



**TENDER SCHEDULES
PART A: SCHEDULE 2 – CONDITIONS OF CONTRACT**

Management of Sam Adams College

RFT 2023-2024-0605

15 April 2024



Management Agreement Sam Adams College

Muswellbrook Shire Council
ABN 86 864 180 944

[insert name of Operator]
ACN [*]

AGREEMENT DETAILS

No.	Issue	Content
1.	Principal	Muswellbrook Shire Council ABN 86 864 180 944 of 60 - 82 Bridge Street, Muswellbrook NSW 2333
2.	Operator	[insert name] ACN [insert] of [insert address]
3.	Date of Agreement	[insert]
4.	Commencement Date	[insert]
5.	Date for Completion	[insert – 3 years from the Commencement Date with one (1) two (2) year extension based on satisfactory performance]
6.	Services	Operation and management of the Facility, including: <ul style="list-style-type: none"> • provision of a Resident Manager who resides in the Manager's Residence at the Facility; • domestic maintenance (non-trade) and cleaning of the Facility (including its grounds)
7.	Policies	The Principal's Student Accommodation Management Plan: Operations, as amended or replaced from time to time. Asset Management Plan for the Facility. Policies and procedures of Hunter TAFE. These policies serve as guidelines that outline acceptable behaviors, procedures, and expectations.
8.	Fee	\$(insert amount) (ex GST)
9.	Incentive Fee	The Principal will pay to the operator the incentive fee for each Financial Year annually in arrears. The incentive fee is only payable where the Annual Revenue exceeds the benchmark, gross revenue \$280,000 excluding GST.
		The incentive fee is calculated as 8% of the gross revenue exceeding the gross revenue benchmark.
10.	Reimbursable Expenses	If, in the course of providing the Services, the Operator incurs pre-approved expenses on behalf of the Principal, the Operator will be reimbursed at cost following a payment claim.
11.	Time for invoicing	Monthly
12.	Public liability insurance	\$20 million for each and every claim
13.	Motor vehicle insurance	\$20 million for each and every claim
14.	Principal address for notices	The General Manager Address: 60-82 Bridge Street Muswellbrook NSW 2333 Telephone: 02 6549 3700 Email: council@muswellbrook.nsw.gov.au

No.	Issue	Content
15.	Operator address for notices	[insert name] Address: [insert] Telephone: [insert] Email: [insert]
16.	Special Conditions	<p>The Operator must be registered for GST purposes.</p> <p>Despite clause 12, if the Operator provided any services to the Principal prior to the Date of Agreement, any Intellectual Property Rights which were generated, created or developed in the course of providing such services to the Principal will be owned by the Principal, and the Operator assigns to the Principal all such Intellectual Property Rights and must do everything necessary to perfect such assignment.</p> <p>The Manager's Residence will be made available to the Resident Manager on a rent-free basis, subject to the payment by the Operator of a \$1,200 bond, which will be refundable within 30 days after the Date of Completion subject to any deductions for damage caused by the Resident Manager or other costs incurred by the Principal due to the Resident Manager's use of the residence.</p> <p>The parties acknowledge that the operation of the Facility will be subject to advice provided by Council's Commercial Property Department, and the Operator agrees to take such advice into account when providing the Services.</p> <p>The Residential Manager may take leave from residing at the Manager's Residence (and performing the associated Services on behalf of the Operator) for up to consecutive 30 days, provided that:</p> <ul style="list-style-type: none"> • the relief arrangements to be put in place by the Operator are to the satisfaction of the Principal; • prior approval has been given by the Principal's General Manager; and • the Principal does not incur any additional expenditure for the provision of the relief.

Executed as an **Agreement** on the **Date of Agreement**

EXECUTED by **MUSWELLBROOK SHIRE COUNCIL** (ABN 86 864 180 944) by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Full name of witness

Name of authorised representative

EXECUTED by **[*]** (ACN **[*]**) in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Signature of director

Signature of director/secretary

Full name of director

Full name of director/secretary

Background

- A. The Principal requires the provision of the Services for the purposes of the operation and management of the Facility.
- B. The Operator has agreed to perform the Services on the terms set out in this Agreement.

Operative Part

1. Definitions and Interpretation

1.1 Definitions

In this Agreement:

Advantage means any financial or other advantage, payment, gift, promise or transfer of anything of value.

Agreement Details means the details set out on page 2 of this Agreement.

Applicable Corruption Laws means all Laws relating to bribery, corruption, money laundering, fraud or similar activities.

Background Intellectual Property Rights means Intellectual Property Rights that:

- (a) existed prior to the Date of Agreement; and/or
- (b) were generated independently of this Agreement.

Business Day means any day other than:

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

Commencement Date means the date stated in Item 4.

Confidential Information means information revealed by or on behalf of a Disclosing Party to a Receiving Party that:

- (a) is by its nature confidential;
- (b) is marked or designated as confidential by the Disclosing Party at the time of its disclosure; or
- (c) the Receiving Party knows or ought to know is confidential.

Corrupt Conduct has the meaning in the *Independent Commission Against Corruption Act 1988* (NSW).

Date for Completion means the date stated in Item 5, as adjusted in accordance with this Agreement.

Date of Agreement means the date stated in Item 3.

Date of Completion means the date on which the Principal confirms to the Operator in writing that the Services have been completed.

Defaulting Party has the meaning in clause 19.1.

Disclosing Party means a party who discloses its Confidential Information to a Receiving Party.

Facility means the 21 semi-detached three-bedroom units providing student accommodation to up to 63 students including the Manager's Residence, grounds and ancillary areas (such as communal laundry) located at 63 Maitland Street, Muswellbrook NSW 2333 and known as the Sam Adams College.

Fee means the fee stated in or determined in accordance with Item 8.

Force Majeure Event means each of the following, including their direct effects, to the extent they are beyond the reasonable control of the affected party and are not caused or contributed to by the affected party or any of its Personnel:

- (a) confiscation by order of any authority; and
- (b) epidemic, pandemic, earthquake, fire, flood, cyclone, hurricane or other natural calamity.

