause B13.2(b)** without the prior approval of the State which consent will not be unreasonably withheld.

B13.2 Developer Modifications

- (a) If the Developer wishes to implement a Developer's Modification, the Developer must submit details of the Developer's Modification and any impact on the Financial Model or Stage budget to which the Developer's Modification relates together with reasons for the Developer's Modification to the State's Representative, in sufficient detail for the State to properly assess the Developer's Modification.
- (b) The Developer may implement a Developer's Modification without the prior approval of the State where:
 - (i) the Developer's Modification will not delay completion of Stage 1 and Stage 2 beyond the dates for completion specified in this Agreement;
 - (ii) the Developer's Modification will not:
 - (A) have an adverse effect on the workmanship or durability of an item of plant or equipment used in the Construction Works;
 - (B) have an adverse effect on the costs of operation or maintenance of the Community Houses;
 - (C) diminish or lessen the benefit of a Developer Obligation relating to defects liability or liability for design concerning the Construction Works;
 - (D) have an adverse effect on the capacity of the Developer to provide the Community Houses in accordance with this Agreement; or
 - (E) result in the Revenue Share Land Payment not being achieved if it would otherwise have been achieved, or reduce the amount of Revenue Share Land Payment that the State would otherwise be likely to receive;
 - (iii) the Developer's Modification will not derogate from the Objective of constructing Stage 1 and Stage 2 as a fully constructed, integrated and occupied development; and
 - (iv) the Developer's Modification will not derogate from the Objective of providing a standard and quality of residential development, landscaping and community infrastructure as reflected in the expected costs allocated for those items in the Financial Model supplied at the Operative Date.

- (c) If the State approves a Developer's Modification under this **clause B13.2**, the State will also be deemed to have approved any changes to the Financial Model and Stage budget to which the Developer's Modification relates and any alteration in Project Expenditure each as required by **clause D2**.
- (d) The Developer shall not be entitled to any extension of time to the Stage 1 Date for Completion, the Stage 2 Date for Completion or the End Date solely as a consequence of a Developer's Modification proposed by the Developer.

B13.3 State Modifications

- (a) The State may at any time prior to Completion of the Community Houses request a State Modification to the Community Houses.
- (b) Where the State requests a State Modification, the Developer must, within the Approval Period, inform (**Developer's Notice**) the State's Representative of:
 - (i) the cost consequences of the State Modification. Any costs claimed for a modification must be limited to the actual costs to be incurred plus a maximum margin of 18% on those costs; and
 - (ii) the time consequences of the State Modification; and
 - (iii) the effects on:
 - (A) the workmanship or durability of the items of plant or equipment affected by the proposed State Modification;
 - (B) the effects of the proposed State Modification on the delivery of the Community Houses; and
 - (C) the effects of the proposed State Modification on the Developer's obligations relating to defects liability, liability for design or other obligations under this Agreement; and
 - (iv) subject to **paragraph (g)** the variation (if any) required to the Community Houses Payment as a consequence of the State Modification, and give evidence supporting that increase or decrease; and
 - (v) any amendments required to the terms of this Agreement as a consequence of the State Modification being implemented.
- (c) Within 10 Business Days of receipt of the Developer's Notice, the State may do one of the following:
 - (i) accept the Developer's Notice ("**Acceptance Notice**");
 - (ii) dispute the cost and/or time consequences in **paragraph (b)(i)** and **(ii)** and/or the variation in fees and charges specified in **paragraph (b)(iv)**; or
 - (iii) reject the Developer's Notice.

If the State fails to accept the Developer's Notice or to refer the matter to dispute resolution under **clause A25** within the 10 Business Days, the State will be deemed not to have accepted the Developer's Notice. If the State issues an Acceptance Notice the Developer must execute the State Modification. If the State does not issue an Acceptance Notice then the Developer must not implement the State Modification. The Developer will not be entitled to be paid for making a State Modification or to any extension of time for that State Modification if no valid Acceptance Notice was issued for it.

- (d) Where the State issues an Acceptance Notice, the Stage 1 Date for Completion, the Stage 2 Date for Completion and the End Date (to the extent applicable) shall be extended by the number of days specified in the Developer's Notice.
- (e) The Developer must use all reasonable endeavours to fund the State Modification including:
 - (i) using any cost savings resulting from other Modifications requested and implemented under this **clause B13**; and
 - (ii) arranging for additional funding.
- (f) Where funding for a State Modification is not available then, where the Developer has complied with its obligations under **clause B13.3(e)** the Developer is not obliged to execute the State Modification.

B14 Community Houses

B14.1 Deleted

B14.2 Developer's Obligation

- (a) The Developer shall execute and complete or shall procure the execution and completion of the Public Land Works in accordance with the Design Brief and the Design Documents so that the Community Houses, when completed, shall:
 - (i) be fit for their stated purpose;
 - (ii) comply with the requirement of all Laws and the requirements of the Design Brief and the Design Documents.
- (b) Nothing in this clause shall otherwise affect or reduce the Developer's obligations or liability under this Agreement.

B14.3 Completion of Milestones

Subject to any extensions of time allowed by the State in accordance with this Agreement, the Developer must:

- (a) carry out the Public Land Works in accordance with the Construction Works Program;

- (b) ensure that Completion of all Initial Community Houses and Stage 1 occurs on or before the Stage 1 Date for Completion; and
- (c) ensure that Completion of Stage 2 occurs on or before the Stage 2 Date for Completion.

B14.4 Defective Work

- (a) If the State's Representative, acting reasonably, determines that there is a Defect in the Public Land Works, the State's Representative may give written notice of the Defect within a reasonable period. The Developer must promptly rectify the Defect to the State's Representative's reasonable satisfaction within the timeframe for rectification specified in the notice from the State's Representative (which must be not less than 30 days).
- (b) For the purposes of this **clause B14.4**, shrinking or settling does not constitute a Defect unless it results from a construction fault or other building defect.

B14.5 Defects Liability Period

- (a) The Developer must promptly at its own expense make good any Defect which arises prior to or during the Defects Liability Period.
- (b) The State's Representative may issue a notice to the Developer notifying the existence of a Defect and specifying a reasonable time within which the Developer must make good the Defect.

B14.6 Completion

- (a) The Developer shall give the State's Representative at least 14 days notice of the date upon which the Developer anticipates that Completion of a Community House will be reached.
- (b) When the Developer is of the opinion that Completion of a Community House has been reached, the Developer shall in writing request the State's Representative to issue a Certificate of Completion for that Community House. When making such requests the Developer shall provide to the State's Representative the occupancy permit or like permission for the lawful occupancy of the Community House or the relevant portion thereof (if applicable) as issued by the Building Surveyor. The Developer shall include a notice to the State's Representative advising in writing as to the status and as to the anticipated dates for completion or provision of the following as the case may be:
 - (i) any defects and omissions identified in the Community Houses to date;
 - (ii) reports on preliminary commissioning of services installation;
 - (iii) operating and maintenance manuals;
 - (iv) as built drawings;

- (v) all manufacturers and suppliers warranties.
- (c) Within 7 days after the receipt of the request, the State's Representative shall give to the Developer a Certificate of Completion certifying that Completion of the Community House has occurred or give the Developer in writing the reasons for not issuing the certificate (as the case may be).
- (d) If the State's Representative refuses to issue a Certificate of Completion, the Developer must rectify all defects preventing the issuing of the certificate prior to making a further application in accordance with **paragraph (a)** seeking a Certificate of Completion.

B14.7 Maintenance of Community Houses

- (a) During the Project Term the Developer:
 - (i) must maintain the external appearance of the Community Houses by repainting or washdown as reasonably required by the State from time to time but only if the need for repainting or washdown arises from fair wear and tear;
 - (ii) may conduct exterior maintenance or repair to the Community Houses if the Developer considers any maintenance or repair reasonably necessary or desirable to facilitate the Sale or Marketing of the Site;
 - (iii) must maintain all gardens and landscaping works in the front yards of the Community Houses.
- (b) At the expiration of the Project Term, the Developer will repaint some or all of the Community Houses if the State reasonably considers that repainting is necessary or desirable.

B14.8 Memorials

The Developer must at its cost relocate the ceramic sculpture produced by Kew Residential Services residents, the long term residents memorial plaque, the 1996 fire memorial and the aboriginal scar tree in accordance with the Planning Consent and the Demolition Permit.

B14.9 Access

- (a) The State's Representative and any other persons under the supervision and control of the State's Representative may view the Public Land Works at any time on 48 hours notice.
- (b) In exercising any access rights in accordance with **paragraph (a)**, the State's Representative shall ensure that all persons accessing the Public Land Works:
 - (i) minimise any disruption or interference to the Developer in carrying out the Construction Works; and
 - (ii) comply with any reasonable directions of the Developer in relation to access and safety.

B14.10 Liquidated Damages

- (a) If the Developer fails to achieve Completion of the Initial Community Houses by the relevant Initial Community Houses Date for Completion, being:
- (i) 1 July 2007 for Stage 1A;
 - (ii) 1 August 2007 for Stage 1B; and
 - (iii) 1 September 2007 for Stage 1C

with the result that Completion and commissioning of the Initial Community Houses does not occur by the Stage 1 Date for Completion, the Developer shall (subject to **paragraph (b) and (c)**) pay Liquidated Damages (calculated on a daily basis) to the State for every day from the Stage 1 Date for Completion until Completion and commissioning of all of the Initial Community Houses is completed.

- (b) Notwithstanding **paragraph (a)**, if the Plan of Subdivision for Stage 1 is not certified by the City of Boroondara on or before 10 November 2006, with the consequence that the Developer is delayed in achieving Completion of the Initial Community Houses or Completion of Stage 1 by the Stage 1 Date for Completion then:
- (i) the Stage 1 Date for Completion;
 - (ii) the Stage 1 Cut Off Date; and
 - (iii) the date in **paragraph (a)** of the definition of Termination Events,

will be extended by one day for each day after 10 November 2006 until the Plan of Subdivision is certified or the statutory period for certification expires (whichever is the earlier) provided the failure by the City of Boroondara to certify the Plan of Subdivision for Stage 1 is not the result of any failure by the Developer to comply with the requirements of the Subdivision Act 1988 (Vic) including satisfying any requirements for variations or to supply further information requested in accordance with the Subdivision Act 1988 (Vic) in a timely manner.

- (c) For the purposes of **paragraph (a)**, the State will act reasonably to complete commissioning of the Initial Community Houses as soon as practicable following Handover of each Initial Community House and the State will have a maximum commissioning period of 10 Business Days after Handover of each Initial Community House to commission each individual Initial Community House. At the expiration of that 10 Business Day commissioning period, that Initial Community House will be deemed to have been commissioned.
- (d) Subject to **paragraph (b)**, if the Developer fails to achieve Completion of Stage 1 by the Stage 1 Date for Completion, the Developer shall pay Liquidated Damages (calculated on a daily basis) to the State for every day after the Stage 1 Date for Completion until Completion of Stage 1.

However, no Liquidated Damages will be payable by the Developer under this **paragraph (d)** if Completion of Stage 1 occurs by the Stage 1 Cut Off Date (as extended in accordance with **paragraph (b)**).

- (e) If:
 - (i) the Initial Community Houses and or Stage 1 have been fully constructed by the Developer in accordance with this Agreement;
 - (ii) notwithstanding **paragraph (e)(i)** the only matter preventing Completion of the Initial Community Houses or Stage 1 is the issue of an Occupancy Permit, a statement of compliance or satisfaction of any other requirement under the Subdivision Act 1988 (Vic); and
 - (iii) the delay in satisfying the matters in **paragraph (e)(ii)** is caused by the City of Boroondara and is not caused or contributed to by a failure by the Developer to comply with the Building Act 1993 (Vic) or the Subdivision Act 1988 (Vic), then for the purposes of this **clause B14.10** the Initial Community Houses or Stage 1 (as the case may be) will be deemed to be Complete as from the date the Developer has achieved the stage described in **paragraph (e)(i)**.
- (f) The Developer acknowledges and agrees that:
 - (i) the amount of Liquidated Damages:
 - (A) have been agreed by the parties in good faith;
 - (B) are a genuine pre-estimate of the anticipated or actual loss the State (or DHS) will or may suffer if commissioning of the Community Houses does not occur by the Stage 1 Date for Completion;
 - (ii) the Liquidated Damages payable are reasonable and not intended as a penalty.
- (g) For the purposes of this **clause B14.10**, the State and the Developer agree that the amount of Liquidated Damages payable by the Developer to the State in accordance with this **clause B14.10** is \$915,747.45.
- (h) The Developer must pay to the State the Liquidated Damages Amount (together with interest calculated in accordance with **clause A27** of this Agreement to be calculated on and from 31 December 2011) on 1 July 2014. The State and the Developer agree that the applicable interest rate for the purposes of calculating interest in accordance with **clause A27** being the rate calculated in accordance with **clause A27** as at 31 December 2011 is 6.46% per annum.
- (i) The State and the Developer agree that the Liquidated Damages Amount (together with interest) as at 1 July 2014 is \$1,063,884.36.

