|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  | *Diamantina Shire Council*  |
|  |  |
|  |  | *#[Manager Name*]# |
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| **Draft** |
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| **Management Agreement** |
| **[Birdsville Tourist Caravan Park]** |
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|  |
| Level 7, 95 North Quay, Brisbane |
| [G.P.O. Box 758, Brisbane, 4001] |
|  | Telephone: (07) 3243 0000 |
|  | Facsimile: (07) 3236 1885 |
| 2224871.1  |

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# Reference Information

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| 1. Formation
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|  |  |
| Date: |   ##, 202#. |
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|  |  |
| --- | --- |
| 1. Parties
 |  |

|  |  |
| --- | --- |
| Name: | Diamantina Shire Council |
| ABN 87 774 161 836 |
|  |  |
| Abbreviated description: | Council. |
|  |  |
| Address for Notices: |  |
|  |  |
|  | *Delivery/Post:* | 17 Herbert Street, Bedourie, Qld, 4829 |
|  |  |  |
|  |  |  |
|  | *Facsimile:* | (07) 4746 1272 |
|  |  |

|  |  |
| --- | --- |
| Name: | #[Manager Name]#. |
| ACN/ABN ## |
|  |  |
| Abbreviated description: | Manager. |
|  |  |
| Address for Notices: |  |
|  |  |
|  | *Delivery:* | ##. |
|  |  |  |
|  | *Post:* | ##. |
|  |  |  |
|  | *Facsimile:* | ##. |
|  | *Email:* | ##. |
|  |  |

|  |  |
| --- | --- |
| Name: | #[Covenantor Name]#. |
|  |  |
| Abbreviated description: | Covenantor. |
|  |  |
| Address for Notices: |  |
|  |  |
|  | *Delivery:* | ##. |
|  |  |  |
|  | *Post:* | ##. |
|  |  |  |
|  | *Facsimile:* | ##. |
|  | *Email:* | ##. |
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|  |  |
| --- | --- |
| Name: | #[Covenantor Name]#. |
|  |  |
| Abbreviated description: | Covenantor. |
|  |  |
| Address for Notices: |  |
|  |  |
|  | *Delivery:* | ##. |
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|  | *Post:* | ##. |
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|  | *Facsimile:* | ##. |
|  | *Email:* | ##. |
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| 1. Particulars
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| --- | --- |
| Facility: | Birdsville Tourist Park, 51 Florence Street, Birdsville, Qld, 4482, located on Lot 1 on SP 276160, Title Reference 51175058 |
|  |  |
| Duration: |  |
|  |  |
|  | Term: | # years, commencing ##, 202# and expiring ##[date]##. |
|  |  |  |
|  | Extension Period: | # years, commencing ##; |
|  |  |  |
| Management Fee: |  |  |
|  |  |  |
|  | Management Fee: | $1.00 per annum (exclusive of GST), payable by Manager. |
|  |  |  |
|  | Adjustment Dates: | On the commencement of the Extension Period. |
|  |  |  |
|  | Adjustment method: | CPI movement. |
|  |  |  |
| Insurances: |  | Manager Damage Policy: full reinstatement or replacement cost. |
|  |  |  |
|  |  | Errors and Omissions Policy: not less than $20,000,000.00. |
|  |  |  |
|  |  | Manager Risk Policy: not less than $20,000,000.00. |
|  |  |  |
|  |  | Workers compensation cover. |

|  |  |  |
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|  |  |  |

# Background

Council owns the Birdsville Tourist Park, situated at 51 Florence Street, Birdsville, Qld, 4482 (the *Facility*).

Council has accepted a tender submitted by #[Manager Name]# to operate the Facility on Council’s behalf, as its contracted manager.

This instrument records the terms of the parties' agreement.

# Interpreting the Agreement

## Interpretation Generally

### This Agreement is to be interpreted by reference to the provisions of this Part 3.

### However, each such provision applies only to the extent that:

#### a given context does not require otherwise; or

#### a contrary intention is not apparent.

## Structure

### The Agreement is composed of:

#### narrative provisions;

#### an appendix; and

#### attestations.

### The narrative provisions are divided into Parts.

### Part 1 is composed of Items, and each subsequent Part is composed of Clauses.

### The following types of word begin with a capital letter:

#### a word that is, or is part of, an expression defined in Clause 3.3 or in another provision;

#### a word that begins a sentence;

#### a proper noun.

### The headings, any notes (including footnotes and endnotes), and the table of contents appear in the Agreement for convenience only; they are not operative provisions of the Agreement.

## Operative Provisions

### All provisions in the Agreement are operative provisions of agreement, other than the Part 2 background provisions and any others expressly identified as non‑operative provisions (for example, subject headings).

### If the meaning of an operative provision (read alone or with other operative provisions) is clear, a non‑operative provision may not be invoked to qualify or otherwise alter that meaning.

### However, if the meaning of an operative provision (read alone or with other operative provisions) is unclear, it is to be read in conjunction with any non‑operative provision, other than a subject heading, which assists in elucidating its intended meaning.

## Glossary

Each of the following expressions in bold to the left bears the meaning shown opposite or contained in the cross‑referenced provision shown opposite:

|  |  |
| --- | --- |
| Act | A legislative enactment of the Queensland Parliament or the Commonwealth Parliament.Subordinate legislation made under the enactment.A direction or requirement made by a competent entity under the enactment or subordinate legislation.A licence, authorization, consent, approval, or exemption granted under the enactment or subordinate legislation.A planning instrument.A local law. |
| Act of Insolvency | For a Party subject to the *Bankruptcy Act 1966 (Cwlth)*:signing an authority that appoints a controlling trustee;committing an act of bankruptcy;presenting a debtors petition for bankruptcy, or suffering the presentation of a creditors petition; orbecoming bankrupt upon a debtors petition or a creditors petition.For a Party subject to the *Corporations Act 2001* (Cwlth):entering voluntary administration;suffering the appointment of a provisional liquidator;failing to satisfy a statutory demand;passing a voluntary winding up resolution, voluntarily applying to be wound up, or suffering presentation of an application for winding‑up otherwise than for the purpose of a reconstruction; orbeing wound up or being de‑registered otherwise than in the context of a reconstruction.For Council:suffering the declaration, by a court of competent jurisdiction, that it is unable to pay its debts as and when they fall due; orsuffering dissolution as a legal entity without another entity acceding to its functions.For a Party in any event:suffering a mortgagee taking possession of its assets or any of them;suffering the appointment of a receiver, which appointment is not terminated, postponed, or enjoined within 14 days after it is made; orfailing to secure the return of an asset within 21 days after a creditor or an encumbrancee lawfully seizes it. |
| Address for Notices | For each Party:its address or facsimile number shown at Item 2;such other address or facsimile number as it has notified to the other Party as its address or facsimile number for notices under this Agreement; orif it is not at either such address or facsimile number, its last principal place of business or facsimile number known to the other Party. |
| Agreement | This instrument and the agreement it evidences. |
| Aggrieved Party | Refer to Clause 16.1. |
| Appendix | The appendix in this Agreement. |
| Business Day | For giving notice: a day other than a Saturday, a Sunday, or another public holiday in the locality to which the notice is to be sent.For making a payment: a day, other than a Saturday, a Sunday, or another public holiday, upon which banks are open for business in the locality of the recipient's Address for Notices.For this definition, a bank is a trading bank licensed to conduct banking business, and conducting banking business, under an Act regulating banking. |
| Claim | An assertion of entitlement to a remedy arising from or otherwise relating to an act or occurrence, made by any means, including:a demand; andthe pursuit of a cause of action before a court, a tribunal, or any other body (whether judicial, quasi‑judicial, or administrative). |
| Clause | A numbered clause or sub‑clause in this Agreement other than in an Appendix. |
| Commencement Date | For the Term: ##, 202#. |
| Compensation Demand | Refer to Clause 16.1. |
| Composite Policy | Refer to Clause 12.1. |
| Cost | Expense and loss, including damages. |
| Council | Diamantina Shire Council. Refer to Item 2. |
| Council Damage Policy | Refer to Clause 13.1. |
| Council Property | All of Council's buildings, fixtures, plant, equipment, and fittings situated within the Facility, including:furnishings;floor coverings (including carpets);air‑conditioning apparatus;security equipment;fire alarm and response equipment;items forming components of the Services; andthe items detailed upon the inventory in the Appendix.  |
| Council Risk Policy | Refer to Clause 13.1. |
| Covenantor | The persons identified as such at Item 2. |
| CPI | The Consumer Price Index (All Groups) Brisbane published from time to time by the Australian Bureau of Statistics (*ABS*).If that index is inappropriate: the Wage Cost Index, Australia published by the ABS at the relevant times.If neither the foregoing two indices is appropriate: the Average Weekly Earnings, Australia index, published by the ABS at the relevant times.If none of the foregoing three indices is appropriate: an index that the Australian Statistician nominates as appropriate (whether by public notice or by specific advice to Council or the Manager).If the Australian Statistician has not published an appropriate index, and will not nominate one: an index or average the Parties agree is appropriate.An index or average is appropriate if it reflects on a consistent basis changes in the cost of living in Brisbane during a relevant period.An index or average is inappropriate if:it is suspended or discontinued; orthe method of its calculation is so substantially altered that it does not reflect on a consistent basis change in the cost of living in Brisbane during a relevant period. |
| Cross‑liability Provision | Refer to Clause 12.1. |
| Damage and Loss | Refer to Clause 12.1. |
|  |  |
| Default Notice | Refer to Clause 16.1. |
| Electrical Equipment | Electrical equipment as defined in the *Electricity Act 1994*.[[1]](#footnote-1) |
| Electrical Installation | An electrical installation as defined in the *Electricity Act 1994*.[[2]](#footnote-2) |
| Errors and Omissions Policy | Refer to Clause 12.1. |
| Expiry Date: | The date the Term (as extended, if relevant) expires. Refer to Item 3 and Part 5. |
| Extension Period | # years, commencing on ##. |
| Facility | The Birdsville Tourist Park complex specified at Item 3. |
| Fees | All fees the Manager charges for:the hire of cabins, caravan sites and camping sites at the Facility; orthe use of an ancillary or other facility within the Facility. |
| Formation Date | The date this Agreement is formed as a contract or (if it is not a contract) is unconditionally delivered as a mutual deed.Absent evidence establishing a different date, that date is the date specified at Item 1. |
| GST | Goods and services tax as defined by the *GST Act*. |
| *GST Act* | *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth), including other relevant GST‑related legislation. |
| Harm | All or any of:death or personal injury;disease or illness (including mental illness);(for clarity) disablement, whether from disease, illness, or personal injury;property Damage and Loss. |
| Item | A numbered item of information in Part 1. |
| LGM Pool | Refer to Clause 13.1. |
| Maintenance | Includes repairing damage and replacing items that require replacement. |
| Management Fee | Refer to Clause 6.1. |
| Manager | #[Manager Name]#. Refer to Item 2. |
| Manager Damage Policy | Refer to Clause 12.1. |
| Manager Property | Refer to Clause 12.1. |
| Manager Risk Policy | Refer to Clause 12.1. |
| Non‑imputation Provision | Refer to Clause 12.1. |
| Officer | For the Manager, if a corporation: a director, a company secretary, or an attorney or other authorized person.For the Manager, if a natural person:the person himself/herself;his/her attorney (for a relevant purpose); orhis/her lawfully appointed guardian or administrator, if (s)he suffers impaired capacity (*for example, a guardian or administrator appointed under the* *Guardianship and Administration Act 2000*).For Council, when concerning the signature of a document (*for example, a notice or an agreement*):[[3]](#footnote-3)its mayor;a councillor or employee duly authorized by the mayor to sign the document, or documents of a class encompassing the document; ora person to whom it has delegated the power to sign the document or a class of document (including, if the delegate is its chief executive officer, the chief executive officer’s subdelegate[[4]](#footnote-4)).For Council, when concerning the performance of an act other than the signature of a document:a person to whom it has delegated the power to perform the act;if it has delegated the power to its chief executive officer: the chief executive officer’s lawful subdelegate for the purpose.For either Party: its solicitor. |
| Operating Expenses | Refer to Clause 6.6. |
| Part | A numbered part of this Agreement, other than in an Appendix, containing:one or more Items; orone or more Clauses. |
| Party | A party to the Agreement. |
| Personnel | For a Party, each of:its Officers;its employees; andits agents and other service‑providers, and each of their officers, employees, agents, and other service providers. |
| Queensland Court | Refer to Clause 19.24. |
| Receiver | A receiver, or a receiver and manager, of the assets of the business the Manager conducts upon the Facility pursuant to this Agreement. |
| Remedial Expenses | Refer to Clause 12.1.  |
| Services | The utility services from time to time appurtenant to the Facility, including:electronic services;fire, sprinkler, and air conditioning services;lighting, gas, fuel, and other energy services;water, sewerage, and drainage services.The infrastructure via which those utility services are delivered, including fittings, fixtures, appliances, plant, and equipment. |
| Structural | For a building or other structure:load‑bearing and/or supportive; orotherwise essential to the integrity of fabric of the structure. |
| Subrogation Waiver | Refer to Clause 12.1. |
| Term | The term specified at Item 3. |
| Vehicle | An item of equipment, motorized or non‑motorized, for transporting persons, goods, commodities, or other items, *for example* *cars, trucks, trailers, and motor cycles.* |
| Vehicle Policy | Refer to Clause 12.1. |
| *WHS Act* | *Work Health and Safety Act 2011.* |
| *Workers Compensation Act* | Refer to Clause 12.1. |

