

Appendix to Water NSW Contracts

Version: 2.0
Date: May 2024

Contents

Schedule 1 - Approved Form Of Unconditional Undertaking	1
Schedule 2 - Parent company guarantee	3
Schedule 3 - Escrow Deed	11
Schedule 4 - Form of Subcontractor Warranty	22
Schedule 5 - Form of Declaration	24
Schedule 6 - Terms of Expert Appointment	28
Schedule 7 - Deed of Novation.....	34
Schedule 8 - KPIs.....	39
Schedule 9 - Subcontractor's Statement	41
Schedule 10 - Confidentiality Deed.....	43
Schedule 11 - Policies, Procedures and Standards	48

Schedule 1 - Approved Form Of Unconditional Undertaking

This deed poll (Undertaking) made on the date of execution of this deed poll

In favour of: **Water NSW ABN 21 147 934 787** of Level 14, 169 Macquarie St, Parramatta NSW 2150
(Principal)

Given by: [] (Institution)

Recitals

- A. By a deed dated [*] (Deed) between [] ABN [] (Contractor) and the Principal, the Contractor agreed to carry out the Contractor's Activities (as defined in the Deed).
- B. Under the provisions of the Deed, the Contractor is required to provide this Undertaking to the Principal.

Operative

1. The Institution unconditionally undertakes and covenants to pay to the Principal on demand without reference to the Contractor and notwithstanding any notice given by the Contractor to the Institution not to do so, any sum or sums which may from time to time be demanded in writing by the Principal to a maximum aggregate sum of [# (\$)].
2. The Institution's liability under this Undertaking will be a continuing liability and will continue until payment is made under this Undertaking of the maximum aggregate sum or until the Principal notifies the Institution that this Undertaking is no longer required.
3. The liability of the Institution under this Undertaking must not be discharged or impaired by reason of any variation or variations (with or without the knowledge or consent of the Institution) in any of the stipulations or provisions of the Deed or the Contractor's Activities or acts or things to be executed, performed and done under the Deed or by reason of any breach or breaches of the Deed by the Contractor or the Principal.
4. The Institution may at any time without being required so to do pay to the Principal the maximum aggregate sum less any amount or amounts it may previously have paid under this Undertaking and thereupon the liability of the Institution hereunder will immediately cease.
5. This Undertaking will be governed by and construed in accordance with the laws for the time being of the State of New South Wales.

Executed as a deed poll.

[Signed, sealed and delivered for and on behalf)
of [Insert] ABN [insert] by its attorney)
)
.....)
Name of attorney (print))
Under power of attorney)
Registration Number / Book Number)
(Powers of attorney created in Victoria do not)
have a number. Insert the date of the power of)
attorney instead.)

.....

in the presence of:

.....
Signature of witness
.....
Name of witness (print)

.....
Signature of attorney
By executing this document the attorney states
that the attorney has received no notice of
revocation of the power of attorney mentioned
above,

.....20.....
Date

Schedule 2 - Parent company guarantee

Deed of Guarantee and Indemnity made on the date on which the last party to execute this deed has executed this deed

Water NSW (ABN 21 147 934 787), of Level 14, 169 Macquarie Street Parramatta NSW 2150 (**Principal**)

[] ABN [] of [] (**Guarantor**)

Recitals

- A. The Principal has agreed to enter into the Contract with the Contractor on the condition that the Guarantor provide this Guarantee.
- B. The Guarantor has agreed on the following terms and conditions to guarantee to the Principal all of the Obligations and to indemnify the Principal against any loss arising from any failure by the Contractor to perform the Obligations.
- C. The Guarantor considers that by providing this guarantee there will be a commercial benefit flowing to it.

This Deed Provides

1. Definitions

1.1 Definitions and Interpretation

In this Deed:

[Delete either Option 1 or Option 2 as required]

[Option 1 - where PCG provided under Standing Offer Agreement] Contract means each of:

- (a) the Standing Offer Agreement (Contract Number: []) dated on or about the date of this Deed between the Principal and the Contractor; and
- (b) each 'Contract' formed under that Standing Offer Agreement.

[Option 2 - where PCG provided under separate contract] Contract means the Contract (Contract Number: []) dated on or about the date of this Deed between the Principal and the Contractor.

Contractor means [] ABN [].

Event of Default means any event which constitutes a breach of, or is duly and properly declared to be an event of default (howsoever described) by, the Contract.

Guaranteed Money means all money the payment or repayment of which from time to time forms part of the Obligations.

Insolvency Provision means any law relating to insolvency, sequestration, liquidation or bankruptcy (including any law relating to the avoidance of conveyances in fraud of creditors or of preferences, and any law under which a liquidator or trustee in bankruptcy may set aside or avoid transactions), and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

Legal Opinion means a legal opinion:

- (a) from lawyers to the Guarantor, authorised to practice in the place of incorporation of that Guarantor, stating that this deed is binding and enforceable against that Guarantor;
- (b) which states that it may be relied upon by the Principal; and
- (c) in a form reasonably satisfactory to the Principal.

Obligations means all the liabilities and obligations of the Contractor to the Principal under or arising out of or in any way in connection with the Contract or the work to be carried out or performed by the Contractor under the Contract, and includes any liabilities or obligations which:

- (a) are liquidated or unliquidated;
- (b) are present;
- (c) are in existence before or come into existence on or after the date of this Deed;
- (d) relate to the payment of money or the performance or omission of any act;
- (e) sound in damages only; or
- (f) accrue as a result of any Event of Default, and irrespective of:
- (g) whether the Contractor is liable or obligated solely, or jointly, or jointly and severally with another person;
- (h) the circumstances in which the Principal comes to be owed each liability or obligation and in which each liability or obligation comes to be secured by this Deed, including any assignment of any liability or obligation or of this Deed; or
- (i) the capacity in which the Contractor and the Principal comes to owe or be owed such liability or obligation,

and **Obligation** means any liability or obligation forming part of the Obligations.

Power means any right, power, authority, discretion, remedy or privilege conferred on the Principal by the Contract, by statute, by law or by equity.

Security means a mortgage, charge, pledge, lien, hypothecation, guarantee (including this Deed), indemnity, letter of credit, letter of comfort, performance bond, contractual right of set-off or combination or other assurance against loss which secures the Guaranteed Money or the performance of any other Obligation, and whether existing at the date of this Deed or at any time in the future.

Specified Rate means the rate which is 2% above the rate expressed as a percentage per annum:

- (a) which is the average of the bid rates shown at or about 10.15 am on reference rate page "BBSY" on the Reuters Monitor System on the day the relevant amount was due and payable for bank accepted bills having a tenor of 30 days; or
- (b) if for any reason the rate referred to in paragraph (a) is no longer available or if there is no rate displayed for that period at that time, then the average of the buying rates quoted by 3 banks selected by the Principal at or about 10.15 am on the relevant date referred to in paragraph (a) for bills accepted by such banks having a tenor of 30 days.

1.2 Defined terms

Terms used in this Deed which are not otherwise defined will have the meaning given to them in the Contract.

1.3 Interpretation

In this Deed unless the context otherwise requires:

- (a) references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), or a partnership;
- (b) the words "including", "includes" and "include" will be read as if followed by the words "without limitation";
- (c) a reference to any party to this Deed includes that party's executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (d) a reference to any Authority, institute, association or body is:
 - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
 - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that Authority, institute, association or body;
- (e) a reference to this Deed or to any other deed, agreement, document or instrument is deemed to include a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (f) a reference to any legislation or to any section or provision of it includes:
 - (i) any statutory modification or re-enactment of, or any statutory provision substituted for, that legislation, section or provision; and
 - (ii) ordinances, by-laws, regulations of and other statutory instruments issued under that legislation, section or provision;
- (g) words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (h) headings are for convenience only and do not affect the interpretation of this Deed;
- (i) a reference to:
 - (i) a party or clause is a reference to a party or clause of or to this Deed; and
 - (ii) a paragraph or a sub-paragraph is a reference to a paragraph or sub-paragraph in the clause in which the reference appears;
- (j) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (k) for all purposes (other than where designated as a Business Day), "day" means calendar day;
- (l) a reference to "\$" is to Australian currency;
- (m) no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this Deed or any part; and
- (n) any reference to "information" will be read as including information, representations, statements, data,

samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated.

1.4 Limitation

(a) Notwithstanding any other clause in this Deed but subject to paragraphs (b) and (c):

- (i) the aggregate liability of the Guarantor under this Deed will not exceed the aggregate liability of the Contractor under the Contract;
- (ii) the liability of the Guarantor under this Deed in connection with a breach of the Contract by the Contractor shall not be greater than the liability of the Contractor under the Contract in respect of the breach;
- (iii) nothing in this Deed is intended to render the Contractor and the Guarantor liable for the same loss twice for the one breach of the Contract by the Contractor;
- (iv) the Guarantor is entitled to rely on all defences, limitations and exclusions (including set off and counterclaim) available to the Contractor under the Contract;
- (v) where the Guarantor is performing any Obligation, the Guarantor will not be required to perform any such Obligation in a manner any different than that required by the Contract; and
- (vi) payment by one of the Contractor or the Guarantor to or in favour of the Principal shall be deemed to be good discharge against the Principal in respect of that payment.

(b) The limitation of liability under this clause 1.4 does not apply to liability to pay any interest in accordance with clause 7.3 of this Deed or otherwise.

(c) Nothing in this clause shall limit the Guarantor's liability for Obligations which arise from or would have arisen from any voided, voidable, unenforceable or irrecoverable Obligations referred to in clause 3(b) of this Deed (if those Obligations had not been voided, avoided, unenforceable or irrecoverable), subject to such liability not exceeding the liability that the Contractor would have had if the Obligations had not been voided, voidable, unenforceable or irrecoverable.

2. Guarantee

2.1 Guarantee

The Guarantor irrevocably and unconditionally guarantees to the Principal the due and punctual performance by the Contractor of all the Obligations.

2.2 Payment by Guarantor

If the Contractor does not pay the Guaranteed Money when due, the Guarantor must on demand pay to the Principal the Guaranteed Money which is then due and unpaid or which later becomes due, owing or payable.

2.3 Perform Obligations

If the Contractor defaults in the performance or observance of any of the Obligations, the Guarantor must, in addition to its obligations under clause 2.2 of this Guarantee, on demand from time to time by the Principal, immediately perform any of the Obligations then required to be performed by the Contractor in the same manner as the Contractor is required to perform the Obligations.

3. Indemnity

As a covenant separate and distinct from that contained in clause 2.1, the Guarantor irrevocably and unconditionally agrees to indemnify the Principal and at all times to keep the Principal indemnified against any loss or damage suffered by the Principal arising out of or in connection with:

- (a) any failure by the Contractor to perform the Obligations; or
- (b) any obligation or liability that would otherwise form part of the Obligations being void, voidable or unenforceable against or irrecoverable from the Contractor for any reason, and whether or not the Principal knew or ought to have known of that reason.

4. Liability as guarantor and indemnifier

A reference in this Deed to the obligations or liabilities of the Guarantor is a reference to the Guarantor's obligations or liabilities as either guarantor or indemnifier (or both) under this Deed. The use of the expression "Guarantor" in this Deed in relation to a party must not be construed as diminishing that party's obligations as an indemnifier under this Deed.

5. Nature and preservation of liability

5.1 Absolute liability

- (a) The liability of the Guarantor under this Deed is absolute and is not subject to the performance of any condition precedent or subsequent by the Contractor or the Guarantor.
- (b) This Deed binds each person who has executed it, notwithstanding that:
 - (i) any person, whether named as a party or not, does not execute this Deed; or
 - (ii) this Deed is or becomes unenforceable, void or voidable against any other person.

5.2 Unconditional liability

The liability of the Guarantor under this Deed will not be affected by any act, omission, matter or thing which, but for this clause 5.2, might operate in law or in equity to release the Guarantor from that liability or to reduce the Guarantor's liability under this Deed, including any of the following:

- (a) the occurrence before, on or at any time after the date of this Deed, of any Insolvency Event in relation to the Contractor or the Guarantor;
- (b) the receipt by the Principal of any payment, dividend or distribution under any Insolvency Provision in relation to the Contractor or the Guarantor;
- (c) the occurrence of any Event of Default;
- (d) the Contract or any payment or other act, the making or doing of which would otherwise form part of the Obligations being or becoming or being conceded to be frustrated, illegal, invalid, void, voidable, unenforceable or irrecoverable in whole or in part for any reason whether past, present or future;
- (e) the Principal accepting or declining to accept any Security from any person at any time;
- (f) the Principal granting time, waiver or other indulgence or concession to, or making any composition or compromise with, the Contractor or the Guarantor;
- (g) the Principal not exercising or delaying (whether deliberately, negligently, unreasonably or otherwise) in the exercise of any remedy or right it has for the enforcement of the Contract or any Obligation;
- (h) any laches, acquiescence or other act, neglect, default, omission or mistake by the Principal;
- (i) the determination, rescission, repudiation or termination, or the acceptance of any of the foregoing, by the Principal or the Contractor or the Guarantor of the Contract or any Obligation;

- (j) any variation to the Contract or any Obligation, whether or not that variation is substantial or material, or imposes any additional liability on or disadvantages the Contractor or the Guarantor;
- (k) the full, partial or conditional release or discharge by the Principal or by operation of law, of the Contractor or the Guarantor from the Contract or any Obligation;
- (l) any change in membership (whether by death or retirement of an existing member, admission of a new member, or otherwise) or in the name of any partnership, firm or association in which the Contractor or the Guarantor is a member;
- (m) the transfer, assignment or novation by the Principal or the Contractor or the Guarantor of all or any of its rights or obligations under the Contract or under any other Obligation;
- (n) any failure by the Principal to disclose to the Guarantor any material or unusual fact, circumstance, event or thing known to, or which ought to have been known by, the Principal relating to or affecting the Contractor or the Guarantor at any time before or during the currency of this Deed, whether prejudicial or not to the rights and liabilities of the Guarantor and whether or not the Principal was under a duty to disclose that fact, circumstance, event or thing to the Guarantor or to the Contractor;
- (o) the Principal agreeing with the Contractor or the Guarantor not to sue, issue process, sign or execute judgment, commence proceedings for bankruptcy or liquidation, participate in any administration, scheme or deed of arrangement or reconstruction, prove in any bankruptcy or liquidation, or do anything else in respect of the liability of the Contractor or the Guarantor; or
- (p) the provisions of section 440J of the Corporations Act 2001 (Cth) operating to prevent or delay:
 - (i) the enforcement of this Deed against any Guarantor; or
 - (ii) any claim for contribution against any Guarantor.

