

Works in Kind Policy

1 Purpose

The City of Coffs Harbour (the City) is responsible for providing infrastructure such as local roads, water, sewer and drainage networks, active transport links (footpaths and bike paths), recreation facilities such as parks, playgrounds and sports fields and other community facilities. These facilities are partly funded through s7.11 contributions and charges imposed by a Development Consent, including complying development.

A Works in Kind (WIK) agreement (Agreement) is a voluntary agreement between the City and a developer of land in the City's local government area. An Agreement requires the developer to undertake works, or part of works, included in a Contributions Plan or a Development Servicing Plan. These works are in full or part satisfaction of payment of s7.11 contributions or development servicing charge imposed in the Development Consent or Complying Development Certificate.

The purpose of this policy is to outline the City's requirements for developers who offer to enter into an Agreement.

The City is committed to ensuring a fair, transparent and accountable process for a developer seeking to enter into an Agreement and that any Agreement provides a net benefit to the community.

2 Policy

2.1 Statutory Framework

This policy applies for the purpose of contributions applied under Section 7.11 (5)(b) of the Environmental Planning and Assessment Act (EP&A Act) and S306(2) of the Water Management Act (WM Act).

Section 7.11(5) of the EP&A Act allows a council to accept a material public benefit from the developer instead of paying a monetary contribution.

Contributions applied in a Development Consent under Section 7.12 of the EPA Act are ineligible for an Agreement.

2.2 Scope

This policy applies when a developer seeks to undertake works included one of the City's Contributions Plan or Development Servicing Plans, as full or partial satisfaction of payment of a condition in a Development Consent.

2.3 Process

The Agreement flowchart is at Appendix 1.

2.4 Offer of a Works in Kind Proposal

The developer must submit an offer of a WIK proposal using the City's [online application form](#). The proposal should provide an overview of the information listed in the City's WIK information requirements factsheet (Appendix 2). An offer can be submitted prior to the issue of a Development Consent.

The City will review the proposal, however it is under no obligation to accept offers to enter into an Agreement. Failure to provide sufficient information in the application form may delay the review of a WIK proposal.

Where a proposal is accepted in principal by the City, the developer will be required to submit a formal offer by completing an [Application for Works in Kind online application](#) setting out in detail the information required in the Factsheet. A WIK application cannot be submitted until a Development Consent is granted with contributions imposed.

2.5 Assessment of a Works in Kind Proposal

Following the receipt of an Application for Works in Kind, the City's Strategic Developer Contributions Officer will liaise with the relevant City staff to assess the proposal and where it is accepted in principal, negotiate the Agreement.

The negotiations for all Developer Works provided under the Agreement will include:

- a) approval of the design and specifications of the works
- b) the valuation of all works
- c) whether the works are in full or part satisfaction of contributions obligations
- d) the supervision requirements
- e) the security requirements
- f) establishing a timetable of the works
- g) the defects liability period and rectification works.

2.6 Developer Works Deeds

A developer Works Deed will be drafted using the City's template (Appendix 3).

The developer will be required to pay any reasonable legal fees incurred by the City where the developer proposes a change to any part of the Developer Works Deed Template.

2.7 Probity

To ensure that the negotiation and consideration of an Agreement by the City is fair, transparent and uphold public confidence, the City will:

- a) Comply with the requirements of the EPA Act, the WM Act and this policy.
- b) Ensure conflicts of interest involving the City are identified and appropriately managed.
- c) Ensure appropriate delegations and separation of roles and responsibilities within the City, including, but not limited to, the following:
 - i. only City officers with delegated authority will be involved in the preparation or negotiation of the Agreement
 - ii. City officers with key responsibilities in assessing or providing advice on development applications (or ensuring compliance), will not have a role in the negotiation of an Agreement or its conditions, except where advice is required on matters relating to the conditions of consent for a particular proposal
 - iii. the City will ensure that all discussions with a developer and their consultants are:
 - a. properly documented
 - b. held at the City offices
 - c. properly minuted
 - d. stored in the City's records management system.
- d) Only enter into an Agreement that achieves public benefits that are at a minimum, equal to the benefits that could be realised through the consented monetary contribution.
- e) Comply with its Code of Conduct and inform developers about the City's Statement of Business Ethics.

- f) Ensure that Councillors and City staff understand their role and responsibility in the WIK process.
- g) Ensure that Councillors are not involved in any direct negotiations with developers during the period of WIK negotiation.

2.8 Dispute resolution

The Agreement template details the mechanism for the resolution of disputes and the means for the enforcement of the Agreement.

2.9 Insurance

The Agreement will include provisions requiring the Developer to take out and keep current the following insurances in relation to the Developer Works:

- a) contract works insurance
- b) public liability insurance
- c) workers compensation insurance
- d) any other insurance required by law.

2.10 Provision of security

The City will require an Agreement to make provision for security to cover the Developer's obligations. The security amount must be adequate to allow the City to ensure that the Developer Works is delivered in accordance the relevant plan.

Security requirements and enforcement procedures are set out in the Agreement template.

2.11 Agreement drafting and implementation

The developer is responsible for all costs related to the negotiation, preparation and execution of the Agreement. The City's fees and charges set out the minimum fees payable by the developer however additional costs may be incurred by the City. These costs may include negotiating, preparing and entering into the Agreement (including legal fees, consultants, land valuers, quantity surveyors and City staff costs not covered by the application fee).

The developer is also responsible for the City's costs of monitoring and enforcing the Agreement. A provision will be included in each Agreement requiring the developer to pay a monitoring fee equivalent to 1% of the total value of the developer Works included in the Agreement.

2.12 Approval for developer works

Entering into an Agreement for works does not provide approval for those works. Where approval is required, the relevant approval must be obtained prior to the works commencing.

The City will not recognise any contribution credit if works commence prior to the developer obtaining all necessary approvals for the Developer Works.

Where Developer Works intended to be the subject of an Agreement are included as part of a development application for wider development works, developers are encouraged to consult with the City prior to lodgement of the development application to determine the necessary specifications.

2.13 Valuation of developer works

Works valuations may be required to inform the amount of any security required and the calculation of contributions credits. Works included in an Agreement will be valued by either a

registered quantity surveyor, or other person the City agrees has the necessary skills, qualifications and experience to perform the valuation.

2.14 Commencing and carrying out developer works

The Agreement will contain provisions concerning the notification of commencement of works, notification of inspections and allowing City staff access to for inspections.

The Agreement will establish City’s required approvals, inspections and handover requirements.

The City’s template agreement (Appendix 3) details these requirements.

3 Definitions

Agreement: means a works in kind agreement between the City and a developer.

Developer: means a person who proposes to enter into an Agreement under this policy.

Contribution Plan: is a plan that has been publically exhibited and adopted by resolution of Council for the purpose of imposing conditions under s7.11 of the EP&A Act.

Development Consent: means the consent granted by the City under the Environmental Planning and Assessment Act 1979 (NSW) authorising the carrying out of the development, as modified from time to time under that Act.

Development Servicing Plan: means a document adopted by resolution of Council for the purpose of enabling the City to impose requirements under s306(2) of the Water Management Act 2000 as a precondition to the granting of certificates of compliance for development.

Developer Works: means the works identified in an Agreement that are carried by the developer in part or full satisfaction of payment for developer charges under the applicable Development Servicing Plan and/or Contributions Plan.

Complying Development: means development approved by the City or an accredited private certifier under Division 4.5 of the Environmental Planning and Assessment Act 1979 (NSW).

4 Key Responsibilities

Position	Directorate	Responsibility
Mayor	Council	To lead Councillors in their understanding of, and compliance with this policy.
General Manger	Executive	To lead staff (either directly or through delegated authority) in their understanding of, and compliance with this policy.
Directors	All Directorates	To communicate, implement and comply with this policy.
All City Officials	City of Coffs Harbour	To abide by and comply with this policy when considering a WIK proposal or application.