GIPA Act means the *Government Information (Public Access) Act 2009* (NSW).

GST has the meaning in the GST Act.

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

ICAC means the Independent Commission Against Corruption.

Incentive Fee means the fee paid to the by the Principal to the Managing Agent based on performance over a given period, where the performance exceeds the set benchmark .

Insolvency Event means, in relation to a Defaulting Party, where:

- (a) it makes a statement or informs the other party in writing or creditors generally, that it is insolvent or financially unable to proceed with this Agreement;
- (b) execution is levied against it by a creditor;
- (c) a notice is given of a meeting of its creditors with a view to the Defaulting Party entering into a deed of company arrangement;
- (d) it enters into a deed of company arrangement with its creditors;
- (e) a controller or administrator is appointed in respect of it;
- (f) an application is made to a court for its winding up and it is not stayed within 14 days thereafter;
- (g) a winding-up order is made against it;
- (h) it resolves by special resolution that it should be wound up voluntarily; or
- (i) a mortgagee of any of its property takes possession of that property.

Intellectual Property Rights means all:

- (a) intellectual property rights and industrial rights, including copyright, trademarks, designs, circuit layouts, patents, inventions, discoveries and rights of confidence; and
- (b) other rights or forms of protection of a similar nature or having similar or equivalent effect to any of the rights referred to in paragraph (a),

that subsist anywhere in the world, whether current or future or registered or unregistered.

Insurances has the meaning in clause 15.1.

Item means an item of the Agreement Details.

Laws means all:

- (a) acts, regulations, by-laws and orders;
- (b) licences, approvals and authority requirements; and
- (c) fees payable in connection with the foregoing.

Loss means any:

- (a) cost, expense, fee, loss, damage, liability or other amount; and
- (b) without limiting paragraph (a) and to the fullest extent permitted by Law, fine or penalty.

Manager's Residence means the single accommodation unit at the Facility which is provided by the Principal for use by the Resident Manager.

Material means any form of material, including documents, reports, products, equipment, information, data and software.

Modern Slavery Laws has the meaning in clause 23.

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

Personnel means a party's officers, employees, agents and contractors, excluding the Operator and its officers, employees, agents and contractors in the case of the Principal.

Policies means the policies, rules and guidelines available at www.muswellbrook.nsw.gov.au/policies/ as well as those identified in Item 7, if any.

Principal Assets has the meaning in clause 21.

Privacy Laws means the *Privacy and Personal Information Protection Act 1998* (NSW) and all other Laws and Policies applicable to Personal Information.

Public Official means a person representing or employed by a government department or enterprise.

Receiving Party means a party who directly or indirectly receives a Disclosing Party's Confidential Information.

Records means all data, records, accounts and Material that is:

- (a) relevant to the performance of this Agreement; and
- (b) under the Operator's or any of its Personnel's custody, possession or control.

Reimbursable Expenses means the expenses identified in Item 10.

Resident Manager means the Operator's Personnel who is appointed to reside at the Manager's Residence for the purpose of providing the Services, and their relief from time to time.

Services means the services described in Item 6.

Special Conditions means the conditions included in Item 16.

Variation means any:

- (a) increase, decrease or omission of any Service(s);
- (b) change in the nature, character or quality of any Service(s);
- (c) change in the timing for the performance of any Service(s); or
- (d) additional services,

but does not include a direction by the Principal to perform the Services in accordance with this Agreement.

Variation Direction has the meaning in clause 5.2(c).

WHS Legislation means:

- (a) the *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2017* (NSW); and
- (b) all other Laws concerning work health and safety which are relevant to this Agreement.

1.2 Interpretation

In this Agreement:

- (a) reference to a person includes an individual, firm, joint venture, association or body, corporate or unincorporate;
- (b) reference to a party to a document includes its successors and permitted assigns;
- (c) the time for doing anything is, if it ends on a day that is not a Business Day, deemed to end on the next following Business Day;
- (d) headings are for convenience only and do not affect the interpretation of this Agreement;
- (e) words in the singular include the plural and vice versa;
- (f) other parts of speech and grammatical forms of a word or phrase defined in this Agreement have a corresponding meaning;
- (g) all communications between the parties must be in English;

- (h) a reference to '\$' or 'dollars' is a reference to Australian dollars;
- (i) the words 'including', 'include' and 'included' are deemed to be followed by the words 'without limitation';
- (j) a reference to a Law or Policy is to it as amended, re-enacted or replaced;
- (k) a reference to a body which ceases to exist is a reference to the body having substantially the same objects as the original body; and
- (l) an agreement on the part of, or in favour of, two or more persons binds or is for the benefit of them jointly and severally.

1.3 Contra proferentem

This Agreement is not to be interpreted against the interests of a party merely because it proposed this Agreement or a provision in it or because it relies on a provision of this Agreement to protect itself.

1.4 Ambiguity or discrepancy

If the Operator becomes aware of an error, ambiguity or discrepancy in any document forming part of this Agreement:

- (a) it must promptly give written notice to the Principal detailing the error, ambiguity or discrepancy;
- (b) the Principal must, promptly thereafter, direct the Operator as to the interpretation to be followed; and
- (c) the Operator must comply with such direction at its own risk and cost.

1.5 Application of this Agreement

The parties acknowledge and agree that:

- (a) this Agreement applies to all Services performed by the Operator, whether performed before, on or after the Commencement Date; and
- (b) any payment made to the Operator by the Principal prior to the Commencement Date in relation to Services performed by or on behalf of the Operator are deemed to have been made pursuant to this Agreement.

2. Operation of this Agreement

2.1 Term

This Agreement commences on the Date of Agreement and ends on the Date of Completion, unless terminated earlier in accordance with its terms.

2.2 Special Conditions

The Special Conditions prevail over these general terms to the extent of any inconsistency between them.