## Cognate Expressions

Derivatives of a defined expression bear meanings corresponding to and consistent with the definition.

## Non-defined Expressions

A term not relevantly defined in the Agreement carries the meaning that the Oxford Dictionary of English ascribes to it.

## Examples

### An example in or for a provision is part of the provision; it is not to be disregarded for interpretation purposes.

### The example is not exhaustive, nor does it limit the meaning of the provision, but it may extend that meaning.

### The example and the provision are to be read:

#### relative to one another; and

#### in the context of all provisions of the Agreement.

### If, so read, they are inconsistent, the example is to be disregarded.

## Severance

A provision is to be treated as omitted from the Agreement if:

### the provision is void, unenforceable, or incomprehensible; or

### retaining the provision would render the Agreement or another provision void, unenforceable, or incomprehensible.

## Determining Intent of Agreement

The intent of the Agreement is to be determined by reference at least to:

### its subject and any expressed objects;

### its Part 2 background, to the extent Clause 3.3 permits;

### its express provisions as originally made (including those omitted pursuant to Clause 3.8); and

### the nature of the provision/s omitted pursuant to Clause 3.8, and the practicality of effectuating the Agreement net of those provisions.

## Parties

### Reference to a Party who is a natural person includes the person’s personal representatives and permitted assigns.

### Reference to a Party that is a legal entity other than a natural person includes the entity’s successors and permitted assigns.

*Examples of a legal entity other than a natural person: a corporation; a body politic*.

### For a Party composed of two or more persons, each acknowledgement, representation, obligation, and entitlement binding or benefiting the Party binds or benefits:

#### all of those persons jointly; and

#### each of them as an individual.

## Durations and Block References

### A period beginning upon a specified day begins at the beginning of that day.

### A period ending on a specified day ends at the moment before midnight of that day.

### A period ending upon a specified day ends at the end of that day.

### Reference to the period between two specified dates, times, or periods includes each of those two dates, times, or periods.

*Example: A reference to the period “from 1 January to 31 December” or “between 1 January and 31 December” is a reference to the period comprising each of those two dates and all of the days between them*.

### Reference to the items between two specified items (in this or another instrument) includes each of those two specified items.

## Inclusive and Particular References

### *Include* and its derivatives are not terms of limitation.

*Example: In a Clause stating that item A includes item B, item B is one of the things that item A encompasses; it is not necessarily the only thing*.

### Neither of *in particular* or *particularly* is a term of limitation.

*Example: A provision requiring compliance with an approval, "particularly" a specified condition of the approval or permit, does not limit the compliance obligation to the stated condition*.

## References to Actions

### Reference (direct or indirect) to person's act:

#### encompasses an act of commission and an act of omission; and

#### includes the act of another person if the law deems the other person's act also to be the first-mentioned person's act because of the legal relationship between the two.

*Example for sub‑clause (1)(b): The act of an employee, in the performance of that person's duties as employee, is imputed to his/her employer; that is, it is deemed by law also to be the act of the employer*.

### A provision that obliges a person not to do something obliges the person also to prevent others over whom he has control or dominion from doing that thing.

## References to Acts/Statutory Provisions

### Reference to an Act includes an Act that amends, consolidates, or replaces it.

### Reference to a provision in an Act includes a provision that amends, consolidates, or replaces it.

### Reference to an Act not identified (by definition or otherwise) as an Act of the Commonwealth Parliament is to an Act of the Queensland Parliament.

## Other References

### Reference to the singular includes the plural, and vice-versa.

### Reference to a gender includes each other gender.

### Reference to a person encompasses a natural person, a corporation, any other type of legal entity (including a body politic), a firm, and a voluntary association.

### Reference to an approval, a consent, or a permission includes any conditions that attach to it.

### Reference to an entity that has ceased to exist, or has reconstituted, amalgamated, reconstructed, or merged, is to be treated as a reference to:

#### the entity established or constituted in its stead; or

#### (if no such entity) the entity succeeding, as nearly as may be, to its power or function.

### Reference to an office or a position includes:

#### an office or a position established or constituted in lieu of that office or position; or

#### (if no such office or position) the office or position succeeding, as nearly as may be, to its power or function.

### Reference to an agreement or other instrument is to that agreement or instrument as amended, supplemented, replaced, or novated.

### Reference to termination of this Agreement is a reference to termination by any means (for example, by expiry or merger, by frustration, or by termination for breach).

### Reference to money is a reference to Australian dollars and cents.

### Reference to a time of day is a reference to Australian Eastern Standard Time.

### Reference to writing is a reference to reproduction of words, figures, symbols, and shapes in visible form, in English.

## Contra Proferentem Interpretation

A provision of the Agreement is not to be interpreted against the interest of a Party merely because the Agreement or provision was drawn or inserted by or on behalf of that Party.

# Appointment and status of Manager

## Appointment

### Council appoints the Manager to operate the Facility throughout the Term.

### The Manager accepts the appointment.

## Disclosure of Status

Whether in operating the Facility or otherwise, the Manager must not represent that:

### it possesses any proprietary or other interest in the Facility; or

### it is other than the contracted operator of the Facility.

## Agency/Authority

### This Agreement alone does not constitute the manager as Council's agent for any purpose

### The Manager possesses no authority to incur any obligation or liability on Council's behalf, or in Council's name.

## Manager‑incurred Liabilities

### Obligations or liabilities that the Manager incurs in operating the Facility must be incurred in the Manager's own name and on its own account.

### Any contract, letter, order, or other instrument to which the Manager is a party, or that the Manager uses, in and for operating the Facility, must display the Manager’s name prominently as the operator of the Facility.

# Duration of Agreement

## Term

### The term of the Agreement (the *Term*) is # years.

### The Term commences on ##, 202# (the *Commencement Date*)

### (Subject to Clause 5.2) the Term expires on ##[date]## (the *Expiry Date*).

## Option to Extend Term

### Subject to Clause 5.3, Council grants the Manager an option (the *option*) to extend the Term by # years beginning on ## (the *Extension Period*).

### For clarity:

#### upon extension of the Term pursuant to the exercise of the option, the Expiry Date will correlatively adjust to become the last day of the Extension Period; and

#### the Manager may not extend the Term beyond the end of the Extension Period.

## Loss of Option

The Manager is not entitled to exercise the option to extend the Term if and while it is in default under the Agreement.

## Exercise of Option

The Manager may exercise the option (if entitled) only by giving notice to Council:

### not earlier than 180 days before the Expiry Date; and

### not later than 90 days before the Expiry Date.

## Loss of Extension Entitlement

### If, having lawfully exercised the option to extend the Term, the Manager defaults under the Agreement before the Extension Period begins, its notice exercising the option will be ineffective while the default or failure continues.

### The Manager will lose all entitlement to extend the Term if it is in default immediately before the Extension Period is due to begin.

## Variation of Agreement

If the Manager lawfully extends the Term pursuant to this Part 5:

### the Term will continue until the Extension Period expires;

### Council will prepare and submit to the Manager a deed formally varying the Agreement consistently with this Clause 5.6; and

### the Parties must promptly execute and deliver the deed.

# Management Fee, Profits and Operating Expenses

## Management Fee

### The Manager must pay Council a fee (the *Management Fee*) of $1.00 per annum (exclusive of GST) during the Term.

### The Manager must pay the Management Fee:

#### monthly in advance;

#### by equal consecutive instalments, each being one‑twelfth of the annual Management Fee;

#### to Council’s nominated account.

## Management Fee Adjustment

### The first day of the Extension Period is an Adjustment Date.

### The annual Management Fee for the Extension Period will be determined by applying the formula:

*Management Fee  x CPI 2*

 *CPI 1*


### For that formula:

#### Management Fee is the annual Management Fee payable immediately before the Adjustment Date;

#### CPI 2 is the CPI published for the quarter year last expiring before the Adjustment Date; and

#### CPI 1 is the CPI published for the equivalent quarter of the previous year.

*Example for sub‑clause (c): If CPI 2 is the CPI for the third quarter of a given year, CPI 1 is the CPI for the third quarter of the previous year*.

## Apportionment for Broken Periods

### Clauses 6.3(2) and 6.3(3) apply if the Term:

#### begins on a day other than the first of a Month; or

#### expires on a day other than the last day of a Month.

### The Manager must pay for the broken period:

#### preceding the first complete Month; and

#### following the last complete Month,

a proportionate part of the Monthly instalment payable on account of the Management Fee (calculated at a pro rata daily rate).

### The Manager must make the payment not later than the 1st day of the broken period.

## Retention of Income

The Manager may retain the Fees, other than excess Fees charged in breach of Clause 6.5(2).