5 References (laws, standards and other Council documents)

- *Environmental Planning and Assessment Act 1979*
- *Water Management Act 2000*
- *Wastewater Development Servicing Plan 2019*
- *Water Supply Development Serving Plan 2019*

6 Details of Approval and revision

- **Approval date:** 8/06/2023
- **Responsible Group:** Financial Services and Logistics Group
- **Responsible Section:** Financial Planning
- **Superseded policies/procedures:**
- **Next review date:** 28/08/2025

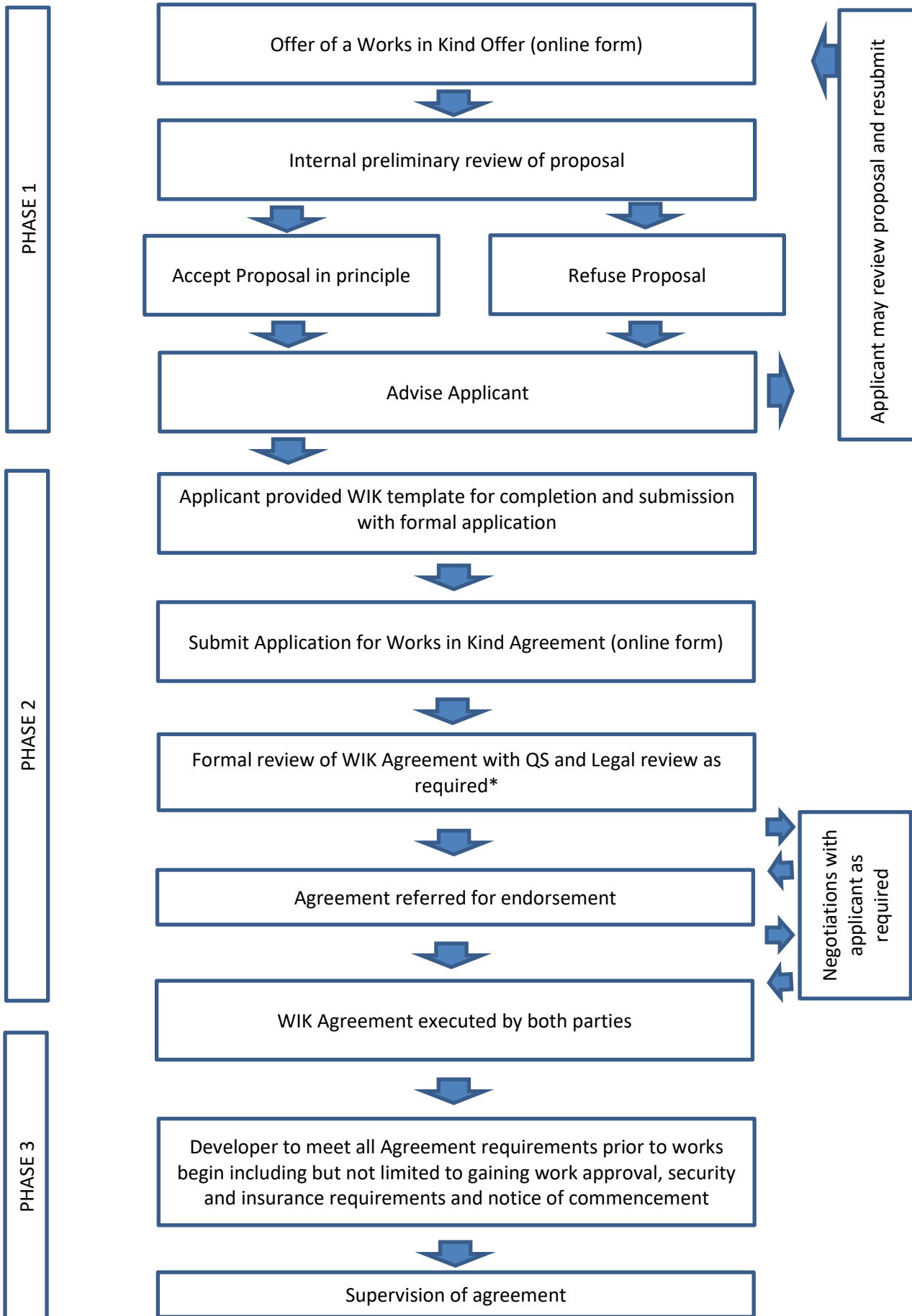
Table of amendments

Amendment	Authoriser	Approval ref	Date
This Policy was revised to make it more concise and to strengthen and clarify the City's expectations on developers when applying for and conducting works in kind.	Council	2023/105	08/06/2023

7 Appendices

- Appendix 1 - WIK agreement Flowchart
- Appendix 2 - WIK Agreement Information Requirements Factsheet
- Appendix 3 - WIK Deed template

7.1 Appendix 1 – WIK Agreement flowchart



* At full cost to applicant as per Councils fees and charges.



FACTSHEET

Works in Kind (WIK) Agreements - information requirements

If you want to enter into a Works in Kind (WIK) Agreement with the City, you are required to prepare a letter of offer.

The following information is the minimum information the letter of offer to City must contain to allow the City to consider your offer. The City may require more information from you.

1. A legal description of the land on which any works are to be carried out under the agreement and / or land to be dedicated to the City. Provide a detailed plan of the works to be carried out and details of the land dedication.
2. Identification of parties to the agreement. If you are acting on behalf of a party, the City requires a written authority from that party.
3. Written consent of all owners of the land affected by the agreement.
4. Details of any development applications, development consents, or applications to modify a development consent to which the agreement relates.
5. Details of the person or entity who will carry out the development to which the agreement applies if known.
6. Detailed description of the works proposed to be undertaken. The detailed description should be supported by concept design drawings.
7. Identification of the relevant developer contributions plan and how it relates to the proposed works or land dedication. A schedule of works must accompany the offer setting those works that are identified in the relevant contributions plan, and the parts of the works that are not.
8. The estimated cost of the land to be dedicated or the works to be undertaken. The estimated cost must be supported by a qualified practising quantity surveyor, civil engineer or property valuer with associate or higher membership of an accredited professional institution in Australia. The valuation must identify any variance between the cost estimate and the costs in the relevant contributions plan.
9. A summary table of the development contributions payable on conditions of consent and the extent the proposed agreement will offset these contributions in the condition of consent.
10. If the value of contributions under the agreement exceed the value of contributions required under s7.11 or s7.12 of the Environmental Planning and Assessment Act, or the cost of works specified in the works schedule to the applicable contributions plan ('surplus value'), whether you wish to claim a credit for the surplus value and how/when the surplus value can be used/applied.
11. Details of whether the proposed works are to be fully or partially completed.
12. Detailed program of works showing the timeframe and staging for design, commencement and handover of works.

7.3 Appendix 3 – WIK Deed template

Developer Works Deed

[Drafting Note. For use where developer works are carried out in part or full satisfaction of s7.11 contributions]

[Drafting Note. Insert Name of Project]

Coffs Harbour City Council

[Drafting Note. Insert Name of Developer]

Dated: **[Insert Date]**

Table of Contents

Parties	11
Background.....	11
Operative provisions.....	11
Part 1 – Preliminary.....	11
1 Interpretation.....	11
2 Commencement	14
3 General warranties	15
4 Power of attorney.....	15
5 Parties’ relationship	15
6 Deed not construction contract.....	15
7 Developer Works before execution of Deed.....	15
8 Developer to procure compliance	15
Part 2 – Developer Works	16
9 Approved persons.....	16
10 Construction Contract & Principal Contractor.....	16
11 General obligations relating to Developer works.....	16
12 Warranties relating to Developer Works.....	16
13 Cost of Developer Works.....	17
14 Ownership & Care of Developer Works.....	17
15 Work Health & Safety	17
16 Accidents & dangerous occurrences	18
18 Variations to approved Developer Works & Costs	19
20 Protection of people, property & utilities	19
21 Damage to assets & property	20
22 Entry onto Land	20
23 Audit, inspection, testing of Developer Works	21
24 Access to information & records	21
26 Practical Completion of Developer Works	21
27 Works-As-Executed Plan.....	22
28 Transfer of Ownership	22
29 Rectification of defects.....	23
Part 3 – Dispute Resolution	24
31 Expert determination.....	24
32 Mediation	25
33 Arbitration Excluded.....	25
Part 4 - Enforcement.....	25
34 Developer Works Security	25
35 Defects Liability Security.....	26