5.3 No merger

- (a) This Deed is in addition to and does not merge with, postpone, lessen or otherwise prejudicially affect the Contract or any other Power of the Principal.
- (b) The Principal will hold any judgment or order obtained by it against any person in respect of the Guaranteed Money or the Obligations collaterally with this Deed, and this Deed will not merge in that judgment or order.

5.4 No obligation to gain consent

No consent is required from any Guarantor nor is it necessary for the Guarantor to or be made aware of any event referred to in clause 5.2, any transaction between the Principal and the Contractor, or any particulars concerning any Obligation.

5.5 Appropriation

- (a) The Principal is under no obligation to marshal or appropriate in favour of any Guarantor, or to exercise, apply, transfer or recover in favour of any Guarantor, any Security or any funds or assets that the Principal holds, has a claim on, or has received or is entitled to receive, but may do so in the manner and order as the Principal determines in its absolute discretion.
- (b) The Principal may hold in a suspense account (without liability to pay interest) any money which it receives from the Guarantor, or which it receives on account of the Guarantor's liability under this Deed, and which the Principal may, at its discretion, appropriate in reduction of the Guarantor's liability under this Deed.

5.6 Void or voidable transactions

- If:
- (a) the Principal has at any time released or discharged:
 - (i) the Guarantor from its obligations under this Deed; or
 - (ii) any assets of the Guarantor from a Security, in either case in reliance on a payment, receipt or other transaction to or in favour of the Principal; or
 - (b) any payment or other transaction to or in favour of the Principal has the effect of releasing or discharging:
 - (i) the Guarantor from its obligations under this Deed; or
 - (ii) any assets of the Guarantor from a Security,
- and:
- (c) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under an Insolvency Provision or under the general law; and
 - (d) that claim is upheld or is conceded or compromised by the Principal,
- then:
- (e) the Principal will immediately become entitled against the Guarantor to all rights (including under any Security) as it had immediately before that release or discharge;
 - (f) the Guarantor must immediately do all things and execute all documents as the Principal may reasonably require to restore to the Principal all those rights; and
 - (g) the Guarantor must indemnify the Principal against costs, losses and expenses suffered or incurred by the Principal in or in connection with any negotiations or proceedings relating to the claim or as a result of the upholding, concession or compromise of the claim.

5.7 No set-off, counterclaim

Subject to clause 1.4(a)(iv), the liability of the Guarantor under this Deed will not be reduced or avoided by any defence, set-off or counterclaim available to the Contractor against the Principal.

5.8 Claim on the Guarantor

- (a) Subject to clause 5.8(b), the Principal is not required to make any claim or demand on the Contractor, or to enforce the Contract, or any other right, power or remedy against the Contractor, before making any demand or claim on the Guarantor.
- (b) The Principal agrees not to make a claim or demand for payment of Guaranteed Money against the Guarantor under this Deed unless:
 - (i) the Principal has made a written claim or demand against the Contractor for such Guaranteed Money, a copy of which the Principal gives to the Guarantor at the same time as the Principal makes the claim or demand against the Contractor, and such Guaranteed Money remains unpaid, in whole or in part, for 10 Business Days after the claim or demand is made; or
 - (ii) an Insolvency Event has occurred in relation to the Contractor or the Guarantor.

5.9 No representation

Each party acknowledges that it has not entered into this Deed as a result of any representation, promise, statement or inducement to the Guarantor by or on behalf of the other party.

6. Representations and Warranties

6.1 General representations and warranties

The Guarantor or if there is more than one Guarantor, each Guarantor, represents and warrants to the Principal that:

- (a) this Deed constitutes a valid and legally binding obligation of the Guarantor in accordance with its terms;
- (b) the execution, delivery and performance of this Deed by the Guarantor does not breach any law binding on it, or any document or agreement to which the Guarantor is a party or which is binding on it or any of its assets;
- (c) no litigation, arbitration, mediation, conciliation, criminal or administrative proceedings are current, pending or, to the knowledge of the Guarantor, threatened, which, if adversely determined, may have a material adverse effect on the ability of the Guarantor to perform its obligations under this Deed;
- (d) all information relating to the Guarantor provided to the Principal in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and
- (e) the Guarantor has not entered into this Deed as the trustee of any trust.

6.2 Corporate representations and warranties

The Guarantor, or if there is more than one Guarantor, each Guarantor, that is or purports to be a body corporate, further represents and warrants to the Principal that:

- (a) it is duly incorporated and has the corporate power to own its property and to carry on its business as is now being conducted;
- (b) the execution, delivery and performance of this Deed does not breach the constitution of the Guarantor and, if the Guarantor or any of its subsidiaries is listed on the Australian Stock Exchange Limited or on any other stock exchange, those listing requirements or business rules;
- (c) it has the power, and has taken all corporate and other action required, to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligations under this Deed; and
- (d) the Guarantor has filed all corporate notices and effected all registrations with the Australian Securities and Investments Commission and all of those filings and registrations are current, complete and accurate to the extent they are material to the performance of the obligations of the Guarantor under this Deed.

7. Payments

7.1 On demand

All money payable by the Guarantor under this Deed must be paid by the Guarantor on demand by the Principal in immediately available funds to the account and in the manner notified by the Principal to the Guarantor.

7.2 Payment in gross

All money received or recovered by the Principal on account of the Guaranteed Money will be treated as payments in gross without any right on the part of the Guarantor to claim the benefit of any money received or recovered by the Principal or any Security, until the Principal has been paid 100 cents in the dollar in respect of the Guaranteed Money.

7.3 Interest

As a liability separate and distinct from the Guarantor's liability under clauses 2 and 3, the Guarantor must on demand by the Principal pay interest on all amounts due and payable by it and unpaid under or in respect of this Deed. Interest will accrue on those amounts from day to day from the due date

up to the date of actual payment, before and (as a separate and independent obligation) after judgment, at the Specified Rate for successive 90 day interest periods commencing on the date of default and, if not paid when due, will itself bear interest in accordance with this clause 7.3, provided that interest will not be payable under this clause to the extent that interest for late payment to the Principal is incorporated into the calculation of the amount payable under the Contract.

7.4 Merger

If the liability of the Guarantor to pay to the Principal any money under this Deed becomes merged in any judgment or order, then, as an independent obligation, the Guarantor will pay interest on the amount of that money at the rate which is the higher of that payable under clause 7.3 and that fixed by or payable under the judgment or order.

7.5 No set-off or deduction

- (a) All payments by the Guarantor to the Principal under this Deed must be:
- (b) subject to clause 1.4(a)(iv), free of any set-off or counterclaim; and
- (c) without deduction or withholding for or on account of any present or future taxes, unless the Guarantor is compelled by law to make any deduction or withholding.
- (d) If the Guarantor is compelled by law to make any deduction or withholding for or on account of any present or future taxes (not being taxes on the overall net income of the Principal), then the Guarantor must:
- (e) pay to the Principal any additional amounts necessary to enable the Principal to receive (after all deductions and withholdings for those taxes) a net amount equal to the full amount which would otherwise be payable to the Principal if no deduction or withholding was required to be made;
- (f) promptly (and within the time prescribed by law) pay to the relevant taxing authority the amount of those taxes which it is compelled by law to deduct or withhold, and indemnify the Principal for any taxes and interest or penalties to which the Principal may become liable consequent on the failure of the Guarantor to pay those taxes; and
- (g) deliver to the Principal, promptly on request from the Principal, a copy of any receipt issued by the relevant taxing authority on payment of those taxes.

7.6 Currency indemnity

- (a) The Australian Dollar is the currency of payment by the Guarantor under or in connection with this Deed, except that payment by the Guarantor or in relation to any Obligation which is denominated in a foreign currency must be made in that foreign currency.
- (b) If for any reason any amount payable by the Guarantor under or in connection with this Deed is received by the Principal in a currency (**Payment Currency**) other than the currency (**Agreed Currency**) in which that amount is required to be paid under this Deed (whether as a result of any judgment or order, the liquidation of the Guarantor or otherwise), and the amount obtained (net of charges) by the Principal on its conversion of the amount of the Payment Currency received into the Agreed Currency is less than the amount payable under this Deed in the Agreed Currency, then the Guarantor will, as an independent and additional obligation, indemnify the Principal for that deficiency and for any loss sustained as a result of that deficiency.

8. Expenses and stamp duties

8.1 Expenses

The Guarantor must on demand reimburse the Principal for and keep the Principal indemnified against all expenses, including legal fees, costs and disbursements on a solicitor/own client basis (or on a full indemnity basis, whichever is the higher) assessed without the necessity of taxation, reasonably incurred by the Principal in connection with:

- (a) any consent, agreement, approval, waiver, amendment to or discharge of this Deed; and
- (b) any exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any rights under this Deed.

8.2 Stamp duties

The Guarantor must:

- (a) pay all stamp duties, transaction, registration and similar taxes, including fines and penalties, financial institutions duty and debits tax, which may be payable to or required to be paid by any appropriate authority, or determined to be payable in connection with the execution, delivery, performance or enforcement of this Deed or any payment, receipt or other transaction contemplated by this Deed; and
- (b) indemnify the Principal against any loss or liability incurred or suffered by it as a result of the delay or failure by the Guarantor to pay taxes.

8.3 Goods and Services Tax

If the Principal is or becomes liable to pay any GST (including any penalty) in respect of any supply it makes under, or in connection with, this Deed (GST Liability) then:

- (a) to the extent that an amount is payable by the Guarantor to the Principal under this Deed for that supply, the amount will be increased by the full amount of the GST Liability; and
- (b) otherwise, the Guarantor will indemnify and keep the Principal indemnified for the full amount of the GST Liability.

9. Assignment

The Principal may assign, novate or otherwise transfer all or any part of its rights under this Deed and may disclose to a proposed assignee or transferee any information in the possession of the Principal relating to the Guarantor.

10. Governing law, jurisdiction and arbitration

10.1 Governing law

This Deed, and where applicable the arbitration reference contained in clause 10.3, is governed by and will be construed according to the laws of New South Wales.

10.2 Jurisdiction

- (a) This clause 10.2 only applies where clauses 10.3 to 10.7 do not apply.
- (b) The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts and appellate courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought relating in any way to this Deed.
- (c) The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceeding has been brought in an inconvenient forum, where that venue falls within paragraph (b) of this clause.

10.3 Reference to arbitration

- (a) Clauses 10.3 to 10.7 will only apply where the Guarantor is a foreign company (as defined in section 9 of the Corporations Act 2001 (Cth)).
- (b) Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this Deed (including but not limited to any question relating to the existence, validity or termination of this Deed) shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Arbitration Rules).
- (c) The seat of the arbitration will be Sydney.
- (d) The number of arbitrators will be one.
- (e) The language of the arbitration will be English.

10.4 Powers of the arbitrator

The arbitral tribunal has the power to grant all legal, equitable and statutory remedies, except punitive damages.

10.5 Consolidation

The parties agree that section 24 of the International Arbitration Act 1974 (Cth) will apply in respect of consolidations.

10.6 Joinder

The arbitral tribunal has the power, on the application of any party to the arbitration, to allow a third party who the arbitrator considers has a sufficient interest in the outcome of the arbitration to be joined in the arbitration as a party. Each party to this Deed hereby consents to such joinder. In the event of such joinder of parties in the arbitration, the arbitrator has the power to make a single final award, or separate awards, in respect of all parties so joined in the arbitration.

10.7 Award final and binding

Any award will be final and binding upon the parties.

10.8 Guarantor incorporated outside Australia

If the Guarantor is incorporated outside of Australia, a Legal Opinion must be provided by the Guarantor to the Principal, on the date of execution of this Deed.

11. Miscellaneous

11.1 Notices

- (a) Any notices contemplated by this Deed must be in writing and delivered or posted by prepaid express post to the relevant address or sent by email to the email address as set out below (or to any new address that a party notifies to the others):
 - (i) to the Principal: [[]]
 - (ii) to the Guarantor: [[]]
- (b) A notice sent will be taken to have been received by the addressee:
 - (i) (in the case of prepaid express post sent to an address in the same country) on the second Business Day after the date of posting;
 - (ii) (in the case of prepaid express post sent to an address in another country) on the fourth Business Day after the date of posting; and
 - (iii) (in the case of email) at the local time (in the place of receipt of that email) that would be determined if section 13A of the Electronic Transactions Act 2000 (NSW) were to apply in respect of that email,

provided that if the communication would be taken to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is taken to be received at 9.00am on the next Business Day.

11.2 Continuing obligation

This Deed is a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, express or implied revocation or any other matter or thing, and the Principal will continue to be entitled to the benefit of this Deed as regards the due and punctual performance of all the Obligations until a final discharge has been given to the Guarantor.

11.3 Further assurance

The Guarantor must immediately on the request of the Principal, and at the cost of the Guarantor, do and perform all further acts and things and execute and deliver all further documents as the Principal reasonably requires, or as are required by law, to perfect or to give effect to the rights and powers of the Principal created, or intended to be created, by this Deed.

11.4 Form of demand

A demand on the Guarantor for payment under this Deed may be in the form and contain any information as the Principal determines, provided it includes particulars of the relevant default in the due and punctual performance of the Obligations.

11.5 Entire agreement

This Deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersede:

- (a) any prior agreement (whether in writing or not) between the parties in relation to the subject matter of this Deed; or
- (b) any correspondence or other documents relating to the subject matter of this Deed that may have passed between the parties prior to the date of this Deed and that are not expressly included in this Deed.

