

6 September 2019

The Independent Pricing and Regulatory Tribunal
PO Box K35
HAYMARKET POST SHOP
NSW 1240

Attention: Mr Ed Willett and Ms Deborah Cope

Dear Mr Willett and Ms Cope

RENTAL ARRANGEMENTS FOR TELECOMMUNICATIONS TOWERS ON CROWN LANDS

Thank you for your invitation to comment on the draft report for IPART's Review of Rental Arrangements for Communications Towers on Crown Land (**Draft Report**).

Axicom considers that the Draft Report has placed inadequate weight on compliance with clause 44 of Schedule 3 of the *Telecommunications Act 1997 (Cth)* (**clause 44**) and, if the recommendations in the Draft Report are adopted by the NSW Government in their current form, this will result in a clear breach of the *Telecommunications Act 1997 (Cth)* and, in our view, will be unlawful.

Our view is that the Draft Report has erred on two fundamental legal grounds:

1. firstly, that IPART has determined that the appropriate basis for setting rents is to set 'efficient rents' by reference to the private market. This is contrary to the Federal Court ruling in *Telstra Corporation vs Queensland* [2016] FCA 1213 (**Telstra Case**) against State Authorities using private market benchmarks to set rental arrangements on Crown land; and
2. secondly, that the Terms of Reference specifically require IPART to have regard to clause 44 but the question of whether there is discrimination, either directly or indirectly, against carriers when compared to other commercial users of Crown land has not been adequately or transparently addressed in the report.

1. Inappropriate Basis for Setting Rents

In relation to the setting of rents:

- a) IPART's first draft recommendation:

'That the appropriate basis for setting rents for communication tower sites on Crown land is rents agreed in a workably competitive market - that is rents paid by commercial users of communication tower sites on private land are the best-available indicator of efficient prices'

is incorrect and inconsistent with the key findings of the Telstra case and legislation (clause 44) and the requirements of the Terms Of Reference.

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- b) The law is clear and unambiguous that State or Territory governments are expressly prohibited from regulating pricing for telecommunications sites in a manner which would be discriminatory (whether directly or indirectly). Any such law, regulation or State or Territory-based imposition with respect to communications sites will be invalid and any attempt to impose such an invalid regime would, accordingly, be unlawful.
- c) This IPART review should carefully consider the clearly established position at law. The Terms of Reference require IPART to have regard to clause 44 but, as we have already set out in our original submission and at the Round Table, the position at law has not been addressed by the Draft Report. Axicom believes this to be a fundamental flaw.
- d) Clause 44 (1) clearly, and without ambiguity, states that:
1. *'a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;*
 2. *without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally'.*
- e) The effect of clause 44 has been tested in the courts, most notably in the Telstra Case which specifically found that:
- a. *'cl 44(1) provides protection for carriers against the effects of discriminatory laws, including protection against the imposition of discriminatory taxes, rents and charges';¹*
 - b. *'Clause 39 confirms the liability of a carrier to taxation under the laws of a State or Territory, but cl 44(1) prevents such laws from discriminating against carriers or having the effect of discriminating against carriers';¹*
 - c. *'Clause 44(1) is cast in broad and absolute terms. It does not...allow any exception to the prohibition against the law of the State or Territory discriminating against carriers. Nor is any such exception expressly contained in any other provision of the Telecommunications Act'.²*
- f) The Draft Report refers in a number of instances to the 'appropriateness' of applying private market principles and private market rents as appropriate comparators to reflect 'efficient prices in a workably competitive market' and seeks to underpin this rationale with private market rent evidence. A number of the submitting participants, including Axicom, provided evidence of private market rents in the interests of co-operation and transparency. However, the private

1. Telstra Corporation Queensland [2016] FCA 1213 [141]

2. Telstra Corporation Queensland [2016] FCA 1213 [142]

market should not be considered by IPART as the 'appropriate' benchmark and the Telstra Case was clear on this point.

- g) The Telstra Case determined that:
- a. whilst the Telecommunications Act may not restrict the behaviour of an individual or private corporation, *'in contrast, cl44(1) expressly prohibits discrimination against carriers under State or Territory legislation'*; ¹
 - b. *'It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments. Individuals and corporations are free to charge carriers whatever rent the market commands' and 'Clause 44(1) is quite inconsistent with the submission that State and Territory governments are in the same position'*; ¹
 - c. *'If State and Territory governments were intended to be free to charge carriers different rents on the basis that carriers are charged more rent in the private market, the exception would have been directly expressed'*; and
 - d. *'In fact, price-gouging of this type by State and Territory governments seems precisely the type of conduct that cl 44(1) is designed to prevent.'* ²
- h) IPART, as an independent body, has a responsibility to consider both the application of the law as well as other State or Territory-based jurisdictional regimes (and how the federal law has been applied in those regimes) in order to make comprehensive and informed recommendations on an independent basis.
- i) With respect to the QLD government, the Telstra Case determined that the calculation of rent for Crown land which the government leased to communications tenants differentiated from that charged to other users of Crown lands and, for this reason, and in accordance with Court's judgement, the QLD government re-set its rents on communications sites to be consistent with the rental methodology used to calculate rents charged to other commercial users of Crown land.
- j) In *Bayside City Council v Telstra Corporation Ltd* [2004] HCA 19 (**Bayside Case**) the Court considered the validity of certain NSW and VIC state legislation which imposed annual charges/rates on Telstra (and other carriers) but which exempted other tenants such as water supply authorities, rail, electricity networks and pipeline operators. The relevant legislative provisions (sections 154 and 155 in Part 8 of the *Local Government Act 1989* (VIC) and s611 of the *Local Government Act 1993* (NSW)) were considered and in each instance found to be discriminatory. The High Court determined that clause 44 is constitutionally valid and that the NSW and VIC legislation, in this case, discriminated against carriers.
- k) If the State Government determines that it will adopt the recommendations of the Draft Report, contrary to the position at law, the regime is potentially invalid and therefore need not be complied with.