36	Breach of obligations	26
37	Termination	26
38	Effect of termination	26
39	Enforcement in a court of competent jurisdiction.....	27
40	Restriction on dealings	27
Part 5 – Indemnities & Insurance.....		27
41	Risk	27
42	Release.....	27
43	Indemnity	28
44	Developer’s Insurances	28
45	Subcontractors’ insurances	28
Part 6 – Other Provisions.....		29
46	Confidentiality	29
47	Ownership of Intellectual Property.....	29
48	Technical Data	30
50	Force Majeure.....	30
51	Notices	30
52	Approvals and Consent	31
53	Costs.....	31
54	Entire Deed.....	31
55	Further Acts	31
56	Governing Law and Jurisdiction	31
57	No Fetter.....	31
58	Illegality	32
59	Amendment.....	32
60	Waiver.....	32
61	GST.....	32
Execution.....		34
Schedule 1		35
Schedule 2		37
Schedule 3.....		38
Schedule 4.....		39

Developer Works Deed

[Drafting Note. Insert Name of Project as Appearing on Front Cover]

Parties

Coffs Harbour City Council ABN 79 126 214 487 of Corner of Coff and Castle Street, Coffs Harbour NSW 2450 ('Council')

and

The person or persons named in Item 1 of the Reference Schedule ('Developer')

Background

A **[Drafting Note. Insert relevant background to this Deed]**.

Operative provisions

Part 1 – Preliminary

1 Interpretation

1.1 In this Agreement the following definitions apply:

Applicable Contributions Plan means the contributions plan approved by the Council under the *Environmental Planning and Assessment Act 1979* (NSW) specified in Item 9 of the Reference Schedule as amended by the Council from time to time in accordance with that Act.

Approved Person means a person reasonably **approved by the Council to undertake design, construction, supervision, inspection, testing or certification of the Developer Works because of the suitability of their qualifications, skills and experience in the Council's reasonable opinion.**

Approval includes approval, authorisation, consent, licence, permission or the like.

Assignment Deed means the form of Deed contained in Schedule 4.

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the LG Act, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

Background Intellectual Property means Intellectual Property that:

- (a) relates to the Developer Works,
- (b) exists at the date of this Deed or is later created but not as a result of performing this Deed,
- (c) does not belong to a third party.

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Cost means a contribution, charge, cost, expense, fee, levy, outgoing, payment, tax and other expenditure of any nature.

Council Developer Works Contribution Amount means the \$ amount specified in Item 12(a) of the Reference Schedule.

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of the Developer Works.

Defects Liability Period means, in relation to the whole or any part of the Developer Works, the period specified in Item 7 of the Reference Schedule commencing on the day immediately after a Practical Completion Certificate is issued by the Council.

Defects Liability Security means a Bank Guarantee or bond or other form of security agreed to by the Council separate from the Developer Works Security on terms reasonably satisfactory to the Council in the amount specified in Item 8 of the Reference Schedule.

Developer Works means the Works specified or described in Item 3 of the Reference Schedule, including the design, construction, supervision, testing and certification of those Works.

Developer Works Agreed Cost means the \$ amount specified in Item 4 of the Reference Schedule.

Developer Works Completion Date means the date specified in Item 5 of the Reference Schedule.

Developer Works Location Plan means the plan contained in Schedule 2 showing the location of the Developer Works.

Developer Works Plans & Drawings means the detailed plans and drawings for the Developer Works approved by the Council referred to in Schedule 3.

Developer Works Security means a Bank Guarantee, or a bond or other form of security agreed to by the Council on terms reasonably satisfactory to the Council in the amount specified in Item 6 of the Reference Schedule.

Development means the Development specified or described in Item 2(a) of the Reference Schedule.

Development Consent means the consent granted by the Council under the *Environmental Planning and Assessment Act 1979 (NSW)* authorising the carrying out of the Development specified in Item 2(b) of the Reference Schedule, as modified from time to time under that Act.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

Development Contribution Amount means the \$ amount (if any) specified in Item 10 of the Reference Schedule.

Development Contribution Credit Amount means the \$ amount (if any) specified in Item 11 of the Reference Schedule.

Development Contribution Surplus Credit Amount means the amount (if any) by which the Developer Works Agreed Cost exceeds the Development Contribution Amount.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

Force Majeure Event means an earthquake, cyclone, fire, riot or serious civil commotion, sabotage, act of a public enemy, act of God (excluding storms), war, revolution, radioactive contamination or flood, the effects of which cannot be prevented by taking those steps a prudent and competent person would take.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Intellectual Property means all copyright (including moral rights), patents, trademarks, designs, confidential information, circuit layouts, data and any other rights from intellectual activity in the industrial, scientific, literary and artistic fields recognised in domestic law anywhere in the world.

Item means a numbered item and the corresponding text in the Reference Schedule.

Milestone Payment means a payment specified in Item 12(b) of the Reference Schedule.

Occupation Certificate has the same meaning as in s6.4(c) of the EPA Act.

Other Land means land owned or occupied by a person other than the Developer or the Council to which entry and access is needed by the Developer to perform this Deed.

Party means a party to this Deed.

Practical Completion, in relation to the Developer Works or a specified part of the Developer Works, occurs when the Council has issued a Practical Completion Certificate for the Developer Works or the specified part.

Practical Completion Certificate means a certificate issued by the Council to the effect that, in the reasonable opinion of the Council, **the Developer Works or a specified part of the Developer Works are substantially complete and any incomplete part or Defect is of a minor nature.**

Principal Contractor means the Person defined in as the Principal Contractor under the *Work Health and Safety Act 2011* (NSW) or *Work Health and Safety Regulation 2011* (NSW) or an equivalent under Commonwealth work health and safety laws.

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect or incomplete work, and
- (b) specifying the works or actions that are required to Rectify the Defect or incomplete work, and
- (c) specifying the date by which or the period within which the Defect or incomplete work is to be rectified.

Rectify means rectify, remedy or correct.

Reference Schedule means Schedule 1.

Technical Data means all technical know-how and information in material form, including manuals, designs, standards, specifications, reports, models, plans, drawings, calculations, software, source code and test results.

Third Party Intellectual Property means Intellectual Property relating to the Developer Works that is owned by a person other than the Council or the Developer.

Transfer of Ownership Notice means a notice issued by the Council to the Developer and dated stating that the Developer Works vest in the Council on the date of the notice.

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

Works-As-Executed Plan means detailed plans and specifications of the Developer Works at the Practical Completion Date.

- 1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:
- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
 - 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
 - 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
 - 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
 - 1.2.5 A reference in this Deed to a \$ value is a reference to the value exclusive of GST.
 - 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
 - 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
 - 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
 - 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
 - 1.2.13 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
 - 1.2.14 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
 - 1.2.15 Any schedules, appendices and attachments form part of this Deed.
 - 1.2.16 Notes appearing in this Deed are operative provisions of this Deed.

2 Commencement

- 2.1 This Deed takes effect on the date when all Parties have executed this Deed.
- 2.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.

3 General warranties

- 3.1 Each party represents and warrants that:
- 3.1.1 it has full legal capacity and power to:
 - (a) own its property and carry on its business,
 - (b) enter into this Deed and carry out the transactions it covers,
 - 3.1.2 it holds each authorisation necessary to:
 - (a) properly execute this document and carry out the transactions,
 - (b) make this document legal, valid, binding and admissible in evidence,
 - (c) properly carry on its business,
 - (d) and it is complying with any conditions of those authorisations,
 - 3.1.3 it is not entering into this Deed as a trustee of any trust or settlement.
 - 3.1.4 it has the full power to enter into and perform its obligations under this Deed and that, when executed, this Deed will constitute legal, valid and binding obligations according to its terms.

4 Power of attorney

- 4.1 Each person who executes this document under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so.