11.6 Joint and several liability

The obligations of the Guarantor, if more than one person, under this Deed, are joint and several. Each person constituting the Guarantor acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this Deed) of the other as if those acts or omissions were its own and the Principal may proceed against any or all of them. This Deed binds each person who signs as a "Guarantor" even if another person who was intended to become a "Guarantor" does not become a "Guarantor" or is not bound by this Deed.

11.7 Severance

If at any time any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed.

11.8 Remedies cumulative

Each Power is cumulative and in addition to each other Power available to the Principal.

11.9 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this Deed by a party will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this Deed.

- (b) Any waiver or consent given by a party under this Deed will only be effective and binding on that party if it is given or confirmed in writing by the party.
- (c) No waiver by:
 - (i) a party of a breach of any term of this Deed; or
 - (ii) the Principal of any other failure by the Guarantor to comply with a requirement of this Deed,will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this Deed or failure to comply with any other requirement of this Deed.

11.10 Consents

Any consent of the Principal referred to in, or required under, this Deed may be given or withheld, or may be given subject to any conditions, as the Principal (in its absolute discretion) thinks fit, unless this Deed expressly provides otherwise.

11.11 Vienna Convention

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Deed.

11.12 Variations

This Deed may only be varied by a document signed by or on behalf of both the Principal and the Guarantor.

11.13 Provisions limiting or excluding liability

Any provision of this Deed which seeks to limit or exclude a liability of the Principal or the Guarantor is to be construed as doing so only to the extent permitted by law.

11.14 Counterparts

- (a) This Deed need not be executed by the Principal.
- (b) If the Guarantor is more than one person, a Guarantor may execute this Deed in one or more separate counterparts, each of which constitutes the deed of that Guarantor.

11.15 Confidentiality

- (a) Subject to paragraph (b), each party must keep the terms of this Deed confidential.
- (b) A party may make any disclosure in relation to this Deed:
 - (i) to a professional adviser, financial adviser, insurer, rating agency, financier or auditor if that person is obliged to keep the information disclosed confidential;
 - (ii) to the extent required to comply with any law, a requirement of a regulatory body (including any relevant stock exchange) or pursuant to administrative request or Parliamentary requirement;
 - (iii) to any of its employees or officers to whom it is necessary to disclose the information;
 - (iv) in connection with any legal or arbitral proceeding under or in relation to this Deed;
 - (v) to obtain the consent of a third party to a term of, or to an act under, this Deed;
 - (vi) to a "related body corporate", as defined in section 9 of the Corporations Act 2001 (Cth), as long as it advises that related body corporate of the confidential nature of the terms of this Deed;
 - (vii) (in the case of the Principal) to a potential assignee provided they agree to keep the terms of this Deed confidential;
 - (viii) (in the case of the Principal) to a related agency or to its responsible Minister;
 - (ix) with the prior consent of the other party to this Deed; or

- (x) if the information disclosed has come into the public domain through no fault of the party (or its Personnel or related bodies corporate) making the disclosure.

Executed as a deed.

Signed for and on behalf of **Water NSW ABN 21 147 934 787** by its authorised delegate in the presence of:

Signature of witness

Full name of witness

Executed by **[Insert name of Guarantor] ABN [insert]** in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Full name of director

Date

Signature of authorised delegate

Full name of authorised delegate

Date

Signature of company secretary/director

Full name of company secretary/director

Date

Schedule 3 - Escrow Deed

(Clause 6.11)

Between [Name] of [Address] (ABN [*]) (**Escrow Holder**).
and [Name] of [Address] (ABN [*]) (**Contractor**); and
and **Water NSW** (ABN 21 147 934 787), of Level 14, 169 Macquarie Street Parramatta NSW 2150 (**Water NSW**).

RECITALS

- A. The Contractor has agreed to deposit with the Escrow Holder a copy of the Source Code Material and to allow Water NSW to access and use the Source Code Material under certain circumstances.
- B. The Escrow Holder agrees to deal with the Source Code Material on the terms and conditions of this deed.

1. Interpretation

1.1 Definitions

Unless otherwise specified, words and phrases used in this deed have the same meaning as that which is given to them under the Contract. In this deed:

Annual Fee means the annual fees set out in section 1 of the Information Schedule.

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

Contract means the Contract entitled [insert] between Water NSW and the Contractor dated [insert].

CPI means the "Weighted Average of Eight Capital Cities: All Groups Consumer Price Index" as maintained and published quarterly by the Australian Bureau of Statistics.

Escrow Deposit Specification Form means the form set out in Schedule 2.

Establishment Fee means the establishment fee set out in section 1 of the Information Schedule.

Government Agency means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity.

Information Schedule means Schedule 1 to this deed.

Insolvency Event means in relation to a party to the Contract, any of the following:

- (a) the party informs the other party in writing, or its creditors generally, that the party is insolvent or is unable to proceed with the Contract for financial reasons;
- (b) a trustee, receiver, receiver and manager, interim receiver, controller, administrator, custodian, sequestrator, provisional liquidator, liquidator or any foreign law equivalent or other person with similar power is appointed to the party;
- (c) the party:
 - (i) becomes bankrupt or insolvent within the meaning of section 95A of the Corporations Act or under any bankruptcy, insolvency or analogous Law;
 - (ii) would be presumed by a court to be insolvent under section 459C(2) of the Corporations Act;
 - (iii) fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act) and fails to remedy that failure within 7 days after being required in writing to do so by the party issuing the statutory demand;
 - (iv) makes any assignment in bankruptcy or makes any other assignment for the benefit of creditors;

(v) seeks relief from its obligations to creditors under any bankruptcy, insolvency or analogous Law;

(vi) commences any proceeding, files a petition or proposal to take advantage of any act of bankruptcy or insolvency;

(vii) resolves to, consents to or acquiesces in the appointment of a trustee, receiver, receiver and manager, interim receiver, controller, administrator, custodian, sequestrator, provisional liquidator, liquidator or other person with similar power of itself or of all or a portion of its assets; or

(viii) files a petition or otherwise commences any proceeding seeking to enter into any compromise, reorganisation, arrangement, composition or readjustment under any applicable bankruptcy, insolvency or analogous Law affecting creditors' rights or consents to, or acquiesces in, the filing of such a petition, or commencement of such proceedings; or

(d) any act is done or event occurs which, under applicable Law, has a similar effect to anything mentioned in paragraphs (b) or (c).

Software Application means the software application(s) specified in section 2 of the Escrow Deposit Specification Form.

Source Code means, in respect of any software, firmware, computer code or configuration files (**Computer Programs**), the human readable code of such Computer Programs, and includes associated software including scripts and applets (collectively comprised in a complete copy of all of the foregoing in executable code) and all compilers, tools, language, documentation necessary to operate, maintain and modify the executable code copy of that Computer Program including all technical documentation and specifications in respect of that Computer Program, including any other information necessary for a reasonably skilled computer programmer to understand the program logic of the software, firmware, computer code or configuration files and to perform any of those acts in relation to it.

Source Code Material means all Source Code for the then currently implemented version of the Software Application, reasonably detailed associated developer commentary regarding that Source Code and all other software, information, documentation and other material described in section 2 of the Information Schedule.

Tax Invoice has the same meaning as in the GST Legislation.

Taxable Supply has the same meaning as in the GST Legislation.

Update means any material update, new release, modification or new version of the computer programs or computer interfaces provided by the Contractor.

1.2 References to certain general terms

In the deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) an obligation or liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;

(c) "person" includes an individual, the estate of an individual, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(d) a reference to a party includes a party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee;

(e) a reference to a document (including the deed) is to that document as varied, novated, ratified or replaced from time to time;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause schedule, exhibit, attachment or annexure to or of the deed, and a reference to the deed includes all schedules, exhibits, attachments and annexures to it;

(i) if the time for giving any notice, issuing any certificate, making any payment or doing any other act required or permitted by the deed, falls on a day which is not a Business Day, then the time for giving the notice, issuing the certificate, making the payment or doing the other act will be taken to be on the next Business Day;

(j) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(k) "includes" in any form is not a word of limitation;

(l) a reference to "\$" or "dollar" is to Australian currency; and

(m) a reference to any Authority, institute, association or body is:

(i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and

(ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that Authority, institute, association or body.

2. Contractor's deposit obligations

2.1 Contractor to make deposits

The Contractor must deposit the then currently implemented version of the Source Code Material, accompanied by a completed Escrow Deposit Specification Form, with the Escrow Holder:

(a) within 14 days of the date of this deed;

(b) where the Contract is a "Construction Works Contract", as a condition precedent to Completion of the Works;

(c) where the Contract is a "Supply of Goods and/or Services Contract", as a condition precedent to Acceptance or completion of any Services;

(d) where the Contract is a "Maintenance Services Contract" or a "Professional Services Contract", as a condition precedent to completion of the Contractor's Activities; and

(e) within 14 days after any update or material change is made to the implemented version of any Source Code then held by the Escrow Holder.

2.2 Water NSW may test deposits

Water NSW may, after providing the Contractor with at least seven days' notice, conduct tests on the Source Code Material to determine whether the Contractor has met its obligations under clause 2.1.

2.3 Escrow Holder to provide access

The Escrow Holder will provide Water NSW with access to the Source Code Material to enable testing under clause 2.2 to be carried out and will, in the presence and with the oversight of the Contractor, allow Water NSW to:

(a) remove the Source Code Material from the custody of the Escrow Holder;

(b) install, download or copy the Source Code Material onto such computer system or hardware as Water NSW may reasonably specify; and

(c) analyse and conduct reasonable tests in relation to the Source Code Material as provided for under clause 2.2.

Following the testing, Water NSW will (in the presence of and with the oversight of the Contractor) ensure that all copies of the Source Code Material are deleted from the computer system or hardware referred to in clause 2.3(b), and the material referred to in clause 2.3(a) is promptly returned to the Escrow Holder.

2.4 Support to provide assistance with testing

The Contractor must, at Water NSW's request and at no charge, give Water NSW all reasonable assistance to enable Water NSW to carry out the tests referred to in clause 2.2.

2.5 Failure to deposit correct version in escrow

If testing by Water NSW reveals that the Source Code Material does not contain the correct version of the computer programs or computer interfaces, the Contractor must, at no charge, deliver a copy of the correct version of the Source Code Material to the Escrow Holder within 5 Business Days of the completion of testing.

3. Escrow Holder's obligations

3.1 Obligations

The Escrow Holder must:

(a) accept each deposit of the Source Code Material and, subject to the terms and conditions of this deed, hold it on behalf of the Contractor and Water NSW;

(b) take all reasonably necessary steps to ensure the preservation, care, safe custody and security of the Source Code Material whilst it is in the possession, custody or control of the Escrow Holder;

- (c) only use, access, copy and release the Source Code Material to the extent necessary to enable the Escrow Holder to comply with its obligations under this deed;
- (d) establish and maintain a register of deposits of the Source Code Material (**Register**) showing deposit and release dates and to whom each deposit was released;
- (e) allow the Contractor or Water NSW to examine the Register at any time during regular business hours; and
- (f) provide the Contractor or Water NSW with a copy of the Register within seven days of receiving a request to do so.

3.2 Limit on obligations

The Escrow Holder has no obligation to and is not responsible for:

- (a) verifying the nature, completeness or accuracy of Source Code Material; or
- (b) any transaction between the parties, other than the performance of the Escrow Holder's obligations under this deed.

4. Confidentiality

The Escrow Holder must not disclose to any person:

- (a) any part of the Source Code Material;
 - (b) any information about the Source Code Material; or
 - (c) any information about this deed,
- other than as permitted by this deed or as required by Law.

5. Release to Water NSW

5.1 Water NSW may request release

If one of the following circumstances occurs:

- (a) an Insolvency Event occurs to the Contractor;
- (b) the Contractor ceases to carry on business;
- (c) the Contractor has ceased for any reason to maintain or support a Software Application;
- (d) the Contractor breaches the terms of this deed;
- (e) the Contract is terminated for the Contractor's breach; or
- (f) the Contractor assigns copyright in a Software Application to a third party,

then Water NSW may notify the Escrow Holder and the Contractor of this event and request that the Escrow Holder release the Source Code Material to Water NSW (**Water NSW Notice**).

5.2 Contractor may dispute release

If the Contractor disputes the Water NSW Notice, then it may notify the Escrow Holder and Water NSW that it objects to release of the Source Code Material on the basis that the event relied on by Water NSW does not exist or that it would not be reasonable to release the Source Code Material in the circumstances given the nature of the breach in 5.1(e), and the Contractor has provided substantial evidence to support its objection (**Contractor Objection**).

5.3 Release of Source Code Material to Water NSW

Unless otherwise ordered by a court the Escrow Holder must release the Source Code Material to Water NSW:

- (a) if no Contractor Objection is received, within 7 Business Days after the Escrow Holder receives a Water NSW Notice; or
- (b) if a Contractor Objection is received, within 14 Business Days after the Contractor Objection is received.

5.4 Grant of licence

If the Source Code Material is released to Water NSW under this clause 5, then the Contractor grants Water NSW an irrevocable, perpetual, royalty-free, worldwide, non-exclusive licence in relation to that Source Code Material to use it for all

purposes in connection with the Contractor's Activities and the purposes described in clause 6.9 of the Contract.

6. Release to Contractor

6.1 Release of Source Code Material to Contractor

If Water NSW has given the Escrow Holder written notice of its consent to the release of the Source Code Material to the Contractor, then the Contractor may request that the Escrow Holder release the Source Code Material to the Contractor, and the Escrow Holder must immediately release the Source Code Material to the Contractor.

6.2 No other release to Contractor is permitted

Other than as provided for in clause 6.1 and clause 7, the Escrow Holder must not release any Source Code Material to the Contractor.

7. Release by agreement or by court order

7.1 Release by agreement

Within five days after receipt of a joint notice from the Contractor and Water NSW requesting release of the Source Code Material, the Escrow Holder must release the Source Code Material in accordance with that notice.

7.2 Release by court order

Each party acknowledges that the Escrow Holder must release the Source Code Material in accordance with any court order requiring the Escrow Holder to do so.