1. Telstra Corporation Queensland [2016] FCA 1213 [146]
2. Telstra Corporation Queensland [2016] FCA 1213 [147]

2. Discrimination and the Relevant Comparator

- a) The Terms of Reference specifically require IPART to have regard to clause 44. However, as stated, the fundamental question of whether there is discrimination, either directly or indirectly, against carriers when compared to other commercial users of Crown land has not been adequately or transparently addressed in the Draft Report, and our view is that it needs to be. (As outlined later in this paper, there does not appear to be parity between users of Crown land but rather, there appears to be a practice of discriminatory pricing).
- b) The position at law is clear and we reiterate that this means there should be no reference to private market benchmarks, but consistent treatment of all users of Crown land.
- c) In Axicom's original submission, and again at the Round Table on 22 July 2019, we invited the Land Management Agencies (LMAs) to provide evidence of the rents charged to other commercial users of Crown land. This is the only manner in which the LMAs can conceivably discharge their obligations of transparency and fairness, and to demonstrate compliance with clause 44.
- d) Regrettably, when considering the issue of potential discrimination, the Draft Report incorrectly refers to the appropriate comparator as being another user of a communications site on Crown land, and so comparing a carrier's use of the site with a non-carrier's use of the same site. The Draft Report does not include any evidence of rent charged and methodology used for calculating rent to other commercial users of Crown land.
- e) It is Axicom's view that IPART has taken too narrow a view in reaching its conclusion that a relevant comparator would make similar use (in nature and extent) of Crown land to the use made by the carriers. In limiting this to use of a communications site, IPART has failed to properly consider the case law and the fact that other similar uses include:
 - 1. other infrastructure style occupiers of Crown land e.g. water, electricity and gas utility companies; and
 - 2. other commercial users of Crown land.
- f) In both the Telstra case and the Bayside Case the issue of the appropriate comparator was fully considered. In his judgment in the Bayside Case Justice McHugh stated:

[77] Clause 44(1) prohibits discrimination against a particular carrier, class of carriers or carriers generally. If the discrimination alleged was against a particular carrier, the appropriate comparison would probably be other carriers. Where the discrimination is alleged to be against "carriers generally", however, the issue arises as to the appropriate entity with which "carriers" should be compared. Was the Full Court correct to conclude that the appropriate comparison here was between Optus and Telstra on the one hand and "other bodies which make a similar use of public places" on the other?

.....

[79] In cases like the present, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). The New South Wales and Victorian Acts confer a power to levy charges or rates on the owners or occupiers of public land, that is, land used for a public purpose. This indicates that the Full Court was correct in comparing the position of carriers with that of other owners or occupiers of public land. In turn, this invites a comparison with electricity suppliers, water suppliers, gas suppliers and other pipeline users. These entities resemble Telstra and Optus in their ownership and/or occupation and use of public land, a use which involves putting wires, cables or pipes over or under the land.'

- g) In the Telstra Case, the relevant comparator was other commercial users of Crown land, in particular Category 13 under the *Land Regulation 2009* (Qld). Section 30 of the Land Regulation provides that a lease is a category 13 lease if the lease is being used for a 'business, commercial or industrial' purpose.
- h) IPART acknowledged in the Draft Report that other commercial users of Crown land may pay different fees than carriers and refers in its example to uses such as agriculture, bee keeping and kiosks in National Parks. It then dismisses these uses as being "sufficiently different in nature and extent" so that they are not a relevant comparator.
- i) What IPART fails to do is consider this with the same broad view taken to the relevant comparator in the case law. Given this is a formal proceeding under which the State of NSW will elect to charge rent to telecommunication users of Crown land, we do not feel that any such decision can be legitimately made without full transparency of what the State charges other commercial users of Crown land.
- j) It is Axicom's view that the legislation itself makes a distinction between how carriers are treated on Crown land and how other commercial users are treated on Crown Land. Section 6.5 of the *Crown Land Management Act 2016* (NSW) (CLMA) specifies the general principles for rent determinations for holders of Crown land which includes that the rent is to be a market rent with certain factors taken into account and disregarded. Clause 6.5(4) then specifies that despite these general principles a recommendation can be made by IPART.

IPART only makes rent determinations for users of communications sites and, Axicom believes, one other user category. As a result, a distinction is being made between users of Crown land.
- k) In addition, section 6.8 of the CLMA allows holders of an interest in Crown land to object to the rent determination under section 6.4. However, section 6.8 (1)(c) expressly excludes a determination made by IPART from any such objection.
- l) IPART has an obligation to investigate whether the distinction that is made between carriers and other users of Crown land results in discriminatory burdens being imposed on carriers.
- m) The verbal submissions at the Round Table by two of the LMAs, the Department of Planning and Environment and National Parks and Wildlife Service (NPWS), were interesting and did great credit to the general principles by which those entities manage and administer Crown land for the State of NSW and its people. Consistent comments regarding the administration of Crown

land by these two entities for the benefit to the community at large, and our society generally were referenced repeatedly by both representatives.

To quote Ms Sam Williams, 'Crown lands provide the foundation for the delivery of some of the state's most important values, services and infrastructure' and 'Crown land provides a multitude of values that underpin the prosperity and wellbeing of our society'.¹ We unequivocally agree with these sentiments, particularly as they reference the critical benefits to the community of 'infrastructure'.

- n) Mr Schramm of NPWS echoed these sentiments and also pointed out the essential nature of 'public services' such as 'electricity, water and telecommunications.' We cannot escape the fact that telecommunications is universally considered an essential service in the same manner that power and water are (by government, the courts and the general public). The State's treatment of telecommunications should therefore mirror the State's treatment of other such essential services.
- o) In addition, Axicom's infrastructure houses equipment owned and operated by emergency services without which emergency services would not be able to operate, or operate efficiently, in these areas.
- p) As such, we reiterate that the State must be transparent in its treatment of all such essential services and provide evidence of rents, or the methodologies for determining rents in relation to these utilities and other commercial users. Failure by the LMAs to provide this evidence can only have the effect of hindering IPART's review process, limit IPART's ability to prepare a valid recommendation and raise the risk of legal challenge.
- q) We again invite the LMAs to disclose rents or fees charged to other commercial users of Crown Land, including fees for the granting of Easements in Gross to Prescribed Authorities. We note that Axicom is a Prescribed Authority as, we understand, are Telstra, Optus and Vodafone. We also note that a number of utilities providing essential services such as power and/or water are classified as Prescribed Authorities. A final report should not be released without this information being disclosed to the participants and giving them the ability to analyse and comment on those rents/fees.
- r) In the absence of any evidence being provided by the LMAs to date, Axicom has been forced to undertake its own investigations. Whilst it is extremely difficult to find recent evidence of rents paid by other commercial users of Crown land, we have identified:
 - 1. a lease from the State of NSW to Delta Electricity Australia Pty Ltd and Sunshine Renewable Energy Pty Limited dated 8 June 2005. A summary of lease terms is provided below and a full copy is provided at Annexure A;
 - 2. numerous leases from National Parks to hotel and ski lodge operators in the Kosciusko National Park. A sample of these leases is provided as evidence of rentals achieved from commercial users of National Park land. A brief summary of the commercial terms is

¹ Pages 24-25 of the Transcript for the Round Table held on 22 July 2019

- outlined below and copies of those agreements are attached as Annexure B; and
3. a lease from the Minister administering the National Parks & Wildlife Act 1974 to the Health Administration Corporation dated 17 November 2010 for the ambulance station at Perisher Valley, a copy of which is annexed at Annexure C.
 4. An undated lease from the State of NSW to Eden Ice Supplies Pty Ltd, a copy of which is annexed at Annexure D; and
 5. A lease from the State of NSW to Twofold Bay Fisherman's Co-Operative Ltd dated 13 March 2009, a copy of which is annexed at Annexure E.