5 Parties' relationship

- 5.1 Nothing in this Deed:
- 5.1.1 makes the Developer a partner, agent or legal representative of the Council,
 - 5.1.2 creates a partnership, agency or trust,
 - 5.1.3 confers on the Developer any authority to bind the Council in any way.
- 5.2 The rights of the parties do not merge once the Developer Works are completed or this Deed is terminated.

6 Deed not construction contract

- 6.1 This Deed is not a construction contract or arrangement as defined in the *Building and Construction Industry Security of Payments Act 1999* (NSW), between the Council and the Developer.

7 Developer Works before execution of Deed

- 7.1 This Deed applies to any Developer Works that occurred before the Deed was executed.

8 Developer to procure compliance

- 8.1 The Developer is to provide every Approved Person engaged in relation to the Developer Works with a copy of this Deed executed by both Parties and procure their compliance with the relevant requirements of this Deed.

Part 2 – Developer Works

9 Approved persons

- 9.1 The Developer is to design, construct, supervise, and test the Developer Works using Approved Persons.
- 9.2 The Developer is to supply to the Council, and keep current, a list of all Approved Persons who are engaged from time to time in relation to the Developer Works.
- 9.3 The Council may, in its reasonable discretion, notify the Developer that an Approved Person whose name appears on the list submitted by the Developer to the Council is not to be engaged in relation to the Developer Works, and the Developer must promptly take such action as is necessary to ensure that the Approved Person does not continue to be engaged in relation to the Developer Works.

10 Construction Contract & Principal Contractor

- 10.1 The Developer must enter into a construction contract with a suitably qualified, skilled and experienced contractor acceptable to the Council for the construction of the Developer Works before any construction work occurs.
- 10.2 The Developer is to notify the Council of the details of the Principal Contractor for the Developer Works before any construction of the Developer Works occurs.

11 General obligations relating to Developer works

- 11.1 The Developer is to carry out the Developer Works:
 - 11.1.1 in the location shown on the Developer Works Location Plan,
 - 11.1.2 in accordance with the Developer Works Plans and Drawings, and
 - 11.1.3 otherwise in accordance with this Deed,by the Developer Works Completion Date.
- 11.2 The Developer is to carry out and complete the Developer Works in a good and workmanlike manner having regard to the intended purpose of the **Developer Works** and in accordance with:
 - 11.2.1 all applicable laws,
 - 11.2.2 any Approval required by any law relating to the carrying out of the Developer Works,
 - 11.2.3 the lawful requirements of any Authority, and
- 11.3 The Developer is to ensure that anything necessary for the proper performance of its obligations under this Deed is supplied or made available.

12 Warranties relating to Developer Works

- 12.1 The Developer warrants to the Council that:
 - 12.1.1 it has obtained all Approvals and has complied with all laws and applicable industry standards in relation to the Developer Works,
 - 12.1.2 it accepts that, if any aspect of the Developer Works do not comply this Deed, the Council is entitled to require the Developer to cease the Developer Works and immediately pursue its legal and equitable rights and remedies relating to the non-compliance,

- 12.1.3 the Developer Works, when completed, are to be fit for purpose,
- 12.1.4 only Approved Persons are to be engaged in relation to the Developer Works.
- 12.2 The Developer is to procure in favour of the Council from the appropriate Approved Person engaged in relation to the Developer Works, any warranty reasonably required by the Council relating to the design, construction, supervision, inspection, testing or certification of the Developer Works.

13 Cost of Developer Works

- 13.1 The Developer is responsible for meeting all Costs of and incidental to the Developer Works except as provided by this clause.
- 13.2 The Council is to pay the Council Developer Works Contribution Amount to the Developer in accordance with the Milestone Payments set out in Item 12(b) of the Reference Schedule.
- 13.3 The Council is not required to make a payment to the Developer under this clause unless:
 - 13.3.1 the Developer submits a written payment claim to the Council, accompanied by a tax invoice for GST purposes addressed to the Council,
 - 13.3.2 the payment claim relates to costs incurred by the Developer relating to the Developer Works, which are verified in writing by the Developer in any manner reasonably required by the Council,
 - 13.3.3 the Council is reasonably of the opinion that the costs to which the payment claim relates were properly incurred by the Developer.

14 Ownership & Care of Developer Works

- 14.1 The Developer owns, and is responsible for care of, the Developer Works, and bears all risk and liability in connection with the Developer Works, until the Developer Works vest in the Council.

15 Work Health & Safety

- 15.1 The Developer acknowledges that it is the Principal Contractor under WHS Law for the Developer Works unless and until such time that the Developer engages a person to construct the Developer Works, or engages another person conducting a business, or undertaking, to be the Principal Contractor for the Developer Works, and authorises the person to have management or control of the workplace relating to the Developer Works and to discharge the duties of a Principal Contractor under WHS Law.
- 15.2 If the Developer at any time terminates the engagement of the person engaged to construct the Developer Works or to otherwise be the Principal Contractor for the Developer Works, the Developer becomes the Principal Contractor until such time as a new person is appointed to construct the Developer Works or to otherwise be the Principal Contractor for the Developer Works.
- 15.3 The Developer is to use its best endeavours to ensure that all persons involved in the Developer Works comply with relevant WHS Law and procedures, including but not limited to:
 - 15.3.1 following published government and industry WHS guidelines,
 - 15.3.2 providing WHS induction training,
 - 15.3.3 keeping and regularly updating WHS records,
 - 15.3.4 preparing and maintaining an WHS management plan,

- 15.3.5 preparing a Project Safety Plan that details safety strategies, including how persons must act to comply with WHS Law,
- 15.3.6 providing safe work method statements for all tasks and ensuring they are complied with,
- 15.3.7 directing staff to take corrective action or stop work if they are not complying with the method statements or WHS Law,
- 15.3.8 identifying hazards and assessing risks using due diligence,
- 15.3.9 eliminating or controlling risks in line with WorkCover requirements using due diligence,
- 15.3.10 reviewing risk assessments and controlling measures,
- 15.3.11 providing information to employers and contractors about WHS,
- 15.3.12 documenting site-specific safety procedures.
- 15.4 The Developer is to use its best endeavours to ensure that:
 - 15.4.1 The Council can audit, inspect and test the Developer Works without breaching WHS Law,
 - 15.4.2 The Council can access and use the Developer Works without breaching WHS Law.
- 15.5 The Developer is to promptly inform the Council of any incident occurring in relation to the Developer Works where a person is injured or otherwise exposed to a risk to his or her health or safety, including, but not limited to, an incident which is required to be reported to WorkCover.

16 Accidents & dangerous occurrences

- 16.1 The Developer is to notify WorkCover, and the Council, as soon as it becomes aware of any serious accident or dangerous occurrence relating to the Developer Works.
- 16.2 Within a further 7 days, the Developer must formally notify or procure the notification of WorkCover of the accident or occurrence in accordance with the WHS Law, using any prescribed form.
- 16.3 The Developer must give to the Council a copy of all information and documents that have been provided to WorkCover relating to the accident or occurrence.
- 16.4 The Developer must also give to the Council, if requested by the Council, a written report relating to the accident or occurrence in the form specified by the Council.
- 16.5 The Developer must cooperate with WorkCover and the Council if the accident or occurrence is investigated by Work Cover or the Council.
- 16.6 The Developer must immediately give the Council a copy of any improvement or prohibition notices that WorkCover issues in relation to the Developer Works.