B14.11 Intentionally Deleted

B14.12 Stage 1 and Stage 2 Completion

The Developer must construct all Dwellings, infrastructure and amenities within Stage 1 by the Stage 1 Date for Completion and Stage 2 by the Stage 2 Date for Completion.

B14.13 Transfer of Transitional Stage 1 Community Houses to State

- (a) The State and the Developer agree that:
 - (i) the State may retain the Transitional Stage 1 Community Houses as the absolute property of the State;
 - (ii) the Developer's Obligations to deliver the Community Houses will be satisfied in full by:
 - (A) retention by the State of the Transitional Stage 1 Community Houses as the absolute property of the State; and
 - (B) payment by the Developer to the State of the Stage 2 Community Houses Payment.
- (b) Subject to satisfaction of **clause B14.13(a)**, the State agrees that the Developer has satisfied its Obligations in full to construct and deliver the Community Houses in accordance with this Agreement.
- (c) For the avoidance of doubt, the parties agree that:
 - (i) the State releases the Developer on and from the date of the Third Deed of Variation from any Claim relating to any failure by the Developer to have constructed the Stage 2 Community Houses prior to the date of the Third Deed of Variation; and
 - (ii) nothing in this **clause B14.3** operates to release the Developer from the requirement of the Developer to keep the State indemnified in accordance with this Agreement against any Claim made by any purchaser of a Lot against the State.

B14.14 Not used

B14.15 Use of Portable Building

The State will make available to the Developer at no cost to the Developer the use of the portable building on the Site (to the south of unit 24) (**portable building**) for the duration of the Project. The Developer uses the portable building on the basis of its own inspections and acknowledges that no representations or warranties are provided by the State in relation to the portable building.

B15 Heritage Buildings

- (a) The State and the Developer agree that the Development Budget includes an allowance of \$5,000,000 (plus GST) for the design, site

preparation and building costs associated with the repair and construction of associated facilities in the Heritage Buildings (**Heritage Building Allowance**).

- (b) Prior to the Revised Developer Payment Date, the Developer must engage an independent auditor (to be approved by the State) to verify the expenditure which has been incurred by the Developer in relation to the Heritage Buildings (including expenditure incurred in maintaining the Heritage Buildings in accordance with **clause (f) (Expended Amount)**) and must provide a copy of the auditor's report to the State as soon as practicable after the audit report is received and in any event by no later than the Revised Developer Payment Date. The cost incurred in obtaining the audit report will form part of Project Expenditure.
- (c) On the Revised Developer Payment Date, the Developer must pay to the State an amount calculated by deducting the Expended Amount from the Heritage Building Allowance (**Heritage Building Repayment**) together with interest in accordance with **clause (d)**. On payment of the Heritage Building Repayment together with interest in accordance with **clause B15(d)**, the State releases the Developer from any future obligations in relation to the Heritage Core.
- (d) Interest shall accrue on the unexpended portion of the Heritage Building Allowance from 1 July 2014 until payment of the Heritage Building Repayment. Interest will be calculated on the daily balance of the unexpended portion of the Heritage Building Allowance at the Developer Interest Rate
- (e) The State and the Developer must agree on that part of the Site which constitutes the Heritage Core and in the event the parties are unable to agree, the dispute will be determined in accordance with **clause A25**. For the purposes of this clause, 'Heritage Core' comprises the Heritage Buildings and all other surrounding land which Heritage Victoria requires to be retained or maintained in conjunction with the use or development of the Heritage Buildings.
- (f) For the avoidance of doubt, the land comprising the Heritage Core and each certificate of title relating to the land comprised in the Heritage Core is to be issued to and held by the State absolutely and may be dealt with by the State in its absolute discretion.
- (g) The Developer must maintain the Heritage Buildings up until the earlier of the completion of the sale by the State of the Heritage Buildings or the Revised Developer Payment Date including carrying out all repair and maintenance reasonably required to ensure that the Heritage Buildings are maintained in their current state of repair. The Developer must seek written approval from the State prior to expending any further funds from the Heritage Building Allowance in relation to the Heritage Buildings. The State must not unreasonably withhold approval to any expenditure reasonably required to ensure that the Heritage Buildings are maintained in their current state of repair.

- (h) Notwithstanding **clause (g)**, the State is responsible for and bears the risk of:
 - (i) compliance with the terms of the Heritage Permit and the Heritage Guarantee Conditions;
 - (ii) dealing with and satisfying the Planning Authority in respect of any reduction in the provision of public open space which results or may result:
 - (A) from an alternative re-development of the Heritage Core to that which is currently specified in the Development Plan including any additional area required under **clause (d)** (which must not include any area within the Project Office Precinct which the Developer may develop in accordance with **clause C14**); or
 - (B) from the construction of the Car Park.
- (i) The State will use its reasonable endeavours to obtain the return to the State of the Heritage Guarantee from Heritage Victoria. If the State is unable to procure the return of the Heritage Guarantee from Heritage Victoria, then the provisions of **clause A23.7** will apply.
- (j) Without limiting the provisions of **clause A14**, the Developer agrees that all materials and documents created by or on behalf of the Developer or the Guarantor in relation to the Heritage Buildings and the Community Facilities (as defined in the Development Agreement prior to the Fourth Deed of Variation) constitute Materials and/or Pre-Existing Matter to which the provisions of **clause A14** apply.
- (k) For the purposes of this **clause B15**, 'Heritage Permit', 'Heritage Guarantee' and 'Heritage Guarantee Conditions' have the same meaning as in clause A23.12.'

B16 Sub-Contracting

- (a) The Developer may sub-contract the performance of the Construction Works.
- (b) The Developer is not relieved of any of its liabilities or obligations under this Agreement as a result of any sub-contracting of the Construction Works and the Developer is at all times responsible for the performance of all project contractors to whom any part of the Construction Works have been sub-contracted.
- (c) The State has no liability to any sub-contractor arising from the sub-contract between the Developer and the sub-contractor.

B17 Inspection and Testing

- (a) The State's Representative, or his or her delegate may at the State's cost:
 - (i) inspect the Public Land Works at all reasonable times on 48 hours notice;
 - (ii) inspect and test the materials used in the construction of the Public Land Works; and
 - (iii) reject any material or workmanship not conforming to the Design Documents, the Design Brief, the good trade practices of the respective trades, relevant regulations or local Laws.
- (b) If the State's Representative considers that the Public Land Works do not comply with this Agreement and that the non-compliance justifies suspension of the whole or part of the Public Land Works, the State's Representative may:
 - (i) issue a notice in writing directing the Developer to suspend the progress of the whole or part of the Public Land Works for such time as the State's Representative considers fit; or
 - (ii) direct the Developer to immediately rectify any aspect of the Public Land Works which do not comply with this Agreement.
- (c) Any notice issued by the State Representative under **clause B17(b)** must give reasonable details of any non-compliance of the Public Land Works with this Agreement.
- (d) The State shall ensure that in exercising its rights under this **clause B17**, the State's Representative acts fairly and reasonably.
- (e) Nothing in this **clause B17** shall in any way lessen or affect the duties and obligations of the Developer under this Agreement.

B18 Compliance with Laws

In the design and construction of the Project, the Developer must comply with the requirements of all Laws, Approvals, Authorisations and agreements relevant to the design and construction of the Project.

B19 Developer's occupational health and safety obligations

B19.1 Statutory Requirements and Codes of Practice

The Developer shall comply with the Occupational Health and Safety Act 1985 and any other relevant statutory requirements dealing with occupational health and safety.

B19.2 Occupational Health and Safety Policy

- (a) The Developer shall:
- (i) develop and maintain a specific and current occupational health and safety policy showing the Developer's commitment to occupational health and safety and allocating responsibilities for the management and facilitation of health and safety on the Site. The occupational health and safety policy must explicitly recognise that the Site will be occupied by KRS Residents and other private occupiers during the Construction Works and include appropriate provisions to ensure the ongoing protection of KRS Residents and other private occupiers on Site;
 - (ii) regularly monitor and update its occupational health and safety policy;
 - (iii) take all appropriate steps to ensure that there is a high level of awareness of the Developer's occupational health and safety policy among all of the Developer's employees and subcontractors at the Site; and
 - (iv) take all appropriate steps to ensure that there is a high level of awareness of any occupational health and safety policy of the Developer among the Developer's employees and subcontractors.
- (b) At any time during the Project Term, the State may conduct an audit of the occupational health and safety policy and compliance with that policy. The Developer must cooperate so as to facilitate any audit undertaken.

B19.3 Site Safety Induction Program

The Developer shall:

- (a) establish and maintain a site safety induction program. That induction program must be undertaken by all of the Developer's employees and subcontractors prior to carrying out work at the Site;
- (b) provide documentary evidence to the State as requested by the State of the induction and training of the Developer's employees and any subcontractors and their employees, including the content of the induction program;
- (c) take all appropriate steps to ensure that there is a high level of awareness of the site safety induction among all of the Developer's employees and subcontractors at the Site; and
- (d) ensure that each new employee and subcontractor commencing at the site during the Development undertakes the site safety induction program.

B19.4 Health and Safety Procedures

The Developer shall or must procure an agent or contractor on behalf of the Developer to:

- (a) implement and maintain work procedures and systems to ensure safe systems of work on the Site, including the provision of an occupational health and safety manual and method of work statements;
- (b) undertake an auditing process of the workplace on a regular basis to ensure that safe systems of work are maintained on the Site;
- (c) implement and maintain a process of identifying actual or potential hazardous or unsafe or unhealthy conditions at the Site, assessing associated risks and identifying and implementing appropriate risk control and prevention measures;
- (d) implement and maintain an appropriate incident investigation process and designate responsibility for investigation to persons with appropriate skills;
- (e) implement and maintain a system to manage occupational health and safety risks with respect to employees and sub-contractors and other persons who may attend the Site; and
- (f) implement an emergency response procedure for responding to occupational health and safety incidents at the Site.

B20 Security of Payment Act

B20.1 Application of the Security of Payment Act

This clause will apply if the Building and Construction Industry Security of Payment Act 2002 (Vic) (**Security of Payment Act**) applies.

B20.2 Service of Notices under the Security of Payment Act

The Developer shall:

- (a) ensure that a copy of any written communication it delivers or arranges to deliver to the State of whatever nature in relation to the Security of Payment Act (including, without limitation, a payment claim under the Security of Payment Act), is provided to the State's Representative at the same time;
- (b) when the Developer becomes aware that a contractor or subcontractor is entitled to suspend work pursuant to the Security of Payment Act, promptly and without delay give the State's Representative a copy of any written communication of whatever nature in relation to the Security of Payment Act which the Developer receives from a contractor or subcontractor.

B20.3 The Role of the State's Representative under the Security of Payment Act

In receiving payment claims or issuing payment schedules pursuant to the Security of Payment Act, the State's Representative acts as the representative of the State.

B20.4 Payment Claim

- (a) A payment claim for the purpose of the Security of Payment Act is a valid claim for payment pursuant to **clause D1.1**.
- (b) The date prescribed in **clause D1.1** as the time for payment claims is, for the purpose of the Security of Payment Act, the “reference date”.

B20.5 Payment Schedule

- (a) The amount (if any) prescribed by this Agreement as the amount of payment which the State proposes to make to the Developer is, for the purposes of sections 9, 10, 11 and 12 of the Security of Payment Act, the amount of the “progress payment” (as defined in the Security of Payment Act) calculated in accordance with this Agreement which the Developer is entitled to be paid under this Agreement.
- (b) Failure by the State’s Representative to set out in a payment schedule an amount which the State is entitled to retain, deduct, withhold or set-off (whether under this Agreement or otherwise) from the amount which would otherwise be payable to the Developer by the State will not prejudice the State’s right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.

B20.6 Nominating authority for adjudication application

Upon an adjudication application under the Security of Payment Act, the authorised nominating authority for the purpose of the Security of Payment Act shall be a person authorised by the Building Commission under section 42 of the Security of Payment Act to nominate persons to determine adjudication applications.

B20.7 Conduct of Adjudication

In dealing with any adjudication application made by the Developer under the Security of Payment Act, the adjudicator shall:

- (a) have no power to open up, review or revise any certificate issued under this Agreement by the State’s Representative;
- (b) at all times act impartially between the parties, in accordance with the Law; and
- (c) include in the determination the reasons for the determination and the basis on which any amount or date has been decided.