## Usage Fees

### Council will determine from time to time the maximum Fees that the Manager may charge, but:

#### Council must not set a Fee at an undervalue; and

#### in any event, the set Fees must be reasonable having reference to all relevant circumstances.

### The Fees will be taken as set on a GST‑exclusive basis.

### The Manager must not charge Fees in excess of those (GST‑exclusive) sums that Council has determined.

## Operating Expenses

### The Manager will meet the Operating Expenses.

### *Operating Expenses* are the expenses incurred, day-to-day and at wider intervals, in the use and operation of the Facility, including all:

#### expenses incurred in providing Services, including charges for energy supplies;

#### service and equipment supply charges for installed telephones and internet connections;

#### charges for telephone and data usage;

#### insurance premiums and other charges, including duty;

#### expenses of providing security services;

#### Maintenance and cleaning expenses (including painting and plumbing expenses);

#### rubbish and waste removal expenses;

#### pest control expenses;

#### expenses of supplying towels, soap and other requisites to washrooms and toilets;

#### audit and other accountancy expenses; and

#### expenses of complying with Acts and governmental requirements or orders.

## Payment of Money Generally

### The Manager must pay all money due to Council under the Agreement:

#### without set‑off or other deduction; and

#### by the date or time for payment, or within the payment period, the Agreement specifies; or

#### upon demand, if neither a date or time for payment, nor payment period, is specified; and

#### otherwise in the manner Council directs.

### Absent a contrary direction from Council, the Manager must pay the money to Council at Council’s Address for Notices.

### Payment or receipt of less than a sum due under the Agreement will be treated as made and received only in reduction of the full amount due.

### If the Manager tenders a short payment, the tender will not create an accord and satisfaction merely because:

#### a letter or note accompanying the payment or giving notice of it; or

#### a negotiable instrument comprising the payment,

contains or (for a negotiable instrument) is endorsed with a statement that the sum tendered represents full or final payment of what is due.

### A *short payment* is the payment of a sum less than the full amount due.

### Council may accept a short payment without prejudice to its entitlement:

#### to recover the outstanding balance; or

#### to pursue another remedy available to it.

# Goods & Services Tax

## Interpretation of Terms

Each of the following expressions bears the meaning the *GST Act* ascribes to it:

### *adjustment event;*

### *adjustment note;*

### *Commissioner;*

### *consideration;*

### *creditable acquisition;*

### *input tax credit;*

### *recipient;*

### *recipient created tax invoice;*

### *registered;*

### *supplier;*

### *taxable supply;*

### *tax invoice.*

## Character of Payments

### Non‑monetary consideration for a taxable supply under the Agreement is GST‑inclusive.

### However, unless the Agreement states otherwise, monetary consideration for a taxable supply made under it is GST‑exclusive.

## Responsibility for Payment

The recipient must:

### bear the GST upon a taxable supply under the Agreement;

### pay the supplier a sum equivalent to that GST with the consideration for the supply.

## Input Credits Adjustment (Reimbursements)

### If the Agreement requires a recipient to reimburse a supplier the cost of a creditable acquisition, the cost is to be net of the input tax credit to which the supplier is entitled for the cost.

### If the Agreement requires the reimbursement of a percentage of the cost of a creditable acquisition, the percentage is to be net of an equivalent percentage of the input tax credit to which the supplier is entitled for the cost.

### If the reimbursement of all or part of the cost of a creditable acquisition constitutes consideration for a taxable supply, the recipient must pay the supplier, in conjunction with the reimbursement payment, the GST referable to the supply.

### If the Agreement obliges a Party to indemnify the other Party against a Cost the other incurs or sustains, the Cost will be net of all input tax credits the payee is entitled to claim concerning that Cost.

### For clarity, if the net Cost to be indemnified constitutes the consideration for a taxable supply, the payer must bear the GST for the taxable supply.

## Adjustments

### This Clause 7.5 applies if an adjustment event occurs concerning a taxable supply made under the Agreement.

### The consideration for the supply will be recalculated to reflect the adjustment event.

### As the case requires:

#### the recipient must pay the resultant GST shortfall to the supplier; or

#### the supplier must refund the resultant GST overpayment to the recipient.

## Tax Invoices and Adjustment Notes

### The supplier need not give the recipient a tax invoice or adjustment note for a taxable supply under the Agreement if:

#### the Commissioner has issued a written determination or ruling permitting the recipient to issue a recipientcreated tax invoice for the supply; and

#### the recipient gives the supplier a recipientcreated tax invoice or an adjustment note (as the case requires) for that supply.

### Otherwise, however, the supplier must give the recipient, when it makes the taxable supply or in exchange for the consideration, a tax invoice for the supply.

### The supplier also must give the recipient an adjustment note:

#### in exchange for payment of a GST shortfall; or

#### in conjunction with the payment of a GST refund.

### If the consideration for a taxable supply is non‑monetary, the tax invoice for the supply, and a relevant adjustment note, must state as the consideration the GST‑inclusive market value of the supply.

### A Party that has been issuing recipientcreated tax invoices for taxable supplies under the Agreement must notify the other Party promptly if it loses its entitlement to issue such invoices.

## Registration

### Each Party declares that it is registered.

### A Party must notify the other promptly if it ceases to be registered.

# Accounts and Financial Records

## Accounts and Records

### Irrespective of its prudential obligations under any Act, the Manager must maintain at all times during the Term complete and accurate accounts and records concerning operation of the Facility pursuant to this Agreement.

#### In particular, the Manager must maintain and retain complete and accurate accounts and records of all income and expenditure, Operating Expenses, and other charges paid by it and payable to it concerning use and operation of the Facility.

### The Manager must take all reasonable steps to ensure that every relevant transaction is recorded (where appropriate upon serially numbered invoices or receipts, or electronically) in accordance with recommendations made by Council from time to time.

### The Manager must keep its financial records at a place Council approves, the approval not to be unreasonably withheld or delayed.

### Upon request by Council, made upon not shorter than 2 Business Days notice of Council’s desire to inspect them, the Manager must give Council unrestricted access to:

#### the financial records; and

#### all other records of the performance of its obligations under this Agreement.

### In particular, though without limitation:

#### Council may inspect and audit at any time all of the Manager’s financial records concerning operation of the Facility;

#### the Manager must ensure its availability, and the availability of its staff, for interview by Council concerning operation of the Facility; and

#### if an audit or enquiry on behalf of Council has revealed an irregularity that, in Council's opinion (reasonably formed), is material, the Manager must reimburse Council upon demand the cost of the audit or enquiry.

### When the Agreement terminates:

#### the Manager must hand to Council all accounts and other records it has maintained pursuant to this Clause 8.1; and

#### Council must retain them for at least 3 years following receipt.

### For clarity, the Manager may retain its own copies of all such accounts and other records.

## Accounting Standards

The Manager must ensure the maintenance of its accounts and financial records in conformity with:

### the requirements of all relevant Acts; and

### (otherwise) generally-accepted accounting practices in Australia for businesses similar to the Facility operation.

## Operating Account

### The Manager must maintain with a bank a current operating account in the name, “Birdsville Tourist Park” (or in another name Council approves), and must provide Council promptly with details of:

#### the bank (including the branch) at which the account is maintained;

#### the name of the account; and

#### the account number.

### The bank must be a trading bank licensed to conduct banking business, and conducting banking business, under an Act regulating banking, and must maintain a business office in Council's local government area.

### The Manager must ensure that all money received and paid in connection with operating the Facility is received to and paid from the operating account, excepting any money required by law to be held in a discrete trust account.

# Facility Use & Operation

## Name of Facility

### The Manager must operate the Facility under whatever name Council lawfully requires.

### If it requires the Manager to operate the Facility, or not to operate it, under a particular name:

#### Council must notify the Manager of the requirement; and

#### the Manager will be bound by the requirement upon receiving the notice.

## Business Hours

### Council will determine from time to time the business hours for the Facility.

### Council will notify the Manager of those hours.

## Availability of Facility

Subject to any specific provision of this Agreement to the contrary, the Manager must keep the Facility open and available for the hire of caravan sites, camping sites and cabins (and their ancillary facilities) by the members of the public.

## Notice of Fees

The Manager must display at a conspicuous location near the main entrance to the Facility, and in its office at the Facility, a notice or notices detailing at least the current fees payable for the hire of cabins, caravan sites and camping sites, and the use of ancillary or other facilities, at the Facility.

## Prime Obligations

### The Manager must operate the Facility honestly and competently:

#### to preserve and enhance their amenity and the goodwill (reputation) of the business; and

#### to optimize the benefit of the Agreement to each Party.

### The Manager must pay its creditors and employees promptly, and collect without delay money owing by its debtors.

### The Manager also must comply promptly and diligently with the requirements of all Acts regulating use of the Facility, particularly those of the *Manufactured Homes (Residential Parks) Act 2003* (where applicable) and the *WHS Act*.

## Operational Standards

### The Manager must ensure that the Facility office or telephone is attended during business hours, to provide information, take bookings, and receive payments.

### The Manager must ensure that use of the facilities at the Facility is properly and adequately supervised or monitored, to ensure the safety of persons and property.

### The Manager must conduct itself, and ensure that its Personnel conduct themselves, in a manner that maintains or enhances good public relations, particularly with persons attending the Facility.

### In particular, the Manager must not engage in or permit anything that:

#### might or does affect adversely, or reflect unfavourably upon, Council's business or reputation or that of the Facility;

#### might or does confuse, mislead, or deceive the public;

#### is unlawful; or

#### is annoying, noxious, or offensive.

### The Manager also must not cease managing the Facility during the Term.

## Statutory Compliance

### Regardless of other provisions in this Agreement, the Manager must comply (by itself and by its Personnel) with all Acts governing the exercise of its entitlements and the discharge of its obligations under and in relation the Agreement.

### The Manager must indemnify Council against all Cost borne of any breach of that obligation.

### For clarity, though without limitation, if an Act requires that persons performing given work must be licensed, the Manager must ensure that all such work is performed by persons appropriately licensed under the Act.

*Examples of licensing Acts:*

*(a) the Queensland Building and Construction Commission Act 1991;*

*(b) the Electrical Safety Act 2002;*

*(c) the Professional Engineers Act 2002.*

### The Manager will be, for the *WHS Act*, the principal contractor and the person in control of the Facility.

## Promotion of Facility

The Manager must:

### actively promote the Facility as an ideal caravan park offering accommodation to the travelling public; and

### actively assist Council to advertise and promote the Facility.

## Third Party Benefits

### The Manager must not seek, claim, or accept from a person other than Council, without Council consent, remuneration for doing anything related to the discharge of its obligations under this Agreement.

### The Manager must declare to Council, and deal with as Council reasonably requires, any gratuity or benefit offered to it in return for anything done in discharge of the Manager’s duties under this Agreement.

## Personnel

### The Manager must ensure that the work necessary to discharge its obligations under this Agreement is performed personally by the Manager and/or by the Manager’s own Personnel.

### The Manager must bear all expenses associated with the engagement of its own personnel, including their remuneration.

### The Manager must ensure that, save to the extent reasonable security measures otherwise require, all Facility staff (including the Manager) seen by the public in the course of their duties at the Facility:

#### are neatly attired; and

#### wear clearly visible identification as Facility staff.

### The Manager must keep Council fully informed of industrial negotiations, disputes, or matters that occur or are likely to occur from time to time, affecting or likely to affect its operation of the Facility under this Agreement.

### The Manager must not enter an agreement with a trade union or other employee organization, or agree to an alteration in working conditions for its personnel at the Facility, without:

#### fully discussing the matter with Council; and

#### obtaining Council approval of the agreement, which Council must not unreasonably withhold or delay.

## Council Systems

### The Manager must make itself proficient in the use of Council guidelines, systems, policies, processes, and procedures relating to operation of the Facility.