17 Design of Developer Works

- 17.1 This clause applies to any part of the Developer Works for which plans and drawings are not included in Schedule 3.
- 17.2 The Developer may not carry out the Developer Works to which this clause applies unless the works are designed and approved in accordance with this clause.
- 17.3 Before commencing the design of the Developer Works to which this clause applies, the Developer is to request the Council to provide the Developer with the Council's design requirements for the works.
- 17.4 Upon receipt of the Developer's request, the Council may:

- 17.4.1 initially request the Developer to provide a written proposal concerning the design of the works, including preliminary concept designs, to assist Council in determining and notifying the Developer of its requirements, and subsequently request the Developer to submit the plans and drawings of the works to the Council for approval, or
- 17.4.2 request the Developer to submit the plans and drawings of the works to the Council for approval.
- 17.5 The Council may reasonably require the Developer to make any change to the plans and drawings of the works that it reasonably considers necessary or desirable as a precondition to approving the plans and drawings, and the Developer is to make any such change.
- 17.6 The Council is to inform the Developer in writing when it approves the plans and drawings of the Developer Works to which this clause applies.
- 17.7 The Parties are to ensure that the reference to the plans and drawings approved by the Council under this clause are included in Schedule 3 without delay after that approval is given.
- 17.8 The Developer is not to make any application for any Approval relating to the Developer Works to which this clause applies unless the Council approved the plans and drawings of the works under this clause.

18 Variations to approved Developer Works

- 18.1 The Developer Works may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Agreement.
- 18.2 The Party seeking the variation is to make a written request to the other Party accompanied by such information and supporting documents as is reasonably necessary to enable the other Party to properly consider the request.
- 18.3 The Party to whom the request is made is not to unreasonably delay, or withhold its Approval to, the request.
- 18.4 If the Council agrees to a request made by the Developer to vary the Developer Works otherwise than because of an act or omission by the Council, the Developer is to meet the costs of the variation unless the Council otherwise agrees.
- 18.5 If the Developer is required in writing by the Council to vary the Developer Works, or the Developer makes a request to the Council to vary the Developer Works because of an act or omission by the Council, the Council is to meet the costs of the variation.
- 18.6 Clause 13.3 of this Deed (with any necessary amendments) applies to a payment required to be made by the Council under clauses 18.4 or 18.5.
- 18.7 The Developer is to promptly comply with any such requirement of the Council.

19 Construction commencement notice

- 19.1 The Developer is to notify the Council of its intention to commence construction of the Developer Works not less than 10 business days before that construction commences.

20 Protection of people, property & utilities

- 20.1 The Developer is to use all reasonable endeavours to ensure that, in carrying out the Developer Works:
 - 20.1.1 all necessary measures are taken to protect people and property,

- 20.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
- 20.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 20.2 The Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land in connection with the Developer Works unless authorised in writing by the Council or any relevant Authority.

21 Damage to assets & property

- 21.1 The Developer must immediately notify the Council in writing of any loss or damage that occurs in respect of a Council asset of which it becomes aware while performing the Developer Works.
- 21.2 The Developer must replace or fix any Council asset the Developer loses or damages while performing the Developer Works in accordance with any reasonable requirements of the Council.
- 21.3 If an audit, inspection or test of the Developer Works shows that:
 - 21.3.1 the Developer Works do not conform to the location, design, specifications, materials or finishes approved by the Council under this Deed, or
 - 21.3.2 damage has occurred to a Council asset or the property of another person in connection with the Developer Works,the Council may require the Developer to take corrective action to bring the Developer Works into conformity or repair the damage, as the case requires.
- 21.4 Without limiting any other remedies available to the Council under this Deed, if the Developer does not comply with the Council's requirements, the Council may take the action required of the Developer and recover the Council's costs of so doing from the Developer.

22 Entry onto Land

- 22.1 The Developer is responsible for obtaining all necessary rights to lawfully enter, occupy, and carry out the Developer Works on Other Land.
- 22.2 The Developer is not to commence the Developer Works on Other Land until it has obtained the written consent of each owner and any tenant of the Other Land to enter, occupy, and carry out the Developer Works.
- 22.3 Upon receiving reasonable prior notice from the Developer, the Council is to allow the Developer, to enter, occupy, and use specified Council owned or controlled land at any reasonable time if the occupation or use of the land by the Developer is reasonably necessary for the Developer Works.
- 22.4 The Council is not required to allow the Developer to enter, occupy and use any Council owned land that is used for public purposes unless and until the Developer has paid any applicable fee or rent, as approved by the Council, for that purpose,
- 22.5 Upon receiving reasonable prior notice from the Council, the Developer is to provide the Council with safe and unhindered access at any reasonable time to any land on which the Developer Works are being, or have been, carried out.
- 22.6 The Council must comply with the Developer's reasonable safety requirements while on any land on which the Developer Works are being carried out.

23 Audit, inspection, testing of Developer Works

- 23.1 The Council may undertake an audit, inspection or test of the Developer Works at any reasonable time for any purpose related to this Deed upon giving reasonable prior notice to the Developer.
- 23.2 The Developer is to provide the Council with any assistance that is reasonably required by the Council to enable the Council to undertake any audit, inspection or test of the Developer Works.
- 23.3 If an audit, inspection or test reasonably shows that particular action must be taken in relation to the Developer Works, the Developer is to:
 - 23.3.1 take the action in the manner, and within the time, the Council reasonably requires, and
 - 23.3.2 provide evidence to the Council that the action has been taken.
- 23.4 If an audit, inspection or test shows that the Developer Works have not been carried out in accordance with this Deed, the Developer is to pay any Costs incurred by the Council in connection with the audit, inspection or test.
- 23.5 If the Council reasonably decides that a further and more detailed audit, inspection or test of the Developer Works is required, the Council may determine an approved fee in that regard and the Developer is to pay to the Council the fee so approved.

24 Access to information & records

- 24.1 The Council may make a written request to the Developer:
 - 24.1.1 to provide information to the Council concerning the Developer Works,
 - 24.1.2 to allow the Council to inspect the Developer's records concerning the Developer Works, including by giving the Council access to premises owned, occupied or controlled by the Developer for that purpose.
- 24.2 The Developer is to comply with any such request made by the Council not later than **15 business days** after the Council makes the request.

25 Easements, covenants etc. relating to Developer Works

- 25.1 The Developer must create, or procure the creation of, any easement or covenant or any other instrument benefitting the Council that is reasonably required by the Council in relation to the Developer Works.
- 25.2 The Costs required to be incurred by the Developer in doing so include, unless otherwise agreed in writing between the Parties, the payment of compensation to any person.

26 Practical Completion of Developer Works

- 26.1 The Developer is to use all reasonable endeavours to ensure that the whole of the Developer Works is the subject of one or more Practical Completion Certificates by not later than the Developer Works Completion Date.
- 26.2 The Developer may make a written request ('**Developer's Request**') to the Council to issue a Practical Completion Certificate for the Developer Works or any part of the Developer Works by not later than the Developer Works Completion Date or such later date agreed in writing between the Parties.
- 26.3 Upon receipt of the Developer's Request, the Council is to inspect the relevant Developer Works in the presence of a representative of the Developer at a time

reasonably agreed between the Parties that is not later than 14 days after the Council receives the request.

- 26.4 As a precondition to issuing a Practical Completion Certificate, the Council may direct the Developer in writing to complete, rectify or repair any specified part of the Developer Works the subject of the Developer's Request within a period specified in the direction in order to bring the Developer Works into conformity with this Deed or any Approval.
- 26.5 The Developer is to promptly comply with any such direction given by the Council.
- 26.6 The Council may undertake more than one inspection and issue more than one direction to the Developer in order to be satisfied that a Practical Completion Certificate may be issued for the Developer Works the subject of the Developer's Request.
- 26.7 The Council is to promptly issue a Practical Completion Certificate for the Developer Works the subject of the Developer's Request when it is reasonably satisfied that no aspect of the relevant Developer Works reasonably requires completion, rectification or repair.

27 Works-As-Executed Plan

- 27.1 No later than 21 days after Practical Completion of the Developer Works, the Developer is to submit to the Council a full Works-As-Executed-Plan for the Developer Works in a format agreed to by the Council.
- 27.2 The Developer, being the copyright owner in the Works-As-Executed Plan, assigns the copyright in the Works-As-Executed Plan to the Council free of Cost to the Council.
- 27.3 If the Developer is not the copyright owner of the Work-As-Executed Plan, the Developer is to promptly procure the assignment of the copyright of the Works-As-Executed Plan to the Council free of cost to the Council.