3. Representations and Warranties

3.1 General

The Operator warrants to the Principal and repeats on each day of the term of this Agreement that:

- (a) it has in full force and effect all approvals needed to enter into and perform this Agreement;
- (b) the execution and performance of this Agreement by the Operator does not violate any Law or agreement binding on it;
- (c) it is not aware of any act, matter, thing or circumstance by reason of which it is unable to perform all of its obligations under this Agreement;
- (d) it does not enter into this Agreement as the trustee of a trust;
- (e) prior to executing this Agreement it carried out all investigations needed to ascertain the risks associated with performing the Services in accordance with this Agreement and it has all resources needed to do so;
- (f) with the exception of those included in this Agreement, it did not rely on any representation, information or data made available to it by or on behalf of the Principal in entering into this Agreement;
- (g) all Services will be fit for the purposes for which they are to be used by the Principal; and
- (h) it will not do or permit to be done anything which might damage the name or reputation of the Principal or any of its Personnel or result in the Principal or any of its Personnel being unreasonably subjected to adverse public criticism.

3.2 Conflict of interest

- (a) The Operator warrants to the Principal and repeats on each day of the term of this Agreement that:
 - (i) having made diligent enquiries, it is not aware of any matter; and
 - (ii) it will not, and will ensure that its Personnel do not, engage in any activity, which may give rise to an actual or perceived conflict of interest in relation to the Operator's performance of this Agreement.
- (b) If, at any time during the term of this Agreement, the Operator becomes aware of anything which may give rise to an actual or perceived conflict of interest in relation to its performance of this Agreement, it must:
 - (i) immediately notify the Principal of such matters in writing, including making full disclosure of all relevant information; and

- (ii) take such steps to resolve or manage the conflict as are directed by the Principal.

3.3 Probity warranties

The Operator warrants to the Principal and repeats on each day of the term of this Agreement that it:

- (a) will act honestly and fairly when performing this Agreement and when dealing with third parties in relation to such performance; and
- (b) has effective systems, policies and procedures in place to ensure its compliance with this clause 3.3 and all relevant Policies.

3.4 Operator's acknowledgements

The Operator acknowledges and agrees that:

- (a) the Principal entered into this Agreement relying on the warranties included in clauses 3.1 - 3.3 and would not have done so without them; and
- (b) it must immediately inform the Principal in writing if any such representation or warranty ceases to be true, including all information directed by the Principal.

4. Nature of relationship, Operator's Personnel and authority to act

4.1 Principal as an authority

The Operator acknowledges and agrees that:

- (a) nothing in this Agreement will in any way limit, fetter or otherwise affect the Principal's discretion as an authority under the *Environmental Planning and Assessment Act 1979* (NSW) or any other Law; and
- (b) anything the Principal does, fails to do or purports to do in its capacity as an authority will be deemed not to be an act or omission by the Principal under this Agreement.

4.2 Independent contractor

- (a) The Operator is engaged by the Principal as an independent contractor and nothing in this Agreement makes the Operator or its Personnel an employee, agent, partner or joint venturer of the Principal.
- (b) The Operator acknowledges and agrees that the Principal is not responsible for:
 - (i) payment of any taxes, levies, superannuation or workers' compensation contributions;
 - (ii) the deduction or withholding of any income tax; or
 - (iii) the provision of any type of leave consequent upon a relationship of employment,

in relation to or arising out of the provision of the Services or in respect of the Operator or the Operator's Personnel.

- (c) The Operator agrees to indemnify and keep indemnified the Principal against any:

- (i) taxes;
- (ii) levies;
- (iii) superannuation;
- (iv) workers' compensation contributions; and
- (v) entitlements claimed by the Operator or any third party (including without limitation any leave or remuneration entitlements, termination benefits, redundancy payments, unfair or unlawful dismissal verdicts),

that the Principal is required to pay in relation to or arising out of the provision of the Services.

4.3 Operator's Personnel

- (a) The Operator must use Personnel to perform the Services who:
 - (i) are appropriately qualified, competent and experienced in the provision of services similar to the Services; and
 - (ii) hold and maintain all necessary professional, technical, trade and other licences, authorisations and registrations relevant to the provision of the Services in accordance with this Agreement.
- (b) The Operator must immediately replace (at its expense) any Personnel involved in the performance of this Agreement who, in the reasonable opinion of the Principal:
 - (i) do not fulfil the criteria in clause 4.3(a);
 - (ii) have or are likely to put the Operator in breach of this Agreement; and/or
 - (iii) are materially hampering the performance of this Agreement or the Services.
- (c) The Operator is liable for the acts, defaults and omissions of its Personnel as if they were its own.
- (d) The Operator's responsibility for the performance of this Agreement and that of its Personnel is not lessened or otherwise affected by this clause 4.3 or anything done pursuant to it.

4.4 No authority

The Operator:

- (a) acknowledges and agrees that it has no authority to:
 - (i) act on behalf of the Principal;
 - (ii) incur any liability on behalf of the Principal;

- (iii) enter into any agreement on behalf of the Principal; or
 - (iv) make any representation, statement or direction to, or enter into any correspondence with, any third party in relation to the Services; and
 - (b) must not represent itself as having authority to do so,
- except with the written consent of the Principal.

5. Services

5.1 Performance of Services

- (a) The Operator must:
 - (i) perform the Services:
 - (A) commencing on the Commencement Date; and
 - (B) in accordance with this Agreement;
 - (ii) not do anything that places the Principal in breach of any Law,
 - (iii) provide all reasonable assistance and information directed by the Principal;
 - (iv) comply with the Policies and all lawful directions of the Principal; and
 - (v) ensure that its Personnel do likewise.
- (b) The scope of the Services includes:
 - (i) the supply of all labour, equipment (excluding IT hardware and software and CCTV equipment), Material and other things incidental to or necessary to perform the Services in accordance with this Agreement (including, without limitation, the supply of any labour, equipment, Material and other things associated with grounds maintenance and cleaning, and an operational mobile telephone for use by the Resident Manager), at the Operator's expense; and
 - (ii) all other matters and things the Operator must do in order to satisfy its obligations under this Agreement.