Utility Lease

Landowner	Lessee	Use	Start Date	Term	Start Rent	Review of Rent	Area (sqm)	Start Rent /sqmpa
State of NSW (Department of Industry)	Delta Electricity Australia Pty Ltd, Sunshine Renewable Energy Pty Ltd	Business Purposes (Biomass Co-generation Electricity Plant)	1-May-05	20 years + 20 year option	\$5,800	Annual CPI and 3 yearly market reviews	1664	\$3.49

Commercial Leases

Landowner	Lessee	Use	Start Date	Term	Start Rent	Review of Rent	Area (sqm)	Start Rent /sqmpa	Current Land Value	Approx. Current Rent /sqmpa
Minister Administering the National Parks and Wildlife Act on behalf of the State of NSW	Precision Holdings Pty Ltd	Commercial lodge providing accommodation to the general public and incidental uses	1/10/2012	15 years 10 months + 3 x 10 year options	\$23,083.12 based on 6% of market land value of \$384,719	Annual CPI reviews and every 10 years to Market (6% of Land Value)	1773	\$13.02	\$464,000	\$15.70
Minister Administering the National Parks and Wildlife Act	Shortland Alpine Club Co-Operative Limited	Ski Lodge for members... including accommodation for the general public	1/07/2008	20 years + 30 year option	\$16,005 based on 6% of market land value of \$266,750	Annual CPI reviews and review to 6% of Market Land Value at commencement of option and thereafter every 10 years	1418	\$11.29	\$310,000	\$13.12
The State of NSW	Sundeck Hotel Pty Ltd	A hotel for the accommodation if the general public and purposes reasonably incidental to that use including staff accommodation and the sale of liquor	1/07/2012 dated 4 September 2018	16 years + 30 year option	\$62,249 based on 6% of market land value of \$1,154,156.30	Annual CPI reviews and review to 6% of Market Land Value at commencement of option and thereafter every 10 years	5755	\$10.82	\$1,120,000	\$11.68
Minister Administering the National Parks and Wildlife Act	Health Administration Corporation	Constructing and maintaining an ambulance station	7 January 1986 and varied 20/12/2011	38 years and 358 days	\$1	n/a	1123	-	\$107,000	-
State of NSW	Eden Ice Supplies Pty	Ice Works	1-Sep-05	20 years	\$3,900	Annual CPI and 3 yearly market	257.6	\$15.14	\$115,000	\$21.04

	Ltd					reviews				
State of NSW	Twofold Bay Fishermen's Co-operative Ltd	Buildings (1)	13-Mar-09	15 years	\$6,750	Annual CPI and 3 yearly market reviews	555.5	\$12.15	\$195,000	\$15

- s) The existence of these agreements has the effect of setting an upper limit on the amount LMAs may charge the communications users on Crown land. Analysis of these leases indicates that existing rentals imposed on Axicom and other communications users significantly exceed the rents charged to other users of Crown land representing discriminatory behaviour that must be rectified by this IPART Review.

	Rent/sqmpa	Rent Comment
IPART Recommendation - Sydney	\$1,123	
IPART Recommendation - High	\$273	
IPART Recommendation - Medium	\$203	
Proposed rent for Axicom Perisher Site	\$126	Based on 106sqm at National Park rate
IPART Recommendation - Low	\$124	
Commercial User (National Park)	\$13.02	6% of land value
Commercial User Eden Waterfront (Dep't of Industry)	\$12.15	
Infrastructre User (Dept of Industry)	\$3.49	
Public Safety / Essential Service	\$1	\$1 p.a. if demanded

- t) In respect of the lease to Delta Electricity and Sunshine Renewable Energy we note:
- a) the lease is to a commercial enterprise and is used for infrastructure purposes including pumps, pipes and electrical services; and
 - b) the starting rent equates to \$3.49/m² pa.
- u) In respect of the leases within the Kosciusko National Park we note:
- i. some of the leases are as close as 500m from Axicom's Perisher Valley communications tower (which also hosts Optus and Vodafone and provides an essential safety service to Park users via the provision of wireless communications services)¹;
 - ii. the existence of more than 120 similar leases in the Kosciusko National Park is a significant volume of evidence and indicates that calculating rents based on land value is an accepted and workable solution for determining 'fair, market based commercial returns' in line with the Terms of Reference;
 - iii. the commencing rent is based on 6% of land value;
 - iv. the rent is reviewed annually by CPI and periodically to a market rate, being 6% of the land value;
 - v. 6% of land value is consistent with Queensland's method of charging commercial users of Crown land, including telecommunications users;
 - vi. a 6% return to the landowner represents a fair, market based commercial return in line with the Terms of Reference;
 - vii. 'relevant land valuations' are taken into account in accordance with the Terms of Reference;