7.3 Notice to Water NSW

The Escrow Holder must immediately notify Water NSW if it receives a court order (or any document that refers to a court order being sought) in relation to the Source Code Material.

8. Fees and charges

8.1 Payment of fees

Water NSW must pay the Establishment Fee and Annual Fee to the Escrow Holder within 30 days of Water NSW' receipt of the invoices referred to in clause 8.3.

8.2 Annual Fee subject to change

The Escrow Holder may increase the Annual Fee for any year by giving 30 days' notice to Water NSW. An increase must not exceed the increase in the CPI for the previous year.

8.3 Invoices

The Escrow Holder may issue invoices as follows:

- (a) for the Establishment Fee, on or after the date of this deed, to Water NSW;
- (b) for the Annual Fee, on or after each anniversary of the date of this deed, to Water NSW; and
- (c) for reasonable delivery costs incurred by the Escrow Holder in releasing the Source Code Material, to the party that requested the release.

All invoices issued by the Escrow Holder must state the basis on which fees are charged and, in respect of amounts invoiced pursuant to sub-clause (c) above, must attach evidence justifying the amounts claimed.

8.4 GST inclusive prices

Unless otherwise stated, the fees include GST.

9. GST

9.1 GST gross up

Subject to clauses 9.2, 9.3 and 9.4, if GST is imposed on any Taxable Supply made by a party under this deed (**Supplying Party**), then the party receiving the Taxable Supply (**Receiving Party**) must pay, in addition to any consideration payable or to be provided under this deed for the supply, an additional amount calculated by multiplying the prevailing GST rate by the consideration for the relevant Taxable Supply payable, or to be provided, by the Receiving Party under any other clause in this deed.

9.2 Tax invoice

Payment for Taxable Supplies is conditional upon the issue of a Tax Invoice. Each Tax Invoice must provide full details of the Taxable Supply, the subject of the Tax Invoice, including any details the payer of the fee may specifically require and such other details required to ensure that it is a Tax Invoice.

9.3 Adjustment

If the amount of GST recovered by the Supplying Party from the Receiving Party differs from the amount of GST payable at Law by the Supplying Party (or an entity grouped with the Supplying Party for GST purposes) in respect of the supply, the amount payable by the Receiving Party to the Supplying Party will be adjusted accordingly.

9.4 Reimbursements

Where one party (**Payer**) is liable to reimburse another party (**Payee**) for any expenditure incurred by the Payer (**Expenditure**), the amount reimbursed by the Payer shall be the GST exclusive Expenditure plus any GST payable to the Payee by the Payer pursuant to clause 9.1.

10. Ownership and risk

10.1 Acknowledgements

Each party acknowledges that:

- (a) nothing in this deed assigns any Intellectual Property Rights in the Source Code Material;
- (b) title in the physical media on which the Source Code Material is stored passes from the Contractor to Water NSW on release of the Source Code Material to Water NSW under clause 5 or clause 7; and
- (c) risk of loss of, or damage to, the Source Code Material and associated media remains with the Contractor.

10.2 Loss or damage to Source Code Material

Without limiting any rights or remedies that any of the parties may have, if any of the Source Code Material or associated media is lost, damaged or destroyed while in the Escrow Holder's control:

- (a) the Escrow Holder must promptly notify each other party; and
- (b) the Contractor must provide the Escrow Holder with replacement Source Code Material within 5 Business Days of receiving such notice from the Escrow Holder.

10.3 Warranty

The Contractor warrants and represents that it has the necessary authority to comply with its obligations under this deed (including the right to grant the licence in clause 5.4).

10.4 Act or omission of Escrow Holder

Notwithstanding any other provision of this deed, if any of the Source Code Material or associated media is lost, damaged or destroyed while in the Escrow Holder's control, and that loss, damage or destruction is caused by:

- (a) the Escrow Holder's breach of this deed; or
- (b) the negligent, wilful or unlawful act or omission of the Escrow Holder,

then the Escrow Holder must, at its own expense, reimburse the Contractor for the reasonable cost of replacing the relevant part or parts of the Source Code Material.

11. Termination

11.1 Upon insolvency

This deed terminates immediately if an Insolvency Event occurs to the Escrow Holder.

11.2 Upon release of Source Code Material

This deed terminates immediately if the Source Code Material is released to Water NSW or the Contractor under this deed, except such termination will not affect those parts of this deed referenced in clause 14.14 (**Survival**).

11.3 Upon provision of notice

This deed may be terminated by:

- (a) the Escrow Holder giving 90 days written notice to the Contractor and Water NSW, subject to a pro-rata refund by the Escrow Holder to Water NSW of any advance payment of the Annual Fee; or
- (b) Water NSW giving 90 days written notice to the Contractor and the Escrow Holder.

11.4 By Water NSW or the Contractor

Either the Contractor or Water NSW may, by giving notice to the Escrow Holder (with a copy to Water NSW or the Contractor, as applicable), terminate this deed with immediate effect if:

- (a) the Escrow Holder commits a material breach of this deed; and
- (b) the breach is not remedied within 14 days of the Escrow Holder receiving a notice detailing the breach and requiring that it be rectified.

11.5 Consequences of an Escrow Holder termination event

Within 14 days after the termination of this deed under clause 11.1, 11.2, 11.3 or 11.4, the Contractor must, at the direction of Water NSW (and Water NSW must, if the Contractor so requests), enter into another agreement between the Contractor, Water NSW and a new escrow service provider in a form substantially similar to this deed.

11.6 Return of Source Code Material on termination

- (a) If this deed terminates for any reason other than under clause 11.2 and 11.3(b), then, unless a new escrow deed is entered into within 14 days in accordance with clause 11.5, the Escrow Holder must, within a further 20 days, deliver the Source Code Material to Water NSW.
- (b) If this deed terminates under clause 11.3(b), then the Escrow Holder must within 7 days deliver the Source Code Material to the Contractor.

12. Notices

- (a) Any notices contemplated by this deed must be in writing and delivered to the relevant address as set out below (or to any new address that a party notifies to the others):
 - (i) to Water NSW: Level 14, 169 Macquarie Street, Parramatta NSW 2150
 - (ii) to the Escrow Holder: **[to be completed]**
 - (iii) to the Contractor: **[to be completed]**
- (b) A notice sent by post will be taken to have been received at the time when, in due course of the post, it would have been delivered at the address to which it is sent.

13. No assignment

- (a) The Contractor and the Escrow Holder must not assign or otherwise deal with all or any of its rights or obligations under this deed without the written consent of the other parties.
- (b) WaterNSW may at any time, at its sole discretion, assign or novate this deed to:
 - (i) the State of New South Wales or any Authority without the consent of the Contractor; or
 - (ii) an entity not referred to in clause 13(b)(i) with the prior consent of the Contractor (which shall not be unreasonably withheld or delayed by the Contractor).

14. General

14.1 Discretion in exercising rights

A party may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by

imposing conditions), unless this deed expressly states otherwise.

14.2 Partial exercise of rights

If a party does not exercise a right or remedy at a given time, the party may still exercise it later.

14.3 Approvals and consents

By giving its approval or consent a party does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval.

14.4 Remedies cumulative

The rights and remedies provided in this deed are in addition to other rights and remedies given by Law independently of this deed.

14.5 Operation of Law

Rights given to the parties under this deed and the parties' liabilities under it are not affected by anything which might otherwise affect them by Law.

14.6 Indemnities

Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed.

Nothing in this clause 14.6 prevents any other provision of this deed, as a matter of interpretation also surviving the termination of this deed.

It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this deed.

14.7 No partnership, joint venture or other fiduciary relationship

Nothing in this deed will be construed or interpreted as constituting the relationship between Water NSW, the Contractor and the Escrow Holder as that of partners, joint venturers or any other fiduciary relationship.

14.8 Entire agreement

This deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersedes:

- (a) any prior agreement (whether in writing or not) between the parties in relation to the subject matter of this deed; or
- (b) any correspondence or other documents relating to the subject matter of this deed that may have passed between the parties prior to the date of this deed and that are not expressly included in this deed.

14.9 Joint and several liability

- (a) The obligations of the Escrow Holder, if more than one person, under this deed, are joint and several. Each person constituting the Escrow Holder acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this deed) of the other as if those acts or omissions were its own and Water NSW may proceed against any or all of them.
- (b) The obligations of the Contractor, if more than one person, under this deed, are joint and several. Each person constituting the Contractor acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this deed) of the other as if those acts or omissions were its own and Water NSW may proceed against any or all of them.

14.10 Severance

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

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
- (b) the legality, validity or enforceability under the Law of any other jurisdiction of that or any other provision of this deed.

14.11 Provisions limiting or excluding liability

Any provision of this deed which seeks to limit or exclude a liability of Water NSW, the Contractor or the Escrow Holder is to be construed as doing so only to the extent permitted by Law.

14.12 Variations

This deed may only be varied by a document signed by or on behalf of Water NSW, the Contractor and the Escrow Holder.

14.13 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or under this deed by Water NSW, the Contractor or the Escrow Holder will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by Law or under this deed.
- (b) Any waiver or consent given by a party under this deed will only be effective and binding if it is given or confirmed in writing by that party.
- (c) No waiver by a party of:
 - (i) a breach of any term of this deed; or
 - (ii) any other failure by a party to comply with a requirement of this deed,

will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this deed or failure to comply with any other requirement of this deed.

14.14 Survival

Clauses 3.1(e) and 3.1(f) ("Obligations"), 4 ("Confidentiality"), 5.4 ("Grant of licence"), 8.4 ("GST inclusive prices"), 9 ("GST"), 10.3 ("Warranty"), 11.5 ("Consequences of an Escrow Holder termination event"), 11.6 ("Return of Source Code Material on termination"), 14 ("General") and 1 ("Interpretation") survive the termination (for any reason) of this deed.

14.15 Governing Law and jurisdiction

- (a) This deed shall be governed by and construed in accordance with the Laws of the State of New South Wales.
- (b) Each party hereby submits to the non-exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeals from any of those courts, for any proceedings in connection with this deed, and waives any right it might have to claim that those courts are an inconvenient forum.

Schedule 1 to Escrow Deed - Information Schedule

1. Fees and charges

Establishment Fee: (first year) [\$I J plus GST]

Annual Fee: (first year and subsequent years) (subject to increases under clause 8.2) [\$I J plus GST]

2. Source code material

- (a) the Source Code which incorporates computer programs or computer interfaces;
- (b) all documentation relating to the material referred to in (a) which a reasonably qualified programmer would require for understanding, maintaining, modifying such material; and
- (c) media on which that Source Code is stored or deposited:
[insert description of media, eg DVD]

Schedule 2 to Escrow Deed - Escrow Deposit Specification Form

1. Depositor information

[Company Name:	
[Technical Contact:	
[Email:	
[Telephone:	

2. Software Application information

[Product Names(s)/Version(s)	
Modules:	

Product Names(s)/Version(s)	
Modules:	
Product Names(s)/Version(s)	
Modules:	

3. Media information

Medium	Quantity	Label
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

4. Escrow deposit details

4.1 Compilation

(a) What hardware is required to compile the Software Application?

| _____
| _____

(b) What operating system and version is used in the compilation process?

| _____
| _____

(c) What operating system and version is used in the compilation process?

| _____
| _____

(d) What development environment (compilers/linkers/other tools) is necessary to compile the Software Application?

| _____
| _____

(e) List all third party libraries/components that are required to compile the software (brand name, version & Contractor) and indicate which (if any) are not included in the deposit?

| _____
| _____

(f) List all non third party libraries/components that are required to compile the software.

| _____
| _____

(g) Detail the steps to follow to compile the source code and produce a version of the Software Application that runs.

| _____
| _____

(h) List all of the files that are created by the compilation process and are needed to successfully run the Software Application.

| _____
| _____

4.2 Running the application

(a) What hardware is required to successfully run the Software Application (if identical to item 4.1(a) please leave blank)?

|

|

(b) What software (in addition to the operating system) is required to successfully run the Software Application?

|

4.3 Documentation

(a) Please provide an overview of the technical documentation.

|

(b) Please provide an overview of the user documentation.

|

(c) Please include a short description on the layout of the deposit.

|

(d) Please include a full directory listing of the contents of the deposit media.

|

4.4 General information

(a) What are the main functions performed by the Software Application?

|

(b) List the additional material (reports, databases, etc.) included with the deposit.

|

(c) Is a copy of the development environment (compilers & third party software) included with the deposit?

|

(d) Does your company use a formal coding convention (please provide a brief description of the convention used).

|

5. Remarks

|

|

|

6. **Signature**

Date: _____

Signature: _____

Name (please print): _____

For and on behalf of the Contractor

The Contractor warrants that the details set out above are correct and complete.]

Executed and delivered as a Deed in Sydney

Signed for and on behalf of WATERNSW (ABN 21 147 934 787):

Signature of Authorised Delegate

Signature of Witness

Print Name
(block letters)

Print Name
(block letters)

Position held

Position held

Executed as a deed in accordance with section 127 of the *Corporations Act 2001* by **[* Limited]**:

Director Signature

Director/Secretary Signature

Print Name

Print Name

Executed as a deed in accordance with section 127 of the *Corporations Act 2001* by **[* Limited]**:

Director Signature

Director/Secretary Signature

Print Name

Print Name

Schedule 4 - Form of Subcontractor Warranty

This Deed Poll is made on the date the Warrantor executes this Deed Poll.

To: **Water NSW** ABN 21 147 934 787 of Level 14, 169 Macquarie Street, Parramatta NSW 2150
(Principal)

[Add other beneficiaries as nominated by Water NSW] (Beneficiary).

By: That person described in Item 1 of the Schedule (**Warrantor**) which expression will include its successors and assigns

Recitals

- A. The Warrantor has supplied the items described in Item 2 of the Schedule (**Equipment, Goods or Services**) to the person described in Item 3 of the Schedule (**Contractor**) or the person described in Item 4 of the Schedule, a subcontractor of the Contractor (**Subcontractor**), for the works (**Works**) being carried out by the Contractor under the contract described in Item 5 of the Schedule (**Contract**) with the Principal.
- B. It is a requirement of the Contract that the Contractor procure the Warrantor to give the following warranties in favour of the Principal and the Beneficiary with respect to the Equipment, Goods or Services.