5.2 Variation of Services

- (b) The Operator must not vary the Services except as directed in writing by the Principal.
- (c) The Principal may, by written notice to the Operator titled 'Variation Direction', direct the Operator to perform a Variation (**Variation Direction**) and the Operator must perform such Variation.
- (d) The Operator must, within 5 Business Days after receiving a Variation Direction, and before commencing its performance of the relevant Variation, provide the Principal with details of the Operator's proposed adjustment to the Fee in order to perform the Variation (if any).

- (e) The adjustment to the Fee for a Variation must be determined by the Principal using the following order of precedence:
 - (i) prior agreement between the parties, if any;
 - (ii) relevant rates and prices included in this Agreement; or
 - (iii) reasonable rates and prices.
- (f) If the Operator receives a direction from the Principal which, although not identified as a Variation Direction, it considers to be a direction to carry out a Variation, it must, within 5 Business Days thereafter, notify the Principal in writing of this belief.
- (g) The Operator is not entitled to make a claim in connection with a direction the subject of a notice under clause 5.2(f) unless the Principal confirms in writing to the Operator that the direction constitutes a Variation Direction.

5.3 Non-complying Services

If a Service does not comply with this Agreement, the Principal may direct the Operator to:

- (a) re-perform or re-supply the relevant Service at the Operator's cost and within the directed period; or
- (b) where the defective Service cannot be effectively re-performed or resupplied, refund to the Principal any amount paid to the Operator by the Principal in respect of such Service,

and the Operator must comply with such direction.

6. Subcontracting and assignment

- (a) The Operator must not subcontract the performance of any of its obligations under this Agreement without the prior written consent of the Principal.
- (b) Neither party may assign any of its rights under this Agreement without the prior written consent of the other party.
- (c) The Operator is liable for the acts and omissions of its Personnel as if they were its own.

7. Cooperation with third parties

The Operator acknowledges and agrees that:

- (a) the Principal has engaged or may engage others to perform services or works relevant to the performance of the Services;
- (b) it must:
 - (i) cooperate with all such third parties and provide them with all assistance they require in order to perform all relevant activities; and

- (ii) coordinate its performance of the Services with the activities of all such third parties, including complying with all relevant directions issued to it by or on behalf of the Principal; and
- (c) it will have no claim against the Principal in relation to:
 - (i) the Operator's compliance with this clause; and/or
 - (ii) any act or omission of any third party engaged by or on behalf of the Principal.

8. Fees, Invoicing and Payment

8.1 Fee

- (a) In consideration of the Operator performing the Services in accordance with this Agreement and subject to clause 8.6, the Principal must pay the Operator the Fee.
- (b) The Operator acknowledges and agrees that:
 - (i) the Fee and Reimbursable Expenses are the only amounts payable to the Operator in relation to its performance of this Agreement;
 - (ii) The fee payable to the Contractor is not subject to rise and fall and shall be adjusted for inflation at 12-monthly intervals from the date of the Agreement.

The adjustment is to be calculated in accordance with the formula:

$$\text{\$FEE2} = (\text{\$Fee1} \times \text{CPI2}) / \text{CPI1}$$

Where: \\$FEE2 is the adjusted amount;

\\$Fee1 is the amount to be adjusted;

CPI1 is the CPI for the Australian Bureau of Statistics immediately before the commencement of the Contract Term; CPI2 is the CPI for the Australian Bureau of Statistics in the quarter immediately before the date of calculation. "CPI" means The Consumer Price Index, Australia (Catalogue No. 6401.0), All Groups (a) Sydney, published by the

Australian Bureau of Statistics; and

with the exception of GST, it is liable for all taxes payable in relation to its performance of this Agreement.

8.2 Incentive Fee

- (a) The incentive fee shall be paid to the Operator by the Principal annually, subject to the Operator's provision of a valid tax invoice to the Principal evidencing the fee.

8.3 Reimbursable Expenses

Any Reimbursable Expenses incurred by the Operator in performing this Agreement will be paid to the Operator by the Principal, subject to the:

- (b) Principal's prior written approval of the expense;
- (c) expense reflecting the actual cost incurred by the Operator, without any additional charge; and
- (d) Operator's provision of a valid tax invoice to the Principal evidencing the expense.

8.4 Invoicing and payment

- (a) The Operator must, at the relevant time stated in Item 11, submit a tax invoice to the Principal for the portion of the Fee and all Reimbursable Expenses then payable to the Operator under this Agreement.
- (b) All tax invoices submitted pursuant to clause 8.4(a) must:
 - (i) be valid tax invoices for the purposes of the GST Act;
 - (ii) contain a description of the relevant Services performed and/or Reimbursable Expense incurred;
 - (iii) specify the period covered by the tax invoice; and
 - (iv) contain all other information required by the Principal.
- (c) The Principal must pay the Operator all undisputed amounts claimed in a tax invoice submitted in accordance with clause 8.4(a) within 30 days after the Principal's receipt of such tax invoice.
- (d) Any payment made by the Principal pursuant to this Agreement is on account only and is not evidence of the value of any Service or that any Service has been performed in accordance with this Agreement.

8.5 Condition precedent

The Operator must not serve a tax invoice on the Principal and the Principal is not obliged to make any payment to the Operator unless the Operator has complied with clause 15.

8.6 Set off

The Principal may set off or deduct from any money otherwise payable by it to the Operator under this Agreement any debt or other money due from the Operator to the Principal under or arising out of this Agreement.

9. Material

All Material made available to the Operator or its Personnel by or on behalf of the Principal is and remains the property of the Principal and must be kept safe by the Operator at all times.

10. Reports, meetings and audits

10.1 Operator to keep proper Records

The Operator must, at its cost:

- (a) keep (and ensure that all subcontractors keep) complete, accurate, up-to-date and proper Records relating to its performance of this Agreement until the date that is 7 years after the Date of Completion; and
- (b) ensure that all such Records:
 - (i) comply with all applicable Australian Accounting Standards; and
 - (ii) are maintained in a form and manner that facilitates access and inspection by the Principal and/or its nominees.