¹ Refer to the illustrations in Annexure F

- viii. Axicom's tower area is 106m², significantly less than the hotel and ski lodge lease areas;
 - ix. If additional land is required by the commercial tenants under these leases, the licence fee for this additional land is '\$1.00, if demanded';
 - x. based on an equivalent land value in 2018, rent under these leases for Axicom's communications tower area would be approximately \$1,500p.a. not \$13,500, as recommended in the Draft Report; and
 - xi. the lease from the State of NSW to the Health Administration Corporation for the ambulance station at Perisher Valley has been granted for the nominal sum of \$1.
- v) We note that the leases within Kosciusko National Park do include a separate and unrelated 'Turnover Rent' and 'Lease Grant Fee' in a manner similar to a retail lease or accommodation management arrangement. The improvements on the land, being the ski lodges, are owned by the Crown and managed by the tenant. The 'Lease Grant Fee' is a premium paid for the grant of the lease and the 'Turnover Rent' is a percentage of the audited gross revenue generated from the use of the improvements. These appear to be payable for the use by the tenant of the improvements on the land, in addition to the base rent for the use of the land.
- w) Additional rents such as these would not be appropriate on communication sites, as ownership of the improvements on the sites sits with the user not the Crown. We note that the LMAs do not own the communications towers on the land that they lease out nor have they contributed to the costs of the towers, their ongoing maintenance, fences, power, spectrum licences, antennas and other related infrastructure. Consequently, the imposition of turnover rent is not an appropriate imposition for the LMAs to make in circumstances where they have not made any investment.
- x) The tenure arrangements which Axicom and the other infrastructure owners and operators have with the LMAs are distinguishable in this regard in that the telecommunications towers, cabins, outdoor units, fencing and other ancillary equipment or fittings are owned, provisioned for, funded and managed by Axicom and the tenants, respectively. Axicom's telecommunications infrastructure belongs at all times to Axicom and we can only assume the other telecommunications tenancy arrangements provide for the same.
- y) The Perisher leases and the on-site ski lodges are clearly to be distinguished because the ski lodges are fixtures owned by, and are 'improvements' of, the Crown. The documents to which Axicom has been privy via public access (for example, a utility lease) clearly do not grant or vest any interest in such infrastructure to the Crown, nor would this be permissible. The Delta Energy lease is a clear example of this. In the same manner that such utilities are treated by the Crown, so should telecommunications infrastructure owners and entities be treated by the Crown. This includes the manner in which users of telecommunications sites are charged rent.
- z) Interestingly, we also note that the length of tenure granted under both the Delta Energy lease and the Ski Lodge leases are far greater than the tenure granted to Axicom under its current arrangements. Whilst we understand that the scope of this review does not intend to cover this issue, we would respectfully ask why this discrepancy occurs. There seems to be a practice by the Crown to treat telecommunications sites differently in other important aspects, not merely the imposition of differentiated rental regimes.

- aa) We draw your attention to the lease from the State of NSW to the Health Administration Corporation which operates under a peppercorn rent, presumably due to factors including public safety and provision of essential services. It would not be unreasonable to afford the same treatment to tenants of communications sites who enable the provision of essential services to the community, and in many cases this includes the operations of emergency services functions.
- bb) In respect of the leases to Eden Ice Supplies and Twofold Bay Fishermen's Co-operative we note:
- a) the leases are for commercial enterprises;
 - b) the starting rents relate to land value only;
 - c) commencing rentals are in the range of \$12/sqmpa to \$15/sqmpa;
 - d) the land is waterfront land within the town of Eden;
 - e) the land is significantly more valuable than the vast majority of land used for communications towers; and
 - f) approximate current rent as a % of current land value is between 4% and 5%.
- cc) We believe this evidence shows clearly that higher rents are charged for communication sites than other commercial users of Crown land and so clause 44 and the question of discrimination against carriers on Crown land cannot be ignored in IPART's final report.
- dd) Based on the Telco Act, the Telstra Case and the Crown land rental evidence provided by Axicom in this paper, the absolute upper limit that may lawfully be charged to Telecommunications users on Crown Land is 6% of the unimproved land value to be non discriminatory.
- ee) Any recommendation by IPART to charge an amount exceeding 6% of the unimproved land value would have to be justified by IPART in accordance with its obligations of independence, transparency and accuracy.
- ff) Rents set by reference to the unimproved land valuations are directly tied to the value of the underlying land, disregarding the tenant's improvements. We would respectfully request more information in relation to IPART's rationale as to why using an approach based on unimproved land valuations would 'not reflect fair, market based commercial returns'.
- gg) The unimproved land value is a well-used and acknowledged methodology for determining market value and the concept is underpinned by the CLMA.
- hh) The principles for rent determination, which include disregarding any improvements on the land that were made by the tenant, are clearly set out in s.6.5 of the CLMA. These principles should be applied consistently for all commercial users of Crown land. To apply them inconsistently potentially results in a breach of clause 44.
- ii) We respectfully request that IPART considers very carefully the comments of all the participants in the consultation process, with specific consideration to be given to compliance with the existing federal legislation and case law.

In respect of the balance of the Draft Report, we have some additional comments that we would like to raise.

3. Primary User Compound

A. Existing Sites

- a) If the recommendations in the Draft Report are adopted by the State government, disregarding the substantive changes recommended above, it is not clear to us from the Draft Report exactly how the primary user's compound will be defined. The inadequacy of the description as to how such a compound could be determined would create an ambiguity and uncertainty which would make the calculation of rent on a per square metre basis hard to implement.
- b) Given that co-users outside of the primary user's compound will have to pay a rate of rent per square metre in accordance with the Draft Report's current recommendation, this could produce wildly different rents for a site as a whole. This is driven and further complicated by the fact that communication compounds are often considerably larger than envisaged in the Draft Report.
- c) We attach in Annexure G a list of the approximate sizes of Axicom's compounds together with a couple of illustrations of our compounds. The average size for each of the location categories is as follows:

IPART Category	Average Compound Size
High	311m ²
Medium	188m ²
Low	410m ²

- d) Axicom, as an infrastructure provider, will typically have large compound sizes to accommodate the efficient colocation of multiple users. This is in line with federal Government policy which promotes colocation on infrastructure.
- e) Compounds can be large to accommodate, for example, tower footings, cabins, earthing mats, solar panels, guy mast anchors, elevated work platforms & generators. When additional carriers install, the Draft Report envisages a 7.5m² shelter being installed. However, it is not only the shelter which has to be installed, the area has to allow for safe access, fencing curtilage and access gates as well as appurtenant cabling and other infrastructure.
- f) The Draft Report refers in several places to the 'fenced compound' and it references the Department of Industry advising that the proponent determines the size of the compound and that it is defined by a number of parameters such as:
- the fenced compound;
 - the area included in a bushfire Asset Protection Zone; or
 - an access track leading to the site.

- g) If the rent is determined in accordance with IPART's draft recommendations, what is within or outside the primary user's compound is a crucial component in determining the total amount of rent payable for the site.
- h) Some analysis undertaken on our sites indicates that the LMAs could receive double or triple the primary user rent if the compound is not taken to be the whole of the fenced compound as it stands at 1 July 2020.
- i) If IPART declines to make the more substantive changes recommended above, it is Axicom's view that any user within its fenced compound as a 1 July 2020 should be included in the primary user fee and that this should be clearly set out in the final report. If IPART determines (as it has by the analysis it has presented) that most sites (75%) are 'within' the primary user's compound, then grandfathering all current users is a reasonable position.