## Consultation between Parties

### Whenever Council requests it to do so, the Manager must meet with and consult Council’s chief executive officer, or their delegate, concerning:

#### operations at the Facility; and

#### pursuit and achievement of Council’s objectives for the Facility.

### The Manager must:

#### consult fully and openly at each meeting; and

#### work with and assist Council in formulating concepts for development and improvement of the Facility.

### Without limitation, the Manager must make available at each meeting any reports or material Council requests.

## Public Relations/Courtesy

### The Manager must conduct itself, and ensure that its Personnel conduct themselves, in a manner that maintains or enhances good relations with persons attending, using, or seeking to use the Facility.

### In particular, the Manager must:

#### answer promptly and courteously all correspondence it receives concerning the Facility;

#### engage courteously and constructively with community members to consider, in conjunction with Council, any proposals they might advance for enhancing or improving the utility of the Facility as a community‑significant facility; and

#### deal promptly, courteously, and efficiently with all complaints it receives concerning the Facility.

## Provision of Information Generally

### The Manager must provide promptly any information or report Council requests of it from time to time concerning the Facility and its operation pursuant to this Agreement.

### The Parties acknowledge that the information and reports the Manager provides in response to a Council request will be commercially sensitive, and they covenant to receive and treat the information/reports as confidential information.

## Exclusion of Unruly Persons

### The Manager may remove from the Facility (or refuse entry) a person who is, in the Manager’s opinion (reasonably formed):

#### causing nuisance; or

#### engaging in Harmful conduct or conduct that creates a risk of Harm;

#### breaching an applicable local law or other Facility rule; or

#### inebriated or otherwise drug‑affected.

### Nuisance includes anything that:

#### disturbs or inconveniences people in the vicinity of the Facility; or

#### unreasonably or impermissibly interferes with a person's lawful use and enjoyment of the Facility.

### The Manager may exclude permanently from the Facility a person who has been removed at least three times under this Clause 9.15.

## Damage to/Misuse of Facility

The Manager must:

### refrain from damaging, misusing, or overloading any Service or other component of the Facility;

### ensure that its Personnel do likewise; and

### take all reasonable steps to ensure that patrons and visitors do likewise.

## Use of Services

### Other than to the extent this Agreement permits or Council consents, the Manager must not interfere with a Service or permit an interference.

### The Manager must not use or permit to be used for a purpose other than that for which it was constructed, any water closet, drain, or other water apparatus, or any other Service, in or about the Facility

### In particular, the Manager must not place or permit to be placed in water closets or drains any sweepings, rubbish, rags, ashes or other deleterious substances for which they were not designed.

## Dangerous Items and Activities

### Subject to any express provision to the contrary, the Manager:

#### must not use or store dangerous goods at the Facility, or permit their storage there;

#### must not conduct a dangerous activity at the Facility, or permit such an activity to occur there without Council approval and without a relevant authorization, consent, or licence required under an applicable Act.

### This Clause 9.16 does not apply to cleaning fluids, fuels, and other materials necessary for operating the Facility under this Agreement, where proper safety procedures and the requirements of applicable Acts are observed in the storage and use of those item.

## Assistance to Injured or Ill Persons

### The Manager must maintain an operational first aid station at the Facility.

### The entrance to the first aid station must be obstacle‑free at all times.

### The Manager must keep the first aid station free of content other than medical/first aid equipment and supplies necessary for efficient and effective provision of first aid.

### Upon becoming aware that a person has been injured or has become ill at the Facility, the Manager must ensure as a priority the provision of first aid or other appropriate assistance to that person.

### If it appears that the person requires further or specialized medical attention, the Manager must arrange for the person:

#### to receive that attention at the Facility; or

#### to be transported by appropriate means to a medical practitioner or a hospital, where that attention can be provided.

### After discharging its obligations under this Clause 9.19, the Manager must notify Council promptly of:

#### the injury or illness occurrence;

#### how the injury or illness was sustained or detected; and

#### how the Manager responded.

## Manager Equipment

The Manager must provide at its own expense any equipment that:

### it requires to enable it to operate the Facility in accordance with this Agreement; and

### Council does not provide.

## Inventory

### The Manager must maintain at the Facility a fully‑detailed and up‑to‑date inventory of all buildings, fixtures, fittings, and chattels forming part of the Facility.

### Without limitation, the inventory must detail ownership, age, condition, Maintenance dates, recommended replacement date, and location, of each item.

### The Manager must make the inventory available to Council upon request.

### Council may require the Manager to amend any detail in the inventory (for example, a description of the condition of an item or its recommended replacement date).

### The Manager acknowledges that the items detailed upon the inventory in the Appendix:

#### are located at the Facility; and

#### are and will remain Council Property.

## Assumption of Risk

### The Manager will operate the Facility at its own risk.

### Council will not be liable to the Manager for expense borne of Harm arising upon or about the Facility, occasioned otherwise than by Council negligence or wilful action.

## Loss of Property

### The Manager must take all reasonable precautions to prevent theft or loss of property from the Facility.

### The Manager must report promptly to the Police and to Council every theft or unexplained loss of property from the Facility.

## Improvements

### The Manager must not make or permit improvements, alterations, or additions to the Facility without Council permission.

### Council may grant or withhold permission at its discretion.

## Lighting

The Manager must keep the Facility fully and safely illuminated by electric lights at all times when natural light is inadequate to ensure their safe use.

## Plant and Equipment

### The Manager must use the plant and equipment Council has provided for day‑to‑day Facility operation.

### The Manager must not bring to or use at the Facility plant or equipment of its own unless it possesses express Council permission.

### Council must not withhold permission unreasonably, or grant permission subject to an unreasonable condition.

## Refuse Bins

### Council must supply and maintain covered refuse bins for the collection and storage of refuse within the Facility.

### Council will determine from time to time, and notify to the Manager, the type/s, design/s, and quantities of the refuse bin the Manager must provide, and will promptly notify the Manager of its determinations.

## Signs

### No sign or hoarding may be painted, erected or otherwise placed in or upon the Facility without Council consent.

### Council will not withhold consent unreasonably for any sign or hoarding customary for or incidental to proper management of the Facility if the item strictly complies with the lawful requirements (if any) imposed by relevant Acts.

### Upon termination of this Agreement, if Council requires, the Manager must:

#### remove forthwith any sign or hoarding painted or placed upon the Facility; and

#### restore the relevant area to the condition in which it existed immediately before the sign or hoarding was painted or installed.

## Auction Sales

The Manager must not hold any auction at the Facility, or permit anybody to do so.

## Amusement Machines

### The Manager must not install, or permit to be operated, within the Facility, without Council’s consent:

#### an amusement or electronic games machine; or

#### a vending machine.

### Council must not withhold consent unreasonably in relation to a vending machine.

### Otherwise, however, Council may withhold or withdraw consent at its discretion.

## Audio and/or Vision Equipment

The Manager must not operate at the Facility, or permit to be operated there, without Council consent, any musical instrument, or any audio, visual, or audio-visual equipment if, in Council's opinion, reasonably held, the sound is or is likely to be obtrusively audible, or the picture is or is likely to be obtrusively visible.

### beyond the caravan, camp site or building in which it is being operated; or

### beyond the Facility.

## Preservation of Insurance Protection

Other than in the ordinary course of operating the Facility under this Agreement, the Manager must not do or permit to occur upon the Facility anything it knows, or ought reasonably to know:

### will or might render void or voidable any insurance Council holds concerning the Facility, or property kept there; or

### will or might increase a premium payable upon the insurance.

## Burning Rubbish

The Manager must not burn anything upon the Facility, or permit anything to be burnt there, other than wood burned in the use of barbeque equipment or the designated fire pit.

## Changing Locks

### The Manager must ensure that:

#### no locks at the Facility are changed without Council's consent; and

#### any additional locks installed at the Facility are keyed into the master key system (if any) for the Facility.

### For clarity, this Clause 9.34 does not apply to locks on patron caravans and other patron equipment.

## Vehicles

For clarity, the Manager must ensure that the Vehicles it uses under or in connection with this Agreement, and those used by its Personnel, are:

### registered in compliance with the *Transport Operations (Road Use Management) Act 1995*;

### structurally and mechanically sound; and

### operated responsibly and competently, by appropriately licensed personnel.

## Social Media

### The Manager acknowledges that Council is the owner of any Facebook or other internet site relating to the Facility.

### The Manager must not make any public announcements in respect of Council or any aspect of this Agreement (including its terms) via social media such as Facebook or Twitter without the prior written approval of Council.

### The Manager must moderate social media in respect of the Facility by:

#### regularly monitoring official social media applications administered by the Manager;

#### exercising responsible management of external comments prior to them being made public.

#### removing any derogatory comments immediately on the Manager becoming aware of such comments; and

#### ensuring all of the Manager’s comments involving Council are approved by Council prior to posting on social media.

### Upon termination of this Agreement, the Manager must provide to Council all usernames and passwords to social media and other internet sites relating to the Facility.

### The Manager may not access internet sites relating to the Facility after the expiration or termination of this Agreement.

## Customer Surveys

### The Manager must conduct from time to time, when directed by Council, a survey of Facility patrons.

### The Manager must conduct the survey:

#### in the manner Council requires; and

#### to acquire the statistical information Council requires,

### The Parties acknowledge that the survey reports will be commercially sensitive, and covenant to receive and treat the reports as confidential information.

## Existing Bookings

### The Manager acknowledges that:

#### prior to the commencement date of this Agreement, Council operated the Facility as a Caravan Park / Tourist Park (“**the Business**”); and

#### as part of the Business Council may have taken bookings from guests intending to stay at the Facility for dates, or granting a right for guests to change the date of their stay to a date, on or after the commencing date of this Agreement.

### The Manager will use its best endeavours, including consultation with the Seller prior to the commencement date of this Agreement, to fulfil all bookings, or booking alterations, made by guests to stay at the Facility.

### Council agrees to transfer to the Buyer any deposits or other forms of security payments related to guest bookings for dates occurring after the commencement date of this Agreement.

### In the event that a booking or bookings commence on a date prior to the commencement date of this Agreement, and end on a date thereafter, the parties agree to make an adjustment between themselves on a pro-rata basis.

# Facility Maintenance, CLEANING AND HEALTH

## Cleaning / Hygiene

The Manager must:

### keep the Facility clean and tidy, particularly washrooms and toilets and operating equipment;

### in particular, ensure washrooms are adequately supplied with toilet requisites;

### ensure regular removal of all garbage, litter, and other waste;

### maintain all food preparation and storage areas and facilities free from grease, spillage, and pests, to ensure the highest practical standards of cleanliness and hygiene;

### take all reasonable measures to prevent the incidence and spread of disease within the Facility; and

### (without limitation) promptly remove graffiti, and otherwise repair damage caused by vandals, within the Facility and upon external walls and other structures.

## Blockages and Cleansing

Without limitation, the Manager must:

### keep clean and flowing to optimum capacity, all pipes, drains, water closets and other apparatus at the Facility;

### keep clean and disinfected all surfaces of the Facility that are subject to fouling, including particularly toilets and concourses, by regular and effective use of soap, cleansers, and disinfectants; and

### notify Council of blockages occurring beyond the Facility, in pipes, drains, and other water conduits that serve the Facility, so that Council may clear the blockages.

## Maintenance

### The Manager must Maintain the Facility, including Council Property and any other of Council’s fixtures, fittings and equipment at the Facility, in proper and functional repair, working order, and condition.