10.2 Reports

The Operator must:

- (a) keep itself fully and properly informed of all matters concerning the performance of this Agreement;
- (b) promptly notify the Principal in writing of all matters of which the Operator becomes aware which are material to the Principal's interests; and
- (c) provide to the Principal all reports concerning this Agreement as are reasonably directed by the Principal.

10.3 Meetings

The Operator must attend and actively participate in all meetings concerning this Agreement as are directed by the Principal, including without limitation a quarterly review meeting with the Principal.

10.4 Availability, audit and access

- (a) Without limiting any of the Operator's other obligations under this Agreement, the Operator must, at the Principal's direction at any time up until the date that is 7 years after the Date of Completion:
 - (i) make available one complete set of the Records required by clause 10.1 for inspection and copying by the Principal and/or its nominee(s); and
 - (ii) participate cooperatively in all audits conducted by the Principal and/or its nominee(s) at the frequency and in relation to such matters as are directed by the Principal.
- (b) The Operator must promptly take, at its cost, corrective action to rectify any error, non-compliance or inaccuracy identified during an audit conducted pursuant to clause 10.4(a).
- (c) If an audit conducted pursuant to clause 10.4(a) shows that the Operator has or is not complying with this Agreement, it must pay

the Principal all costs incurred by the Principal in conducting the relevant audit.

11. Safety and the Environment

Without limiting its other obligations under this Agreement or at Law, when performing the Services, the Operator must:

- (a) at all times have the capability and resources needed to comply with all relevant obligations under the WHS Legislation;
- (b) comply, and ensure that its Personnel comply, with the WHS Legislation, including maintaining all registers, records and documents it is required to prepare and maintain in respect of the Services under the WHS Legislation;
- (c) consult, cooperate and coordinate with the Principal and all relevant third parties to the extent they have obligations in respect of the same matter under the WHS Legislation; and
- (d) immediately inform the Principal in writing if the Operator becomes aware of the existence or possibility of any work, health and safety or environmental issue occurring in connection with the Services or Principal.

12. Intellectual Property Rights

12.1 Background Intellectual Property Rights

- (a) Subject to any terms to the contrary, nothing in this Agreement affects the ownership of a party's Background Intellectual Property Rights.
- (b) The Principal grants the Operator a non-exclusive, royalty-free and non-transferable licence for the term of this Agreement to use all relevant Principal's Background Intellectual Property Rights for the sole purpose of the Operator performing this Agreement.
- (c) The Operator grants the Principal an irrevocable, perpetual, royalty-free and non-exclusive licence (including the right to sublicense) to use, copy, modify and publish all relevant Operator's Background Intellectual Property Rights for any purpose relevant to this Agreement or the Services.

12.2 Foreground Intellectual Property Rights

Except to the extent that it constitutes Operator's Background Intellectual Property Rights, the Principal owns and the Operator assigns to the Principal on and from their creation and free of any encumbrance, all Intellectual Property Rights created or developed by or on behalf of the Operator in performing this Agreement and the Operator must do everything necessary to perfect such assignment.

12.3 Warranty

The Operator warrants to the Principal and repeats on each day of the term of this Agreement that:

- (a) it owns or is licenced to use all Intellectual Property Rights necessary for it to perform this Agreement; and
- (b) the Principal and any of its Personnel will not incur any liability for infringement of any third party's Intellectual Property Rights in connection with the Services.

13. Confidentiality, Privacy and No Publicity

13.1 Confidential Information

- (a) Subject to clause 13.1(b), a Receiving Party must not, without the prior written consent of the Disclosing Party, divulge or permit any of its Personnel to divulge to any person (other than to its Personnel who require such information to properly perform this Agreement) any Confidential Information of the Disclosing Party.
- (b) A Receiving Party is not obliged to keep confidential Confidential Information of the Disclosing Party:
 - (i) which becomes public other than as a result of a breach of this Agreement by the Receiving Party or any of its Personnel; or
 - (ii) the disclosure of which is:
 - (A) required by Law; or
 - (B) made to a court in the course of proceedings to which the Receiving Party is a party.
- (c) At the end of the term of this Agreement, each Receiving Party must promptly return to the Disclosing Party or securely destroy (at the Disclosing Party's election) all Confidential Information of the Disclosing Party it obtains pursuant to this Agreement.

13.2 Privacy

Without limiting its obligations under all relevant Laws, the Operator and its Personnel must, in respect of Personal Information it or they obtain under or in relation to this Agreement:

- (a) comply with the Privacy Laws and all other privacy guidelines and requirements notified to it by the Principal as if it was the Principal;
- (b) only use such Personal Information for the sole purpose of performing this Agreement;
- (c) protect all such Personal Information from unauthorised access, modification, disclosure or use;
- (d) immediately notify the Principal in writing if the Operator becomes aware of any:
 - (i) breach of this clause 13.2;

- (ii) unauthorised access, modification, disclosure or use of Personal Information or privacy breach in relation to any Personal Information; or
- (iii) complaint it receives concerning a party's compliance with its privacy obligations; and
- (e) at the end of the term of this Agreement or in response to any earlier direction from the Principal, promptly return to the Principal or securely destroy (at the Principal's election) all Personal Information it obtains pursuant to this Agreement.

13.3 No publicity

- (a) The Operator must not, and must ensure that its Personnel do not:
 - (i) make any public announcement, issue any media release or make any representation to any media relating to the Principal (including its Personnel), this Agreement or the Services; or
 - (ii) otherwise exploit the fact that it has entered into this Agreement,
 without the prior written consent of the Principal.
- (b) If the Operator receives an enquiry from any media in relation to the Principal (including its Personnel), this Agreement or the Services, it must promptly refer such enquiry to the Principal and ensure that its Personnel do likewise.