B. New Sites

- a) Axicom, as an infrastructure provider, has operated successfully for 20 years with a business model to deliver communications infrastructure and improvements at sites which are co-locatable. Axicom partners with all of the major carriers as well as smaller operators, emergency services and government (at various levels) in providing, operating and maintaining critical communications infrastructure.
- b) Axicom builds communications infrastructure at a site with at least one anchor tenant and the potential to accommodate future users.
- c) IPART's current recommendation does not recommend a cap on new sites at the primary user rate for that location. If there is no cap for new sites this could result in either:
 - i. Axicom paying more for a new site than it currently pays for existing sites of similar size (for example Axicom's Undercliffe site in Sydney is 110m² and under the current IPART recommendations a new site of the same size would result in a ground rent of \$123,000 per annum which is clearly outrageous); or
 - ii. Axicom seeking to minimise the size of the initial compound and each co-user having to acquire additional land at a per square metre rate; or
 - iii. Axicom (or other operators) declining to provide communications coverage to the area because the penal rental charges do not allow an ability to generate a commercial return.
- d) This would result in unnaturally high rents being imposed on communications users for these sites which do not reflect the rents (we believe) are paid by other commercial users of Crown land.

- e) This will discourage investment in new infrastructure on Crown land by companies such as Axicom and this is contrary to Government directives that are actively trying to promote the installation of, and colocation on, communications infrastructure throughout the state, particularly in regional areas. One only has to look at the Black Spots Programme initiative by the government to understand how critical this initiative is and the emphasis on the colocation model to deliver choice and utility to the community.
- f) As a result of this, if IPART declines to make the more substantive changes recommended above, Axicom recommends that a cap is imposed on new sites for macro towers in the same way that a cap has been recommended for SCAX sites, at the flat rent per site for primary users in that location.

4. Infrastructure Provider Discount Removed

If we put aside the fact that the rate of rent recommended by IPART in the Draft Report is not agreed by Axicom, the removal of the infrastructure provider discount should be separated into new sites and existing sites as the position is different with respect to each as set out below:

A. New Sites

- a) For new sites, if:
 - i. Axicom is permitted to decide on the size of the compound that it wishes to build and users within this compound either pay nothing or a minimum rent; and
 - ii. a cap on the primary user rate of the flat rate for primary users in that category is imposed,

Axicom has no issue with the fact that the infrastructure provider discount is removed. In this case, Axicom would pay the same rates on the same basis as the other users of the land.

- b) If there is no cap on the primary user rate for new builds, this particular model, with the high rates per square metre, would effectively punish infrastructure providers, and therefore be discriminatory against infrastructure providers, whose main objective is to operate/create sites with the capacity for multiple users.

B. Existing Sites

- a) For existing sites, Axicom has existing contracts in place which were entered into shortly after IPART was introduced on the dependence on and understanding of, an agreed rent with a relatively commonplace form of periodic market rent review. Market rent reviews were therefore included in the agreements but a combination of the removal of the infrastructure provider discount (which means a rent increase of 30% on sites), plus a further 20% increase in relation to the re-setting of the low category, increases the rent by 50% on some sites.
- b) In our view this is a unilateral change to fundamental terms of those contracts which were relied on by Axicom when they were entered into. Generally, at law, a counterparty is not

permitted to make fundamental and unilateral changes to a contract without the counterparty's consent (to which that counterparty is not compelled to agree). Accordingly, Axicom will have to consider its position in relation to this issue and reserves its rights in this regard.

- c) The removal of the Infrastructure Provider discount on these sites results in an unjustified windfall to the LMAs at the significant expense of Axicom and other infrastructure providers in the same situation.

5. Co-user fees

- a) In relation to co-user fees generally, Axicom was a strong advocate for the removal of the co-user fees in our submission. Co-user fees do not exist in the private market and this practice was something introduced by the Government in 2005.
- b) As a direct result of this, customers have chosen not to co-locate on Axicom's sites and this is contrary to federal Government policy that promotes colocation.
- c) The fact that a fee has been retained for users who are within the primary user's compound is illogical as:
 - i. the primary user is already paying rent for using this land; and
 - ii. the primary user is the key contracting party responsible for the site and already provides the State with the relevant protections, obligations and indemnities.
- d) A fee from a co-user in compound, no matter how small, is still 'double dipping' and, as shown by the evidence, it does not happen in the private market. It also creates an additional administrative step for both the LMAs and co-users where an additional licence has to be agreed and executed. This simply slows down deployment that is an anathema to both the communal and government mandates to require and ensure efficient and cost effective rollouts.
- e) This fee does not seem to be justified. If the reason for the fee is because there is arguably additional administration for the LMAs in processing applications to allow an entity to share the site, this should be a one off application fee. If the reason for the fee is due to the additional use on the access roads etc, we understand from the Draft Report that this is included in the primary user's fee.
- f) Our view therefore is that co-user fees are a discriminatory annexing of value from the improvements funded by the user of the site, tantamount to a tax impost, and bear no relationship to and are not reflective of the unimproved land value.
- g) We would respectfully ask that IPART reconsider whether the co-user fee principle, other than a one off administration fee, can be justified.

6. High Value sites and NPWS

- a) The unilateral decision by the NPWS to increase all of its rents by one category higher is a clear example of discrimination against the owners of communication sites unless it can be established that a similar increase exists for other commercial users of land owned by NPWS. This does not appear to be the case in the evidence presented with Axicom's submission.
- b) Rather than endorsing this decision by NPWS, IPART should be asking whether all commercial users of National Parks land pay an increased rate of rent (in some cases double) to reflect the 'social, cultural and environmental values' of National Park land.
- c) This additional charge is a charge levied against the user of the land as opposed to a charge imposed for the use of the land. Unless a similar regime is in place for other commercial users of National Park land, it has the potential to be discriminatory.

Concluding Comments

In summary, the Round Table was useful in identifying two key recurring themes in relation to this review, namely:

1. IPART's approach in the Draft Report, in light of clause 44 and the application of the laws in relation to discriminatory pricing, is fundamentally flawed for the reasons set out in this further submission. Our understanding is that this view was shared by virtually all participants at the Round Table for similar reasons; and
2. a number of other key proposals (particularly with respect to the delineation and identification of compounds) require further work to establish certainty and avoid future ambiguity and potential conflict.

In relation to the first point, we reinforce that there has been a fundamental shift in the industry following the Federal Court's decision in the Telstra Case and the clear result is that the private market is not to be considered when determining comparable rents for telecommunications sites on Crown land. Whilst the Terms of Reference list clause 44 as a matter for consideration by IPART, due weight and attention to the implications of clause 44 and the relevant case law has not been given, particularly in light of the changes made to the regime on Crown land in Queensland.