### Without limitation, the Manager’s obligation to Maintain the Facility includes:

#### rectifying damage to the Facility;

#### replacing broken glass;

#### replacing inoperative or damaged light bulbs or other illumination sources within the Facility;

#### repairing or replacing (as necessary) Council Property damaged by the Manager or its Personnel (which repair or replacement may be, at Council’s option, effected by Council at the Manager’s expense);

#### maintaining in good repair Council Property within or exclusively serving the Facility, including (where Council reasonably requires it) entering and maintaining service contracts with persons Council approves;

#### ensuring that Electrical Equipment and Electrical Installations connected to the source of electricity supply in the Facility are kept free of defects likely to cause fire or electric shock;

#### keeping cleansed, free of blockage, and flowing to optimum capacity, all pipes, drains, water closets and other conduits at the Facility;

#### keeping cleansed and disinfected all surfaces that are subject to fouling, including particularly change rooms, shower facilities, toilets, and concourses, by regular and effective use of soap, cleansers and disinfectants; and

#### removing any trees deemed to be a nuisance or dangerous.

## Excepted Damage

### The Manager's obligations to Maintain the Facility do not extend to oblige it (absent its negligence, default, or wilful act, or the wilful act of any of its Personnel) to repair:

#### inherent defects;

#### Structural damage; and

#### damage resulting from Harmful occurrences.

### Harmful occurrences are occurrences that precipitate Harm against which Council possesses insurance protection, such as:

#### fire;

#### entry of water;

#### storm and tempest;

#### lightning;

#### flood;

#### earthquake;

#### explosion and concussion from it;

#### impact of vehicles, aircraft, and articles escaping from them;

#### malicious acts;

#### civil commotion;

#### theft;

#### force majeure;

#### inevitable accident.

## Notice of Damage

The Manager must promptly notify Council upon becoming aware of:

### damage to the Facility; or

### the defective operation of Services.

## Landscaping and Gardening

The Manager must:

### keep the Facility free of long grass, noxious plants, and other weeds;

### water and fertilize all plants;

### replace plants that die or are destroyed;

### plant trees and lay grass upon the Facility, and otherwise landscape them, as required by Council;

### Maintain throughout the Term, to Council’s satisfaction, what it has been completed under Clause 10.6(4); and

### remove any trees deemed to be a nuisance or dangerous having regard to any legislative requirements (for example cultural heritage or environmental requirements).

## Maintenance and Repair Obligations

### Included in an obligation to maintain an item is an obligation to repair damage to the item.

### An obligation to repair an item or a component includes an obligation to replace it if:

#### the item or component is unrepairable; or

#### it reasonably requires replacement for continued effective operation; or

#### replacement is prudent as an economic or safety measure.

# Council Obligations

## Structural Repairs

### Save where the repairs are necessitated by the neglect or default of the Manager, or the wilful act of the Manager or its Personnel, Council will meet the cost of necessary Structural repairs for the Facility.

### For repairs necessitated by the negligence or default of the Manager, or the wilful act of the Manager or one or more of its Personnel, Council may require the Manager to arrange or undertake the repairs.

# Manager Insurances

## Part‑specific Definitions

For this Part 12, each of the following expressions in bold to the left bears the meaning shown opposite:

|  |  |
| --- | --- |
| Composite Policy | An insurance policy that:specifies each of the Parties as a named assured;covers each for its rights, interests, and liabilities connected with the Facility; andtreats them as if each were issued a separate or individual policy. |
| Cross‑liability Provision | An insurance policy provision, or collection of provisions, that covers each assured person upon claims made against it by other assured persons as though a separate insurance policy were issued to each of them. |
| Damage and Loss | For an item of property:damage to the item; andloss of the item, including complete or partial loss of use, and loss via misplacement or theft. |
| Errors and Omissions Policy | An insurance policy that covers the insured against Cost born of Claims concerning, and liability for:the erroneous or otherwise inadequate provision of work or a service requiring or entailing the application of a professional or other skill; orthe breach of a professional, ethical, or analogous duty connected with providing, or failing to provide, skilled work or a skilled service. |
| Manager Damage Policy | An insurance policy that:covers the insured against Cost born of Claims concerning, and liability for:Damage and Loss of Manager Property;Harm to persons resulting from use of the insured property (to the extent that the Manager Risk Policy does not cover the Harm); andextends the cover items in the physical and legal control of the insured. |
| Manager Property | All items of property owned by the Manager, or to which the Manager is entitled to possession[[5]](#footnote-5) (other than Council Property):located within the Facility; orused by the Manager at the Facility. |
| Manager Risk Policy | An insurance policy that covers the insured against Cost born of Claims concerning, and liability for:Harm to persons, other than Personnel, for whom the Manager must ensure cover by a policy of workers compensation insurance; andHarm to property other than property that must be covered by a Manager Damage Policy,in connection (directly or indirectly) with operation of the Facility pursuant to this Agreement. |
| Non‑imputation Provision | An insurance policy provision or collection of provisions whereby:the knowledge of one insured person will not be imputed to another insured person for assessing compliance with duties of disclosure; andthe insurer may exercise a remedy for policy breach only against the insured Party that actually commits the breach; not against an innocent co‑insured. |
| Remedial Expenses | For the Manager Damage Policy:the cost of repairing damage or reinstating damaged items, structures, or work, in each case at least to the condition in which it existed before it was damaged;the cost of replacing destroyed items, structures, or work with items, structures, or work of at least equivalent quality;the cost of demolition, debris removal and disposal, site clearance, and the cost of other work required by an Act;the fees payable to architects, engineers, surveyors, solicitors, building contractors, and other service providers engaged to facilitate necessary repair, reinstatement, rebuilding, or replacement; andincidental expenses. |
| Subrogation Waiver | An insurance policy provision, or collection of provisions, by which the insurer relinquishes its right to pursue and exercise the remedies of one co‑assured or beneficiary (the *claimant*) against another co‑assured or beneficiary for the compensation of loss or expense against which the insurer has covered the claimant. |
| Vehicle Policy | A Vehicle insurance policy, or collection of policies, that covers the insured against:Damage or Loss of the Vehicle; andDamage and Loss of property arising from its use. |
| *Workers Compensation Act* | *Workers Compensation and Rehabilitation Act 2003*. |

## Independence of Obligations

### The insurance obligations in this Part 12 are independent of the Manager's indemnity obligations under the Agreement.

### Accordingly, the limits of those indemnity obligations do not confine or limit the insurance obligations nor do the insurance obligations confine or limit those indemnity obligations.

## Manager Insurance

### This Part 12, particularly this Clause 12.3, applies for as long as the Manager operates the Facility pursuant to this Agreement.

### The Manager must maintain:

#### a Manager Damage Policy;

#### an Errors and Omissions Policy; and

#### a Manager Risk Policy.

### The Manager also must ensure that every motor vehicle used upon or in connection with its operation of the Facility (including every vehicle used by its Personnel) is covered by a Vehicle Policy.

### The Manager must ensure that all of its Personnel are insured under the *Workers Compensation Act*.

### For clarity, the Manager does not breach this Clause 12.3 merely because the cover that a specified individual policy would provide is provided by another specified policy.

### The Manager must not begin the provision of its services under the Agreement until:

#### all of the insurance cover this Part 12 requires has been obtained; and

#### it has given Council, for each policy, the items specified in Clause 12.15(1).

## Damage Cover

The Manager Damage Policy must cover the insured property for full reinstatement or replacement cost, including at least the Remedial Expenses.

## Errors and Omissions Cover

The Errors and Omissions Policy:

### must provide a per‑occurrence limit of indemnity not less than the sum specified at Item 3;

### must remain current or continuously renewed at least until the Agreement ends;

### must provide run‑off cover until, at the earliest, the expiry of 7 years after the Expiry Date; and

### must contain a continuous cover clause; namely, a clause extending cover under the policy to a claim arising from a fact or circumstance that could have been, but was not, notified to the insurer under a previous errors and omissions policy.

## Risk Cover

### The Manager Risk Policy must provide a per‑claim limit of indemnity not less than the sum specified at Item 3.

### Council may require from time to time, but not more frequently than once every 3 years, that the Manager increase the level of its cover under the Manager Risk Policy to the sum nominated in a notice (an *escalation notice*) to the Manager.

### In determining the extent of an increase, Council must act reasonably, by reference to demonstrable changes in the real value of damages awards.

### Upon service of an escalation notice, the sum specified in the notice will be deemed the indemnity level specified at Item 3.

### Council may not give an escalation notice earlier than the third anniversary of the Commencement Date.

## Vehicle Insurance Cover

Each Vehicle Policy must:

### for damage to the vehicle, or to each vehicle: cover the vehicle for reinstatement or replacement value; and

### for other Harm: provide per‑vehicle, per‑occurrence indemnity cover not less than $20,000,000.00 (irrespective of whether a given occurrence is one of a series arising from the same event).

## Insurers

### Each policy of insurance this Part 12 requires, other than a *Workers Compensation Act* policy, must issue from a registered insurer that Council approves:

### A registered insurer is an entity licensed under the *Insurance Act 1973*(Cwlth) to conduct general insurance business.

### For clarity, Council may refuse to approve an insurer that holds a financial strength rating lower than:

#### from A.M. Best Company:  A minus;

#### from Standard & Poor’s:  A minus;

#### from Moody’s:  A3; or

#### from Fitch Ratings:  A minus.

### The Manager must give Council upon request, for each policy of general insurance this Part 12 requires, evidence confirming the insurer's current financial strength rating.

## Common Policy Requirements

### This Clause 12.9 applies to each of the insurance policies this Part 12 requires save the Errors and Omissions Policy and the *Workers Compensation Act* policy.

### Each policy must be occurrence‑based; that is to say, it must provide indemnity upon each claim made after expiry or cancellation of the policy where the event precipitating the claim occurs during the term of the policy (irrespective of whether the occurrence is one of a series arising from or in connection with the same event).

### Each policy must be a Composite Policy.

### Alternatively, each policy must expressly insure Council as a third party beneficiary, whether by name or via inclusion in a specified class of beneficiary:

#### covering Council for its interests and entitlements under the Agreement; and

#### enabling Council to make claims under the policy, and to enforce it, directly against the insurer.

### For clarity, a policy must not, in any event, merely note Council as a person with an insurable interest.

### Each Policy:

#### must cover the Parties and the Personnel for their respective rights, interests, and liabilities connected with their engagement upon operation of the Facility;

#### must treat each Party as if the Party were issued a separate or individual policy;

#### must contain a Cross‑liability Provision, a Non‑imputation Provision, and a Subrogation Waiver;

#### must provide automatic limit‑of‑indemnity reinstatement following payment upon a Claim;

#### must cover each insured upon Claims resulting or arising from its own negligence; and

#### must contain no provisions (particularly exclusions, endorsements, or alterations) that Council reasonably disapproves.[[6]](#footnote-6)

### A Composite Policy must provide that notice given to the insurer by one named insured is deemed a notice given by all named insured.

### Further, a Composite Policy must contain the insurer's undertaking:

#### to give each Party a copy of any notice it issues under the policy;

#### to notify Council promptly if the Manager fails to maintain the policy; and

#### to refrain from cancelling the policy until it has given the notice and allowed Council a reasonable opportunity to have the policy reinstated.