B20.8 Security to be provided under the Security of Payment Act

If the adjudicator determines an adjudication application made by the Developer under the Security of Payment Act by determining that the State must pay any amount to the Developer:

- (a) the State may give security for payment of that amount pending the final determination of matters in dispute between the State and the Developer in the adjudication;

- (b) the security shall be in the form described in section 25(4) of the Security of Payment Act; and
- (c) the security shall, pending the final determination of matters in dispute, be in lieu of payment and in full satisfaction of any liability for that amount under this Agreement.

B20.9 Suspension of Works under the Security of Payment Act

If the Developer suspends the whole or part of the work under this Agreement pursuant to the Security of Payment Act:

- (a) the suspension shall not of itself affect the Stage 1 Date for Completion, the Stage 2 Date for Completion or the End Date;
- (b) the State shall not be liable for any costs, expenses, damages, losses or other liability including delay or disruption costs whatsoever suffered or incurred by the Developer as a result of the suspension; and
- (c) the State's Representative may direct the Developer to omit the whole or part of the suspended work and thereafter the State may engage others to carry out the suspended work.

B20.10 Contractor Suspension

If the State becomes aware that a contractor or subcontractor is entitled to suspend work pursuant to the Security of Payment Act, the State may (in its absolute discretion) pay the contractor or subcontractor money that is or may be owing to the contractor or subcontractor in respect of that work, and any amount paid by the State shall be a debt due from the Developer to the State.

B20.11 Indemnity

The Developer shall indemnify the State against all damage, expense (including legal costs), Loss (including consequential and economic loss) or liability of any nature suffered or incurred by the State arising out of:

- (a) a suspension pursuant to the Security of Payment Act by a contractor or subcontractor of work which forms part of the Construction Work; or
- (b) a failure by the Developer to comply with **clause B20.2**.

B21 Construction of Car Park

- (a) The Developer must construct a permanent car park comprising 12 car spaces in the location of the existing temporary car park in Stage 1 as denoted on the Car Park Plan by 30 September 2014.
- (b) The Car Park must be constructed in accordance with all relevant standards applicable to the construction of at grade car parks for use primarily by passenger vehicles as agreed with the State, acting reasonably.
- (c) All cost incurred by the Developer in modifying and completing construction of the Car Park will form part of Project Expenditure.

Part C – Subdivision, Sales and Marketing

C1 Subdivision

C1.1 Development in Stages

The State and the Developer acknowledge and agree that the Site is to be subdivided and construction of the Project is to be undertaken in Stages in accordance with the Development Plan and generally in accordance with the Construction Works Program.

C1.2 State to procure Crown Grant

The State must procure the issue of a Crown Grant for the Site to the Secretary to the Department of Infrastructure as soon as practicable after the Operative Date and the State must hold that Crown Grant until it is required to be made available at the LTO to enable registration of a Plan of Subdivision.

C1.3 Release of Stages

- (a) The Developer shall notify the State when it intends to commence Construction Works within any Stage and shall submit to the State's Representative for information purposes (the **Information Documents**):
- (i) a landscape concept plan, showing the location of all planting and paving;
 - (ii) elevations of all Dwellings in the Stage, indicating external materials, finishes and colours;
 - (iii) perspective views to illustrate the form of the Stage; and
 - (iv) the budget for that Stage prepared in accordance with **clause D2.4**,

unless those documents have already been provided to the State.

- (b) The Information Documents must be consistent with the Development Plan, except to the extent that the State has agreed to amend the Development Plan.

C1.4 Amendments to Development Plan

- (a) The Developer may request an alteration to the Development Plan (including any change in approved uses and/or construction mix from that noted on the Development Plan) by notice in writing to the State's Representative.
- (b) The State will not unreasonably withhold its consent to any change proposed to the Development Plan requested by the Developer where:

- (i) the change can be effected without an extension of time to the End Date or the change will require an extension of time to the End Date, but **clause C1.4(b)(iii)** applies;
- (ii) the change will not adversely affect the Project or derogate from the Objectives;
- (iii) the State is satisfied having regard to the prevailing economic and market conditions it is in the best commercial interest of both the Developer and the State to do so;
- (iv) the Developer provides to the State reasonably satisfactory evidence that:
 - (A) a Market Condition Change has occurred including sufficient details of the Market Condition Change; and
 - (B) a change to the Development Plan is a satisfactory response to the Market Condition Change.
- (c) The State and the Developer acknowledge and agree that the Stage 2 plan in **schedule 6** is indicative only and subject to change as part of the final design for Stage 2. The final form of the Stage 2 plan must be agreed between the State and the Developer as soon as practicable so as to allow the Construction Works Program for Stage 2 to be met. When agreed, the agreed form of the Stage 2 plan will be signed by the Developer and the State and be incorporated in and form part of **schedule 6**.

C1.5 Plan of Subdivision

The Developer must prepare or procure preparation of a Plan of Subdivision for each Stage and deliver four copies to the State for the written approval of the State prior to submission to the Planning Authority for certification.

C1.6 Nature of Plan of Subdivision

Each Plan of Subdivision for a Stage to be prepared under **clause C1.5** must:

- (a) be consistent with the Development Plan, except to the extent that the State has agreed to amend the Development Plan; and
- (b) by way of a marked up plan specify, which parts of the Stage are intended to be:
 - (i) Community House Lots;
 - (ii) Sale Lots;
 - (iii) Vacant Land; and
 - (iv) Public Purpose Lots, in which event the Developer must also generally identify the Relevant Authority to which each Public Purpose Lot may be transferred or reserved.

C1.7 Decision by State

Within 10 Business Days after receipt of a Plan of Subdivision prepared and delivered in accordance with **clauses C1.5 and C1.6**, the State (acting reasonably) must either:

- (a) approve the Plan of Subdivision; or
- (b) dispute any aspect of the Plan of Subdivision (to the extent the Plan of Subdivision does not comply with **clause C1.6** or **clause C4.1**, if applicable) by notice in writing to the Developer (which notice must specify the details of the dispute),

and if the State:

- (c) approves the Plan of Subdivision, then **clause C1.10** applies;
- (d) disputes any aspect of the Plan of Subdivision, then if the dispute cannot be resolved by the parties, acting reasonably, within 5 Business Days after the date on which the Developer receives the notice, the dispute will be determined in accordance with **clause A25**; or
- (e) fails to give a notice within 10 Business Days, the State will be deemed to have approved the Plan of Subdivision and **clause C1.10** applies.

C1.8 Alterations to Plan of Subdivision

- (a) The Developer may by written notice request the State to agree to an alteration to any Plan of Subdivision approved under **clause C1.7**, in which event **clauses C1.5, C1.6** and **C1.7** apply, the necessary changes being made.
- (b) Regardless of anything in **clause C1.7** to the contrary, the State must:
 - (i) approve an alteration to any approved Plan of Subdivision where the alteration is a Requirement of the Planning Authority or the LTO, or reflects on alteration to the Development Plan in accordance with **clause C1.4**; and
 - (ii) not unreasonably withhold its approval to any other alteration to any approved Plan of Subdivision requested by the Developer.

C1.9 State to sign applications

After each Plan of Subdivision has been approved in accordance with **clause C1.7**, the State must promptly at the request of the Developer:

- (a) sign all applications and consents; and
- (b) do all other things reasonably necessary, to enable the Plan of Subdivision to be certified by the Planning Authority.

C1.10 Developer to carry out Subdivisional Works

After each Plan of Subdivision has been approved in accordance with **clause C1.7** and certified by the Planning Authority the Developer must construct the roads and Utilities and comply with all Laws and satisfy all proper

Requirements of the Planning Authority with respect to the land in that Plan of Subdivision.

C1.11 State to make titles available

At any time after a Plan of Subdivision for a Stage has been approved in accordance with **clause C1.7** and certified by the Planning Authority, the State must promptly at the request of the Developer:

- (a) sign an application for registration of the Plan of Subdivision in the form required by the LTO;
- (b) make the Crown Grant or certificate of title for the land in the Plan of Subdivision available at the LTO; and
- (c) do all other things reasonably necessary to enable registration of the Plan of Subdivision at the LTO.

C1.12 Certification

- (a) The Developer must comply with the requirements of the Subdivision Act 1988 (Vic) in relation to each Plan of Subdivision including satisfying any requirements for variations or to supply further information requested in accordance with the Subdivision Act 1988 (Vic) in a timely manner.
- (b) The Developer must keep the State fully informed of the status of the certification process for each Plan of Subdivision relating to Stage 1 and Stage 2 including all actions being taken by the Developer to facilitate the timely certification of those Plans of Subdivision so as to enable the Developer to comply with its obligations under this Agreement.

C2 Body Corporate

C2.1 Creation of Body Corporate

Where a Plan of Subdivision which the State has approved under **clause C1.7** incorporates a Body Corporate, then on registration of that Plan of Subdivision, the State must as registered proprietor of the Lots procure:

- (a) the convening of an extraordinary meeting of the Body Corporate;
- (b) the passing of a special resolution at that extraordinary meeting to create the Body Corporate Rules;
- (c) the passing of any other resolutions required by Law; and
- (d) the execution and registration of all necessary forms and documents required for the purpose of registering the Body Corporate Rules at the LTO.

C2.2 Alterations to Body Corporate Rules

The State must make such alterations to the Body Corporate Rules proposed by the Developer for a Plan of Subdivision as may be necessary to have them approved by the LTO or are otherwise necessary or desirable for the proper functioning of the Body Corporate or the Project generally.

C2.3 Role of State

- (a) Subject to **clause C2.3(b)**, on and from the date of registration of a Plan of Subdivision including a Body Corporate, the State, as the sole member of the Body Corporate, must on the written request of the Developer procure the Body Corporate to enter into any agreements required for the Project or under the Lot Sale Contracts for the Stage with any person or group and on terms which the Developer, acting reasonably, considers appropriate.
- (b) Each agreement entered into under **clause C2.3(a)**:
 - (i) must, unless in a form required under the Lot Sale Contracts for the Stage, be in a form and content acceptable to the State, acting reasonably;
 - (ii) must be consistent with the Planning Consents, all Authorisations and this Agreement;
 - (iii) may confer or impose on the Body Corporate and its members (individually or collectively) Rights (subject to conditions) and Obligations in respect of the Project and the Utilities and facilities of the Project; and
 - (iv) may be separately documented or embodied in the Plan of Subdivision for the Stage or the Body Corporate Rules.
- (c) The State will remain the proprietor of all Lots which are not the subject of a Dealing for up to 24 months (or such longer period as may be agreed by the State) after registration of a Plan of Subdivision including a Body Corporate on the following conditions:
 - (i) the Developer will pay any Body Corporate charges or levies (including water and any other Utility charges for the Body Corporate or the relevant Lots) while the State remains proprietor;
 - (ii) the State will pay any Rates and Taxes while the State remains proprietor and shall indemnify the Developer accordingly;
 - (iii) if the State serves a notice on the Developer requiring any Lots which are not subject to a Dealing to be transferred to the Developer within 24 months following registration of the Plan of Subdivision (or such later period as the State may agree) the State and the Developer (or its nominee) must enter into a contract of sale for those Lots in or substantially in the form specified in **schedule 14**:
 - (A) with a price equal to the aggregate of the Guaranteed Land Payments for the relevant Lots plus any GST payable by the State in respect to the Sale of the relevant Lots (subject to **sub-paragraph (iv)**, on the basis that the relevant Lots are sold subject to the margin scheme); and
 - (B) with a 10% deposit payable on exchange and the balance payable in 60 days,

- (iv) Notwithstanding **sub-paragraph (iii)**, the Developer may elect by notice in writing not to use the margin scheme for the purposes of calculating GST.
- (d) If the State and the Developer enter into a contract for any Lot pursuant to **paragraph (c)(iii)**, any subsequent sale of that Lot by the Developer will not constitute Project Revenue.

C3 Public Purposes Lots

C3.1 Transfer or vest in Relevant Authority

The State must procure that each Public Purpose Lot is reserved for, transferred to or vested in the appropriate Relevant Authority for no monetary consideration as soon as practicable after registration or approval of the relevant Plan of Subdivision which created the Public Purpose Lot.

C3.2 State to retain Ownership

If any Public Purpose Lot cannot be reserved for, transferred to or vested in the appropriate Relevant Authority, the State must retain or take ownership of the Public Purpose Lot and must, at its cost, maintain it to a level not less than the level of maintenance that would be expected from the appropriate Relevant Authority.