Operative

1. Quality

The Warrantor:

- (a) warrants to the Principal and the Beneficiary that the Equipment, Goods or Services will be to the quality and standard stipulated by the Contract and will be of merchantable quality and fit for the purpose for which it is required; and
- (b) gives the warranty more particularly set out in Item 6 of the Schedule with respect to the Equipment, Goods or Services.

The above warranties are in addition to and do not derogate from any warranty implied by law in respect of the Equipment, Goods or Services.

2. Replacement

The Warrantor warrants to the Principal and the Beneficiary that it will replace so much of the Equipment, Goods or Services as within the period described in Item 7 of the Schedule:

- (a) are found to be of a lower quality or standard than that referred to in clause 1; or
- (b) shows deterioration of such extent that in the opinion of the Principal or the Beneficiary the Equipment, Goods or Services ought to be made good or replaced in order to achieve fitness for the purpose for which they are required, whether on account of utility, performance, appearance or otherwise.

3. Warrantor to bear cost

The Warrantor covenants to the Principal and the Beneficiary that it will bear the cost of any work reasonably necessary to any part of the Works to enable the requirements of clause 2 to be carried out or to make good the Works afterwards.

4. Principal not liable

The Warrantor acknowledges to the Principal and the Beneficiary that nothing contained in this deed poll is intended to nor will render either the Principal or the Beneficiary in any way liable to the Warrantor in relation to any matters arising out of the Contract or otherwise.

5. This deed poll may not be revoked

This deed poll may not be revoked or otherwise modified without the prior written consent of the Principal and the Beneficiary.

6. Governing law

This deed poll is governed by the laws of the State of New South Wales.

7. Jurisdiction

The Warrantor irrevocably submits to the non-exclusive jurisdiction of the Courts of New South Wales.

8. Enforcement of this deed poll

For the avoidance of doubt this deed poll is enforceable by any of the Principal or the Beneficiary.

Schedule

- Item 1: [Name and Address of Warrantor]
- Item 2: [Equipment, Goods or Services
(Recital A)]
- Item 3: [Contractor
(Recital A)]
- Item 4: [Subcontractor
(Recital A)]
- Item 5: [Contract
(Recital A)]
- Item 6: [Detailed Warranty of Warrantor
(Clause 1(b))]
- Item 7: [Period of Years
(Clause 2)]
 [Insert period] years from the expiry of the last "Defects Liability Period" as defined in the General Conditions (including any extension under clause 9.12 of the General Conditions).

Executed as a deed poll.

Executed by [insert name of Warrantor] (ABN [insert ABN]) [] []
 in accordance with s 127 of the Corporations Act 2001
 (Cth):

 Signature of Director [] [] Signature of Secretary/other Director

 Name of Director in full [] [] Name of Secretary/other Director in full

 Date [] [] Date

Schedule 5 - Form of Declaration

Declaration											
<p>I, [.....] [.....]</p> <p>of [.....] [.....]</p> <p>do solemnly and sincerely declare that:</p> <p>1. I am the representative of: [.....] [.....] ("the Contractor") in the Office Bearer capacity of: [.....] [.....]</p> <p>2. The Contractor has a contract with the [.....] [.....] ("the Contract")</p> <p>3. I personally know the facts which I have set out in this declaration.</p> <p>4. All employees who have at any time been engaged by the Contractor for work done under the Contract:</p> <p style="margin-left: 20px;">a) have been paid all remuneration and benefits to the date of this declaration payable to them by the Contractor in respect of their employment on work under the Contract, and</p> <p style="margin-left: 20px;">b) have otherwise had accrued to their account all benefits to which they are entitled from the Contractor as at the date of this declaration in respect of their employment on work under the Contract pursuant to any award, enterprise agreement, act or regulation,</p> <p style="margin-left: 20px;">with the exception of the employees and respective amounts unpaid or not accrued for each employee listed below:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; width: 70%;">Employee:</th> <th style="text-align: left;">Amount unpaid or not accrued:</th> </tr> </thead> <tbody> <tr> <td>[.....]</td> <td>[.....]</td> </tr> <tr> <td>[.....]</td> <td>[.....]</td> </tr> <tr> <td>[.....]</td> <td>[.....]</td> </tr> <tr> <td>[.....]</td> <td>[.....]</td> </tr> </tbody> </table> <p>5. [Note: This clause 5 only applies where the Building and Construction Industry Security of Payment Act 1999 (NSW) applies to the Contract.] Attached to and forming part of this declaration, as Annexure A, is a supporting statement for the purposes of section 13(7) of the Building and Construction Industry Security of Payment Act 1999 (NSW).</p> <p style="margin-left: 20px;">Where the Contractor holds any retention money from a Subcontractor, the Contractor has complied with all requirements under the Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015 (NSW), with the exception of the items listed below:</p> <p>[.....] [.....] [.....]</p> <p>6. In all cases where a subcontractor or supplier to the Contractor has provided services and/or materials in respect of the Contract and has submitted a claim to the Contractor for these services or materials which as at the date of this declaration would have been due and payable but which the Contractor disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Contractor prior to the date of this declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the Contractor to the subcontractor or supplier as at the date of this declaration except for the amounts listed in 5 above.</p>	Employee:	Amount unpaid or not accrued:	[.....]	[.....]	[.....]	[.....]	[.....]	[.....]	[.....]	[.....]	
Employee:	Amount unpaid or not accrued:										
[.....]	[.....]										
[.....]	[.....]										
[.....]	[.....]										
[.....]	[.....]										

7. The provisions of the Contract relating to the payment of employees, subcontractors and suppliers of the Contractor have been complied with by the Contractor.

8. The Contractor has been informed by each subcontractor to the Contractor (except for subcontracts not exceeding \$25,000 at their commencement) by declaration in equivalent terms to this declaration (made no earlier than the date 14 days before the date of this declaration):

- (a) that their subcontracts with their subcontractors and suppliers comply with the requirements of the Contract relating to payment of employees and subcontractors, and
- (b) that all their employees and subcontractors, as at the date of the making of such a declaration:
 - i) have been paid all remuneration and benefits due and payable to them by; or
 - ii) had accrued to their account all benefits to which they are entitled from; the subcontractor of the Contractor or from any other subcontractor (except for subcontracts not exceeding \$25,000 at their commencement) in respect of any work under the Contract, and
- (c) of details of any amounts due and payable or benefits due to be received or accrued described in 8(b) above which have not been paid, received or accrued,

except for the following subcontractors to the Contractor who have failed to provide such a declaration:

Subcontractor:	Due amount unpaid:
.....
.....
.....
.....
.....

insert names and addresses of the Contractor's subcontractors who have not submitted a declaration, and unpaid amounts due or otherwise due to each of them by the Contractor in respect of this claim

9. Where a subcontractor to the Contractor has provided a declaration as in 8 above, and it includes unpaid amounts or benefits either not received or not accrued, details of the subcontractor, details of the affected employees, suppliers and subcontractors of the subcontractor, and the respective amounts or benefits either unpaid or not accrued are as follows:

Employee, subcontractor or supplier:	Amount unpaid or not accrued:
.....
.....
.....
.....
.....

insert names of the subcontractors, the name and addresses of the unpaid employees, subcontractors and suppliers and amounts listed as unpaid or not accrued to them.

10. In relation to the declaration provided by each subcontractor to the Contractor, I am not aware of anything to the contrary of what is contained therein, and on the basis of the contents of those declarations, I believe that information to be true.

11. I personally know the truth of the matters which are contained in this declaration.

12. I am not aware of anything which would contradict the statements made in the declarations or written statements provided to the Contractor by its subcontractors, as referred to in this declaration.

I, [full name], being the Contractor, a director of the Contractor or a person authorised by the Contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this declaration.

Signature: [.....] Date: [.....]
 Full name: [.....] Position/Title: [.....]

Annexure A

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms "principal", "head contractor", "subcontractor", and "construction contract" have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

Head contractor: *[business name of head contractor]*

ABN: *[ABN]*

* 1. has entered into a contract with: *[business name of subcontractor]*

ABN: *[ABN]*

Contract number/identifier: *[contract number/identifier]*

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* ***[Delete whichever of the above does not apply]***

This statement applies for work between *[start date]* and *[end date]* inclusive (the construction work concerned), subject of the payment claim dated *[date]*.

I, *[full name]*, being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: *[.....]* Date: *[.....]*

Full name: *[.....]* Position/Title: *[.....]*

Penalties

The Building and Construction Security of Payment Act 1999 provides that:

Section 13(7): A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 1,000 penalty units in the case of a corporation or 200 penalty units in the case of an individual.

And:

Section 13(8): A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 1,000 penalty units in the case of a corporation or 200 penalty units or 3 months imprisonment (or both) in the case of an individual.

Attachment

Schedule of subcontractors paid all amounts due and payable				
Subcontractor	ABN	Contract number/identifier	Date of works (period)	Date of payment claim (head contractor claim)

Schedule of subcontractors for which an amount is in dispute and has not been paid				
Subcontractor	ABN	Contract number/identifier	Date of works (period)	Date of payment claim (head contractor claim)

Schedule 6 - Terms of Expert Appointment

THIS AGREEMENT is made on the date the last party to execute this agreement executes this agreement
BETWEEN [insert name, company number and address] ("Principal")
AND [insert name, company number and address] ("Contractor")
AND [insert name and address] ("Expert")

Recitals

- A. The Principal and the Contractor (together the **Parties** and each a **Party**) are parties to a contract (the **Contract**) for the provision of certain goods, services or works for the [] in [].
- B. By written notice dated [to be inserted], the [insert Principal or Contractor as applicable] has required that the matter described in Schedule 1, being a matter that the Contract requires or permits to be referred to an Expert for determination, be determined by an Expert appointed under clause 15 of the Contract (the **Matter**).
- C. Pursuant to clause 15 of the Contract, the Expert has been appointed to determine the Matter in accordance with the process set out in this Agreement.

Operative part

1. Appointment of Expert

- (a) The Parties appoint the Expert to determine the Matter in the manner and within the times set out in this Agreement and the Expert accepts the appointment on the basis set out in this Agreement.
- (b) The Parties agree that:
- (i) the Expert will act as an expert and not as an arbitrator;
 - (ii) neither the determination of the Matter, nor the process required by this Agreement is an arbitration and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;
 - (iii) the rules of evidence do not apply to the determination;
 - (iv) the Expert must conduct the determination of the Matter in accordance with the Rules for Expert Determination Process set out in Schedule 2; and
 - (v) in making the determination, the Expert may determine that a Party pay the other Party's costs of the expert determination.
- (c) If, at any time during the determination, the Expert becomes aware of circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this Agreement.

2. Confidentiality

All proceedings and submissions relating to the determination (including the fact that any step in the determination is occurring), and all documents prepared for the purposes of the determination (including the Expert's determination), must be kept confidential between the Parties and the Expert. No such proceedings, submissions or documents, nor any other information relating to or arising out of the determination, may be divulged to any other person, except with the prior written consent of both Parties or as may be required by law or to the extent necessary to give effect to or enforce the Expert's determination.

3. Costs and fees

- (a) As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements set out in Schedule 3. The Parties agree to comply with any direction from the Expert as to the provision of security deposits in respect of his or her fees and disbursements.
- (b) Subject to any direction as to costs given by the Expert in the Expert's determination, the Parties agree as between themselves that:
- (i) they will each pay one half of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements set out in Schedule 3; and
 - (ii) they will each bear their own costs of and incidental to the preparation of this Agreement and their participation in the determination.

4. Exclusion of liability and indemnity

Except in the case of fraud, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this Agreement. The Parties jointly and severally indemnify the Expert against all claims arising out of or in any way referable to any act or omission by the Expert (except fraud) in the performance or purported performance by the Expert of the terms of this Agreement.

5. Co-operation of the Parties

Each Party agrees to take part in the determination in good faith and to comply with the reasonable requests and directions of the Expert in relation to the conduct of the determination.

6. Governing law

This Agreement is governed by and is to be construed in accordance with the laws in force in the place stated in Schedule 1.

7. Jurisdiction

- (a) The Parties and the Expert irrevocably submit to the non-exclusive jurisdiction of the courts in the place stated in Schedule 1.

- (b) The Parties and the Expert irrevocably waive any objection they may now or in the future have to the venue of any proceedings, and any claim they may now or in the future have that any proceeding has been brought in an inconvenient forum, where that venue falls within clause 7(a).

SCHEDULE 1

1. **The Matter**
[[to be inserted when it comes time for Expert determination]]
2. **Governing law - the place**
[[insert place - it should be the same as that nominated for the purposes of clause 24.2 of the Contract.]]
3. **Jurisdiction - the place**
[[insert place - it should be the same as that nominated for the purposes of clause 24.3 of the Contract.]]
4. **Place for conferences with Expert (clause 3.1 of Schedule 2)**
[[insert place - it should be the same place as that nominated for meetings and hearings the purposes of clause 15.13 of the Contract.]]

SCHEDULE 2

Rules for Expert Determination Process

1. Commencement

Except as provided in clause 4.3 of these Rules, the Expert determination process begins when the Expert accepts an appointment to determine the Matter in accordance with these Rules and the Code of Conduct appended to these Rules.

2. Written submissions

2.1 No later than 7 days after the date this process begins, Party A (ie the Party who gave notice under clause 15.1 of the Contract) must, in addition to any particulars provided by Party A under clause 15.1 of the Contract, give the other Party and the Expert a written statement of the Matter referred for Expert determination, any agreed statement of facts and a written submission on the Matter in support of Party A's contentions.

2.2 Within 7 days after the statement in clause 2.1 is served, the other Party must give Party A and the Expert a written response to Party A's submissions.

2.3 If the Expert considers it appropriate, Party A may reply in writing to the other Party's response in clause 2.2 within the time allowed by the Expert.