28 Transfer of Ownership

- 28.1 The Developer Works vest in the Council when:
 - 28.1.1 the Council gives the Developer a Transfer of Ownership Notice, or
 - 28.1.2 the ownership of the land on which the Developer Works are situated is transferred to the Council.
- 28.2 The Council may give the Developer a Transfer of Ownership for the whole of the Developer Works or separately for the following parts of the Developer Works:
 - 28.2.1 paragraphs 1 and 2 of Item 3 of the Reference Schedule,
 - 28.2.2 paragraph 3 of Item 3 of the Reference Schedule.
- 28.3 Before the Developer Works vest in the Council, all of the following must have occurred:
 - 28.3.1 the Developer Works or the part or parts of the Developer works to which the Transfer of Ownership relates must be the subject of one or more Practical Completion Certificates,
 - 28.3.2 any easement reasonably required by the Council to access the Developer Works or the part or parts of the Developer Works has been registered on the title to the land on which the works are situated on terms reasonably satisfactory to the Council, and
 - 28.3.3 the Developer has provided all of the following to the Council in respect of the Developer Works or the part or parts of the Developer works to which the Transfer of Ownership relates:
 - (a) a full Works-As-Executed Plan, and
 - (b) the Defects Liability Security, and

- (c) any maintenance manuals and test results reasonably required by the Council.

29 Rectification of defects

- 29.1 The Council may give the Developer a Rectification Notice during the Defects Liability Period.
- 29.2 The Developer is to comply with a Rectification Notice according to the terms of the Rectification Notice and to the reasonable satisfaction of the Council.
- 29.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice given by the Council.

30 Development Contributions

[Drafting Note. This clause is required where the Developer Works are being carried out in part or full satisfaction of the Developer's obligation to pay s7.11 contributions and the Deed is entered into pursuant to s7.11(5) of the *Environmental Planning and Assessment Act 1979* (NSW)]

- 30.1 This clause applies if Items 10 and 11 of the Reference Schedule specify a Development Contribution Amount payable by the Developer to the Council and a Development Contribution Credit Amount, respectively, in relation to the Developer Works.
- 30.2 The Developer acknowledges the obligation imposed by the Development Consent to pay to the Council the Development Contribution Amount in relation to the Development.
- 30.3 Pursuant to s7.11(5)(b) of the Act, in consideration of the Developer carrying out the Developer Works and otherwise performing all of its obligations under this Deed, the Development Contribution Amount payable by the Developer is to be reduced by the Development Contribution Credit Amount.
- 30.4 The Council is to apply any Development Surplus Credit Amount, indexed from the date of this Deed in accordance with [Drafting Note. Specify indexation method], to reduce any future amount that may be payable by the Developer under s7.11 of the *Environmental Planning and Assessment Act 1979* (NSW) in relation to any development other than the Development.
- 30.5 The Developer may, with the written consent of the Council, which may not be unreasonably withheld, and subject to entering into an Assignment Deed, assign the Development Surplus Credit Amount to any person.
- 30.6 Any part of the Development Surplus Credit Amount which, after a period of [Drafting Note. Specify period], the Developer has been unable to use, and which has not been assigned, must be repaid to the Developer by the Council, but the Council is only required to do so if, and to the extent, that it holds Development Contributions towards the cost of the provision of the Developer Works paid by persons other than the Developer.
[Drafting Note. Delete this clause if not applicable]

Part 3 – Dispute Resolution

31 Expert determination

- 31.1 This clause applies to a Dispute between the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert.
- 31.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 31.3 If such a notice is given, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 31.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 31.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 31.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

- 31.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

32 Mediation

- 32.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute that is subject to expert determination in accordance with this Deed.
- 32.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 32.3 If such a notice is given, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 32.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the NSW Law Society to select a mediator.
- 32.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 32.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 32.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

33 Arbitration Excluded

- 33.1 The arbitration of any Dispute between the Parties arising under, or in connection with, this Deed is expressly excluded.

Part 4 - Enforcement

34 Developer Works Security

- 34.1 The Developer is to deliver the Developer Works Security to the Council upon the execution of this Deed.
- 34.2 The Council may keep the Developer Works Security as security for the Developer performing its obligations under this Deed other than an obligation to which the Defects Liability Security applies.
- 34.3 The Council may access the Developer Works Security as a consequence of any breach of this Deed by the Developer, other than a breach of an obligation to which the Defects Liability Security applies, or on termination of this Deed.
- 34.4 The Council is to release and return the Developer Works Security or any remaining part to the Developer within 30 days of when all of the Developer Works are the subject of a Transfer of Ownership Notice under this Deed.

35 Defects Liability Security

- 35.1 The Developer is to deliver the Defects Liability Security to the Council prior to Council issuing the Practical Completion Certificate
- 35.2 The Council may keep the Defects Liability Security as security for the Developer performing its obligations under this Deed, including but not limited to its obligations during the Defects Liability Period.
- 35.3 The Council may access the Defects Liability Security as a consequence of a failure by the Developer to comply with any of its obligations under this Deed.
- 35.4 The Council is to release and return the Defects Liability Security, or any remaining part, to the Developer within 30 days of the end of the Defects Liability Period if, at that time, the Developer is not in breach of an obligation under this Deed to which the Defects Liability Security relates.

36 Breach of obligations

- 36.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
 - 36.1.1 specifying the nature and extent of the breach, and
 - 36.1.2 **requiring the Developer to:**
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification, and
 - 36.1.3 **specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.**

37 Termination

- 37.1 If the Council reasonably considers that the Developer has failed to fully comply with a written notice given under this Deed in relation to a breach of the Developer's obligations, the Council may, without further notice to the Developer:
 - 37.1.1 terminate this Deed by written notice to the Developer, and
 - 37.1.2 take the Developer Works out of the hands of the Developer, and
 - 37.1.3 access and use the Developer Works Security and the Defects Liability Security.

38 Effect of termination

- 38.1 If the Council terminates this Deed:
 - 38.1.1 the Parties are to immediately stop performing the Deed,
 - 38.1.2 no rights of the Council existing at the date of termination are affected,
 - 38.1.3 the Developer is not entitled to any payment or compensation for damages, losses or Costs arising because of the termination,
 - 38.1.4 the Developer is to pay any Costs the Council incurs, and which are invoiced to the Developer, in completing the Developer Works that exceed the amount of the Developer Works Security,

- 38.1.5 the Council may complete the Developer Works by such means as it considers reasonably appropriate,
- 38.1.6 without paying compensation, the Council may take possession of any of the Developer's documents, information or records as it reasonably needs to complete the Developer Works,
- 38.1.7 without paying compensation, the Council may take possession of and occupy any land the Developer owns or controls as it reasonably needs to complete the Developer Works.

39 Enforcement in a court of competent jurisdiction

- 39.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 39.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 39.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 39.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

40 Restriction on dealings

- 40.1 The Developer is not to assign the Developer's rights or obligations under this Deed, or novate this Deed to any person unless:
 - 40.1.1 the Developer is not in breach of this Deed,
 - 40.1.2 the Council reasonably considers that the proposed assignee or novatee is reasonably capable of performing the Developer's obligations under this Deed, and
 - 40.1.3 the Developer and the assignee or novatee execute the Assignment Deed with the Council.

Part 5 – Indemnities & Insurance

41 Risk

- 41.1 The Developer performs this Deed at its own risk and at its own Cost unless otherwise expressly provided in this Deed.

42 Release

- 42.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

43 Indemnity

- 43.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence, fraud or wilful misconduct or default.
- 43.2 This Developer's indemnity covers:
 - 43.2.1 any loss, destruction or damage to any real or personal property because of the Developer Works,
 - 43.2.2 any redress owed by the Council to any person under a contract or on any other legally enforceable basis,
 - 43.2.3 death or injury to any person,
 - 43.2.4 infringement or alleged infringement of any Intellectual Property, including moral rights,
 - 43.2.5 a breach or alleged breach of any duty of confidentiality.