C4 Vacant Land

C4.1 Procedures for Vacant Land

- (a) If any Plan of Subdivision submitted to the State for approval under **clause C1.5** includes any Sale Lot that is Vacant Land, the Developer must specify which parts of the Stage are to be sold as Vacant Land, in accordance with **clause C1.6**. Evidence to State
- (d) Where a Plan of Subdivision submitted to the State for approval under **clause C1.5** includes any Sale Lot that is Vacant Land, in addition to complying with the requirements of **clauses C1.6** and **paragraph (a)**, the Developer must provide evidence to the reasonable satisfaction of the State that, a Dealing with respect to that Vacant Land is the most effective and appropriate method of disposing of that Vacant Land having regard to the prevailing economic and market conditions and is in the best commercial interests of both the Developer and the State.

C5 Retention and release of Lot titles

C5.1 Retention by State

The Developer irrevocably requests, authorises and directs the State to take delivery of and hold each certificate of title to be issued by LTO following registration of each Plan of Subdivision of a Stage until the first to occur of:

- (a) Settlement of a Dealing with that certificate of title in accordance with this Agreement and payment to the State of the Guaranteed Land Payment for that Lot;
- (b) the Developer delivering up to the State a Bank Guarantee (or other security acceptable to the State) for the State's Guaranteed Land Payment in respect of that certificate of title; and
- (c) the termination of this Agreement.

C5.2 Release of Lot titles

- (a) Where **clause C5.1(a)** applies, the State must deliver or procure delivery of the certificate of title to or at the direction of the Developer at Settlement of the relevant Dealing in accordance with the Sale Procedures.
- (b) Where **clause C5.1(b)** applies, the State must deliver each certificate of title to or at the direction of the Developer.
- (c) Where **clause C5.1(c)** applies the State must Settle any Dealing which is entered into by the Developer in accordance with this Agreement on the date on which the Dealing is to Settle.

C5.3 Public Purpose Lots in name of Relevant Authority

Where a certificate of title in respect of a Public Purpose Lot is issued in the name of a Relevant Authority, then the State may release the certificate of title relating to the relevant Public Purpose Lot to that Relevant Authority on such terms as it thinks fit, acting reasonably.

C6 Dealings by Developer

C6.1 Developer not to sell undeveloped land

Except with the prior written consent of the State, or in accordance with **clause C4** or any other provision of this Agreement, the Developer must not enter into any Dealing in respect of any Lot or any other part of the Site unless it is a Dealing in respect of:

- (a) a Lot and improvements constructed on the Lot; or
- (b) a Lot and improvements to be constructed under a binding contract between the Developer and the End Purchaser.

C6.2 Leasing of unsold Lots

The Developer may lease any Lot owned by the State prior to Sale provided that:

- (a) the Developer may not grant a lease greater than 12 months in respect to any Lot without the prior written consent of the State;
- (b) the Developer may not grant a lease of any Vacant Land without the prior written consent of the State.

Any revenue derived from the letting will comprise Project Revenue.

C7 Sales and Marketing policy

C7.1 Marketing and Sale Period

The Developer must Market the Lots in accordance with the Sales Procedures and the Policy approved by the State under **clause C10.2** during the Marketing and Sale Period.

C7.2 State's Approval

The Developer must prepare and submit to the State for its approval any Marketing material which applies to the Marketing and Sale of the Sale Lots and which refers to the Community Houses or the KRS Residents. No advertising material referring to the Community Houses or the KRS Residents may be published or disseminated by the Developer without the prior written approval of the State which may be granted or withheld in the State's absolute discretion.

C7.3 Co-ordination of Marketing and Selling agents

- (a) The State must promptly, at the request of the Developer, sign such forms of agency agreement or selling authority as may be reasonably required by any selling agents selected by the Developer for the Marketing and Sale of Lots.
- (b) The Developer must supervise and co-ordinate the activities of any selling agents from time to time appointed in respect of the Project until the expiration of the Marketing and Sale Period.

C7.4 Developer to ensure compliance

Without limiting **clause C7.3(a)**, the Developer must ensure that any selling agents comply with all relevant Legislative Requirements and those provisions of this Agreement which are applicable to the Marketing and Sale of Lots.

C8 Execution of Sale Documents

C8.1 Appointment as agent

- (a) Within 10 Business Days after the Operative Date, the State must appoint the Developer as the agent of the State for the purposes of execution of Lot Sale Contracts, Lot Vendor's Statements and any lease pursuant to **clause C6.2**.
- (b) For the purposes of **clause C8.1(a)**, the State will provide a delegation under the Project Development Construction and Management Act, authorising two nominees of the Developer to execute Lot Sale Contracts, Lot Vendor's Statements and leases as agent for and on behalf of the State for the purposes of this Agreement.

- (c) The Developer accepts the appointment described in **clause C8.1(a)** and agrees to observe and perform all of its Obligations under this **clause C8** according to their terms.

C8.2 Developer to Market

During the Sales and Marketing Period, the Developer may agree to Dealings with Sale Lots and, in so doing, the Developer must comply with the Sale Procedures.

C8.3 State's Obligations

During the Sales and Marketing Period, the State must and must procure the State's solicitors to comply with the Sale Procedures.

C9 Acknowledgements and Indemnity

C9.1 Compliance with Laws

In Marketing the Lots, the Developer must at all times comply with all relevant Legislative Requirements and those provisions of this Agreement which are applicable to the Sale of Lots.

C9.2 Acknowledgement by State

The State acknowledges and agrees that, despite anything in **clauses C7, C8** and **C9**, the Developer is not and will not at any time during the Sales and Marketing Period be required to be the State's selling agent.

C9.3 Indemnity

In consideration of the State authorising the Developer to do all those things that the Developer may do under or pursuant to this **Part C** and the Sale Procedures, the Developer must as a part of Project Expenditure keep the State indemnified against any Loss suffered or incurred by the State as a direct or indirect result or consequence of:

- (a) any inaccuracy in or omission from a Vendor's Statement in respect of a Lot;
- (b) the Sale, design or construction of any Lot and all improvements or any Lot;
- (c) any Dealing with the Site or any part of the Site;
- (d) the enforcement of or failure to enforce any Dealing relating to a Lot; and
- (e) any Claim brought or made by any person against the State in respect of or arising from the Sale or prospective Sale or Lease of any Lot including any Claim for rectification of title or based on or claiming misdescription of any Lot,

but this indemnity will not extend to any loss, damage, cost or expense suffered or incurred by the State as a direct result or consequence of the State requiring the Developer to do or not do anything in respect of the Sale or lease of a Lot.

C10 Rates and Taxes

C10.1 State to pay

The State must pay or reimburse the Developer for all Rates and Taxes (if any) assessed against the Site during the period:

- (a) commencing on the Operative Date; and
- (b) ending, in respect of any part of the Site, on the date on which title to that part of the Site is transferred or granted to:
 - (i) the Developer; or
 - (ii) any other person at the request of the Developer, including an End Purchaser.

C10.2 Developer to provide details

The Developer must provide reasonable details (including copies of all assessments) in relation to any Claim made against the State under **clause C10.1**.

C10.3 Minimise costs

The Developer, acting reasonably, must minimise the amount of Rates and Taxes payable from time to time by the State under **clause C10.1**.

C11 Duty

C11.1 Transfer Duty

The parties acknowledge and agree that:

- (a) no Transfer Duty is payable on the Crown Grant to be issued to the State under **clause C1.2**;
- (b) Transfer Duty is payable:
 - (i) by the Developer in respect of the transfer of a certificate of title by the State to the Developer; and
 - (ii) by the transferee in respect of the transfer of a certificate of title by the State to any other person; and
- (c) in this clause, "**Transfer Duty**" means the duty and other fees and charges payable from time to time in respect of a transfer of Victorian land and improvements under the Duties Act 2000 (Vic).

C12 Community Houses Lots

C12.1 State to hold title

Subject to **clause B14.13**, each certificate of title relating to a Community House Lot is to be issued to and held by the State absolutely.

C12.2 Transfer of Community Houses

If at any time during the Project Term the State determines that it no longer wishes to occupy a Community House, the following provisions will apply:

- (a) the relevant Community House will be treated as a Sale Lot for the purposes of this Agreement; and
- (b) the proceeds from the sale of the relevant Community House will be distributed in accordance with **Part D** and **schedule 12**.

C13 No Caveat

- (a) The Developer must not permit any End Purchaser or the financier of any End Purchaser to lodge any caveat over any part of the Site, before that part of the Site becomes a Lot on a registered Plan of Subdivision.
- (b) The Developer must not lodge (and must not permit its financier to lodge) a caveat over any part of the Site, except where the grounds of claim relate to an exchanged contract of sale entered into between the parties under **clause C2.3** or D4.2.

C14 Redevelopment of Project Office Precinct

- (a) 'Project Office Precinct' means that part of the Site used by the Developer as a project office for the Project and which comprises Stage 8 on the Staging Plan.
- (b) The Developer will undertake an assessment to determine whether the developable area of the Site allows for Additional Sale Lots to be constructed in the Project Office Precinct (**Additional Sale Lots**).
- (c) If the Developer confirms to the State that Additional Sale Lots would be permissible (subject to any approvals required), the State will use its reasonable endeavours to assist the Developer to obtain all relevant Planning Permits and other Authorisations which are necessary or desirable to facilitate the Additional Sale Lots in the Project Office Precinct (**Planning Approvals**).
- (d) The Developer must obtain the consent of the State to the form and content of any application for the Planning Approvals prior to submission to the Planning Authority. Nothing in this clause imposes any obligation on the State as Planning Authority to grant or approve any Planning Approvals.
- (e) The Developer bears the risk should the Developer not obtain the Planning Approvals, and the Developer is solely responsible for paying all costs incurred in obtaining the Planning Approvals.
- (f) If the Developer obtains the Planning Approvals, any payment due to the State for each Additional Sale Lot will be calculated in accordance with schedule 12. For the avoidance of doubt, when calculating any payment due to the State for each Additional Sale Lot, all payments previously

made to the State on the Settlement of the existing Lots will be taken into account in determining any payment due to the State for each Additional Sale Lot.

- (g) For the avoidance of doubt the Lot Sale Price for each Additional Sale Lot (exclusive of GST) will constitute Project Revenue and the costs in constructing any Additional Sale Lot will constitute Project Expenditure for the purposes of calculating any Revenue Share Land Payment under the Development Agreement.

Part D – Financial and commercial arrangements

D1 Payments

D1.1 Community Houses Payment

The State must pay the Community Houses Payment to the Developer at the times and in the manner set out in **schedule 12**.

D1.2 Land Payments

- (a) The State may retain the Guaranteed Land Payment and any GST payable on a Lot Sale Contract from the proceeds of settlement of each Lot Sale Contract and must pay the balance of the proceeds of each Lot Sale Contract to the Developer in payment for performance by the Developer of its obligations under this Agreement.
- (b) The Developer must pay to the State the Revenue Share Land Payment at the times and in the manner set out in **schedule 12**.
- (c) The Developer must pay to the State the Stage 2 Community Houses Payment at the time and in the manner set out in **clause 2.5 of schedule 12**.

D1.3 Priority of Payments

The priority of payments from the proceeds of the Sale of each Lot to the State and the Developer will be as follows:

- (a) first, to the State for the Guaranteed Land Payment and GST;
- (b) second, to the Developer or its financier at the Developer's direction, until such time as the State is entitled to a Revenue Share Land Payment; and
- (c) third, to the State and the Developer *pari passu* for the Revenue Share Land Payment and the Developer's share of the surplus profit above the Developer's Base Margin.

D2 Financial Model

D2.1 Purpose of Financial Model

- (a) The Financial Model sets out the expected expenditure and returns in respect of the Project and forms the basis on which the State and the Developer have estimated the expected Revenue Share Land Payment to be received by the State.
- (b) The Developer must provide the State with an electronic version of the Financial Model on the Operative Date.

D2.2 Updated Financial Model

- (a) The Developer must provide the State with an updated Financial Model at the expiration of each 12 month period following the Operative Date and following the approval of a Stage budget or implementation of any Developer's Modification. The updated Financial Model must include all changes to the Financial Model arising in the previous 12 month period, arising either as a consequence of:
 - (i) any increase or decrease in Project Expenditure or Project Revenue from that anticipated in the Financial Model; or
 - (ii) arising in consequence of any Developer's Modification , State Modification or Stage budget.
- (b) The updated Financial Model must indicate:
 - (i) Any amended Guaranteed Land Payment;
 - (ii) Any changes to the number of Lots or changes in the construction mix of Lots; and
 - (iii) Any other substantive changes to the Financial Model.

D2.3 Material Changes

If a change occurs in any category of expenditure or revenue in the Financial Model which is or may result in a material decrease in the Revenue Share Land Payment, the Developer must include this in the next Monthly Report following the Developer becoming aware of that occurrence.