### Each policy (as renewed, if necessary or applicable) must remain current until the Agreement ends.

## Notices from Insurer

If it receives a notice from the insurer under a policy that also covers Council, the Manager must give Council promptly a copy of that notice.

## Policy Changes

The Manager must not pursue or agree, without Council consent, a change to any policy the subject of this Part 12.

## Acting Reasonably

### Council may not delay or withhold unreasonably an approval under this Part 12.

### Council may not require unreasonably the inclusion, retention, modification, or exclusion of an insurance policy provision.

## Excesses

If a policy that covers Council requires the insured to pay a claims excess, the Manager will indemnify Council against Cost reasonably incurred by Council because of the requirement.

## Payment of Premiums

The Manager must ensure the prompt payment of all premiums and other money (for example, duty and GST) due to any person or authority upon or concerning the insurance it is obliged to maintain.

## Proof of Insurance

### The Manager must give Council, whenever Council reasonably requests it to do so:

#### a copy of each insurance policy that covers Council; and

#### a certificate of currency of each policy it obtains for this Part 12.

### Each certificate of currency must issue from the insurer, not from the Manager's broker.

### The Manager must comply with the Council request not later than 7 days after Council makes the request.

## Failure to Insure

If the Manager fails to maintain insurance as this Part 12 requires:

### Council may obtain or maintain the insurance; and

### the Manager must reimburse Council upon demand the administrative Cost that Council incurs in the exercise of that entitlement.

## Settlement of Claims

### The Manager must not pursue a claim under a Composite Policy if Council (acting reasonably) notifies it that Council has elected to pursue the claim.

### If it elects to pursue the claim, Council must:

#### pursue the claim diligently; and

#### make every reasonable effort to ensure that each insured Party receives from the insurer no less than its entitlement under the policy.

# Council Insurance

## Part‑specific Definitions

For this Part 13 each of the following expressions in bold to the left bears the meaning shown opposite:

|  |  |  |
| --- | --- | --- |
| **Council Damage Policy** |  | An insurance policy providing indemnity against Cost borne of:Harm to Council Property; andHarm to persons resulting from use of that property (to the extent that the Council Risk Policy does not cover the Harm). |
| **Council Risk Policy** |  | An insurance policy that indemnifies insured against Cost borne of liability for Harm caused by or arising from occurrences upon or about the Facility for which Council is responsible. |
| **LGM Pool** |  | The *Queensland Local Government Mutual Liability Pool*, a mutual scheme established by Local Government Association of Queensland (Incorporated)[[7]](#footnote-7) to manage, and provide a pooled fund for meeting, public liability and professional indemnity claims:affecting member local governing bodies and related entities; andarising in connection with exercise of the members duties, powers, and functions. |

## Types of Council Insurance

### Council must maintain:

#### a Council Damage Policy; and

#### a Council Risk Policy.

### Council must maintain the policies throughout this Agreement.

## Insured Persons

The Council Risk Policy must cover severally Council and the Council Personnel engaged upon operational activities at the Facility.

## Indemnity Levels

### The Council Risk Policy must provide indemnity for not less than $20,000,000.00 per individual occurrence.

### The Council Damage Policy must cover the insured property to reinstatement or replacement value.

## Substantial Compliance

Council complies with its public risk insurance obligation if:

### it is a member of the LGM Pool; and

### it holds a certificate of currency of that membership.

# Trustee Covenants

## Application of Part

This Part 13 applies if the Manager enters the Agreement as a trustee.

## Dual Capacity

The Manager acknowledges that it is personally liable upon its covenants under the Agreement.

## Trustee Warranties

The Manager declares that:

#### it is the sole trustee of the trust;

#### it has fully disclosed to Council the terms of the trust;

#### it possesses unqualified power under the trust to enter the Agreement;

#### it possesses unqualified power to discharge all of its obligations under the Agreement;

#### it possesses unqualified entitlement to indemnity from the trust assets for the liabilities it incurs in the exercise of its trustee powers;

#### it enters the Agreement in the proper exercise of its trustee powers;

#### it is not in breach of trust except as disclosed in writing to Council;

#### it will not breach the trust;

#### no action has been taken to vest or terminate the trust, and none is proposed;

#### no beneficiary is presently entitled to trust assets.

## Prohibited Trust Dealings

The Manager must not commit a breach of trust while any of its obligations under this Agreement remain to be discharged.

## Remedies upon Trustee Default

#### If it incurs a liability to Council for default under this Agreement, the Manager must exercise, upon demand by Council, all indemnity entitlements it possesses against the trust assets and beneficiaries, to discharge the liability.

#### The Manager grants Council a charge over those indemnity entitlements, to assure the payment of all amounts that become owing to Council under the Agreement.

#### The Manager irrevocably appoints Council's chief executive officer its attorney to do in its name, on its behalf, anything the appointee considers necessary to exercise those indemnity entitlements pursuant to the security interest.

## Copy Trust Instrument

* + - 1. The Manager must give Council, upon request, a copy of the deed or deeds comprising the current trust constitution, to enable Council to verify that the trust:
				1. is properly constituted; and
				2. otherwise meets the requirements of this Part 13.
			2. Council must treat the trust deed/s as confidential.

# Dealings with Agreement

## Prohibition (Assignment by Manager)

The Manager may not assign or transfer its interest in this Agreement without Council consent.

## Change in Shareholder Control

If the Manager is a corporation, a change in its directorate or membership that alters its effective control will be deemed a transfer of its interest in the Agreement.

## Security over Agreement

The Manager must not mortgage or otherwise encumber its interest in the Agreement without Council consent.

## Council Consent

Council may grant (absolutely or conditionally) or may refuse, at its discretion, a consent for this Part 15.

# Default and termination

## Part‑specific Definitions

Each of the following expressions in bold to the left bears the meaning shown opposite:

|  |  |
| --- | --- |
| Aggrieved Party | A Party that suffers the breach of an obligation that the other Party owes it under this Agreement. |
| Compensation Demand | A notice from an Aggrieved Party to a defaulting Party:specifying in reasonable detail the loss the default has caused the Aggrieved Party;directing the defaulting Party to pay it a specified, reasonable sum in compensation of the specified loss;specifying the period within which, or the date by which, the compensation must be paid; and(by reason of the specified date or period) allowing the defaulting Party a reasonable opportunity to comply with the demand. |
| Default Notice | A notice from an Aggrieved Party to a defaulting Party:specifying the default in reasonable detail;directing the defaulting Party to remedy the default within a specified period or by a specified date;(by reason of the specified period or date) allowing the defaulting Party a reasonable opportunity to comply with the notice; and(at the Aggrieved Party's option) including a Compensation Demand. |

## Events of Default

A Party defaults under this Agreement if:

### it fails to discharge an obligation that the Agreement imposes upon it;

### a statement or assurance it makes or gives in the Agreement was materially incorrect or misleading when made;

### a statement or assurance it makes or gives in the Agreement is rendered materially incorrect or misleading by its act;

### it commits an Act of Insolvency.

## Entitlements upon Default

### An Aggrieved Party may terminate the Agreement if the defaulting Party fails to comply with a Default Notice.

### However, the Aggrieved Party may not terminate the Agreement for a default that is remedied:

#### after the Default Notice expires; but

#### before the Aggrieved Party delivers, posts, or transmits a notice of termination.

### For serial default, the Aggrieved Party may terminate the Agreement without giving a Default Notice.

### Serial default occurs where a Party:

#### has defaulted under the same provision on not fewer than three occasions (irrespective of whether it has complied with Default Notices concerning those defaults); and

#### defaults under the provision again: that is, on a fourth or subsequent occasion.

### Termination for serial default is an acceptance of repudiation.

### An Aggrieved Party terminates the Agreement by giving notice of termination to the defaulting Party.

## Irremediable/Repudiatory Default

### Irrespective of Clause 16.3, an Aggrieved Party need not give a Default Notice:

#### for an irremediable default; or

#### for a default that is repudiatory.

### Only if the defaulting Party fails to comply with a Compensation Demand concerning the default may an Aggrieved Party terminate the Agreement for an irremediable default:

#### that is not a fundamental breach of the Agreement; and

#### for which it can be adequately compensated.

## Default Compensation

For clarity, compensation the subject of a Default Notice or a Compensation Demand may include the cost of preparing and giving the notice or demand.

## Termination for Convenience

Either Party may terminate this Agreement during the Term by giving the other Party 90 days’ notice.

## Vacation of Possession

When the Term ends (by expiry or otherwise), the Manager must:

### vacate the Facility, leaving it in the condition required under this Agreement (after severance and removal of its property); and

### reinstate each part of the Facility damaged or defaced in the course of the severance and removal, to the condition in which the part existed before the damage or defacement occurred.

# Communications

## Communications Generally

### This Part 17 governs communications under and for the Agreement save to the extent that a provision in another Part or an Appendix expressly provides otherwise.

### Neither an approval nor a consent or permission binds the Party giving it unless that person gives it in writing.

### An appointment or a direction made or given is ineffective unless made or given in writing.

### A notice is ineffective unless given in writing.

### A statement is ineffective unless given in writing.

### A request is taken as neither made nor received if not made in writing.

### A response to a request made is taken as neither given nor received if not given in writing.

## Formal Requirements for Notice

### A notice must be intelligible.

### The Party giving the notice, or one of its Officers, must sign the notice.

### If a Party is composed of more than one person:

#### a notice by that Party need not be signed by all of those persons if it expressly states that the signatory is, or signatories are, authorized by all of those persons to sign the notice; and

#### the recipient of the notice need not enquire into the validity of the authorization.

## Methods of Giving Notice

A Party must give a notice:

### by delivering it to the intended recipient's Address for Notices; or

### by posting it to the intended recipient at its Address for Notices; or

### by transmitting it via facsimile to the intended recipient at its Address for Notices.

## Receipt of Notices

### A notice delivered or posted is deemed received:

#### if delivered at or before 4:30pm: at the moment of delivery;

#### if delivered after 4:30pm: at 8:30am on the Business Day following the day of delivery;

#### if posted to an address in Australia: 5 Business Days after posting, unless the recipient proves later receipt;

#### if posted to an address outside Australia: 8 Business Days after posting, unless the recipient proves later receipt.

### For Clauses 17.4(1)(c) and 17.4(1)(d), proof of later receipt need not be conclusive; proof that the later receipt occurred more probably than not will suffice.

### A notice sent by facsimile transmission is deemed received at the time of receipt specified in a confirmation report, if the report discloses that the transmission was received at or before 4:30pm.

### If the confirmation report discloses receipt of the transmission after 4:30pm, the notice is deemed received at 8:30am on the Business Day following the date of receipt disclosed in the report.

### A confirmation report is, for a facsimile transmission, a transmission confirmation report produced by the sender’s facsimile machine:

#### containing the identification code of the intended recipient's facsimile machine; and

#### indicating that the transmission was received without error.

### A notice received upon a day that is not a Business Day is deemed received at 8:30am on the Business Day following the day of receipt.

# Personal Guarantee

## Guarantee and Indemnity

### The Covenantor acknowledges that:

#### Council enters this Agreement at the request of the Covenantor; and

#### the Covenantor attestations upon the Agreement confirms the request.

### In return for Council entering the Agreement at its request, the Covenantor irrevocably and unconditionally contracts with Council upon the terms in this Part 18.