The evidence that has been provided by Axicom suggests strongly that the LMAs are engaging in discriminatory pricing with respect to telecommunication sites. The evidence we have provided illustrates that rents charged by the LMAs to other commercial users of Crown land are in the range of \$1 per annum for uses benefitting the public, \$3.49 per square metre for infrastructure users and 6% of the market value of the underlying unimproved land for commercial users. Compliance with the provisions of the Telecommunications Act dictates that any rent charged for telecommunications sites cannot exceed that charged to other commercial users. These facts, along with the relevant comparison to the regime on Crown Land in Queensland (in the aftermath of the Telstra Case) should strongly compel IPART to reconsider its approach in this review.

In order to address this issue adequately, with sufficient transparency to minimize the risk of downstream challenges, the LMAs should be compelled to disclose the manner in which they charge rents to other commercial users. Without this evidence, the only conclusion possible is that the LMAs are, and will be, charging discriminatory pricing in relation to telecommunications sites if the current recommendations of the Draft Report are implemented.

We urge IPART to request the LMAs to provide the relevant rental evidence to adequately address this issue before proceeding with this review.

If you require any further information on the issues raised in this submission, please do not hesitate to contact me.

Director, Property & Asset Management

Axicom Pty Limited

T: 02 9495 9019

F: 02 9495 9119

E: jane.pollard@axicom.com.au

Encl:

- Annexure A - Lease between the State of NSW and Delta Electricity Australia Pty Ltd and Sunshine Renewable Energy Pty Limited dated 8 June 2005**
- Annexure B - Various Leases between Minister Administering the National Parks and Wildlife Act 1974 and various commercial entities**
- Annexure C - Lease from the Minister administering the National Parks & Wildlife Act 1974 to the Health Administration Corporation dated 17 November 2010**
- Annexure D - Undated lease between State of NSW and Eden Ice Supplies Pty Ltd**
- Annexure E - Lease between the State of NSW and Twofold Bay Fishermen's Co-operative Limited dated 13 March 2009**
- Annexure F - Illustrations of Site locations/Rent Rates**
- Annexure G - List of Axicom's compound sizes & illustrations of typical compounds**

Annexure A

Lease between the State of NSW and Delta Electricity Australia Pty Ltd and Sunshine Renewable Energy Pty Limited dated 8 June 2005



Form number: 01-117L
Lease number: LE 341566

LEASE

Real Property Act, 1900

AB564738S

<small>Office of State Revenue use only</small>	
NEW SOUTH WALES DUTY	
09-06-2005	0002718067-001
SECTION 179-DUPLICATE	
NO DUTY PAYABLE	

(A) **PROPERTY LEASED**
Show no more than 20 References to Title.
Specify the part or premises if appropriate.

Folio Identifier(s) 12/1074083,13/1074083

(B) **LODGED BY**

LTO Box	Name, Address or DX and Telephone
469S	Grafton District Office Department of Lands Level 1, 76 Victoria Street GRAFTON NSW 2460
	REFERENCE: GF02H125

(C) **LESSOR** STATE OF NEW SOUTH WALES

(D) The lessor leases to the lessee the property described above subject to the following **ENCUMBRANCES**

1. 2. 3. 4.

(E) **LESSEE**

L	DELTA ELECTRICITY AUSTRALIA PTY LTD, SUNSHINE RENEWABLE ENERGY PTY LTD (ACN 074 408 923) (ACN 095 991 638)
	Lvl 12 201 Sussex St SYDNEY NSW 2000
(F)	TENANCY: tenants in common <i>IN EQUAL SHARES</i>

- (G) 1. **TERM:** 20 years
- 2. **COMMENCING DATE:** 1st May, 2005
- 3. **TERMINATING DATE:** 30th April, 2025
- 4. With an **OPTION TO RENEW** for a period of 20 YEARS set out in SCHEDULE 2
- 5. With an **OPTION TO PURCHASE** set out in [NOT APPLICABLE]
- 6. Together with and reserving the **RIGHTS** set out in [NOT APPLICABLE]
- 7. Incorporates the provisions set out in ANNEXURE "A" hereto
- 8. Incorporates the provisions set out in **MEMORANDUM No.** [NOT APPLICABLE]

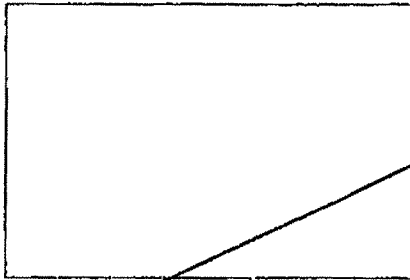
CHECKED BY (office use only)

(H) DATE 8 June 2005 We certify this dealing correct for the purposes of the Real Property Act, 1900

Signed in my presence by the lessor who is personally known to me

<p>_____ Signature of Witness</p> <p><u>WAYNE MCINTYRE</u> Name of Witness (BLOCK LETTERS)</p> <p><u>C/ 36 MARINA DRNE COPPS HARBOR</u> Address of Witness</p>	<p>_____ Signat</p> <p>Phillip Fogarty by delegation pursuant to section 180 of the Crown Lands Act 1989 and with authority under section 13L of the Real Property Act 1900 from the Minister administering the Crown Lands Act 1989 on behalf of the State of New South Wales</p>
--	--

The Common Seal of was affixed in accordance with the articles of association in the presence of:



<p>_____ Signature</p> <p>_____ Position</p> <p>_____ Date</p>	<p>_____ Signature</p> <p>_____ Position</p> <p>_____ Date</p>
--	--

See Annexure "B" for execution

Lease No.:LE 341566

ANNEXURE "A"

This and the following pages comprise Annexure "A" referred to in the Lease between the STATE OF NEW SOUTH WALES as Lessor and DELTA ELECTRICITY AUSTRALIA PTY LTD. SUNSHINE RENEWABLE ENERGY PTY LTD as Lessee.