2.4 If the Expert decides further information or documentation is required for the determination of the Matter, the Expert may direct one or more Parties to provide such further submissions, information or documents as the Expert may require.

3. Conference

3.1 The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held in the place nominated in Schedule 1.

3.2 At least 14 days before the conference, the Expert must inform the Parties of the date, venue and agenda for the conference.

3.3 The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which that Party had been notified under clause 3.2, the Expert and the other Party may nevertheless proceed with the conference and the absence of that Party will not terminate or discontinue the Expert determination process.

3.4 The Parties:

- a. may be accompanied at a conference by legal or other advisers; and
- b. will be bound by any procedural directions as may be given by the Expert in relation to the conference both before and during the course of the conference.

3.5 The conference must be held in private.

3.6 If required by any Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties.

4. General

4.1 In making a determination or calling or holding a conference, the Expert must proceed in accordance with the Contract.

4.2 All proceedings and submissions relating to the Expert determination process must be kept confidential except:

- a. with the prior consent of the Parties;
- b. as may be required by law; or
- c. as may be required in order to enforce the determination of the Expert.

4.3 The Expert must:

- a. inform the Parties of:
 - i. any relationship or interest with the Parties or their respective officers, employees, contractors, consultants or agents;
 - ii. any interest the Expert has in the matters in dispute; and
 - iii. any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, immediately upon becoming aware of any such circumstances; and
- b. upon making any disclosure under this clause 4.3, unless and until the Parties agree otherwise or it is otherwise determined under clause 15 of the Contract, terminate the proceedings.

5. The determination

5.1 As soon as possible after receipt of the submissions or after any conference and, in any event not later than 20 Business Days after the Expert's acceptance of appointment, the Expert must:

- a. determine the Matter between the Parties; and
- b. notify the Parties of that determination.

5.2 The determination of the Expert must meet the requirements of the Contract.

5.3 To the extent permitted by law, the Expert's determination will be final and binding on the Parties unless a party gives a notice of appeal to the other party in accordance with clause 15.12(b) of the Contract.

6. Costs

Security for costs must be deposited by both Parties at the commencement of the Expert determination process in accordance with any direction of the Expert.

7. Modification

These rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

APPENDIX 1 TO RULES FOR EXPERT DETERMINATION PROCESS
Code of Conduct for an Expert

1. The function of the Expert is to make a determination of the Matter in accordance with the Contract and the Expert Determination Agreement, including the Rules and this Code of Conduct.
2. The Expert must receive the written submissions and responses of the Parties in accordance with the procedures specified in the Rules and may require further information or documentation from the Parties which is reasonably necessary to determine the Matter.
3. The Expert must decide whether a conference is necessary to receive further information. The Expert must inform the Parties of the subject matter of any conference and may hear representations only on those matters during any such conference.
4. The Expert must disclose to both Parties all information and documents received.
5. If a Party fails to make a written submission, the Expert may continue with the process.
6. Subject to clause 3.3 of the Rules in relation to conferences, meetings and discussions with the Expert must only take place in the presence of both Parties.

SCHEDULE 3
The Expert's Fees and Disbursements

[to be inserted when it comes time for expert determination]

Schedule 7 - Deed of Novation

Dated the Effective Date

Parties [] (Retiring Party)
 [] (Continuing Party)
 [] (Substitute Party)

Recitals

- A. The Retiring Party and the Continuing Party are parties to the Contract.
- B. The Retiring Party and the Substitute Party have asked the Continuing Party to agree to the novation of the Contract on the terms and conditions of this deed.
- C. The Continuing Party has agreed to the novation of the Contract on the terms and conditions of this deed.

This deed provides

1. Definitions and interpretation

1.1 Definitions

Defined terms in the Contract have the same meanings in this deed, unless the contrary intention appears, and in this deed:

Contract means the agreement between the Retiring Party and the Continuing Party entitled [insert description], and where the agreement is a Standing Offer Agreement, includes all the Contracts formed in accordance with the Standing Offer Agreement (except for any Contracts that are identified in the Schedule as being excluded).

Contract Guarantees means the guarantees (if any) issued or required to be issued under the Contract in respect of the performance by a party to the Contract, by a bank or insurer and, where required by the Contract, by a Related Entity of that party.

Effective Date means the date on which the last party to execute this deed executes this deed.

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

Liability means all liabilities, losses, Claims, damages, outgoings, costs and expenses of whatever description.

Related Entity means:

- (a) in respect of [insert party which is Water NSW] any 'water supply authority' (as defined in the Water NSW Act 2014 (NSW)), the State of NSW, and any entity controlled by any of them; and
- (b) in respect of the other parties, has the meaning ascribed to that term in section 9 of the Corporations Act 2001 (Cth).

1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

- (b) an obligation or a liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;
- (c) "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;

- (e) a reference to a document (including this deed) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) "includes" in any form is not a word of limitation; and
- (k) a reference to "\$" or "dollar" is to Australian currency.

2. Novation

2.1 Novation

- (a) The parties novate the Contract so that the Substitute Party and the Continuing Party are parties to a new agreement on the same terms as the Contract.
- (b) Any reference in the Contract to the Retiring Party shall be read as a reference to the Substitute Party.

2.2 Assumptions of rights and obligations

- (a) The Substitute Party:
- (i) will be bound by and shall comply with the terms of the Contract as amended by this deed, and shall enjoy the rights and benefits conferred on the Retiring Party under the terms of the Contract; and
- (ii) will assume the obligations and Liability of the Retiring Party under the terms of the Contract, in all respects as if the Substitute Party had originally been named in the Contract as a party instead of the Retiring Party.
- (b) The Continuing Party will comply with the terms of the Contract on the basis that the Substitute Party has replaced the Retiring Party under the Contract in accordance with this deed.

2.3 Release by Continuing Party

- (a) The Continuing Party releases the Retiring Party from:
- (i) any obligation or Liability under or in respect of the Contract; and
 - (ii) any action, Claim and demand it has against the Retiring Party under or in respect of the Contract.
- (b) This release does not affect any rights the Continuing Party may have against the Substitute Party as a result of the assumption by the Substitute Party under the terms of this deed of the obligations and Liability of the Retiring Party under the terms of the Contract.

2.4 Release by Retiring Party

The Retiring Party releases the Continuing Party from:

- (a) any obligation or Liability under or in respect of the Contract; and
- (b) any action, Claim and demand it has, or but for this clause would have had against the Continuing Party under or in respect of the Contract,
- except that nothing in this clause affects the obligations of the Continuing Party to the Substitute Party under the Contract.

3. Insurance

As from the Effective Date:

- (a) the Substitute Party must replace any insurances effected and maintained by the Retiring Party under the terms of the Contract;
- (b) the Continuing Party must take the necessary steps to ensure that, for all insurances required to be effected by the Continuing Party under the terms of the Contract, the Substitute Party is named in place of the Retiring Party (or, if applicable, the benefit of cover is extended to the Substitute Party) as required by the Contract; and
- (c) the Substitute Party must take necessary steps to ensure that, for all insurances required to be effected by the Substitute Party under the terms of the Contract, the Continuing Party is named (or, if applicable, the benefit of cover is extended to the Continuing Party) as required by the Contract.

4. Replacement of Guarantees

The Continuing Party and the Substitute Party must replace or procure the replacement of the Contract Guarantees with guarantees on similar terms in favour of:

- (a) in the case of the Continuing Party, the Substitute Party; and
- (b) in the case of the Substitute Party, the Continuing Party.

5. Overriding effect

The parties agree that the execution and operation of this deed will for all purposes be regarded as due and complete compliance with the terms of the Contract relating to any requirement for consent to assignment of the Contract so far as any such provisions would apply with respect to the novation of the Contract to the Substitute Party.

6. Representations and warranties

6.1 Authority

Each party represents and warrants to each other party that it has full power and authority to enter into and perform its obligations under this deed.

6.2 Authorisations

Each party represents and warrants to each other party that it has taken all necessary action to authorise the execution, delivery and performance of this deed in accordance with its terms.

6.3 Binding obligations

Each party represents and warrants to each other party that this deed constitutes its legal, valid and binding obligations and is enforceable in accordance with its terms.

7. Duties, Costs and Expenses

7.1 Stamp Duty

The Substitute Party must pay all stamp duty, duties or other taxes of a similar nature (including but not limited to any fines, penalties and interest) in connection with this deed or any transaction contemplated by this deed (except to the extent the terms of the Contract provide otherwise).

7.2 Costs

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

7.3 GST

The parties agree that:

- (a) with any payment of amounts payable under or in connection with this deed including without limitation, by way of indemnity, reimbursement or otherwise, the party paying the amount must also pay any GST in respect of the taxable supply to which the amount relates;
- (b) the party receiving the payment will provide a tax invoice; and
- (c) the payment of any amount referred to in paragraph (a) which is a reimbursement or indemnification of a cost, expense, loss or liability will exclude any part of the amount for which the other party can claim an input tax credit.

8. General

8.1 Governing law

This deed is governed by and must be construed according to the laws applying in New South Wales.

8.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 8.2(a).

8.3 Amendments

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

8.4 Waiver

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

8.5 Counterparts

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each

counterpart constitutes the deed of each party who has executed and delivered that counterpart.

8.6 Severance

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

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.

8.7 Further acts and documents

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

8.8 Assignment

A party cannot assign, novate or otherwise transfer any of its rights or obligations under this deed without the prior consent of each other party.

Executed as a deed.

[[insert appropriate execution blocks for each party]]

|

|

Schedule to Novation Deed

Contracts excluded from definition of Contract: *[[list Contracts, if any]]*

[
]

Schedule 8 – KPIs

There may be additional KPIs applicable to the Contractor's Activities. See Annexure D of the Standing Offer Agreement (if any) or Schedule 3 of the General Conditions.

Key Performance Indicator (KPIs)		Measure	Target (per Contract)
Safety and environment			
1.	Minor incidents	Number of minor safety/environmental incidents and near misses	0
2.	Major incidents	Number of major safety/environmental incidents, including Lost Time Injuries (LTIs), Medical Treatment Injuries (MTIs) and safe working incidents	0
3.	Incident reporting	Percentage of safety/environmental incidents reported on within the timeframe and in the format specified by Water NSW	100%
4.	Corrective actions	Percentage of corrective actions closed out within the timeframe specified by Water NSW following inspection/audit/investigation by Water NSW	100%
Delivery			
5.	Delivery In Full On Time (DIFOT)	Percentage of Contractor's Activities commenced and completed in accordance with contractual timeframes	100%
6.	Rectification of defects or errors	Percentage of defects or errors in Contractor's Activities rectified or replaced within timeframe specified by Water NSW	≥ 90%
7.	Management of subcontractors	Number of complaints received by Water NSW in relation to non-payment of subcontractors	≤ 1
Quality			
8.	Quality of workmanship	Number of instances of poor quality workmanship, including any damage to existing infrastructure and property	0
9.	Skills and experience of Personnel	Number of incidents of Contractor's Personnel who are not competent and/or appropriately accredited, qualified, licensed and/or trained	0
10.	Quality assurance	Number of instances of quality assurance documentation being out of date or incorrect	0
11.	Accuracy of invoices and other claims	Percentage of invoices and other claims under the Contract that have no errors and contain all required information	≥ 90%
Value			
12.	Legitimacy of Contractor claims	Percentage of claims for Variations, extensions of time, delays costs and other adjustments to the Contract Price accepted by Water NSW or upheld following	≥ 90%

Key Performance Indicator (KPIs)		Measure	Target (per Contract)
		dispute resolution (claims the subject of unresolved dispute resolution not be to counted)	
13.	Cost saving initiatives	Number of tangible cost saving initiatives identified	≥ 1
Innovation and Continuous Improvement			
14.	Performance Reports	Percentage of monthly KPI Performance Reports provided to Water NSW by the required date and which contain accurate and complete information	≥ 80%
Codes and Procedures			
15.	Compliance with Code of Conduct	Number of non-compliances with the Code of Conduct	0
16.	Compliance with Policies and Procedures	Number of non-compliances with the Policies and Procedures	0
17.	Compliance with any statement of business ethics of the Principal or any document outlining the Principal's ethical standards and requirements (Statement of Business Ethics)	Number of non-compliances with the Statement of Business Ethics	0

Schedule 9 - Subcontractor's Statement

SUBCONTRACTOR'S STATEMENT REGARDING WORKERS COMPENSATION, PAYROLL TAX AND REMUNERATION (Note 1 - see back of form)

For the purposes of this Statement a "subcontractor" is a person (or other legal entity) that has entered into a contract with a "principal contractor" to carry out work.

This Statement must be signed by a "subcontractor" (or by a person who is authorised, or held out as being authorised, to sign the statement by the subcontractor) referred to in any of s175B *Workers Compensation Act 1987* (NSW), Schedule 2 Part 5 *Payroll Tax Act 2007* (NSW), and s127 *Industrial Relations Act 1996* (NSW) where the "subcontractor" has employed or engaged workers or subcontractors during the period of the contract to which the form applies under the relevant Act(s). The signed Statement is to be submitted to the relevant principal contractor.

SUBCONTRACTOR'S STATEMENT (Refer to the back of this form for Notes, period of Statement retention, and Offences under various Acts).

Subcontractor: [.....] ABN: [.....]

(Business name)

of [.....]

(Address of Subcontractor)

has entered into a contract with [.....] ABN: [.....]

(Business name of principal contractor)

(Note 2)

Contract

number/identifier

[.....]

(Note 3)

This Statement applies for work between: [...../...../.....] and [...../...../.....] inclusive,

(Note 4)

subject of the payment claim dated [...../...../.....]