D2.4 Stage Budgets

- (a) The Developer must prepare a budget for each individual Stage based on the expected expenditure and revenue contained in the Development Budget and Financial Model as applicable to that Stage, and provide a copy of that budget for the approval of the State prior to commencing any work in relation to a Stage.
- (b) Each Stage budget must contain details regarding the estimated expenditure for that Stage in respect to design costs and marketing costs.
- (c) If the Stage budget differs from the estimated Project Expenditure and Project Revenue contained in the Financial Model, the Developer must provide the State with reasons for the difference and advise the State of any expected impact on the forecast Revenue Share Land Payment to the State.
- (d) The State may only withhold approval to a Stage budget if:
 - (i) the Stage budget does not reflect the Financial Model; and
 - (ii) the implementation of the Stage budget will result in:
 - (A) the Objectives not being met; or

- (B) a Revenue Share Land Payment not being payable when it otherwise would be or the Revenue Share Land Payment being reduced from that forecast in the Financial Model.
 - (C) other than as a result of a Market Condition Change.
- (e) As soon as the Developer becomes aware that the actual Project Expenditure incurred in respect to a Stage will or is likely to:
- (i) exceed the total budgeted expenditure by more than 3%; or
 - (ii) exceed the estimated costs allocated for any individual item of Project Expenditure including design costs or marketing costs by more than 10%,

the Developer must notify the State in writing providing details as to:

- (A) the amount of the increased expenditure;
 - (B) the items to which the increased expenditure relates;
 - (C) reasons for the increase in expenditure and whether the increase in expenditure will be set off by a corresponding increase in Project Revenue;
 - (D) whether the increase will result in an increase in expenditure under the Development Budget or require an alteration to the Financial Model; and
 - (E) whether the increase will reduce the forecast Revenue Share Land Payment.
- (f) If the notice under **paragraph (e)** indicates an expected reduction in the forecast Revenue Share Land Payment the State and the Developer must discuss whether having regard to the prevailing economic and market conditions it is in the commercial interest of both the Developer and the State to incur the increased Project Expenditure.
- (g) The Developer must update each Stage budget on a quarterly basis to reflect actual expenditure and revenue for the Stage. The Developer must provide a copy of the updated budget to the State.

D2.5 Project Expenditure

- (a) All Project Expenditure will be recorded by the Developer on a fully auditable and open book basis including the provision of detailed invoices showing all direct costs and the calculation of margin on these costs.
- (b) The Developer must not incur any Project Expenditure greater than the amounts specified in **clause D2.4(e)** without the prior written consent of the State which consent will not be unreasonably withheld or delayed where the Developer demonstrates that the cost to be incurred is necessary for the Project and represents an appropriate market rate for the expenditure being incurred. The State will only withhold approval to

any increase in budgeted Project Expenditure if it is not satisfied (acting reasonably) that it is in the commercial interest of the parties to do so.

- (c) If the Developer incurs Project Expenditure greater than the amounts specified in **clause D2.4(e)** without the prior consent of the State, the State may by notice (acting reasonably) exclude the application of the Developer's Base Margin to that excess expenditure.

D3 Audit

D3.1 Independent Audit

- (a) Within 90 Business Days after each financial year during the Project Term, the Developer must cause:
 - (i) the books of account of the Developer for the Project to be audited; and
 - (ii) the amount of any Revenue Share Land Payment payable to the State under this Agreement to be calculated, audited and confirmed,

for each financial year by a firm of chartered accountants to be appointed jointly by the Developer and the State (any dispute to that appointment is to be determined in accordance with **clause A25**).

- (b) The Developer must provide a copy of each audit under **clause D3.1(a)** to the State, as soon as practicable.
- (c) The State:
 - (i) acknowledges that the costs incurred by the Developer under **paragraph (a)** may form part of the Project Expenditure;
 - (ii) accepts that the Revenue Share Land Payments payable to the State under **Part D** may reduce in consequence of **sub-paragraph (i)**; and
 - (iii) accepts the risk described in **sub-paragraph (ii)**.

D3.2 Provide Information

Within a reasonable time after receipt of a reasonable request in writing from the State, the Developer must provide to the State all information relating to the Project, including:

- (a) records;
- (b) accounts;
- (c) details of costs;
- (d) details of the proceeds of Sales of Lots; and
- (e) details of the distribution of proceeds from the Sales of Lots.

D3.3 Review by State

- (a) At any time up to 6 months after the end of the Project Term, the State Representative may give notice to the Developer requiring independent audit of the Financial Model or the books of account of the Developer in order to verify their accuracy, correctness and completeness.
- (b) If the State Representative serves a notice under this **clause D3.3**:
 - (i) the State Representative will appoint, and notify the Developer of, an appropriately trained and qualified person to carry out and complete the audit (**Financial Auditor**), at the State's cost and expense, on terms and conditions of appointment determined by the State Representative; and
 - (ii) the Developer must within a reasonable period, make its financial statements, accounts and all source information, documentation and data required for the preparation of such annual financial statements or Financial Model, available for the Financial Auditor.
- (c) Upon request by the Financial Auditor, the Developer must make available to the Financial Auditor, an appropriately trained and qualified member of the Developer's staff to extract any relevant information for the Developer's accounting system for the purposes of the audit.
- (d) If the written report of the Financial Auditor (**Financial Auditor's Report**) specifies that any annual financial accounts, or the Financial Model, or any part of them is materially inaccurate, incomplete or incorrect, then:
 - (i) the Developer must:
 - (A) fix the inaccuracy, incorrectness or incompleteness in the affected accounts or data and reissue the affected accounts or data to the State Representative; and
 - (B) as applicable, promptly take steps to remedy the inaccuracy, incorrectness or incompleteness in its monitoring, measuring and reporting systems;
 - (ii) if the inaccuracy, incorrectness or incompleteness has affected the amount of any Revenue Share Land Payment that has been paid to the State, the State Representative will determine, and notify the Developer of, the amount of the appropriate adjustment to the affected amounts and that amount will be a debt due and payable from the Developer to the State; and
 - (iii) the Developer will reimburse the State the costs of the Financial Auditor in carrying out the audit pursuant to this **clause D3.3**.
- (e) If a Financial Audit Report discloses any:
 - (i) fraud; or
 - (ii) false, misleading or negligent reporting or selective measurement,

in respect of any annual financial statements or Financial Model, such event is a Default Event for the purposes of this Agreement.

D4 Sunset Provisions

D4.1 Expiration of Project Term

- (a) If at the End Date (as extended in accordance with **clause A5.3**) the Project has not reached the stage described in **clause A5.1(a)** and the Developer is not entitled to extend the Project Term in accordance with **clause A5.3** or complete the Stage in accordance with **clause D4.3**, the State must, by notice in writing to the Developer, offer to Sell to the Developer or a nominee of the Developer ("**Offer Notice**") all of the Lots which are not then the subject of a Dealing and the Lots to which **clause D4.3** applies ("**Available Lots**").
- (b) If the State fails to give a notice in accordance with **paragraph (a)** within 20 Business Days after the End Date, the Developer may give the State 20 Business Days notice in writing inviting the State to give a notice in accordance with **paragraph (a)** and if the State still fails to give a notice the State will be deemed to have given a notice under **paragraph (a)** offering to Sell the Available Lots.
- (c) The Developer must accept or reject the Offer Notice within 10 Business Days.
- (d) If the Developer accepts the Offer Notice, the State and the Developer must enter into a contract of sale for the Available Lots at the price and on the terms and conditions specified in this **clause D4**.
- (e) If the Developer rejects the Offer Notice, this Agreement will terminate on the End Date and the Developer will have no further rights or interest in this Agreement or the Site.
- (f) If the Developer accepts the Offer Notice, the Developer must within 10 Business Days after the Offer Notice is accepted, give to the State the Developer's estimate of the cash valuation for the Available Lots (**Valuation**) calculated as follows:
 - (i) the Guaranteed Land Payment for the Available Lots as at the End Date; plus
 - (ii) the estimated Revenue Share Land Payment for the Available Lots which would have been payable to the State if this Agreement continued in accordance with its terms post the End Date and until all Available Lots were reasonably expected to be sold; plus
 - (iii) GST calculated (subject to **paragraph (i)**) on the basis that the Available Lots are sold subject to the margin scheme.

The Valuation must be expressed as a dollar value as at the date of the Offer Notice.

- (g) If the State and the Developer are unable to agree on the Valuation for the Available Lots, the dispute will be determined in accordance with the dispute resolution provisions in **clause A25**.
- (h) The Developer acknowledges that notwithstanding any other provision of this Agreement, the State is not required to sell the Available Lots for a Valuation less than the amount approved by the Valuer-General as being the amount of the Valuation determined in accordance with the principles outlined in **paragraph (f)**.
- (i) Once the Valuation is determined, the Developer must within 10 Business Days confirm in writing whether the Developer wishes to proceed with acceptance of the Offer Notice. If the Developer does not confirm in writing that it wishes to proceed with acceptance of the Offer Notice, the Developer will be deemed to have rejected the Offer Notice and **paragraph (e)** will apply.
- (j) Notwithstanding **paragraph (f)(iii)**, the Developer may elect by notice in writing not to use the margin scheme for the purpose of calculating GST.

D4.2 **Sale of Available Lots**

- (a) If the Developer confirms acceptance of the Offer Notice in accordance with **clause D4.1(i)**:
 - (i) a contract of sale (and, if applicable, a vendor's statement pursuant to section 32 of the Sale of Land Act 1962) for the Available Lots in or substantially in the form specified in **schedule 14** will be prepared by or on behalf of the State in accordance with usual conveyancing practice and with payment terms of a 10% deposit on exchange and the balance payable in 60 days;
 - (ii) the price for the Available Lots will be the Valuation as determined or agreed in accordance with **clause D4.1**.
 - (iii) the State is authorised to complete any blanks in the form of contract prepared under **sub-paragraph (i)**; and
 - (iv) the Developer must execute the contract of sale (and vendor's statement, if applicable) and return it to the State or the State's solicitors within 10 Business Days after it is given to the Developer or its solicitors.
- (b) If the Developer confirms acceptance of the Offer Notice in accordance with **clause D4.1(i)** and fails to execute and return the contract of sale (and vendor's statement, if applicable) for the Available Lots in accordance with **paragraph (a)** then the Developer is taken to have repudiated the Agreement for the sale of the Available Lots and the State may by written notice to the Developer accept that repudiation.
- (c) If the State accepts the Developer's repudiation under **paragraph (b)**, then the Developer ceases to have any further Rights under this clause in respect of the Available Lots and the State may in its discretion elect to terminate this Agreement and recover from the Developer as a debt

due and payable to the State any difference between the Valuation of the Available Lots and the net sale price derived by the State from the Sale of the Available Lots. The State's rights under this **paragraph (b)** are not in substitution for or derogation from any other Rights the State may have in consequence of the repudiation by the Developer under **paragraph (b)**.

D4.3 Substantial Commencement of a Stage of the Project

- (a) If, at the End Date, the Developer has Substantially Commenced any Stage, then the Developer's Rights under this Agreement continue to apply to that Stage, with only those changes required to reflect that this Agreement only applies to that Stage, until the earlier to occur of:
 - (i) 24 months after the End Date or such later date as may be agreed by the State; and
 - (ii) the date all Lots forming part of that Stage are the subject of a Dealing and the State has received payment in respect of all Dealings in accordance with **Part D**.
- (b) For avoidance of doubt, for the purposes of this **clause D4.3** and the definition of 'Substantially Commenced', Stage shall include Stage 8.

Part E – Guarantee

E1 Guarantee and indemnity

E1.1 Acknowledgment

The Guarantor acknowledges that the State enters into this Agreement at the request of the Guarantor relying on (amongst other things) the Guarantor executing this Agreement to guarantee the performance by the Developer of its Obligations under this Agreement.

E1.2 Guarantee

In consideration of the State entering into this Agreement at the request of the Guarantor, the Guarantor irrevocably and unconditionally guarantees to the State the performance by the Developer of the Obligations under this Agreement.

E1.3 Compliance

The Guarantor agrees with the State that the Guarantor must ensure the Developer's compliance with the terms of this Agreement.

E1.4 Indemnity

The Guarantor unconditionally and irrevocably indemnifies the State against all Loss relating directly or indirectly to:

- (a) failure by the Developer to pay moneys in relation to, or to comply with any of its Obligations contained in or implied by this Agreement; and
- (b) this Agreement being or becoming unenforceable in accordance with its terms or the priority or effectiveness of any of them being adversely affected as a result of any act or omission of the Developer.

E1.5 Guarantee not affected

- (a) The liability of the Guarantor under this **clause E** is a principal, unconditional and absolute Obligation and is not adversely affected by:
 - (i) the granting of time, forbearance or other concession to the Guarantor or to the Developer or to the Financier;
 - (ii) the actual or alleged invalidity or unenforceability of any provision of this Agreement; or
 - (iii) anything else which, but for this provision, could operate to adversely affect the Guarantee and Indemnity.
- (b) If payments made by the Developer are set aside or avoided by statutory provision or otherwise, those payments are taken not to have been made and do not reduce the liability of the Guarantor under the Guarantee and Indemnity.