Witness

Lessee

Phillip Fogarty by delegation to section 180 of the Crown Lands Act 1989 and with authority under section 13L of the Real Property Act 1900 from the Minister administering the Crown Lands Act 1989 on behalf of the State of New South Wales

see Annexure 'B'

Lessee

see Annexure 'B'

Lessee

(A Table of Contents appears at the end of this Annexure) (4.001)

Holder

The Lessor and the ~~Lessee~~ hereby covenant and agree the one with the other as follows:-

1. Authority for Grant of Lease

The Holder acknowledges that -

- (a) the Land is Crown land within the meaning of the CLA;
- (b) the State of New South Wales is recorded as registered proprietor of the Land by virtue of the provisions of section 13D of the Real Property Act 1900;
- (c) the Minister is authorised by section 34 of the CLA to grant a lease of Crown land on behalf of the Crown;
- (d) the Minister has executed this Lease on behalf of the State of New South Wales as authorised by section 13L of the Real Property Act 1900;
- (e) this Lease has been granted pursuant to section 34 of the CLA and is a "holding" for the purposes of that Act and the provisions of that Act relating to holdings apply to this lease; and
- (f) the holder is a "holder" for the purposes of the CLA and the provisions of that Act relating to holders apply to the holder. (4.002)

2. Definitions

In this Lease unless the contrary intention appears:

"CLA" means the Crown Lands Act 1989.

Lease No.:LE 341566

"**Commencement Date**" means the date of commencement of the Term as referred to on the front page of this Lease.

"**Holder**" means the Lessee or its permitted assigns or permitted transferee and where not repugnant to the context its agents employees invitees and licencees.

"**Improvements**" means all buildings structures facilities works and equipment situated on or in the land or which under the terms of this Lease are to be constructed effected erected or undertaken on or in the land.

"**Land**" means the land (including any submerged land and waterway) described on the front page of this Lease or where the context so admits any part thereof.

"**Lease**" means this Lease including the Schedules and Annexures hereto.

"**Lessee**" means the Lessee or its permitted assigns or permitted transferee and where not repugnant to the context its agents employees invitees and licensees.

"**Lessor**" means the State of New South Wales being the Crown in the right of New South Wales.

"**Minister**" means the Minister of the Crown for the time being administering the CLA or any Act replacing or consolidating that Act.

"**Premises**" means the Land, the Improvements and the Lessee's Plant and where the context so permits any part of the foregoing.

"**Rent**" means the rent hereby reserved.

"**Schedule 1**" means schedule 1 of this Lease.

"**Term**" means the term of this Lease as shown on page one of this Lease.

"**Termination Date**" means the date of expiration of the Term as referred to on the front page of this Lease or where this Lease is determined (by forfeiture or otherwise) on a date earlier than that date then that earlier date. (4.003)

3. Plurals and Genders

- (a) Words importing the singular number shall include plural and vice versa.
- (b) Words importing the masculine gender shall include the feminine or neuter and vice versa.
- (c) Any reference to a person shall be deemed to include a reference to a corporation and vice versa. (4.005)

4. Contra Proferentum

In the interpretation of this lease no rule of construction shall apply to the disadvantage of a party on the basis that that party was responsible for the preparation of this Lease or any part of it. (4.006)

5. Headings Code Numbers and References

- (a) Headings (and subheadings within clauses) marginal notes the matter appearing in Column 1 of Schedule 1 and the Table of Contents have been included for guidance only and shall be deemed not to form any part of this Lease.
- (b) The code number appearing at the end of each clause of the Lease shall be deemed not to form part of the Lease.

- (c) References to Clauses Parts and Schedules are references to clauses parts and schedules of this Lease. (4.007)

6. Statutes

- (a) A reference to a statute or statutory instrument includes amendments to that statute or statutory instrument whether by subsequent statutes or statutory instruments or otherwise and any statute or statutory instrument passed in substitution for the statute or statutory instrument referred to or incorporating any of its provisions.
- (b) Without limiting the operation of paragraph (a) where any clause of this Lease contains a reference to a specific provision in a statute or statutory instrument which is repealed the Lessor may by notice in writing served on the Holder specify that a provision of any statute or statutory instrument replacing the abovementioned provision shall be substituted for the abovementioned provision and the clause shall be read and construed to that effect.
- (c) A reference to a statute includes a reference to any statutory instrument made thereunder. (4.008)

7. Provisions to be construed as Covenants

Such of the provisions and conditions herein contained as require or prescribe anything to be done or not to be done by the Holder shall in addition to being read and construed as conditions of this Lease shall be also read and construed as covenants and agreements whereby the Holder for itself and its assigns agrees with the Lessor to observe and perform such provisions and conditions. (4.009)

8. Application of Conveyancing Act

Pursuant to the provisions of section 43 of the CLA the provisions of sections 84, 84A, 85, 86, 129, 130, 131, 132, 133, 133A and 133B of the Conveyancing Act 1919 shall not apply to this Lease. (4.011)

9. Performance of Functions etc.

The Lessor and the Holder expressly agree that -

- (a) any power authority duty or function conferred or imposed upon the Lessor under any provision of this lease may be exercised or performed by the Minister as if the power authority duty or function had been conferred or imposed by this Lease on the Minister;
- (b) any power authority duty or function exercised or performed by the Minister pursuant to this clause may be exercised or performed in the name of the Minister with or without any reference to the Lessor;
- (c) the Minister may authorise a person to exercise or perform any power authority duty or function which this clause or this lease authorises or requires the Minister to exercise or perform;
- (d) a person shall be taken to have been validly authorised by the Minister to exercise or perform any power authority duty or function if that person is authorised to exercise any power authority duty or function conferred or imposed in any lease granted under section 34 of the CLA or any such lease of a specific type or any such lease within a specified locality. (4.012)

10. Lessor as Public Authority

The Holder acknowledges that nothing in this Lease can in any way restrict or otherwise affect the Lessor's or the Minister's unfettered discretion as to the use of the Lessor's or the Minister's statutory powers as a public authority. (4.013)

11. Approval by the Lessor or the Minister

- (a) In any case where pursuant to this Lease the doing or executing of any act matter or thing by the Holder is dependent upon the approval or consent of the Lessor or the Minister such approval or consent shall not be effective unless given in writing and may be given or withheld by the Lessor or the Minister in its or the Minister's absolute discretion and may be given subject to such conditions as it or the Minister may determine unless otherwise herein provided.
- (b) The Holder expressly agrees that any failure by the Holder to comply with or perform a condition imposed pursuant to this clause will constitute a failure by the Holder to comply with or perform a condition of this Lease. (4.014)

12. Opinion of the Lessor or the Minister

Any opinion to be formed by the Lessor or the Minister for the purposes of this Lease may be formed by the Lessor on such grounds and material as the Lessor or the Minister determines to be sufficient after consultation if the Lessor or the Minister deems it necessary with any New South Wales Government Department or other public authority the Standards Association of Australia or any other body whose objects and functions are relevant. In forming any such opinion the Lessor or the Minister shall be deemed to be exercising merely administrative functions. (4.015)