(Note 5)

I, [.....] a Director or a person authorised by the Subcontractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters which are contained in this Subcontractor's Statement and declare the following to the best of my knowledge and belief:

(a) The abovementioned Subcontractor has either employed or engaged workers or subcontractors during the above period of this contract. Tick if true and comply with (b) to (g) below, as applicable. If it is not the case that workers or subcontractors are involved or you are an exempt employer for workers compensation purposes tick and only complete (f) and (g) below. You must tick one box. **(Note 6)**

(b) All workers compensation insurance premiums payable by the Subcontractor in respect of the work done under the contract have been paid. The Certificate of Currency for that insurance is attached and is dated [...../...../.....] **(Note 7)**

(c) All remuneration payable to relevant employees for work under the contract for the above period has been paid. **(Note 8)**

(d) Where the Subcontractor is required to be registered as an employer under the *Payroll Tax Act 2007* (NSW), the Subcontractor has paid all payroll tax due in respect of employees who performed work under the contract, as required at the date of this Subcontractor's Statement. **(Note 9)**

(e) Where the Subcontractor is also a principal contractor in connection with the work, the Subcontractor has in its capacity of principal contractor been given a written Subcontractor's Statement by its subcontractor(s) in connection with that work for the period stated above. **(Note 10)**

(f) Signature [.....] Full name [.....]

(g) Position/Title [.....] Date [...../...../.....]

NOTE: Where required above, this Statement must be accompanied by the relevant Certificate of Currency to comply with section 175B of the *Workers Compensation Act 1987* (NSW).

Notes

1. This form is prepared for the purpose of section 175B of the Workers Compensation Act 1987 (NSW), Schedule 2 Part 5 Payroll Tax Act 2007 (NSW) and section 127 of the Industrial Relation Act 1996 (NSW). If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, payroll tax and remuneration payable by the subcontractor.

A principal contractor can be generally defined to include any person who has entered into a contract for the carrying out of work by another person (or other legal entity called the **subcontractor**) and where employees of the subcontractor are engaged in carrying out the work which is in connection with the principal contractor's business.

2. For the purpose of this Subcontractor's Statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity) referred to as the subcontractor, and employees / workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal contractor.
3. Provide the unique contract number, title, or other information that identifies the contract.

4. In order to meet the requirements of section 127 of the Industrial Relations Act 1996 (NSW), a statement in relation to remuneration must state the period to which the statement relates. For sequential Statements ensure that the dates provide continuous coverage.

Section 127(6) of the Industrial Relations Act 1996 (NSW) defines remuneration 'as remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.'

Section 127(11) of the Industrial Relations Act 1996 (NSW) states '*to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.*'

5. Provide the date of the most recent payment claim.
6. For Workers Compensation purposes an exempt employer is an employer who pays less than \$7500 annually, who does not employ an apprentice or trainee and is not a member of a group.
7. In completing the Subcontractor's Statement, a subcontractor declares that workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid.
8. In completing the Subcontractor's Statement, a subcontractor declares that all remuneration payable to relevant employees for work under the contract has been paid.
9. In completing the Subcontractor's Statement, a subcontractor declares that all payroll tax payable relating to the work undertaken has been paid.
10. It is important to note that a business could be both a subcontractor and a principal contractor, if a business 'in turn' engages subcontractors to carry out the work. If your business engages a subcontractor you are to also obtain Subcontractor's Statements from your subcontractors.

Statement Retention

The principal contractor receiving a Subcontractor's Statement must keep a copy of the Statement for the periods stated in the respective legislation. This is currently up to seven years.

Offences in respect of a false Statement

In terms of s127(8) of the *Industrial Relations Act 1996*, a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:

- (a) the person is the subcontractor;
- (b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor; or
- (c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

In terms of s175B of the *Workers Compensation Act 1987* and clause 18 of Schedule 2 of the *Payroll Tax Act 2007* a person who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Further Information

For more information, visit the WorkCover website www.workcover.nsw.gov.au, Office of State Revenue website www.osr.nsw.gov.au, or Office of Industrial Relations, Department of Commerce website www.commerce.nsw.gov.au. Copies of the *Workers Compensation Act 1987*, the *Payroll Tax Act 2007* and the *Industrial Relations Act 1996* can be found at www.legislation.nsw.gov.au.

Schedule 10 - Confidentiality Deed

Given by: **[insert full legal name of Recipient (insert ABN)]** of [insert registered address of Recipient] (**Recipient**) for and on behalf of itself and the Recipient Representatives (as defined in this Deed)

In favour of: **Water NSW ABN 21 147 934 787** of Level 14, 169 Macquarie Street, Parramatta NSW 2150 (**Water NSW**), the Water NSW Representatives and Water NSW' Related Entities (as defined in this Deed)

Made: at Sydney on the date the Recipient executes this Deed (**date of this Deed**).

Background

A Water NSW and the Recipient have entered into a contract entitled **[insert] (Contract)** dated on or about the date of this Deed pursuant to which the Recipient will carry out certain activities (**Contractor's Activities**).

B It is a condition of the Contract that the Recipient enter into this Deed.

C Water NSW has agreed to disclose certain Confidential Information to the Recipient for the Permitted Use on the terms and conditions of this Deed for the purposes of the Recipient providing services to Water NSW under the Contract between the parties.

1. Definitions and Interpretation

1.1 Definitions

In this Deed (including the Background), unless the context otherwise requires:

Claim means any action, suit, claim, demand, cause of action or notice, of any nature whatsoever, at Law or in equity, including:

- (a) in contract, whether for breach or for an entitlement under a contract;
- (b) in tort, for negligence or otherwise, including negligent misrepresentation;
- (c) for contribution or indemnity at common law, equity or statute;
- (d) for restitution, unjust enrichment or quantum meruit;
- (e) under or for breach of statute; or
- (f) in any other way,

whether for a Loss or a Remedy.

Confidential Information means:

- (a) information disclosed by or on behalf of Water NSW or the Water NSW Representatives to the Recipient or the Recipient Representatives (or of which the Recipient or the Recipient Representatives become aware) arising out of or in connection with the Permitted Use;
- (b) information acquired by the Recipient or the Recipient Representatives in the course of discussions prior to the date of this Deed in relation to the Permitted Use;
- (c) any Document or other correspondence provided by Water NSW to the Recipient or the Recipient Representatives, that:
 - (i) is by its nature confidential; or
 - (ii) is designated as confidential by Water NSW or the Water NSW Representatives from time to time; or
- (d) any other information which by its nature should reasonably be considered to be the confidential information of Water NSW or the Water NSW Representatives, or which the Recipient or the Recipient Representatives knows is confidential,

whether or not marked as "Commercial in Confidence", "Proprietary" or "Confidential", and which may be provided in writing, electronically, verbally or otherwise, but does not include any information which:

- (e) the Recipient can demonstrate to be in the public domain or was known to the Recipient at the time of disclosure other than through a breach of this Deed;
- (f) is in the lawful possession of the Recipient without restriction in relation to disclosure before the date of receipt of the information from Water NSW or the Water NSW Representatives;
- (g) was independently developed by the Recipient or the Recipient Representatives; or
- (h) is required by Law to be disclosed.

Deed means this Deed Poll.

Information Documents means any information, opinion, data or document in whatever form (including, electronic, verbal, written or visual):

- (a) issued or made available by, or on behalf of, Water NSW or the Water NSW Representatives to the Recipient or the Recipient Representatives in connection with this Deed or the Permitted Use; and
- (b) includes any information, opinion, data or document referred to, or incorporated by reference, in any such Information Documents,

whether or not such Information Documents were issued or made available to the Recipient before or after the date of this Deed.

Information Security Requirements means the following principles, policies, codes, standards, Laws and directions relating to the storage, management, control and handling of information that is security classified and/or subject to a sensitive information label or other protective marking (such as dissemination limiting markers) or a restriction on use:

- (a) the most recent version of:
 - (i) the Water NSW policy, "IT Information Security Policy";
 - (ii) the NSW Government Information Classification, Labelling and Handling Guidelines to the extent applicable;
 - (iii) the NSW Government Cyber Security Policy; and
 - (iv) the Australian Government Information Security Manual;
- (b) Premiers Memorandum M2006-08, Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions;

- (c) legislation, including the State Records Act 1998 (NSW) and the Privacy Law; and
- (d) any other principles, policies, codes, standards, Laws and directions that are notified to the Recipient by Water NSW to the Recipient from time to time, with respect to the same subject matter as the foregoing,

as replaced, amended or updated from time to time.

Loss means any money, cost (including reasonable legal costs and expenses), expense, damage, interest, penalty, fine, delay, disruption, costs and losses associated with a Remedy or detriment of any kind whatsoever.

Law means the common law and any legislation of the Parliament of the Commonwealth of Australia, of any State or Territory of the Commonwealth of Australia or of any other jurisdiction in force at any time and any rule, regulation, ordinance, by-law, statutory instrument, order or notice at any time made under that legislation and, in each case, any consolidations, amendments, re-enactments and replacement.

Permitted Use means use for the purposes of the Recipient carrying out the Contractor's Activities under the Contract, and for no other purpose.

Personal Information has the same meaning as in the Privacy and Personal Information Protection Act 1998 (NSW).

Principal Data means all data and information relating to the Principal or its operations, facilities, clients, customers, Personnel, assets and programs (including Personal Information) in whatever form that information may exist, and whether entered into, stored in, generated by or processed through software or equipment, or produced as part of the performance of the Contractor's Activities under the Contract.

Privacy Laws means the Privacy and Personal Information Protection Act 1998 (NSW), the Privacy Act 1988 (Cth), any applicable principles, codes of conduct or directions issued under those Acts and all other applicable Laws relating to privacy or personal information.

Related Entity in relation to:

- (a) the Recipient, has the meaning given to 'related body corporate' in section 9 of the Corporations Act 2001 (Cth); and
- (b) Water NSW, means any "water supply authority" (as defined in the Water NSW Act 2014 (NSW)), the State of New South Wales, and any entity controlled by any of them.

Remedy means any entitlement, damages, interest, compensation, contribution, indemnity, injunction, specific performance, extension of time or other legal or equitable or statutory remedy of any kind whatsoever.

Representatives means:

- (a) in respect of the Recipient, any Related Entity of the Recipient and any directors, officers, employees, consultants, agents and contractors of Recipient and any Related Entity of the Recipient (the "Recipient Representatives"); and
- (b) in respect of Water NSW, any Related Entity of Water NSW and any directors, officers, employees, consultants, agents and contractors of Water NSW and any Related Entity of Water NSW (other than the Recipient) (the "Water NSW Representatives").

1.2 Interpretation

In this Deed:

- (a) headings are for convenience only and do not affect interpretation;
- (b) an obligation or liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;

- (c) a reference to a "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
- (e) a reference to a document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute or statutory provision includes a statutory modification or re-enactment of it or a statutory provision substituted for it, and each ordinance, by-law, regulation, rule and statutory instrument (however described) issued under it;
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (h) a reference to a party or clause is a reference to a party or clause to or of this Deed;
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning; and
- (j) "includes" in any form is not a word of limitation.

2. Representations and warranties regarding Information Documents

The Recipient acknowledges and agrees, for itself and the Recipient Representatives, that:

- (a) the Information Documents are provided by Water NSW for the information only of the Recipient or as otherwise required for the Permitted Use;
- (b) Water NSW does not make any representation or warranty (express or implied) in respect of the Information Documents including the accuracy, adequacy or completeness of any reports, data, test results, samples, investigations, opinions, recommendations or findings contained in the Information Documents; and
- (c) Water NSW has provided, or will provide, the Information Documents to the Recipient in reliance upon the acknowledgements and agreements contained in this clause 2.

3. Recipient's obligations

3.1 Confidentiality

The Recipient acknowledges and agrees, for itself and the Recipient's Representatives, that it will:

- (a) keep the Confidential Information confidential, safe, secure and protected against unauthorised use and access and, subject to clause 3.5, not disclose the Confidential Information to any person;
- (b) not use or permit the use of the Confidential Information for any purpose other than for the Permitted Use;
- (c) ensure Confidential Information is not copied or reproduced without the Water NSW' express written consent;
- (d) not introduce any Confidential Information into any computer system or other device operated, controlled or which may be accessed to any extent by a person other than the Recipient or the Recipient's Representatives to whom the Confidential Information has been disclosed in accordance with this Deed;
- (e) ensure that any Representative of the Recipient to whom the Recipient discloses Confidential Information:

- (i) is aware of the confidentiality requirements of this Deed; and
 - (ii) is advised that he or she is strictly forbidden to disclose the Confidential Information to any other person or use the Confidential Information for any purpose other than as provided for in this Deed;
- (f) not issue any information, publication, document or article or make any statement to or advertise in any media about any matters relating to the Permitted Use or this Deed, unless otherwise approved in writing by Water NSW to do so; and
- (g) not attempt to access any Confidential Information other than the Confidential Information that they need to know and access for the purposes of the Permitted Use.

3.2 Comply with Privacy Laws

In relation to any Personal Information provided by Water NSW to the Recipient under or in connection with this Deed or its subject-matter, the Recipient warrants that it will comply with all applicable Privacy Laws including, if applicable, obtaining the consent of each individual to whom the Personal Information relates for the collection, use and disclosure of that Personal Information.

3.3 Not cause breach by Water NSW

Where the Recipient is required to access, collect or disclose Personal Information on behalf of Water NSW, then the Recipient must comply with the Privacy and Personal Information Protection Act 1998 (NSW) as if it were Water NSW accessing, collecting or disclosing the Personal Information.

3.4 Security measures

The Recipient must ensure that any Confidential Information in its or the Recipient's Representatives' possession, custody or control is kept secure at all times, including by:

- (a) where the Recipient has access to Confidential Information by password or other secure means, the Recipient must not disclose that password or means of access to any other person unless it has been authorised in writing to do so by Water NSW; and
- (b) where applicable, complying with the Information Security Requirements.

3.5 When Recipient may disclose

The Recipient may disclose Confidential Information:

- (a) with the prior written consent of Water NSW;
- (b) to the Recipient's Representatives, but only to the extent that each Recipient's Representative has a "need to know" the Confidential Information for the purposes of the Permitted Use; and
- (c) subject to clause 3.6, to the extent required by Law to do so.

3.6 Disclosure required by Law

If the Recipient is required by Law to disclose any Confidential Information, the Recipient must before doing so immediately notify Water NSW and comply with any reasonable directions given by, or requirements of, Water NSW.