E1.6 Continuing Guarantee and Indemnity

The Guarantee and Indemnity:

- (a) is a continuing guarantee and indemnity;
- (b) is irrevocable; and
- (c) remains in full force despite termination of this Agreement, until those Obligations of the Developer under this Agreement which are remaining to be performed following termination have been performed in full.

E1.7 No competition

Until the Developer has fully performed all its Obligations under this Agreement, the Guarantor may not:

- (a) reduce its liability under this Guarantee and Indemnity by:
 - (i) raising a set-off or counter-claim available to itself, the Developer or a co-surety or co-indemnifier against the State; or
 - (ii) Claiming a set-off or making a counter-claim against the State; or
- (b) prove in competition with the State against the Developer or the Financier,

without the written consent of the State.

E1.8 Guarantee and Indemnity in addition to other Rights of the State

The Guarantee and Indemnity:

- (a) is in addition to any other security or Right which the State may now have or may subsequently take or hold against the Developer or the Guarantor or the Financier; and
- (b) may be enforced without first recourse to such other security or Right and without taking steps or proceedings against the Developer, despite any rule of Law or equity or statutory provision to the contrary.

E1.9 Warranties by the Guarantor

The Guarantor warrants to the State that:

- (a) it has the corporate power to enter into and perform and has taken all necessary corporate and other action to authorise the execution and performance of the Guarantee and Indemnity;
- (b) the Guarantee and Indemnity constitutes a legal and binding Obligation of the Guarantor;
- (c) the execution and performance of the Guarantee and Indemnity does not violate:
 - (i) existing Law;

- (ii) the constitution of the Guarantor; or
 - (iii) any mortgage, contract or other undertaking to which the Guarantor is a party or which is binding on the Guarantor or its assets; and
- (d) the Guarantor is not aware of any matter material to the decision of the State to enter into this Agreement which has not been adequately disclosed to the State in this Agreement.

E1.10 Acknowledgment by Guarantor

The Guarantor acknowledges that:

- (a) in entering into this Agreement it had the opportunity to, and has relied upon, its own enquiries, inspection and knowledge as to the risks associated with entering into this Agreement and not on any explanation, representation, warranty or condition made by, or on behalf of the State or any other person;
- (b) before executing this Agreement it had the opportunity to, and obtained independent legal and financial advice in relation to its terms; and
- (c) no person is authorised by the State to provide on behalf of the State any explanation of the terms of this Agreement to the Guarantor.

Schedule 1

Notices

State Address: Level 8, 121 Exhibition Street, Melbourne
Fax: (03) 9655 8633
E-mail: tania.orr@mpv.vic.gov.au

Developer Address: Level 50, Governor Phillip Tower, 1 Farrer Place, Sydney, NSW 2000
Fax: (02) 9252 7400
E-mail: dave.ryan@walkercorp.com.au

Guarantor Address: Level 50, Governor Phillip Tower, 1 Farrer Place, Sydney, NSW
Fax: (02) 9252 7400
Email: john.hughes@walkercorp.com.au

State's Representative Name: Tim Bamford
Address: Level 8, 121 Exhibition Street, Melbourne
Fax: (03) 9655 8633
E-mail: tim.bamford@mpv.vic.gov.au

Developer Representative Name: David Gallant
Address: 50, Governor Phillip Tower, 1 Farrer Place, Sydney, NSW
Fax: : (02) 9252 7400
E-mail: david.gallant@walkercorp.com.au

Schedule 2

Community Houses Specification

Part 1 Agreed Principles

Part 2 Design Brief

Part 3 Design Documents

Part 4 Completion Requirements

A Community House will be Complete when:

- (a) the Community House has been constructed in accordance with the Design Documents for that Community House; and
- (b) an Occupancy Permit has been issued in respect to that Community House; and
- (c) all Developer's Infrastructure necessary to enable access and use of the Community Houses in accordance with their intended purpose has been constructed. In the case of road access into Stage 1, that road access may be temporary pending completion of the Developer's Infrastructure for the balance of the Project.

Part 5 Liquidated Damages

- (a) For a failure to achieve Completion and commissioning of the Initial Community Houses by the Stage 1 Date for Completion - \$733,000 per month.
- (b) For a failure to achieve Completion of Stage 1 by the Stage 1 Date for Completion - \$50,000 per month.

Schedule 3

DKO Consent

Schedule 4

Key Personnel

Role

Skills

Development Manager

Advisor regarding design, implementation and marketing of the Project and interface and liaison with DHS in relation to Community House and KRS issues

Demonstrated experience in marketing and design associated with delivery of large scale medium density residential build out developments and an ability to manage high level Government stakeholders.

Schedule 5

Site Plan

Schedule 6

Development Plan

Stage 1 Plan

Staging Plan

Schedule 7

Project Guarantee

Project Guarantee Amount	Delivery Date	Release Date
\$5,000,000 (Existing Project Guarantee)	On or before Operative Date	On delivery of the New Project Guarantee and the Heritage Guarantee in accordance with Clause A23.7 . [Note: this Existing Project Guarantee has been released]
\$4,200,000 (New Project Guarantee)	On the date referred to in clause A23.7 . [Note: the State is holding the New Project Guarantee]	On the date that the last of the Heritage Building Repayment, the Stage 2 Community Houses Payment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) have been paid in full by the Developer and the Developer has provided the Retention Guarantee to the State, (if required) in accordance with clause A23.9 .
\$800,000 (Heritage Guarantee)	On the date referred to in clause A23.7 . [Note: Heritage Victoria is holding the Heritage Guarantee]	On the date that the last of the Heritage Building Repayment, the Stage 2 Community Houses Payment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) have been paid in full by the Developer and the Developer has provided the Retention Guarantee to the State, (if required) in accordance with clause A23.9 .

<p>\$2,425,000 (Initial Stage 2 Community Houses Payment Guarantee)</p>	<p>On the date the last party executes the Third Deed of Variation [Note: the State is holding the Initial Stage 2 Community Houses Payment Guarantee]</p>	<p>On the date that the last of the Heritage Building Repayment, the Stage 2 Community Houses Payment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) have been paid in full by the Developer and the Developer has provided the Retention Guarantee to the State, (if required) in accordance with clause A23.9.</p>
<p>\$1,700,000 (Balance Payment Guarantee)</p>	<p>On the date the last party executes the Fourth Deed of Variation.</p>	<p>On the date that the last of the Heritage Building Repayment, the Stage 2 Community Houses Payment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) have been paid in full by the Developer and the Developer has provided the Retention Guarantee to the State in accordance with clause A23.9.</p>
<p>\$1,000,000 (Retention Guarantee)</p>	<p>On the date that the last of the Heritage Building Repayment, the Stage 2 Community Houses Payment and the Liquidated Damages Amount (plus interest on any of those amounts payable in accordance with the Fourth Deed of Variation) have been paid in full by the Developer.</p>	<p>5 Business Days after the End Date.</p>

Schedule 8

Construction Works Program

Schedule 9

Financial Model

Schedule 10

VIPP Statement

Schedule 11

Sale Procedures

Compliance

The Developer or the State, as the case may be, must comply with the following procedures for the Sale of Lots, in the following order.

Preparation of documents

- 1 In relation to a proposed Sale of a Lot, the Developer must prepare or cause to be prepared:
 - (a) a Lot Vendor's Statement; and
 - (b) a Lot Sale Contract.
- 2 The Developer must use all reasonable endeavours to ensure that each Lot Sale Contract:
 - (a) complies with all Laws relating to the Sale of land and improvements in Victoria;
 - (b) incorporates all of the terms and conditions negotiated for the Sale of that Lot;
 - (c) is a cash contract of Sale, unless otherwise agreed by the State; and
 - (d) is substantially in the form of the Lot Sale Contract in **schedule 15**, subject to the Developer's right to amend the form of the Lot Sale Contract in accordance with the amendment protocol in **schedule 15**.

Execution by Vendor

- 3 The Developer must execute the Lot Vendor's Statement and the Lot Sale Contract on behalf of the State as vendor in accordance with the Developer's appointment under **clause C8**.

Acknowledgment of Lot Vendor's Statement

- 4 The Developer must procure the prospective End Purchaser to execute the acknowledgment on one copy of the Lot Vendor's Statement before the Lot Sale Contract is executed by the End Purchaser and return that acknowledged copy to the Developer.

Execution of Lot Sale Contract

- 5 The Developer must procure the End Purchaser to execute the Lot Sale Contract as purchaser.

Exchange

- 6 The Developer must arrange for:

- (a) the exchange of the Lot Sale Contract; and
- (b) payment of the deposit payable under the Lot Sale Contract by the End Purchaser to the State's solicitors; or
- (c) delivery of any bank guarantee or deposit bond provided by the End purchaser in lieu of actual payment of the deposit payable under the Lot Sale Contract to the State's solicitors.

Retention of documents

- 7 After exchange of the Lot Sale Contract, the Developer must hold, or cause its solicitors to hold, a copy of the Lot Vendor's Statement acknowledged by the End Purchaser together with the State's part of the Lot Sale Contract on behalf of the State.

Investment of Deposit

- 8 Any cash deposit paid under **clause 6(b)** must be held by the State's solicitors as stakeholder under the Sale of Land Act 1962 (Vic) and invested in an interest bearing trust account until the earliest of:

- (a) the Settlement date of the Lot Sale Contract;
- (b) termination or rescission of the Lot Sale Contract; and
- (c) the granting of a release of the deposit by the End Purchaser under the Sale of Land Act 1962 (Vic).

When the deposit is entitled to be released under the Sale of Land Act 1962 (Vic), the State's solicitors must pay the deposit together with any interest to the Developer for distribution in accordance with **clause 16**.

- 9 Any bank guarantee or deposit bond, delivered under **clause 6(c)** must be held by the State's solicitors in accordance with the terms of the Lot Sale Contract until the earliest of:

- (a) the Settlement date of the Lot Sale Contract;
- (b) termination or rescission of the Lot Sale Contract; and
- (c) the granting of a release of the deposit by the End Purchaser under the Sale of Land Act 1962 (Vic).

Conveyancing Procedures

- 10 The Developer must, or must procure its solicitors to, diligently manage the Lot Sale Contract according to its terms,.
- 11 The Developer is responsible for the resolution of any disputes or claims arising under a Lot Sale Contract.

State Lot Settlements

- 12 In relation to each Sale of a Lot, not later than 5 Business Days before the scheduled Settlement date of each Lot Sale Contract, the Developer must deliver to the State or the State's solicitors as directed by the State:

- (a) a copy of the particulars of sale of the Lot Sale Contract executed by the End Purchaser;
 - (b) a transfer of the Lot executed by the End Purchaser in anticipation of Settlement;
 - (c) a goods statutory declaration (undeclared) and, where applicable, in land and building packages statutory declaration (undeclared) and any other declarations or statements (undeclared or signed) in the form required by the Commissioner of State Revenue with respect to the Lot Sale Contract;
 - (d) written confirmation of the amount of the Guaranteed Land Payment and any GST payable by the State on the Lot Sale Contract to be retained by the State in accordance with Part D at Settlement;
 - (e) details of the scheduled time and date for Settlement of the Lot Sale Contract.
- 13 As soon as practicable after receipt of the documents referred to in **clause 12**, the State must:
- (a) procure the execution of the transfer for the Lot by or on behalf of the State; and
 - (b) procure the declaration of the goods statutory declaration and land and building packages statutory declaration (where applicable) and the declaration or signing of any other declaration or statements (undeclared or signed) by an authorised Representative of the State.
- 14 The State must then deliver the documents referred to in **clause 13** together with the duplicate certificate of title for the Lot to the State's solicitors at least 1 Business Day prior to the scheduled Settlement date of the Lot Sale Contract.
- 15 The State must procure the State's solicitors to effect Settlement of the Sale of the Lot at the offices of the State's solicitors or as otherwise agreed from time to time. All Settlement arrangements are to be made by or on behalf of the Developer.

Proceeds

- 16 The proceeds of each Sale of a Lot, including any deposit monies invested by the State's solicitors under **clause 8**, are to be distributed in accordance with **Part D** and **schedule 12**.

Protection of State's position

- 17 In addition to the above, the Developer must use all reasonable endeavours to ensure that:
- (a) each Lot Sale Contract is valid and enforceable;
 - (b) the Rights of the State as vendor under each Lot Sale Contract are properly and diligently enforced; and
 - (c) Settlement of the Sale of each Lot takes place according to the Lot Sale Contract and these Sale Procedures.