### The Covenantor guarantees to Council punctual discharge of all Manager obligations under the Agreement.

### The Covenantor will indemnify Council against every Cost that Council sustains or incurs, directly or indirectly, in connection with the Manager failing punctually to discharge an obligation under the Agreement.

## Payment on Demand

Without limitation, the Covenantor must pay Council upon demand the sum necessary to enable Council to discharge a Manager obligation under the Agreement, or to obtain its discharge.

## Refund of Recovered Money

### If it recovers, from a person otherwise responsible for paying it, money received from the Covenantor under this Part 18, Council must refund the money to the Covenantor net of:

#### the recovery expenses incurred; and

#### money the Covenantor still owes it.

### Council must make the refund without unreasonable delay.

## Interest on Overdue Money

### If it fails to pay by the due date money that it owes Council under this Part 18 the Covenantor must pay interest at the overdraft rate on the daily balances outstanding.

### The *overdraft rate* is the interest rate Council's principal banker is charging its customers at the relevant time upon overdraft accommodation exceeding $100,000.00.

## Manager Insolvency

### Council may require the Covenantor (or, if the Covenantor consists of more than one person, whichever of those persons Council selects) to enter an agreement for management of the Facility if:

#### a liquidator or trustee‑in‑bankruptcy appointed to the Manager disclaims the Agreement; or

#### Council becomes entitled to terminate the Agreement.

### Council must exercise that entitlement by notice given to the Manager not later than 180 days after the date of the disclaimer or termination.

### The Covenantor must pay:

#### Council's costs of giving the notice; and

#### Council's legal costs of and incidental to documenting the new agreement.

### The agreement will be coterminous with the remainder of the Term at the date of disclaimer or termination.

### Otherwise, the agreement will contain the provisions of this Agreement referable to the remainder of the Term.

## Liability as Principal Debtor and Contractor

Although, relative to the Manager, it is a surety[[8]](#footnote-8) only, the Covenantor will be deemed a principal contractor of and to Council, collectively and individually liable with the Manager to discharge the Manager obligations under the Agreement.

## Waiver of Entitlements as Surety

To the extent they are inconsistent with a provision of this Part 18, the Covenantor waives its entitlements as the Manager's surety.

## Continuity of Obligations

### The Covenantor obligations under this Part 18 will remain fully enforceable until the Manager obligations under the Agreement have been fully discharged.

### The Covenantor acknowledges that its obligations will not be affected by:

#### termination of the Agreement;

#### the grant of a time or other concession to the Manager;

#### waiver of the failure to discharge a Manager obligation under the Agreement;

#### postponement of the exercise of a Council entitlement under the Agreement;

#### variation of the respective obligations and liabilities of the Council and the Manager (including variation of the Management Fee) whether made with or without Covenantor knowledge or consent;

#### a change in the positions inter se[[9]](#footnote-9) of the Manager and the Covenantor, irrespective of whether Council receives notice of the change;

#### transfer or purported transfer of a Manager interest in the Agreement;

#### transfer or purported transfer of a Council interest in the Facility;

#### the Manager committing an Act of Insolvency (irrespective of whether it is placed into liquidation or declared bankrupt, or enters a scheme that restricts or defers its creditors' claims); or

#### disclaimer of the Agreement by a liquidator or a trustee‑in‑bankruptcy appointed to the Manager.

## Irrelevance of Negligence/Laches

The Covenantor obligations under this Part 18 also will remain unaffected by:

### neglect, negligence, or laches[[10]](#footnote-10) by Council in the enforcement of its entitlements; or

### the release or loss of a security held by Council; or

### the discharge or release of any of the persons comprising the Covenantor (where more than one).

## Independence, Non‑conditionality of Obligations

### The Covenantor's obligations under this Part 18 are not conditional or dependent upon the validity or enforceability of the Manager's obligations, or those of any other obligor under the Agreement.

### Those Covenantor obligations are enforceable against every person who signs this instrument as Covenantor, regardless of whether another person the instrument names as Covenantor fails to sign in that capacity.

## Priority of Council Entitlements (Manager Insolvency)

### This Clause 18.11 applies if the Manager commits an Act of Insolvency before it has discharged all of its obligations under this Agreement.

### While any of those obligations remain outstanding:

#### the Covenantor must not lodge, without Council consent, a proof of debt or similar claim concerning an entitlement it possesses against the Manager (including an entitlement arising from this Part 18);

#### the Covenantor must not attempt to enforce a security granted to it by the Manager;

#### the Covenantor must hold in trust for Council whatever entitlements or benefits it possesses under a security granted to it by the Manager;

#### if required by Council, the Covenantor must lodge proof of debt, enforce its security, and do anything else Council lawfully requires of it to obtain for Council the benefit of the claim or security;

#### the Covenantor must not claim the benefit, or seek to require the transfer, of a guarantee or other security held by Council concerning the money or obligations secured under this Part 18; and

#### the Covenantor must pay Council upon demand the equivalent to all sums Council receives for the credit of the Manager but is obliged to remit to a trustee, administrator, liquidator, or other person.

## Void Manager Payments

### A void payment that the Manager makes under this Agreement does not diminish the Covenantor's liability to Council.

### Each of Council and the Covenantor retains the entitlements it held before the Manager made the void payment.

## Warranty of Power

Each person comprising the Covenantor assures Council that he/she possesses unqualified and unrestricted power to covenant with Council upon the terms of this Part 18.

## Evidence of Money Owing

A certificate signed by the Chief Executive Officer, or his delegate, specifying a sum as owing to Council under this Part 18 at a specified date, is prima facie evidence[[11]](#footnote-11) of what the Covenantor owed or owes at the specified date.

## Transfer of Council Entitlements

If Council's interest in the Facility becomes vested in another entity, its entitlements under this Part 18 will be deemed transferred to that other entity.

# Miscellaneous

## Threshold Assurances

### Each Party assures the other Party that:

#### it possesses the power to enter this Agreement;

#### it possesses the power to perform all of its obligations under the Agreement;

#### all necessary authorizing action has been taken to enable it to enter the Agreement and to perform its obligations (*for example, the passage of any necessary resolutions*);

#### entering the Agreement and performing its agreed obligations does not contravene any law.

### Each Party acknowledges that the other enters this Agreement in reliance upon those assurances.

## Representatives' Assurances

Each Party (*first Party*) assures the other Party that any and each person signing the Agreement on behalf of the first Party possesses unrestricted authority to sign.

## Passage of Consideration

For clarity, each Party makes and assumes its promises and obligations under this Agreement in return for the promises and obligations the other Party makes and assumes under the Agreement.

## Manager Indemnity

### Subject to the qualifications expressed in this Clause 19.4, the Manager will indemnify Council and hold it harmless against all Cost borne of Claims made in connection with:

#### operation of the Facility pursuant to this Agreement, irrespective of who has performed or been engaged upon that work;

#### performance of the Manager's other obligations under the Agreement; and

#### Manager breach of the Agreement.

### The indemnity binds the Manager irrespective of whether a Claim results also from:

#### a person’s carelessness;

#### the breach of a statutory duty; or

#### the breach of a non‑delegable duty of care.

### Further, the indemnity binds the Manager irrespective of:

#### who is Harmed;

#### who is responsible for the care and safety of a person Harmed;

#### what property is Harmed and

#### who owns, possesses, or controls the Harmed property.

### Excluded from the indemnity are:

#### Cost born of Claims that are inevitable results of operating the Facility in accordance with the Agreement;

#### Cost born of Claims that result from Council's own negligence (but only to the extent that that negligence has precipitated the relevant Harm); and

#### Cost that Council would have avoided had it taken reasonable steps to mitigate the effects of the relevant Harm.

### However, for clarity, the exclusion does not extend to Cost born of Claims for breach of the Agreement.

## Benefit of Contracts and Arrangements

### When the Term ends, Council may elect, by notice to the Manager, to acquire the benefit of, or otherwise to enforce, continue or extend, any agreement or arrangement entered by the Manager in operating the Facility.

### Upon receipt of the notice of election, the Manager will be deemed to have assigned to Council, or to a person Council has nominated, the Manager’s interest under the relevant agreement or arrangement.

### The Manager must sign all documents required formally to record or register the assignment.

### The Manager must do whatever Council reasonably requires to enable Council or its nominee to acquire and enjoy all benefits of and entitlements under the assigned arrangement or agreement.

### The Manager irrevocably appoints Council's chief executive officer its attorney:

#### to exercise in the Manager's name, or in the name of Council, Council's chief executive officer, or Council's nominee, all of the Manager's entitlements under the assigned agreement or arrangement; and

#### to sign all documents necessary formally to record or register the assignment.

## Acquisition of Manager’s Equipment

### Before the Agreement ends, Council may give to the Manager notice (an *acquisition notice*) that Council wishes to acquire the Manager’s interest in any item of Manager‑owned, -leased, or ‑hired equipment used in operating the Facility.

### If the Manager owns the relevant equipment, the Parties must negotiate in good faith for Council purchase of the equipment at a reasonable price.

### If the Parties fail to agree the purchase price within the 14 days following the date upon which Council gives the acquisition notice, Council may give the Manager notice to remove the equipment from the Facility (a *removal notice*).

### The Manager must comply with the removal notice not later than 7 days after the later of:

#### the date upon which Council gives the removal notice; and

#### the date the Agreement ends.

### Equipment not removed by the Manager in compliance with a removal notice becomes Council property.

### If any such equipment is leased or hired, the Manager must assign its interest in the leasing or hiring agreement and Council will assume all lessee/hirer obligations under the agreement from the date of assignment.

## Public Criticism

### Each Party (and its Personnel), must refrain from:

#### publicly criticising the other Party (and its Personnel) concerning this Agreement; or

#### publicly criticize the Facility.

### However, for clarity, a Councillor engaging, in good faith, in political debate concerning the Agreement or the Facility will not place Council in breach of this Clause 19.4.

## Time for Performance

### If a provision does not specify the time within which a Party must perform a given obligation, the Party must perform the obligation promptly.

### If the day upon which, or the final day by which, a Party must perform an act (each a *deadline day*) is not a Business Day, the Party must perform the Act not later than the first Business Day that follows the deadline day.

## Knowledge Assertions

A statement or assertion expressed as made to a Party’s knowledge, or to the best of the Party’s knowledge, or in cognate terms, is taken as made to the best of the Party’s knowledge and belief following proper enquiry, including enquiry that a reasonable person would make given that reasonable person’s knowledge of relevant facts.

## Consents, Approvals and Discretions

### This Clause 19.10 applies to the extent that the Agreement does not expressly require otherwise.

### If a Party’s consent or approval, or an exercise of its discretion, is required for any purpose, the Party may:

#### grant the consent or approval, or exercise the discretion, conditionally or unconditionally;

#### withhold the consent or approval, or decline to exercise the discretion.

## Legal Relationship

### This Clause 19.11 applies irrespective of:

#### any other provision in this Agreement;

#### any provision of an Act; and

#### any rule of general law.

### This Agreement creates between the Parties no partnership, joint venture, or agency relationship.

### The Agreement also grants no authorization for the Manager or its personnel to exercise Council's powers or entitlements under an Act.

### Nothing in the Agreement, or in the manner of its discharge, creates between the Parties a relationship other than that of principal and contractor.