14. GIPA Act

- (a) The Operator acknowledges and agrees that the Principal:
 - (i) is subject to the GIPA Act; and
 - (ii) may disclose information concerning or included in this Agreement (including the entire Agreement) on its nominated website established for GIPA Act disclosures,
 and irrevocably consents to the Principal acting in accordance with this clause 14.
- (b) The Operator must, upon receipt of a written request from the Principal, provide the Principal and its nominees with immediate access to the following where it is held or able to be accessed by the Operator:
 - (i) information that relates to the carrying out of this Agreement by or on behalf of the Operator; and
 - (ii) information received by the Operator from or on behalf of the Principal to enable the Operator to carry out this Agreement or have others do so.
- (c) The Operator must provide copies of all information contemplated in clause 14(b) and

requested by the Principal at the Operator's expense.

- (d) A failure by the Operator to comply with this clause 14 will constitute a material breach of this Agreement and entitle the Principal to immediately terminate this Agreement by written notice to the Operator.

15. Insurance

15.1 Operator's insurances

The Operator must:

- (a) from the Date of Agreement and for the duration of the term of this Agreement, effect and maintain the following insurances (together, the **Insurances**):
 - (i) public liability insurance in the amount stated in Item 12;
 - (ii) workers compensation insurance as required by Law; and
 - (iii) comprehensive motor vehicle insurance and compulsory third party motor vehicle insurance in the amount stated in Item 13;
- (b) on or before the Date of Agreement, provide the Principal with certificates of currency in respect of the Insurances and thereafter provide such evidence within 48 hours after being directed to do so by the Principal; and
- (c) ensure that it:
 - (i) does not do or omit to do anything which may prejudice the level of cover afforded by any Insurance;
 - (ii) takes all steps needed to rectify any situation which might prejudice the level of cover afforded by any Insurance;
 - (iii) renews or replaces any Insurance if it expires during the period for which it is required to be maintained by this Agreement;
 - (iv) does not cancel or allow any Insurance to lapse during the period for which it is required to be maintained by this Agreement;
 - (v) immediately notifies the Principal in writing of any event which may result in any Insurance lapsing, being cancelled or rescinded; and
 - (vi) complies fully with its duty of disclosure and obligations of utmost good faith towards all relevant insurers.

15.2 Effect of insurances

The obtaining of the Insurances does not limit, reduce or otherwise affect any of the Operator's obligations or liabilities under or arising out of this Agreement.

16. Indemnities and Liability

16.1 Indemnities

The Operator must indemnify and keep indemnified on demand and by way of continuing indemnity, defend and save harmless, the Principal from and against all Losses it suffers or incurs arising out of or in connection with:

- (a) any unlawful, wilful or negligent act or omission of the Operator or any of its Personnel;
- (b) any breach by the Operator or any of its Personnel of a duty of confidence owed under this Agreement or at Law;
- (c) any breach by the Operator or any of its Personnel of the Intellectual Property Rights of a third party or any claim by a third party against the Principal in respect of any Intellectual Property Rights assigned or licenced to it by the Operator under this Agreement;
- (d) any act of abandonment of some or all of this Agreement by the Operator; or
- (e) any:
 - (i) damage to or loss of property, including loss of use; or
 - (ii) injury to or sickness or death of any person,
 caused or contributed to by the Operator or any of its Personnel,

however, such liability will be reduced to the extent that a negligent act or omission of the Principal caused or contributed to the relevant Loss.

16.2 Indirect Loss

With the exception of the Operator's liability under the heads of liability included in clause 16.1, neither party has any liability for any of the following types of loss or damage under or arising out of this Agreement:

- (a) loss of revenue, use, production, goodwill, profit, business, contract or anticipated savings;
- (b) financing costs or increased operating costs; or
- (c) other purely financial or economic or special or indirect loss or damage.

16.3 Proportionate liability

In determining the rights, obligations and liabilities of the parties under or arising out of this Agreement, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded to the maximum extent permitted by Law.

17. Suspension

- (a) Except as permitted by Law or directed by the Principal in writing, the Operator must not

suspend its performance of any or all of the Services.

- (b) The Principal may immediately suspend the performance of any or all of the Services by the Operator by giving a direction to this effect to the Operator and the Operator must comply with such direction.
- (c) The Operator must resume its performance of suspended Services as soon as practicable after being directed to do so by the Principal and, in any event, within 3 Business Days after being directed to do so by the Principal.
- (d) If the need for the suspension arises directly from the Principal's breach of this Agreement or negligent act or omission and causes the Operator to be delayed, or incur unavoidable costs additional to those it would have incurred had the suspension not been directed, the Operator may, in respect of the suspension, claim such additional costs as are reasonably and directly incurred by the Operator by reason of the suspension, provided that:
 - (i) such costs are substantiated to the Principal's satisfaction; and
 - (ii) the Operator has taken reasonable steps to mitigate such costs.

18. Dispute Resolution

18.1 Procedure for resolving disputes

- (b) All disputes that arise out of, or in connection with, this Agreement must be resolved in accordance with this clause 18.
- (c) If a dispute arises between the parties, either party may give a written notice to the other which:
 - (i) states that it is a notice under this clause 18.1; and
 - (ii) includes reasonable particulars of the dispute.
- (d) If a notice is given under clause 18.1(c), the parties must meet at least once within 10 Business Days after the receiving party's receipt of the relevant notice and use reasonable endeavours to attempt to resolve the dispute.
- (e) If a dispute is not resolved within 20 Business Days after the first meeting held pursuant to clause 18.1(d) or the meeting contemplated in that clause does not occur within the specified period, either party may commence litigation to resolve it.
- (f) Subject to clause 18.2, compliance with the process set out in clauses 18.1(b) - (e) is a condition precedent to commencing litigation.

18.2 Urgent relief

Nothing in clause 18.1 prejudices the right of a party to institute proceedings to enforce a

payment due under this Agreement or to seek injunctive or urgent declaratory relief.

18.3 Continue to perform

To the fullest extent permitted by Law, each party must continue to perform this Agreement notwithstanding the existence of a dispute.