State's Obligations

- 18 The State must and must procure the State's solicitors to hold deposit monies and bank guarantees and deposit bonds and to facilitate the settlement of the Sale of each Lot Sale Contract in accordance with the Lot Sale Contract and these Sale Procedures.

Schedule 12

Payments

1 Community Houses Payments

1.1 Price

Subject to paragraph 1.2 and 1.3, a fixed price of \$545,454.00 (plus GST) is payable by the State to the Developer in respect to the construction of each Community House, including the Community House known as OS13.

1.2 Reduction of price

The fixed price described in paragraph 1.1 in respect of each Community House shall be reduced by any expenditure incurred by the State:

- (a) under **clause A21.10(b)** in respect of that Community House; and
- (b) in procuring the carrying out of any works or services properly forming part of the Construction Works.

1.3 Adjustment of price

- (a) The fixed price described in paragraph 1.1 in respect of each Community House shall be adjusted to take account of the cost of any State Modifications to any Community Houses made pursuant to **clause B13.3** after the Operative Date.
- (b) The State acknowledges that the incorporation of the hydro baths in the Community Houses constitute a State Modification. The State and the Developer will agree the cost of that State Modification as soon as practicable after the Operative Date. The State and the Developer must act reasonably in agreeing the cost of the hydro baths and any dispute will be dealt with under **clause A25**.

1.4 Method of Payment

Payment will be made on a monthly progress payable basis by reference to:

- (a) the proportion of the Community Houses construction works which are complete as at the expiration of each month; and
- (b) any reduction for the expenditure incurred by the State under **clause 1.2(a)** and **(b)** of this **schedule 12**.

1.5 Payment Claims

- (a) At the end of each calendar month during the Project Term until Completion of construction of all Community Houses, the Developer shall

deliver to the State Representative a claim for payment of the costs incurred by the Developer in constructing the Community Houses for that calendar month (**Progress Claim**). The initial Progress Claim may include all costs incurred up to the date of that Progress Claim. The Progress Claim must include:

- (i) details of the Community Houses construction works undertaken in respect to each Community House to which the Progress Claim relates;
 - (ii) the proportion of the work undertaken in respect to each Community House to which the Progress Claim relates as a percentage of the total work required to complete construction of those Community Houses; and
 - (iii) the amount claimed.
- (b) The State will appoint the Quantity Surveyor to verify that the amount of the Progress Claim has been incurred by the Developer within 10 Business Days of the date the State receives the Progress Claim.
 - (c) Once the Quantity Surveyor has verified the amount of costs incurred by the Developer in relation to the construction of the Community Houses for the period covered by the Progress Claim, the Quantity Surveyor will certify the amount payable and the State must pay the Developer that amount within 10 Business Days of the date of certification..

2 Land Payments

2.1 Commercial Principles

The land payment comprises the following components:

- (a) A Guaranteed Land Payment to the State of \$30,979,157 (NPV in \$2006 at 8% discount rate) based on a payment of \$122,000 per Lot based on a current site yield of 360 Lots constructed over the life of the Project. This is a guaranteed payment to the State payable irrespective of the proceeds or profit component received by the Developer from the Sale of each Lot, but which will be adjusted by the applicable payment per Lot should the number of private dwellings vary upwards or downwards from 360.
- (b) If the Sale price of any Lot (inclusive of GST) exceeds \$1,500,000, the State will be paid an amount in addition to the amount specified in **paragraph (a)** equal to the difference between:
 - (i) 10% of the Sale price of that Lot (inclusive of GST); and
 - (ii) the amount payable pursuant to **paragraph (a)**,but only when that amount is a positive amount.

- (c) In addition to the Guaranteed Land Payment per Lot, the Developer will pay a further Revenue Share Land Payment to the State calculated in accordance with **paragraph 2.3(a)**.
- (d) In addition, additional payments to those set out in paragraphs (a), (b) and (c) will be payable by the Developer to the State in the following circumstances:
 - (i) if the net developable area of the Site is increased in order to secure additional yield; or
 - (ii) if the increase in the net developable area of the Site is used to enlarge the size of the effective private open space area contained within any Lots, ie. the additional lot area was rendered effectively “private” by way of fencing or planting.
- (e) In the event either of those circumstances occurred, the Developer will pay an additional payment to the State of \$400 per square metre of additional land utilised. For the purposes of future assessment, the net developable area of the Site is 18.82 hectares.
- (f) Additional payments by the Developer to the State will not be required in circumstances where dwellings and lots shown on the Development Plan abut or front onto proposed public open space and the adjustment of the net developable area increases the size of the area of that part of any Lot which is between the dwelling and the edge of the open space area in order to either:
 - (i) secure a services or access easement on the Lot; or
 - (ii) establish clarity in respect to that part of the effectively open area between a dwelling and the edge of the open space area, whether or not this edge is defined by a pedestrian path or cycleway, that is to be maintained and managed as unfenced “frontage” by the lot owner as opposed to the local council.
- (g) The nature of reasons for any significant change to the net developable area of the Site must be discussed between the State and the Developer and, if appropriate, the quantum of any adjustment to the level of payments required as set out above will need to be approved by the Valuer-General with input from the Developer’s own valuation team. Any such payment will be payable by the End Date.

2.2 Guaranteed Land Payment

- (a) The State may retain each Guaranteed Land Payment (adjusted in accordance with paragraph (d)) at Settlement of the Sale of each Lot.
- (b) Unless otherwise agreed, each Guaranteed Land Payment is to be made to or at the direction of the State’s solicitors attending the Settlement of the relevant Sale in accordance with the Sale Procedures set out in **Schedule 11**.

- (c) In addition to the Guaranteed Land Payment, the State may retain at Settlement of the Sale of each Lot any GST payable by the State in respect to the Sale of the relevant Lot calculated in accordance with **clause A26**.
- (d) The dates for estimated payment of each Guaranteed Land Payment is specified in the attached schedule ("Land Payment Schedule"). If the timing of the Guaranteed Land Payments differ from those dates specified in the Land Payment Schedule, the Land Payment Schedule will be adjusted annually so that the NPV of the future payments (in \$2006 using an 8% discount rate) is maintained at \$30,979,157. The annual adjustment referred to above will occur on each anniversary of the Operative Date.
- (e) The State must pay to the Developer or at the Developer's direction the balance of the Sale proceeds from the Sale of each Lot after deduction of all amounts to be retained by the State pursuant to this **paragraph 2.2**.

2.3 Revenue Share Land Payment

- (a) The Revenue Share Land Payment is 50% of the amount calculated by deducting the Project Expenditure and the Developer's Base Margin from the Project Revenue.
- (b) The Developer must pay to the State an interim Revenue Share Land Payment, calculated on a Stage by Stage basis in accordance with this **Schedule 12**. For the purposes above, the Stage will be as set out in the Stage budget presented at the commencement of each Stage, in accordance with **clause D2.4**.
- (c) If at the end of any Stage the amount calculated under **paragraph (a)** exceeds \$500,000 and the State and the Developer reasonably expect having regard to the current performance of the Project that a Revenue Share Land Payment will be payable to the State, the Developer must pay the State an interim distribution of the Revenue Share Land Payment equal to the amount in excess of \$500,000.
- (d) The interim distribution of the Revenue Share Land Payment will be payable within 30 days following completion of each Stage. For the purposes of this paragraph, "completion of a Stage" means when settlement has occurred in respect to the last Lot comprised in the Stage or as otherwise agreed between the State and the Developer.
- (e) At the same time that the Developer pays the interim Revenue Share Land Payment to the State, the Developer may retain its share.
- (f) If at any time, the total interim Revenue Share Land Payment distributed to the State or the Developer exceeds their respective entitlement under this Agreement, the State or the Developer (as the case may be) must refund the amount of any excess payment received.

- (g) At the End Date any Revenue Share Land Payment payable but unpaid must be paid in full or any overpayment of Revenue Share Land Payment must be repaid.

2.4 Forfeited Deposits

If any Lot Sale Contract is rescinded and the State is entitled to forfeit the deposit:

- (a) the deposit forfeited will be paid by the State to the Developer and will form part of the Project Revenue for the purposes of calculating any Revenue Share Land Payment; and
- (b) no Guaranteed Land Payment will be retained by the State in respect to that Lot Sale Contract.

2.5 Stage 2 Community Houses Payment

The Developer must pay to the State an amount of \$4,850,000 (plus GST) on the Revised Developer Payment Date together with interest calculated from 1 July 2014 up to and including the day of payment at the Developer Interest Rate.

Land Payment Schedule

Schedule 13

Domestic Building Contracts Act 1995

Domestic Building Contracts Act Compliance Checklist

COOLING OFF NOTICE TO THE PRINCIPAL

You may end this **Contract** within five (5) clear **Business Days** after receipt by you of a signed copy of the **Contract** by filling in the notice below and giving it to the **Contractor** in one of the following ways:

- 1 Personally;
- 2 Leaving it at his or her address set out in the Contract with a person who appears to be at least 16 years old;
- 3 Sending it by pre-paid certified mail to the address set out in this Contract;
- 4 Sending it by facsimile to the facsimile number (if any) set out in this Contract.

Detach along dotted line

NOTICE THAT CONTRACT IS ENDED

A **Principal** cannot withdraw from a contract under the Act if:

1. The Contractor and the Principal have previously entered into a major domestic building contract that is in substantially the same terms for the carrying out of the work in relation to the works; OR
2. The Principal received independent legal advice from a current practitioner (within the meaning of the Legal Practice Act 1996) concerning the Contract before entering into the Contract.

To (Contractor)

I/We give notice under our contract with you that the Contract is ended. Please refund any money paid less \$100 and any out of pocket expenses incurred by you which I have previously approved.

Domestic Building Contracts Act Compliance Checklist

CHECKLIST TO BE COMPLETED BY PRINCIPAL

Before signing this legally binding Contract check this list.

If you answer NO to any of the following questions, you are not ready to sign this Contract:

- Has the Principal had this Contract long enough to read and understand it? YES or NO
- Has the Principal contacted the Building Control Commission to make sure or has the Principal otherwise been provided with evidence that the Contractor named in this Contract is registered with the Building Practitioners Board? YES or NO
- Has an insurance policy or certificate of currency for Contractor's insurance been issued and provided to you? If not, the Contract is conditional upon you receiving either an insurance policy or a certificate of currency for Contractor's insurance. YES or NO
- If this Contract is conditional upon the Principal receiving written approval for finance has the Principal obtained such approval? YES or NO
- Are the Contract Sum and progress payment procedures clearly stated? YES or NO
- Do you understand how the Contract Sum is calculated and may be varied? YES or NO
- Has the Contractor assessed the suitability of the Site for the proposed Works and if tests are necessary have they been carried out before signing the Contract? YES or NO
- If a deposit is payable, is it within the legal limit?
The maximum under the Domestic Building Contracts Act 1995 is 10% if the Contract Sum is less than \$20,000; or 5% if the Contract Sum is \$20,000 or more. YES or NO
- Is the work shown and described clearly in the Building Contract, Drawings or Specifications and any other relevant documents, such as engineering computations or soil report? YES or NO
- Are the Principal's special requirements or finishes included in the Drawings or Specifications? YES or NO
- Are the date of commencement of work under the Contract and Date for Practical Completion clearly stated or capable of being ascertained? YES or NO
- Is the procedure for extensions of time understood? YES or NO
- Is the procedure for variations of drawings or specifications Understood? YES or NO
- Are any provisional sums or prime cost items clearly stated in the Contract and understood? YES or NO
- Do you understand the circumstances in which you can end the Contract? YES or NO

NOTE: This checklist does not form part of the Contract.

Signed for and on behalf of the Principal
Date:

1 Contract Sum

The amount payable by the State to the Developer for carrying out the Construction Works (**Contract Sum**) is the amount equal to Project Revenue less the Revenue Share Land Payment, which is expected to be the amount expressed as the Developer's return from the Project in the Financial Model.

2 Building Approval and Plans

- (a) Without limiting **clause B3**, the Developer must at its cost obtain any building permit or approval required under the Building Act 1993 in respect of the Construction Works.
- (b) The plans and specifications for the Initial Community Houses are included in **schedule 2**. The plans and specifications for each other component of the Construction Works will be provided to the State by the Developer before commencement of that component of the Construction Works.

3 Time to complete

The Construction Works will commence on the Operative Date and end on the End Date.

4 Provisional Sums and Prime Cost Items

The parties acknowledge and agree that:

- (a) there are no provisional sums included in the Contract Sum in relation to the Construction Works; and
- (b) there are no prime cost items included in the Contract Sum in relation to the Construction Works.

5 Amounts included in Contract Sum

The parties acknowledge and agree that:

- (a) all amounts payable to a third party in relation to the Construction Works for the conveying, connection or installation of services such as gas, electricity, telephone, water and sewerage, or for the issue of planning or building permits, are included in the Contract Sum; and
- (b) the cost of all fixtures and fittings for the Construction Works is included in the Contract Sum.