## Council Obligations and Entitlements

### Unless otherwise expressly provided in this Agreement, nothing in the Agreement obliges Council to consider interests other than its own when exercising an entitlement or performing an obligation under the Agreement.

### Irrespective of anything expressed or implied to the contrary in the Agreement:

#### Council is not obliged to exercise an executive or statutory entitlement or obligation;

#### Council is not obliged to direct or otherwise to intervene in or interfere with another local government body's exercise or performance of an executive or statutory entitlement or obligation;

#### nothing expressed or implied in the Agreement constrains Council or fetters its discretion to exercise or decline to exercise an executive or statutory entitlement or obligation.

### The Manager is not entitled to make any claim against Council for Cost attributable to or connected with Council exercise or non‑exercise of an executive or statutory entitlement or obligation.

## Effectuation of Purpose

### Each Party must act honestly in the discharge of its obligations and the exercise of its entitlements under this Agreement.

### A Party does not act honestly if:

#### it knowingly acts to frustrate the Agreement or to prevent performance of an obligation or of obligations by the other Party; for example, by wilfully withholding from that Party information it knows that Party needs to enable it to make a properly‑informed decision upon action it may or must take pursuant to the Agreement;

#### it knowingly acts to lull the other Party into a false belief concerning the Agreement;

#### it gives the other Party, or arranges for that Party to be given, false information upon which it knows, or ought reasonably to know, the Party will rely.

### For clarity, however, unless a given provision of the Agreement expressly states otherwise:

#### the obligation to act honestly is not fiduciary;

#### in particular, that obligation does not oblige a Party to subordinate its interests to those of the other in exercising an entitlement (including a discretion); for example, a Party does not become disentitled to exercise a discretion or power the Agreement has given it merely because the exercise will or might have an adverse consequence for the other Party; and

#### the honest exercise of an entitlement need not be objectively defensible as being reasonable.

## Good Faith Obligations

An obligation to act in good faith is an obligation to act honestly and with sincerity, but it not a fiduciary obligation unless the Agreement expressly states that it is.

## Honest Refusals

### Although an obligation not to refuse its consent unreasonably obliges a Party to consider honestly a request for the consent:

#### it does not oblige the Party to act against its own interests in deciding the request;

#### it does not oblige the Party to pursue the applicant for material that the applicant must or should provide to obtain the consent;

#### it does not oblige the Party to grant the request despite the applicant having failed to satisfy a consent prerequisite the Agreement specifies;

#### it does not oblige the Party to grant the request merely because the applicant has satisfied a consent prerequisite, or the consent prerequisites, the Agreement specifies.

### Similarly, if the acquisition of an entitlement or the receipt of a benefit is conditional upon a Party (the beneficiary) satisfying specified prerequisites:

#### the other Party not obliged to pursue the beneficiary for material, or to take other action, necessary for ensuring or establishing satisfaction of the prerequisites;

#### whether it is reasonable for the obligor to refuse to permit the acquisition or receipt, or to recognize it, is irrelevant if the beneficiary fails to satisfy the prerequisites; and

#### irrespective of whether it wishes to deny the beneficiary the entitlement for another reason, the obligor does not act dishonestly (or unreasonably) in declining to permit or recognize the acquisition or receipt if the beneficiary fails to satisfy the prerequisites.

## Entirety of Agreement

### This instrument details the entire arrangement between the Parties concerning this Agreement:

#### irrespective of negotiations or discussions preceding its execution and delivery; and

#### irrespective of the content of any brochure, report, correspondence, or other document produced by or on behalf of a Party.

### Each Party acknowledges that no representation, verbal or written, made by or on behalf of the other Party but not detailed in this instrument has induced it to enter the Agreement.

## Cumulative Entitlements

### The remedies and other entitlements the Agreement gives a Party are cumulative, not alternative.

### Moreover, no remedy or entitlement is exclusive of other remedies or entitlements that the Party possesses (whether under an Act or at general law).

## Waiver/Abandonment of Entitlement

### The mere fact that a Party does not exercise an entitlement under or concerning this Agreement when the entitlement accrues:

#### does not deprive it of the entitlement; and

#### does not deprive it of similar entitlements that accrue at other times.

### The mere fact that a Party grants an indulgence under or concerning the Agreement on a given occasion does not entitle the recipient to the same or a similar indulgence on another occasion.

### The mere fact that a Party grants an indulgence under or concerning the Agreement in a given circumstance does not entitle the recipient to the same or a similar indulgence in a similar circumstance.

### The waiver of an entitlement under the Agreement is not binding unless evidenced in writing.

## Variation of Agreement

A purported variation of this Agreement is ineffective unless encapsulated in a deed.

## Survival of Provisions

A provision of the Agreement capable of continued application after the Agreement has terminated will remain enforceable despite the termination.

## Character of Instrument

This instrument is an agreement made by deed, binding each Party:

### irrespective of its terminology (for example, referencing “Clauses” and "Paragraphs" rather than “covenants”); and

### irrespective of whether it is contractual or consideration otherwise passes in return for a promise.

## Delivery

Each Party delivers this instrument as its deed conditionally upon both Parties executing the instrument.

## Governing Law

### Queensland law governs the Agreement.

### For clarity, Queensland law includes Commonwealth Acts to the extent that they bind Queensland.

## Jurisdiction (Adjudication of Disputes)

### For this Clause 19.24, a Queensland Court is:

#### a court or tribunal constituted under Queensland legislation and empowered to adjudicate a dispute arising under this Agreement; and

#### the High Court of Australia.

### The Parties submit exclusively to the jurisdiction of the Queensland Courts for the adjudication and resolution of disputes under the Agreement.

### Each Party undertakes to refrain from bringing action upon the Agreement in a forum other than a Queensland Court.

### Each Party waives all entitlement to object to a Party bringing action upon the Agreement before a Queensland Court, including entitlement to claim that:

#### the Queensland Court is an inconvenient forum; or

#### no Queensland Court has jurisdiction.

|  |  |  |
| --- | --- | --- |
|  | *[Appendix follows]* |  |

1.

[Inventory of Council-owned Property]

All items of property and equipment owned and used by Council previously in operating the Facility as a Caravan Park / Tourist Park, and existing in the Facility as at the commencing date of this Agreement, with the exception of any:

(i) telephone equipment and ancillary telecommunication systems;

(ii) computer and IT equipment and ancillary systems (including any ADSL);

(iii) loose items of personal property (not directly pertaining to the operation of the Facility); and

(iv) motor vehicles or other transportation equipment,

which will be removed by Council on or prior to the commencement date of this Agreement and will not be made available to the Manager for its use in connection with the Facility under this Agreement.

|  |  |  |
| --- | --- | --- |
|  | *[Attestations follow]* |  |

|  |  |
| --- | --- |
| Council |  |
|  |  |
| **Executed** on behalf of **Diamantina Shire Council**:* as a deed;
* pursuant to *Local Government Act 2009* section 236;
* by a Council delegate, who certifies his authority to sign;
* in the presence of a witness:
 |
|  |
|  |  |  |  |
| Delegate  | Witness |
|  |  |
|  |  |
| Full name [*Print*] | Full name [*Print*] |
|  |
|  |

|  |  |
| --- | --- |
| Manager |  |
|  |  |
| **Executed** by **#[Manager Name**]#:* as his/her deed;
* in the presence of a witness:
 |
|  |
|  |  |  |  |
| Signatory | Witness |
|  |
|  |
| Full name [*Print*] |
|  |  |  |  |
|  |  |  |  |

|  |
| --- |
| **Executed** by **#[Manager Name**]#:* as its deed;
* under *Corporations Act* sections 127(1) and 127(3);
* by the signatures of a director and a second director/the secretary:
 |
|  |
|  |  |  |  |
| Director | Director/Secretary |
|  |  |
|  |  |
| Full name [*Print*] | Full name [*Print*] |
|  |
|  |

|  |  |
| --- | --- |
| Covenantor |  |
|  |  |
| **Note to Covenantor****If you sign this document:*** you become responsible for the performance of another person's obligations under this Agreement;
* you agree to pay a party to this Agreement money equivalent to whatever loss and expense that party suffers because another party fails to perform obligations under the Agreement.

It would be prudent, **particularly** if you stand to derive no personal benefit from this Agreement, to **obtain independent legal advice** about the extent of your obligations as guarantor and indemnifier, **before you sign**.If you elect to sign without obtaining independent legal advice, you may be taken to have signed with full knowledge, understanding, and acceptance of those obligations. |
|  |  |
|  |  |
| **Executed** and delivered by #[**Covenantor name**]#:* as his/her deed;
* in the presence of a witness:
 |
|  |
|  |  |  |  |
| Signatory | Witness |
|  |
|  |
| Full name [*Print*] |
|  |  |  |  |
|  |  |  |  |

|  |
| --- |
| **Executed** and delivered by #[**Covenantor name**]#:* as his/her deed;
* in the presence of a witness:
 |
|  |
|  |  |  |  |
| Signatory | Witness |
|  |
|  |
| Full name [*Print*] |
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|  |  |  |
|  |  | *[End of Instrument]* |  |  |

1. At the Commencement Date, section 13 defines “electrical equipment” as, to paraphrase, any apparatus, appliance, cable, conductor, fitting, insulator, material, meter or wire used for controlling, generating, supplying, transforming, or transmitting electricity at a voltage greater than extra low voltage, or operated by electricity at a voltage greater than extra low voltage, or that is, or forms part of, a cathodic protection system. However, the expression does not include certain equipment associated with motor vehicles, e.g. headlights, spark plugs, and suchlike. [↑](#footnote-ref-1)
2. At the Commencement Date, section 14 states in broad terms (and again to paraphrase), that an “electrical installation” is a group of items of electrical equipment permanently connected to one another electrically, other than electricity generation and transmission works items (such as generators, transformers and cables), to which electricity can be supplied from generation and transmission works. An example is the switchboard, wiring, lighting, socket outlets, and other electrical equipment permanently connected for a shopping centre, or for a shop in a shopping centre. [↑](#footnote-ref-2)
3. Refer to Local Government Act 2009 section 236 concerning persons who may sign documents on behalf of a local government. [↑](#footnote-ref-3)
4. Refer to Local Government Act 2009 section 259 concerning chief executive officer subdelegation. [↑](#footnote-ref-4)
5. Example: Items on lease to the Manager. [↑](#footnote-ref-5)
6. Refer, however, to Clause 12.12 (Acting Reasonably). [↑](#footnote-ref-6)
7. The predecessor of Local Government Association of Queensland Ltd. [↑](#footnote-ref-7)
8. A surety is someone who undertakes to discharge one person’s contractual obligation to another only if the person on whose behalf the undertaking is given fails to discharge the obligation. [↑](#footnote-ref-8)
9. In relation to one another; but not in relation to Council. [↑](#footnote-ref-9)
10. In simple terms, laches is the neglect to assert an entitlement, which neglect, when considered together with lapse of time and other circumstances that prejudice the party against whom the entitlement exists, renders enforcement of the entitlement inequitable. [↑](#footnote-ref-10)
11. Prima facie evidence is evidence that, in the absence of evidence to the contrary, suffices as proof of the fact or proposition in question. It contrasts with conclusive evidence. Conclusive evidence is incontrovertible, either because the law does not permit it to be contradicted, or because it is so strong and convincing that it overbears all proof to the contrary, establishing the fact or proposition beyond reasonable doubt.. [↑](#footnote-ref-11)