19. Termination

19.1 Termination for default

A party may terminate this Agreement with immediate effect by giving the other party (**Defaulting Party**) written notice if the Defaulting Party:

- (a) breaches this Agreement and fails to remedy such breach within 10 Business Days after receiving written notice from the other party to do so;
- (b) breaches a material term of this Agreement that is incapable of remedy; or
- (c) to the fullest extent permitted by Law, suffers an Insolvency Event.

19.2 Termination for convenience

- (a) Without prejudice to any of its other rights under this Agreement, the Principal may terminate this Agreement in its absolute discretion by giving no less than 30 days' prior written notice to the Operator to this effect.
- (b) If this Agreement is terminated pursuant to clause 19.2(a):
 - (i) the Principal must pay the Operator the applicable portion of the Fee for Services performed in accordance with this Agreement up to and including the date of termination; and
 - (ii) except as set out in clause 19.2(b)(i), the Operator is not entitled to and is barred from claiming any other payment in connection with such termination.

19.3 Return of property

On the termination of this Agreement, the Operator must promptly return to the Principal all equipment, tools, documents, information, data and other material supplied to the Operator by or on behalf of the Principal in relation to this Agreement.

20. Force Majeure Event

- (a) Where a party is unable, wholly or in part, by reason of a Force Majeure Event, to perform an obligation under this Agreement and that party:
 - (i) provides the other party within 3 days after the commencement of the relevant Force Majeure Event with full details of the event, all affected obligations and, to the extent known, likely extent to which it will be unable to perform or be delayed in performing such obligations;

- (ii) uses reasonable endeavours to avoid and mitigate the effects of the Force Majeure Event; and
- (iii) has not caused or contributed to the relevant Force Majeure Event,

all affected obligations are suspended to the extent they are adversely affected by the Force Majeure Event.

- (b) If a Force Majeure Event prevents the performance of a majority or all of the Operator's obligations under this Agreement for more than 30 days, the Principal may terminate this Agreement by written notice to the Operator, in which case neither party will have any liability to the other in respect of such termination.

21. Management of COVID-19

- (a) If the Principal considers that it is necessary to do any of the following things to manage COVID-19 related issues, it may (in its absolute discretion) direct that:
 - (i) all or part of any asset or place owned or controlled by the Principal (**Principal Assets**) be placed into isolation or under quarantine;
 - (ii) the Operator or anyone on its behalf not access some or all of any Principal Asset;
 - (iii) the Operator only access any Principal Asset at the times and subject to the conditions specified by the Principal; and/or
 - (iv) all or part of the Services are suspended, and the Operator must:
 - (v) comply with such direction;
 - (vi) cooperate with the Principal to effectively manage all relevant COVID-19 related issues, including by providing access to documentation, information and Personnel; and
 - (vii) recommence performing the Services as soon as practicable after being directed to do so by the Principal.
- (b) The Operator must, and must ensure that its Personnel, take all reasonable steps to prevent, overcome and mitigate all delays and other claims related to COVID-19 and any direction of the Principal under clause 21(a), including by promptly and diligently:
 - (i) complying with all relevant Laws, Policies and authority recommendations concerning public health and the management of infectious illnesses;
 - (ii) applying for any payment, benefit or other relief made available by any authority in connection with COVID-19 or its effects; and

- (iii) providing such assistance and information as the Principal directs in connection with any payment, benefit or other financial relief made available by any authority in connection with COVID-19 or its effects.

22. Corruption prevention

- (a) The Operator must comply with all Applicable Corruption Laws and not offer, promise or give any Advantage to any:
 - (i) person with the intention of inducing that person to breach a position of trust or duty of good faith or impartiality; or
 - (ii) Public Official intending to influence that official.
- (b) The Operator warrants to the Principal and repeats on each day of the term of this Agreement that it has not been found by ICAC to have engaged in Corrupt Conduct.
- (c) The Operator must ensure that:
 - (i) it does not employ, or continue to employ; and
 - (ii) no subcontractor employs, or continues to employ,
 any person in relation to this Agreement who has been found to have engaged in, or in the case of a company, any officer of which has been found to have engaged in, Corrupt Conduct by ICAC.
- (d) The Principal may direct the Operator to terminate a subcontract if an officer of the relevant subcontractor has been found to have engaged in Corrupt Conduct by ICAC and the Operator must promptly comply with such direction.

23. Modern slavery

- (a) The Operator warrants to the Principal and repeats on each day of the term of this Agreement that it:
 - (i) has full knowledge of the terms of and the resources needed to comply with the *Modern Slavery Act 2018 (NSW)*, *Modern Slavery Act 2018 (Cth)*, *Commonwealth Criminal Code 1995 (Cth)* and all similar Laws in all relevant jurisdictions (together, the **Modern Slavery Laws**);
 - (ii) understands and will comply with all relevant parties' obligations under the Modern Slavery Laws;
 - (iii) has made and will make thorough enquiries of all persons involved in performing any of the Operator's obligations under this Agreement to ensure that they have the knowledge, understanding and resources required by clauses 23(a)(i) and (ii);

- (iv) has not been convicted of an offence involving slavery or human trafficking and neither has anyone involved in performing any of its obligations under this Agreement; and
- (v) will at all times during the term of this Agreement:
 - (A) comply with the Modern Slavery Laws;
 - (B) have policies and procedures in place to ensure such compliance; and
 - (C) do everything needed to assist the Principal to comply with the Modern Slavery Laws; and
- (vi) ensure that all persons involved in performing any of the Operator's obligations under this Agreement do likewise.
- (b) In performing this Agreement, the Operator must:
 - (i) not do, seek to do or permit anyone to do or seek to do anything which could or does:
 - (A) violate a Modern Slavery Law; or
 - (B) place the Principal in breach or potential breach of a Modern Slavery Law; and
 - (ii) ensure that all subcontracts include terms equivalent to those included in this clause 23.
- (c) If the Operator becomes aware of anything that does or could place a party or anyone involved in performing this Agreement in breach of a Modern Slavery Law, it must immediately:
 - (i) notify the Principal in writing of all relevant facts;
 - (ii) respond to all questions asked and requests for information made by or on behalf of the Principal in respect of the Operator's compliance with this clause 23 and the Modern Slavery Laws; and
 - (iii) provide the Principal with all assistance it requires to:
 - (A) minimise the effects of the relevant event; and
 - (B) where possible, restore compliance with the Modern Slavery Laws.
- (d) If directed to do so by the Principal, an executive of the Operator in a position to know all relevant facts must execute and provide the Principal, within 24 hours after being directed to do so, a statutory declaration confirming the Operator's compliance with

this clause 23 or detailed reasons why it cannot do so.