44 Developer's Insurances

- 44.1 Until the Developer Works vest in the Council, the Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Developer Works:
 - 44.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Developer Works (including but not limited to the Cost of demolition and removal of debris, consultants' fees and Authorities' fees), to cover the Developer's liability in respect of damage to, or destruction of, the Works,
 - 44.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
 - 44.1.3 workers compensation insurance as required by law, and
 - 44.1.4 any other insurance required by law.
- 44.2 If the Developer fails to comply with its obligations relating to insurances under this Deed, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including but not limited to by recovery as a debt due in a court of competent jurisdiction.
- 44.3 The Developer is not to commence construction of the Developer Works unless it has first provided to the Council satisfactory written evidence of all of the insurances required under this Deed.

45 Subcontractors' insurances

- 45.1 Before construction of the Developer Works commences, the Developer must ensure that the Council is provided with evidence satisfactory to the Council that all subcontractors engaged in relation to the Developer Works, are:
 - 45.1.1 covered by the insurances the Developer is required to take out and maintain in relation to the Developer Works, or
 - 45.1.2 have effected and maintain insurance policies that are the same types and for the same amounts and periods as the Developer's insurances.

Part 6 – Other Provisions

46 Confidentiality

- 46.1 Each party must keep confidential and must not publicly announce or disclose information about:
 - 46.1.1 documents, plans and other material clearly identified as confidential, or which should reasonably be considered confidential,
 - 46.1.2 any tender by the Developer relating to the Developer Works.
- 46.2 In particular, any party receiving confidential information must:
 - 46.2.1 treat the information as it would its own confidential material,
 - 46.2.2 promptly notify the Council if it becomes aware that the law might require the information to be disclosed,
 - 46.2.3 ensure that only authorised persons have access to the information and that it is stored safely and securely.
- 46.3 The Parties must immediately notify each other if they become aware of a breach of confidentiality relating to the Developer Works or this Deed.
- 46.4 The confidentiality obligations contained in this Deed survive the completion of the Developer Works or the termination of this Deed, whichever occurs first, by 5 years, unless otherwise agreed in writing between the Parties.
- 46.5 The confidentiality obligations contained in this Deed do not apply if a disclosure of confidential information is required:
 - 46.5.1 by law,
 - 46.5.2 by the Listing Rules of the Australian Securities Exchange Limited,
 - 46.5.3 to enable a Party to perform its obligations, or to make or defend any claim or dispute, under the Developer Works Deed,
 - 46.5.4 under this Deed,but only if, before the Party discloses any confidential information, it notifies the other Party in writing of the information it proposes to disclose and explains why it proposes to do so.

47 Ownership of Intellectual Property

- 47.1 Nothing in this Deed affects the ownership of Background Intellectual Property or Third Party Intellectual Property unless expressly provided to the contrary in this Deed.
- 47.2 The Council owns all Intellectual Property relating to the Developer Works that does not belong to a person other than the Council or the Developer.
- 47.3 The Developer grants to the Council a royalty-free, irrevocable, worldwide, perpetual, non-exclusive licence for all Background Intellectual Property it owns, including the right to sub-licence it for the purpose of:
 - 47.3.1 using, maintaining and disposing of the Developer Works or support systems,
 - 47.3.2 modifying and developing the Developer Works and support systems, linked works or associated infrastructure,
 - 47.3.3 completing the Developer Works on termination of this Deed,
 - 47.3.4 Rectifying Defects relating to the Developer Works.
- 47.4 The Developer is to use its best endeavours to ensure that the Council is granted a licence on the same terms from each subcontractor engaged in relation to the Developer Works.

- 47.5 The Developer is to use its best endeavours to ensure that the Council is granted a licence to use all Third Party Intellectual Property on the best commercial terms reasonably available.

48 Technical Data

- 48.1 The Developer is to give the Council any Technical Data that the Council considers reasonably necessary in relation to the Developer Works.
- 48.2 The Council may provide Technical Data to any person for a purpose relating to the Developer Works.

49 Moral rights

- 49.1 The Developer is not to enforce any moral rights against the Council relating to the Developer Works.
- 49.2 The Developer is to use its best endeavours to ensure that no other person enforces any moral rights against the Council relating to the Developer Works.

50 Force Majeure

- 50.1 If a Party is affected, or likely to be affected, by a Force Majeure Event, that Party must promptly notify the other Party, giving:
- 50.1.1 full details of the event,
 - 50.1.2 an estimate of its duration,
 - 50.1.3 the obligations under this Deed it affects and how much it will affect them,
 - 50.1.4 the steps either taken or planned to manage its effects.
- 50.2 A Party's obligations under this Deed are suspended if those obligations are affected by a Force Majeure Event for as long as the event continues.
- 50.3 A party affected by a Force Majeure Event must do all it reasonably can to remove, overcome or minimise the effects of the event as quickly as possible.

51 Notices

- 51.1 Any notice, consent, information, application or request that is to, or may, be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
- 51.1.1 delivered or posted to that Party at its postal address set out in Item 13 or 14 of the Reference Schedule as the case requires,
 - 51.1.2 emailed to that Party at its email address set out in Item 13 or 14 of the Reference Schedule.
- 51.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 51.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 51.3.1 delivered, when it is left at the relevant postal address,
 - 51.3.2 sent by post, 2 business days after it is posted,

51.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.

51.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

52 Approvals and Consent

52.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an Approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.

52.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

53 Costs

53.1 Each Party is to bear their own costs relating to the preparation, negotiation, execution and stamping this Deed.

53.2 The Developer is to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

54 Entire Deed

54.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.

54.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Deed was executed, except as permitted by law.

55 Further Acts

55.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

56 Governing Law and Jurisdiction

56.1 This Deed is governed by the law of New South Wales.

56.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

56.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

57 No Fetter

57.1 Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

58 Illegality

- 58.1 If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- 58.2 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed unless to do so would materially change the intended effect of this Deed, but the rest of this Deed is not affected.
- 58.3 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

59 Amendment

- 59.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed.

60 Waiver

- 60.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 60.2 A waiver by a Party is only effective if it:
- 60.2.1 is in writing,
 - 60.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 60.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 60.2.4 is signed and dated by the Party giving the waiver.
- 60.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 60.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
- 60.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

61 GST

- 61.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and **Tax Invoice** have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

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

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by

that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 61.2 Subject to clause 61.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 61.3 Clause 61.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 61.4 No additional amount shall be payable by the Council under clause 61.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 61.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
 - 61.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
 - 61.5.2 that any amounts payable by the Parties in accordance with clause 61.2 (as limited by clause 61.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 61.6 No payment of any amount pursuant to this clause 61, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 61.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 61.8 This clause continues to apply after expiration or termination of this Deed.

[The next page is the Execution page]

Execution

Executed as a Deed

Dated: [Drafting Note. Insert the date when the Deed has been executed by all of the Parties.]

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

Executed on behalf of the Developer in accordance with s127(1) of the Corporations Act (Cth) 2001

Name/Position

Name/Position

Schedule 1

(Clause 1.1)

Reference Schedule

Item	Detail
1 Developer	[Drafting Note. Insert name, ABN and address of Developer]
2 (a) Development (b) Development Consent	[Drafting Note. Insert description of Development by reference to the Development Consent in par. (b) or otherwise describe the Development] [Drafting Note. Insert details of the applicable development consent for the Development described in par. (a)]
3 Developer Works	[Drafting Note. Insert description of Developer Works]
4 Developer Works Agreed Cost	\$ [Drafting Note. Insert amount]
5 Developer Works Completion Date	[Drafting Note. Insert date for all Developer Works to be completed or insert different dates for different parts of the Developer Works to be complete]
6 Developer Works Security	[Drafting Note. Insert amount] % of the Developer Works Agreed Cost.
7 Defects Liability Period	[Drafting Note. Insert period of time] months from the issuing a Transfer of Ownership Notice to the Developer under clause 28 in respect of the Developer Works.
8 Defects Liability Security	[Drafting Note. Insert amount] % of the Developer Works Agreed Cost.
9 Applicable Contributions Plan	[Drafting Note. Insert name]
10 Development Contribution Amount	\$ [Drafting Note. Insert amount]
11 Development Contribution Credit Amount	\$ [Drafting Note. Insert amount]
12 (a) Council Developer Works Contribution Amount (b) Milestone Payments	\$ [Drafting Note. Insert amount] [Drafting Note. Insert number and description of Milestone Payments]
13 Council Contact for Notices	Postal Address: [Drafting Note. Insert] Telephone: [Drafting Note. Insert] Email: [Drafting Note. Insert] Representative: [Drafting Note. Insert]
14 Developer Contact for Notices	Postal Address: [Drafting Note. Insert] Telephone: [Drafting Note. Insert]