3.7 Inspections and audit

The Recipient consents, and must procure the necessary consents from any Representative to which the Confidential Information is disclosed by the Recipient, to such inspections and audits as may be reasonably required by Water NSW for the purpose of auditing compliance by the Recipient and any relevant Representatives with the terms of this Deed after Water NSW has given the Recipient reasonable notice, to the extent practicable in the circumstances.

3.8 Breach of confidentiality obligations

If the Recipient becomes aware of any actual, threatened or suspected breach of this Deed, including by the Recipient or the Recipient's Representative, the Recipient must:

- (a) immediately notify Water NSW in writing and take all steps necessary to remedy, prevent or stop the actual, threatened or suspected breach of this Deed and comply with any reasonable directions issued by Water NSW regarding any unauthorised use or disclosure of the Confidential Information; and
- (b) provide such other assistance as may be reasonably required by Water NSW, including in relation to any Claim or proceedings that Water NSW may bring against any third party for unauthorised use or disclosure of the Confidential Information.

3.9 Return of Confidential Information

- (a) Subject to clause 3.9(f), if requested by Water NSW, the Recipient must:
- (b) promptly return to Water NSW all documents and other physical records of Confidential Information in its or the Recipient Representatives possession, custody or control;
- (c) delete the Confidential Information from any computer system or other device operated or controlled by, or which may be accessed by, the Recipient or the Recipient Representatives to which the Confidential Information has been disclosed by the Recipient;
- (d) where applicable, comply with the requirements of the Information Security Requirements in respect of the destruction or return of any Confidential Information; and
- (e) comply with any reasonable directions issued by Water NSW in respect of the Confidential Information.
- (f) If the Recipient is required by Law to retain any Confidential Information, and provided the Recipient has not breached any of its obligations under this Deed, the Recipient may retain one copy of part or all of the Confidential Information, to the extent that the Recipient is obliged to retain a copy of part of or all of the Confidential Information by Law. Any Confidential Information retained pursuant to any such obligation at Law shall continue to be subject to the obligations of this Deed.

3.10 Compliance with Information Security Requirements

The Recipient acknowledges and agrees that:

- (a) some, or all, of the Confidential Information, Personal Information and other Principal Data is security classified, and/or subject to a sensitive information label or other protective marking (such as dissemination limiting markers) or restriction on use and must therefore be stored, managed, controlled and handled strictly in accordance with the Information Security Requirements;
- (b) prior to the date of this Deed it is familiar with and has read, and it will ensure that all relevant Recipient's Representatives are familiar with and have read, the Information Security Requirements, as provided by Water NSW or as publicly available and published online;
- (c) it will, and it will ensure that all relevant Recipient's Representatives:
 - (i) at all times comply with and adhere to all relevant and applicable Information Security Requirements; and
 - (ii) cooperate with and assist Water NSW and the Water NSW' Representatives in the performance of any obligations or

requirements of Water NSW and the Water NSW' Representatives under or in connection with the Information Security Requirements, in respect of any Confidential Information and other Principal Data; and

- (d) it will not, and it will ensure that the Recipient Representatives do not, do anything which would:
- (i) constitute a contravention of the Information Security Requirements by Water NSW; or
 - (ii) put Water NSW in breach of any Information Security Requirements.

4. Water NSW may enforce Deed

4.1 Recipient acknowledgements

The Recipient:

- (a) agrees that:
- (i) the obligations in this Deed are for the benefit of Water NSW and the Water NSW Representatives, and that Water NSW or the Water NSW Representatives may enforce the obligations herein; and
 - (ii) the Confidential Information is the exclusive property of Water NSW or Water NSW's Representatives and this Deed does not convey any proprietary or other interest in the Confidential Information to the Recipient or the Recipient Representatives; and
- (b) acknowledges that:
- (i) the Confidential Information is valuable to Water NSW and Water NSW's Representatives and that damages may not be an adequate remedy for Water NSW or the Water NSW Representatives for any breach of this Deed by the Recipient; and
 - (ii) Water NSW is, and any Water NSW's Representatives are, entitled to seek injunctive relief as a remedy for any breach or threatened breach of this Deed by the Recipient, in addition to any other remedies available at Law or in equity under or independently of this Deed.

4.2 Breach by Representative

Where the Recipient discloses the Confidential Information or any Personal Information to a Representative, a breach of a provision of this Deed by the relevant Representative will be deemed to be a breach of this Deed by the Recipient.

5. Release and Indemnity

5.1 Release

To the extent permitted by Law, the Recipient releases and forever discharges, and agrees to hold harmless and acquit Water NSW and each of Water NSW' Representatives from and against any and all Claims arising out of, relating to or in any way in connection with or incidental to:

- (a) the provision of, or purported reliance on, or use of, the Information Documents or any Confidential Information by the Recipient, the Recipient's Representatives or any other person associated with the Recipient to whom the Information Documents or any Confidential Information are disclosed by the Recipient;
- (b) any failure by Water NSW or the Water NSW Representative to provide any information to the Recipient; and
- (c) any fact, matter, circumstance, conduct, act, omission or thing in connection with any of those matters or things,

whether or not the parties were aware of the fact, matter, circumstance, conduct, act, omission or thing as at the date of this deed and including any Claims in respect of a Loss or a Remedy which the Recipient may suffer or incur in respect of the fact, matter, circumstance, omission or thing after the date of this Deed.

5.2 Indemnity

- (a) To the extent permitted by Law, the Recipient indemnifies and will keep indemnified each of Water NSW and the Water NSW Representatives (**Those Indemnified**) against:
- (i) any Loss incurred or suffered by Those Indemnified where such Loss is incurred by reason of or in connection with any breach of this Deed by the Recipient or the Recipient Representatives; and
 - (ii) any and all Claims by or on behalf of the Recipient, the Recipient's Representatives or any person claiming through, under, for, on behalf of or by virtue of the Recipient or the Recipient's Representatives, which have arisen or may arise in relation to the matters the subject of the release in clause 5.1.
- (b) The Recipient's liability to indemnify Those Indemnified will be reduced proportionally to the extent that any negligent act or omission of Those Indemnified caused or contributed to the liability or loss.

6. General

6.1 No exclusion of Law or equity

This Deed must not be construed to exclude the operation of any principle of Law or equity intended to protect and preserve the confidentiality of the Confidential Information.

6.2 Waiver

The Recipient acknowledges and agrees that:

- (a) no waiver by Water NSW of one breach of any obligation or provision herein contained or implied shall operate as a waiver of another breach of the same or of any other obligation or provision herein contained or implied; and
- (b) none of the provisions hereof shall be taken either at Law or in equity to have been varied, waived, discharged or released by Water NSW unless by its express consent in writing.

6.3 Governing Law

This Deed will be governed by and construed in accordance with the Law in force in the State of New South Wales. Each party submits to the non-exclusive jurisdiction of the Supreme Court of New South Wales and the courts competent to determine appeals from that court.

6.4 Continuing obligations

The obligations of the Recipient under this Deed continue after the completion or termination of any employment, engagement or assignment in respect of the Permitted Use.

6.5 Revocation or amendment

This Deed may not be revoked or otherwise modified or amended without the prior written consent of Water NSW.

Executed as a deed poll

[Note: Delete the execution block that is not applicable.]

[If the Recipient is an individual]

Signed, sealed and delivered by **[insert full legal name of Recipient]** in the presence of:

Signature of witness

Signature of Recipient

Full name and position of witness

Full name and position of Recipient

Address of witness

Address of Recipient

Date

[If the Recipient is a company]

Executed by **[insert] ABN [insert]** in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Signature of director/company secretary

Full name of director

Full name of director/company secretary

Date

Date

Schedule 11 - Policies, Procedures and Standards

All clause references in this Schedule are references to clauses in this Schedule unless otherwise indicated.

Capitalised terms in this Schedule have the same meaning as in the General Conditions.

Any reference in this Schedule to a policy, guideline or other document is a reference to such policy, guideline or document as updated or replaced from time to time.

This Schedule applies without limiting any of the Contractor's obligations under the General Conditions.

1. Transaction Platforms

The Contractor acknowledges that:

- (a) the Principal generally conducts business with contractors electronically, including by transacting and exchanging data with contractors for the purposes of:
 - (i) creating purchase orders and for the acknowledgement of the receipt of purchase orders;
 - (ii) processing invoices and payments;
 - (iii) conducting spend analyses; and
 - (iv) supplier management;
 - (v) as at the date of the Contract, the Principal uses:
 - (vi) Workday Strategic Sourcing
 - (vii) Microsoft Dynamics 365; and
 - (viii) EFTsure,

(collectively, **the Transaction Platforms**) as the platforms for transacting and exchanging data with contractors;

- (b) if the Contractor is requested by the Principal to register as a "supplier" on the Transaction Platforms, the Contractor must, at its own cost, do all things necessary to give effect to such request; and
- (c) the Principal may from time to time, in its absolute discretion, nominate a platform or tool other than or in addition to the Transaction Platforms as a platform for transacting and exchanging data with contractors, in which case, the Contractor must do all things required by the Principal, at the Contractor's own cost, to enable transactions and the exchange of data to be undertaken using such other platform or tool.

2. Contractor's compliance with government policies and agreements

- (a) The Contractor acknowledges that when selecting the Contractor, the Principal may consider the Contractor's compliance with any government policies, including the:
 - (i) Code of Conduct and the Policies and Procedures;
 - (ii) Australian New Zealand Government Procurement Agreement; and
 - (iii) Australia-United States Free Trade Agreement.
- (b) The Contractor warrants that to the extent the information was provided to the Principal in its tender proposal in respect of compliance with the requirements of the documents listed in clauses 2(a)(i) to 2(a)(iii), all such information will remain true for the duration of the Contract.

3. Corruption Prevention

- (a) The Contractor warrants and represents to the Principal that:
 - (i) it has not, and none of its Personnel have, engaged in any corrupt conduct at any time prior to the Award Date; and

- (ii) it will not, and will ensure that its Personnel do not, at any time engage in any corrupt conduct.

- (b) Without limiting or otherwise restricting any other rights of the Principal under the Contract, if:

- (i) the Contractor or any of its Personnel are at any time found to have engaged in corrupt conduct; or
- (ii) the Contractor is at any time found to have breached the warranty and representation given in clause 3(a),
- (iii) the Principal may terminate the Contract with immediate effect by giving written notice to the Contractor.

- (c) In this clause 3, terms which are defined in the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**) have the meaning given in the ICAC Act.

4. Supplier Code of Conduct

- (a) Prior to the engagement of any Subcontractor, the Contractor must obtain a written acknowledgement from such Subcontractor that it has received, read, understood and will comply with the Principal's Supplier Code of Conduct or any document outlining the Principal's ethical standards and requirements, as provided by the Principal to the Contractor prior to the parties' entry into the Contract and with any updates to the Statement from time to time and re-issued by the Principal to the Contractor where applicable. The Contractor must retain the documentation required by this clause 4(a) for a period of seven years and must provide such documentation to the Principal as and when requested.
- (b) If a person has committed a material breach of the Principal's Supplier Code of Conduct and the Contractor has material information, knowledge of, or believes that such a breach has been committed, the Contractor must notify the Principal's Representative of such information, knowledge or belief.

5. Chain of responsibility legislation

- (a) Without limiting or otherwise restricting any of the Contractor's responsibilities or obligations under or in connection with the Heavy Vehicle Law, to the extent heavy vehicles are used in the performance of the Contractor's Activities, the Contractor:
 - (i) acknowledges that it is a primary duty holder under the COR Laws with responsibility for developing COR Systems;
 - (ii) must ensure that:
 - A. any heavy vehicles are appropriately maintained with loads that do not exceed vehicle mass or dimension limits and are appropriately secured;
 - B. operators carrying freight containers have a valid Container Weight Declaration; and
 - C. drivers do not exceed speed limits or regulated driving hours, do not drive

- while impaired by fatigue and observe minimum rest requirements;
- (iii) must proactively provide reasonable assistance to the Principal's Representative to enable the Principal (and any of the Principal's Personnel) to satisfy its duties and responsibilities under the COR Laws;
 - (iv) must obtain and maintain, and ensure that each of its Personnel obtains and maintains, all approvals required to enable the applicable activity, function or task to be undertaken lawfully;
 - (v) must undertake any audits or monitoring as requested by the Principal's Representative to demonstrate compliance with this clause; and
 - (vi) warrants that it is familiar with and has the capability and resources to comply with the COR Laws and ensure that its Personnel comply with all COR Laws.
- (b) Where used in this clause 5:
- (i) **"Container Weight Declaration"** has the meaning given in the Heavy Vehicle Law;
 - (ii) **"COR Laws"** means any section of the Heavy Vehicle Law under which the Contractor is "a party in the chain of responsibility" (within the meaning given to that term under the Heavy Vehicle Law);
 - (iii) **"COR Systems"** means policies, procedures, standards, training and systems designed to ensure, so far as is reasonably practicable, compliance with the COR Laws;
 - (iv) **"Heavy Vehicle Law"** means the:
 - A. Heavy Vehicle National Law (NSW) within the meaning of that term under the Heavy Vehicle (Adoption of National Law) Act 2013 (NSW); and
 - B. regulations in force under the Heavy Vehicle National Law (NSW) as applied (with modifications) under the Heavy Vehicle (Adoption of National Law) Act 2013 (NSW) as amended, reproduced or updated from time to time; and
 - (v) terms which are defined in the Heavy Vehicle Law have the meaning given in the Heavy Vehicle Law.

6. Aboriginal Procurement Policy

Where the NSW Government Aboriginal Procurement Policy (January 2021) (**Policy**) is applicable to the Contractor's Activities, the Contractor must:

- (a) comply with the requirements of the Policy;
- (b) comply with the "Aboriginal Participation Plan" in accordance with the Policy;
- (c) report to the Principal on its progress towards the "Aboriginal Participation Plan" every 3 months in the form required by the Policy; and
- (d) provide a final report on completion of the Contract, including a final reconciliation against the Aboriginal participation requirements.