24. Cyber security

24.1 General

The Operator must:

- (a) ensure that:
 - (i) all technology systems utilised in performing this Agreement or forming part of the Services do not expose the Principal to any material cybersecurity risk such as the introduction of any virus, trojan or other malware onto any Principal network or system;
 - (ii) appropriate encryption standards are applied to all information exchanged between the parties electronically;
 - (iii) prior to commencing its performance of this Agreement, it conducts an appropriate cyber security risk assessment of all electronic systems to be utilised in performing this Agreement; and
 - (iv) all key technology systems operated or used by the Operator have appropriate response and recovery plans;
- (b) on the termination of this Agreement for any reason, promptly:
 - (i) return or destroy, as directed by the Principal, all information supplied to the Operator by or on behalf of the Principal;
 - (ii) cease accessing all information technology environments of the Principal; and
 - (iii) appropriately transition all Principal's Intellectual Property Rights back to the Principal;
- (c) whenever accessing any Principal information technology network, do all things directed by the Principal to ensure the integrity of such network; and
- (d) immediately notify the Principal of any actual or suspected breach of this clause 24.

24.2 Access controls

To the extent that the Operator requires access to any electronic system of the Principal as part of its performance of this Agreement, the Operator must ensure that:

- (a) such access is restricted to those of its Personnel who require such access in order to perform this Agreement in accordance with its terms;
- (b) all relevant Operator access procedures include appropriate identification, authentication, authorisation and auditing requirements;

- (c) all Operator Personnel who require such access do so in a manner that uniquely identifies their access;
- (d) all users, devices and other assets are appropriately authenticated; and
- (e) where access is required from outside a Principal network, multi factor authentication is used for all access.

24.3 Remote access to the Principal's systems

To the extent that the Operator or any of its Personnel require remote access to any Principal network as part of their performance of this Agreement, the Operator must ensure that:

- (a) all such access is securely designed and managed;
- (b) such access is provided only to authorised parties;
- (c) such access is revoked once it is no longer required for the purpose of performing this Agreement; and
- (d) it follows the minimum technical controls directed by the Principal to support the secure operation of remote access.

25. Whistleblower regime

- (a) The Operator:
 - (i) acknowledges and agrees that:
 - (A) whistleblowers play an important role in identifying and preventing misconduct and harm; and
 - (B) the Principal is committed to providing an environment in which whistleblowers are encouraged to come forward and are protected when they do so; and
 - (ii) warrants to the Principal and repeats on each day of the term of this Agreement that it will:
 - (A) comply with the legal rights and protections afforded to whistleblowers in the *Corporations Act 2001* (Cth) as if those rights and protections applied to all persons involved in performing this Agreement; and
 - (B) not threaten, persecute or punish any person who intends to exercise or exercises a whistleblower right.
- (b) If the Operator fails to comply with this clause 25 the Principal may immediately terminate this Agreement by written notice to the Operator.

26. General

26.1 Notices

A notice under this Agreement is only effective if it is in writing, signed and either left at the

addressee's address or sent to the addressee by mail or email to the relevant address stated in Item 14 or 15, as may be updated by written notice to the other party by the addressee.

26.2 Governing law

This Agreement is governed by the laws of New South Wales and each party submits to the exclusive jurisdiction of the courts of that State and courts that may hear appeals from those courts.

26.3 Giving effect to this Agreement

The Operator must do anything and ensure that its Personnel do anything the Principal reasonably requires to give effect to this Agreement.

26.4 Invalidity and enforceability

The invalidity or unenforceability of any provision of this Agreement does not affect the validity or enforceability of any other provision of this Agreement and the invalid or unenforceable part is severable.

26.5 Entire agreement

This Agreement contains the entire agreement between the parties in respect of its subject matter and any previous understanding, agreement, representation or promise relating to that subject matter is of no effect.

26.6 Waiver

- (a) No failure to exercise or delay in exercising any right, remedy or power under this Agreement will operate as a waiver of that right, remedy or power.
- (b) No single or partial exercise of any right, remedy or power under this Agreement will preclude any other or further exercise of that or any other right, remedy or power.
- (c) No waiver of any right, remedy or power on one occasion will operate as a waiver by the waiving person of that right, remedy or power on any other occasion or preclude any other or further exercise of that right, remedy or power on any other occasion.

26.7 Indemnities

- (a) Each indemnity included in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives the termination, rescission or expiration of this Agreement.
- (b) It is not necessary for a party to incur any expense before enforcing an indemnity under this Agreement.
- (c) A party must pay on demand any amount it must pay under an indemnity in this Agreement.

26.8 Liability for expenses

Each party must pay its own expenses incurred in negotiating and performing this Agreement.

26.9 Consents

Where this Agreement contemplates that the Principal may agree or consent to something, unless this Agreement expressly provides otherwise, the Principal may:

- (a) agree or consent, or not agree or consent, in its absolute discretion; and
- (b) agree or consent subject to conditions.

26.10 Counterparts

This Agreement may be executed in counterparts and all counterparts, when taken together, will constitute a single agreement.

26.11 Amendment

This Agreement may only be amended by a document signed by or on behalf of each party.

26.12 Survival

This clause 26 and clauses 1, 2, 3.4, 4, 5.2(e), 78.5, 8.6, 9, 10.4, 11 - 14, 15, 16, 18 - 20 and 23(d) survive the end of the term of this Agreement.