6 Registered building practitioner

The Developer warrants that at least one of its directors is a registered building practitioner under the Building Act 1993 (Vic) with the following registration details:

DB-U228904,

and that there is no fact, matter, circumstance or thing that has or might give rise to the suspension or revocation of that registration.

7 Insurance

The Developer warrants that it has in force, and shall maintain, the insurance required by the Building Act 1993 (Vic). That insurance is comprised of a home building work insurance policy complying with the Ministerial Order under the *Building Act 1993* (Vic), issued by HIA.

8 Warranties

The Developer makes the following warranties implied in this Agreement by sections 8 and 20 of the DBCA:

- (a) any provisional sum included in the Contract Sum has been calculated with reasonable care and skill taking account of all the information reasonably available at the date this Agreement was made, including the nature and location of the Site;
- (b) the Construction Works will be carried out in a proper and workmanlike manner and in accordance with all plans and specifications provided under this Agreement;
- (c) all materials to be supplied by the Developer for use in the Construction Works will be good and suitable for the purpose for which they are used and that, unless otherwise stated in this Agreement, those materials will be new;
- (d) the Construction Works will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under the Building Act 1993;
- (e) the Construction Works will be carried out with reasonable care and skill and will be completed within the period specified in this Agreement;
- (f) if the Construction Works consist of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the Construction Works are completed; and
- (g) the Construction Works and any material used in carrying out the Construction Works will be reasonably fit for their purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

Schedule 14

Contract of Sale - clause C2.3 and clause D4.2

A. Particulars of Sale

The Particulars of Sale for a contract of sale of Lots under **clause C2.3** or Available Lots under **clause D4** will be in or substantially in the following form:

PARTICULARS OF SALE

Vendor's Agent: Not applicable

Vendor: **The Secretary to the Department of Infrastructure** for and on behalf of the Crown in right of the State of Victoria
of Nauru House,
Level 18, 80 Collins Street,
MELBOURNE VIC 3000

Vendor's Solicitor: Corrs Chambers Westgarth
600 Bourke Street
MELBOURNE VIC 3000
Tel: 9672 3446 Fax: 9672 3010
Ref: Michael McDonald

Purchaser: **Kew Development Corporation Pty Ltd**
ACN 119 766 264
Level 7
3 Rider Boulevard
Rhodes NSW 2138
and/or nominee

Purchaser's Solicitor: Norton Gledhill
Level 23, 459 Collins Street
Melbourne Vic 3000
Tel: 9614 8933 Fax: 9620 1802
Ref: Brendan Keilar

Land: described in the attached copy title volume [] folio [] and being the land together with any improvements known as

Address: ***[Describe the Lots or Available Lots pursuant to clause D4.1 of the KRS Agreement]***

Purchase Price: \$[To be completed] [GST treatment to be confirmed as per **clause C2.3** or **clause D4.1** of the KRS Development Agreement]

Deposit: an amount equal to 10% of the Purchase Price payable in full on the signing of this Contract

Residue: an amount equal to 90% of the Purchase Price

Payment of Residue: on the date which is 60 days after the Day of Sale or earlier by agreement

Settlement Date: is the date on which the whole of the Purchase Price is paid when the Purchaser will become entitled to vacant possession of the Land

Day of Sale: is the date of this Contract, namely / / 20

B Special Conditions of Sale

If the Land is comprised in a certificate of title as at the day of sale, the special conditions of sale will be in or substantially in the following form (to be used in conjunction with the REIV form of contract published from time to time by the Law Institute of Victoria):

SPECIAL CONDITIONS OF SALE (GC)

- 1 The Purchaser acknowledges that the Land as offered for sale and inspected by it is identical with the Land described in the Particulars of Sale and agrees not to make any requisition or any enquiry about or objection to or claim any compensation in relation to any matter concerning title to the Land or any improvement erected on the Land or claim for any alleged or actual misdescription or deficiency in dimensions or area of the Land;
2. The conditions in Table A of the seventh schedule of the Transfer of Land Act 1958 apply to this Contract;
3. The Land is sold:
 - (a) subject to any limitation or restriction upon its use or development imposed by existing or proposed provisions of any planning scheme; and
 - (b) subject to the reservations covenants estates exceptions easements rights and encumbrances (if any) specified in the attached statement under section 32 of the Sale of Land Act 1962 (and the Purchaser acknowledges receipt of that statement).
4. The Purchaser agrees that:
 - (a) it has made all enquiries about the Land, the entitlement to improvements existing on the Land and all other matters affecting the Land and title thereto it considers necessary and has not relied on any statement or representation made by the Vendor or any agent or servant of the Vendor about the Land or its condition quality or suitability for any purpose or about any improvement erected on the land or service connected or supplied to the Land;
 - (a) no representations, warranties or indemnities of any kind have been made or given by the Vendor or any agent or servant of the Vendor concerning the existence or otherwise of any contamination of on or in the Land or concerning the risk of any possible harm or detriment which may be caused to any beneficial use of the land and agrees not to make any requisition or claim against the Vendor howsoever arising by reason of or in consequence of or in respect of any contamination or any harm or detriment which may be caused to any beneficial use of the Land; and
 - (c) no promise about the obtaining of a loan of money to defray some or all of the cost of the Purchase Price has been made by or on behalf of the Vendor.
5. The Vendor and the Purchaser agree:

- 5.1 that from the Day of Sale the Purchaser shall be deemed to be the owner of the Land for the purpose of any Act which imposes any obligation or liability on an owner of Land and for the purposes of condition 9 of Table A the date for apportionment of outgoings (if any) will be the Day of Sale;
- 5.2 that from the Day of Sale, the Land sold is at the entire risk of the Purchaser;
- 5.3 the words "30 days" are substituted for the words "14 days" in condition 5 of Table A;
- 5.4 all money payable under this Contract by the Purchaser shall be paid to the Vendor by bank cheque drawn payable to the Vendor or by such other method as the Vendor may approve; and
- 6.1 This General Condition only applies to supplies under this contract that are taxable supplies under the GST Act.
- 6.2 Interpretation
- (a) In this contract, "price" has its ordinary meaning and not the meaning given to it in the GST Act.
- (b) In this General Condition:
"GST" means GST within the meaning of the GST Act and includes penalties and interest.
"GST Act" means the A New Tax System (Goods and Services Tax) Act 1999 (as amended).
- (c) Except where the contrary intention appears, expressions used in this General Condition and in the GST Act have the same meanings as when used in the GST Act.
- 6.3 Each amount payable by a party under this contract is expressed as a GST exclusive amount.
- 6.4 Subject to section 75-5(2) of the GST Act, the Vendor and Purchaser agree that the Vendor will apply the margin scheme to the supply of the Property made under this contract unless the Purchaser requests its non application in writing at least 10 Business Days before the Settlement Date.
- 6.5 The party liable to pay for a taxable supply made under this contract must also pay the amount of GST payable in respect of the taxable supply on the date on which payment for the taxable supply is due. However, if the Vendor is required to return GST in respect of a supply it makes under this contract in relation to a tax period which ends on an earlier date, then the Purchaser must pay the amount payable to the Vendor on account of GST on that earlier date.
- 6.6 Unless the margin scheme is applied, a party is not obliged under **General Condition 6** to pay an amount for GST in respect of a taxable supply to it, until given a valid tax invoice for the supply.

- 6.7 This Special Condition does not merge in the completion of this contract or the transfer of the Property.
- 7.1 The Purchaser acknowledges:
- (a) having been advised that the Victorian Government has established the Contracts Publishing System (**CPS**) as a key measure to implement the Government's objectives of transparency in contracting processes and disclosure of contract outcomes; and
 - (b) the Vendor is required to report this Contract on the CPS if the Price is \$100,000 or more and to disclose the full text of this contract if the Price is \$10,000,000 or more (the CPS is located at <http://www.tenders.vic.gov.au/contracts/public/>).
- 7.2 The Purchaser consents to and authorises the Vendor to:
- (a) report this Contract on the CPS if the Price is \$100,000 or more; and
 - (b) disclose the full text of this Contract on the CPS if the Price is \$10,000,000 or more.

Schedule 15

Pro Forma Lot Sale Contract

AMENDMENT PROTOCOL

LOT SALE CONTRACT FOR KRS SITE

The following amendments may be made to the Lot Sale Contract by the Developer without obtaining the State's consent:

- 1 completion of the particulars of sale and certain definitions with stage specific information, such as plan details, title details, address details and details of encumbrances;
- 2 extension of the date for payment of the second instalment of the 10% deposit, or changes to the amount and terms of payment of the deposit generally;
- 3 extension of the time allowed for payment of the balance of price;
- 4 inclusion of any stage specific conditions precedent to settlement in special condition 2 and consequential amendments;
- 5 special condition 3 – inclusion of stage specific matters to which land is subject, including references to owner's corporation rules and lot entitlement and lot liability, where an owner's corporation is created by the stage plan;
- 6 special condition 5.3 – inclusion of further matters about which the purchaser cannot object;
- 7 special condition 5.4 – change to the percentage;
- 8 special condition 6.2 – inclusion of specific details of works affecting the natural surface level of the land and/or deletion of the reference to engineering plans;
- 9 special condition 7 – amendments to reflect changes in the Building Act 1993 or Domestic Building Contracts Act 1995 and to deal with any stage specific changes to building plans and specifications under special condition 7.2;
- 10 deletion of special condition 14;
- 11 amendment of special condition 15 (and consequential amendments throughout the contract) to exclude the right for the purchaser to pay the deposit by way of bank guarantee and/or deposit bond. Amendments to the definitions of bank guarantee and/or deposit bond to include further parameters of acceptability (for example, requiring deposit bond issuer to have a certain Moody's rating);
- 12 special condition 16 – amendment to the warranties made by the vendor to reflect stage specific matters to which the land is subject;
- 13 if requested by a purchaser, amendments to special condition 20 (and the particulars of sale) to make the price GST exclusive and the purchaser liable to pay GST on the price at settlement;
- 14 inclusion of a confidentiality clause;
- 15 any changes necessary due to changes in legislation (including those mentioned at 9 above);

- 16 where necessary, specific conditions making the contract subject to agreements under section 173 of the Planning and Environment Act, section 143 of the Melbourne & Metropolitan Board of Works Act and to other agreements with adjoining land owners, Council, supply authorities and companies and other competent authorities (including definitions and annexing draft documentation to the contract);
- 17 where necessary, specific conditions making the contract subject to the Memorandum of Common Provisions including inclusion of definitions and annexing draft Memorandum of Common Provisions to the contract;
- 18 completion of expiry dates for the registration and construction periods for each stage;
- 19 attachment of relevant annexures;
- 20 amendment of the provisions changing or deleting general conditions or conditions under Table A;
- 21 any other amendment of a minor nature provided that the amendment does not give the purchaser a right to rescind (that the purchaser did not otherwise have);
- 22 where **clause C2** applies, inclusion of a special condition (and various definitions) dealing with owner's corporation matters, including:
- (a) conduct of the inaugural meeting and passage of owner's corporation rules;
 - (b) controls on the purchaser's voting rights, supported by proxy rights and a power of attorney;
- 23 including the definition of 'Building' and use of that term in special conditions 4.1 and 6.2 (and wherever else relevant), where the relevant stage includes apartments;
- 24 deletion of all definitions and special conditions relating to the registration of the plan of subdivision and construction, where the Lot was sold after registration of the plan and construction of the property (and all consequential amendments);
- 25 the inclusion of provisions dealing with optional finishes, fittings, floor plans and the like.

Schedule 16

Monthly Report

Schedule 17

Quality Assurance Plan

Schedule 18

Schedule 19

Schedule 20

Car Park Plan

Executed as an agreement.

Signed by Sean Sweeney, Executive)
Director, Major Projects Victoria in his)
capacity as authorised delegate of The)
Secretary to the Department of)
Infrastructure for and on behalf of the)
Crown in right of the State of Victoria in)
the presence of:)

.....
Executive Director

.....
Witness

.....
Name of Witness (print)

Executed by Kew Development)
Corporation Pty Ltd by being signed)
by its duly appointed attorney)
Michael Andrew Randall pursuant to a)
power of attorney dated 26 October)
2006 in the presence of:)

.....
Witness

.....
Attorney

.....
Name of Witness (print)

.....
Name of Attorney(print)

Executed by Walker Group Holdings)
Pty Ltd by being signed by its duly)
appointed attorney)
Michael Andrew Randall pursuant to a)
power of attorney dated 26 October)
2006 in the presence of:)

.....
Witness

.....
Attorney

.....
Name of Witness(print)

.....
Name of Attorney (print)