	<p>Email: [Drafting Note. Insert]</p>
--	--

	<p>Representative: [Drafting Note. Insert]</p>
--	--

Schedule 2

(Clause 1.1)

Developer Works Location Plan

[Drafting Note. Insert plan showing location of the Developer works]

Schedule 3

(Clause 1.1)

Developer Works Plans & Drawings

[Drafting Note. Insert approved plans and drawings for the Developer works]

Schedule 4

(Clause 1.1)

Assignment Deed

[The next page and following pages contain the Assignment Deed]

Assignment Deed

[Insert Name of Project]

Coffs Harbour City Council

[Insert Name of Developer]

[Insert Date]

Assignment Deed

[Insert Name of Project]

Parties

Coffs Harbour City Council ABN 79 126 214 487 of Corner of Coff and Castle Street, Coffs Harbour NSW 2450 (**Council**)

and

[Insert Name] [Insert Details] (**'Assigning Party'**)

and

[Insert Name] [Insert Details] (**'Incoming Party'**)

Background

- A The Council and the Assigning Party are parties to the Developer Works Deed.
- B The Assigning Party wishes to assign its rights and obligations under the Developer Works Deed to the Incoming Party.
- C The Incoming Party is willing to receive an assignment of the Assigning Party's rights and obligations under the Developer Works Deed.
- D The Council consents to the assignment of the Assigning Party's rights and obligations to the Incoming Party.
- E The Parties have agreed to enter into this Deed to give effect to these arrangements.

Operative provisions

1 Definitions and Interpretation

1.1 In this Deed, the following definitions apply:

Assignment means the assignment of all the Assigning Party's rights and obligations **[Drafting Note. Alternatively, specify particular rights and obligations if not all of them are to be assigned]** under the Developer Works Deed to the Incoming Party in accordance with this Deed.

Claim includes a claim, demand, remedy, suit, injury, damage, Loss, liability, action, proceeding, right of action, of any kind including contingent claims.

Deed means this deed, and includes any schedules, annexures or appendices to this deed.

Developer Works Deed means the Deed between the Council and the Developer dated **[Drafting Note. Insert date]**.

Effective Date means **[Drafting Note. Insert date]**.

Loss means any loss (including loss of profit and loss of expected profit), cost, charge, expense, outgoing, payment, fee, diminution in value or deficiency of any kind or character which the indemnified party suffers or incurs or is liable of including:

- (a) all interest and other amounts payable by third parties; and
- (b) all legal costs (on a full indemnity basis) and other expenses incurred in connection with investigating or defending any claim or action, whether or not resulting in any liability and all amounts paid in settlement of any claim or action.

Party means a party to this Deed.

- 1.2 All other capitalised words used in this Deed have the meanings given to those words in the Developer Works Deed. **[Drafting Note. Delete if inapplicable]**
- 1.3 Clauses 1.2, **[Drafting Note. Insert clause numbers for any Developer Works Deed provisions which apply to this Deed]** of the Developer Works Deed apply as if they form part of this Deed with any necessary changes.

2 Assignment

- 2.1 With effect on and from the Effective Date:
 - 2.1.1 the Assigning Party assigns to the Incoming Party absolutely all of the Assigning Party's rights and obligations under the Developer Works Deed **[Drafting Note. Specify particular rights and obligations if not all of them are to be assigned]**, and
 - 2.1.2 the Incoming Party accepts the Assignment, and
 - 2.1.3 the Incoming Party undertakes to comply with the provisions of the Developer Works Deed that are binding upon the Incoming Party as a consequence of the Assignment.

3 Effect of Assignment

- 3.1 The Incoming Party is bound by the rights and obligations assigned to it by the Assigning Party on and from the Effective Date.

4 Indemnities

- 4.1 The Assigning Party indemnifies the Incoming Party against all Claims which the Incoming Party suffers or incurs in relation to the Developer Works Deed which arise or relate to acts or omissions of the Assigning Party occurring before the Effective Date **[Drafting Note: This clause will need to change if not all rights and obligations are assigned]**.
- 4.2 The Incoming Party indemnifies the Assigning Party against all Claims which the Incoming Party suffers or incurs in relation to the Developer Works Deed which arise or relate to acts or omissions of the Incoming Party occurring on or after the Effective Date.

5 Release

- 5.1 On and from the Effective Date, the Council and the Assigning Party release each other in relation to their respective obligations under the Developer Works Deed and all Claims that the parties may have or have had against each other under or in respect of the Developer Works Deed except in relation to any breaches by the Assigning Party prior to the Assignment of the Developer Works Deed. **[Drafting Note: This clause will need to be modified if not all rights and obligations are assigned and the Assigning Party retain obligations under the Developer Works Deed]**.

6 Affirmation of the Developer Works Deed

- 6.1 The Developer Works Deed is to be read and construed subject to this Deed, and in all other respects the provisions of the Developer Works Deed are ratified and confirmed, and, subject to the Assignment contained in this Deed, the Developer Works Deed will continue in full force and effect.

7 Address for notices

- 7.1 On and from the Effective Date, all notices and communications which are to be given or made by the Council to the Incoming Party under the Developer Works Deed are to be given or made to the following:

Incoming Party: [Insert details]

Postal Address: [Insert details]

Fax: [Insert details]

Email: [Insert details]

Contact Person: [Insert details]

8 Warranties

- 8.1 Each Party represents and warrants that at the time of execution of this Deed, and at the Effective Date:
- 8.1.1 it has capacity unconditionally to execute, deliver and comply with its obligations under this Deed;
 - 8.1.2 it has taken all necessary action to authorise the unconditional execution and delivery of, and the compliance with, its obligations under this Deed;
 - 8.1.3 this Deed is a valid and legally binding obligation and is enforceable against it by each other party in accordance with its terms; and
 - 8.1.4 its unconditional execution and delivery of, and compliance with its obligations under, this Deed do not contravene:
 - (a) any law or directive from a government entity;
 - (b) its constituent documents;
 - (c) any agreement or instrument to which it is a party; or
 - (d) any obligation of it to any other person.
- 8.2 The warranties and representations in clause 8.1 survive the execution of this Deed and the Assignment.

9 Costs

- 9.1 The Assigning Party and the Incoming Party are to:
- 9.1.1 bear their own costs, and
 - 9.1.2 each reimburse 50% of the Council's reasonable costs, of preparing, negotiating and executing this Deed.

10 Stamp duty

- 10.1 The Incoming Party is to pay all stamp, transaction, registration, financial institution, bank account debit and other duties and taxes (including fines and penalties) which may be payable or determined to be payable in relation to the execution, delivery, performance or enforcement of this Deed or any payment or receipt or other transaction contemplated by this Deed.

11 Governing law

11.1 This Deed is governed by the law in force in New South Wales and the Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

12 Counterparts

12.1 This Deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

13 GST

13.1 Where a supply made under this Deed gives rise to a liability for GST, the consideration to be provided for that supply (other than under this clause) shall be increased by an additional amount equal to the GST payable on the supply. The additional amount is to be paid, and the supplier is to provide a tax invoice, at the same time as the other consideration for that supply is to be provided under this Deed. Terms used in this clause have the meanings in the *A New Tax System (Goods and Services Tax) Act 1999*.

Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

Executed on behalf of the Assigning Party in accordance with s127(1) of the Corporations Act (Cth) 2001

Name/Position

Name/Position

Executed on behalf of the Incoming Party in accordance with s127(1) of the Corporations Act (Cth) 2001

Name/Position

Name/Position