13. Time to be of the essence

Where in any provision of this Lease -

- (a) the Holder is given or allowed a specified time or period within which to undertake or do any act or thing;
- (b) any power or authority is conferred on the Lessor the Minister or the Holder after the lapse of a specified time or period; or
- (c) any event occurs after the lapse of a specified time or period

the Lessor and the Holder expressly agree that time shall be of the essence of this contract in that regard. (4.016)

14. Holder to pay Cost of Work

Whenever the Holder is required by this Lease to do or effect any act matter or thing or to undertake any work then the doing of such act matter thing or work shall unless this Lease otherwise provides be at the sole risk cost and expense of the Holder. (4.017)

15. Notices

- (a) A reference in this clause to a notice required to be served includes a reference to any -
 - (i) requirement in this lease for a notice or other communication to be given;
 - (ii) notice or other communication which may be convenient to be given or served in connection with this Lease; and
 - (iii) notice or other communication which may be required to be given or served or which may be convenient to be given or served under any condition of any approval consent or permission which the Lessor or the Minister may give under this Lease.
- (b) All notices which are required to be served by the Lessor or the Minister to or upon the Holder under this Lease shall be sufficiently given or served if left at or sent by ordinary post addressed to the Holder

Lease No.:LE 341566

at the address specified in Column 2 of Item 1 of Schedule 1 or at the Premises or at such other place as notified in writing by the Holder to the Lessor.

- (c) All notices which are required to be served by the Holder to or upon the Lessor or the Minister under this Lease shall be sufficiently given or served if left at or sent by ordinary post addressed to the Minister at the address specified in Column 2 of Item 2 of Schedule 1.
- (d) Any notice or communication given or served by post shall be deemed to have been duly given or served at the time when it would in the ordinary course be delivered.
- (e) Subject to any other provision of this Lease to the contrary where the Holder is a corporation any notice or other communication required to be served or given or which may be convenient to be served or given under or in connection with this Lease shall be sufficiently executed if signed by the Secretary or other principal permanent officer of the corporation. (4.018)

16. Manner of Payment of Rent and Other Moneys

The rent and other moneys payable in accordance with this Lease shall be paid to the person and at the address specified in Column 2 of Item 3 of Schedule 1 or to such other person or at such other address as the Lessor may from time to time direct by notice in writing served on the Holder. (4.019)

17. Waiver

No waiver by the Lessor of one breach of any provision of this Lease shall operate as a waiver of another breach of the same or of any other provision. (4.020)

18. Severability of Provisions

Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall as to such jurisdiction be ineffective to the extent of such prohibition or inability to enforce without invalidating the remaining provisions of this Lease or affecting the validity or enforceability of such provision in any other jurisdiction. (4.021)

19. Applicable Law

This Lease shall be construed and interpreted in accordance with the law of New South Wales. (4.022)

20. Exclusion of Warranties

The Holder acknowledges having inspected the Premises and that in entering into this Lease the Holder has not relied on any statement representation or warranty (other than those implied by or deemed to have been given by law and which cannot be contracted out of) by or on behalf of the Lessor whether expressed or implied other than the statements representations and warranties expressly set out in this Lease. (4.023)

21. Payment of Rent (CPI)

- (a) For the purposes of this clause:

"Initial Rent" means the rent for the first year of this Lease specified or referred to in Column 2 of Item 6 of Schedule 1.

"Base Annual Rent" means -

- (i) the Initial Rent where the rent has not been redetermined in accordance with subclauses (e) (f) or (g) or

Lease No.:LE341566

- (ii) in any other case - the rent as last redetermined in accordance with those provisions.

"Due Date" means each anniversary date of the Commencement Date.

"Market Rent Review Date" means -

- (i) the date specified or referred to in Column 2 of Item 7 of Schedule 1 (either being a Due Date or another date); and
- (ii) thereafter the date of the expiration of each period of years as specified or referred to in Column 2 of Item 8 of Schedule 1 as calculated from the date specified or referred to in Column 2 of Item 7 of Schedule 1.

"Market Rent Review Period" means the period between each Market Rent Review Date as specified or referred to in Column 2 of Item 8 of Schedule 1.

- (b) The Holder covenants with the Lessor that the Holder will during the whole of the Term pay to the Lessor in accordance with the provisions of this clause without demand free of exchange and without deduction whatsoever the rent hereinafter provided.
- (c) The Holder will pay to the Lessor on the Commencement Date the Initial Rent and thereafter shall pay on each Due Date rent in advance adjusted as hereinafter provided.
- (d) (i) On the Due Date the rent shall be adjusted in accordance with the following formula:

$$R = B \times \frac{C}{D}$$

where:

R represents the adjusted rent;

B represents the Base Annual Rent;

C represents the Consumer Price Index number for the last quarter for which such a number was published before the Due Date; and

D represents the Consumer Price Index number for the last quarter for which such a number was published -

- (1) before the Commencement Date where the rent has not been adjusted in accordance with subclauses (e) (f) or (g) or
- (2) in any other case - before the Due Date being the effective Due Date of the last adjustment of rent as defined in subclauses (h) and (i).
- (ii) In this clause "Consumer Price Index number" in relation to a quarter means the number for that quarter appearing in the Consumer Price Index (All Groups Index) for Sydney published by the Australian Statistician. In the event that such index be discontinued or abolished the Minister may at his absolute discretion nominate another Index.
- (iii) If the reference base for the Consumer Price Index is changed regard shall be had only to Index numbers published in terms of the new reference base or to Index numbers converted to the new reference base in accordance with an arithmetical conversion factor specified by the Australian Statistician.
- (iv) Any rent adjusted under this subclause shall be adjusted to the nearest whole dollar.

Lease No.:LE 341566

- (e) In addition to the rent adjustment provided for in subclause (d) on the first Market Rent Review Date after the Commencement Date and thereafter on each Market Rent Review Date the rent may be adjusted by the Minister redetermining the rent pursuant to the provisions of sections 142 and 143 of the CLA.

A redetermination of rent for the purposes of this subclause shall be taken to have been made on the Market Rent Review Date if it is made at any time within the period of six months before the Market Rent Review Date.

- (f) Where the Minister does not redetermine the rent as provided for in subclause (e) he may adjust the rent by redetermining the rent pursuant to the provisions of sections 142 and 143 of the CLA at any time prior to the next Market Rent Review Date and no succeeding Market Rent Review Date shall be postponed by reason of the operation of this subclause.
- (g) Where the Minister does not adjust the rent on the first Market Rent Review Date or a Market Rent Review Date as provided for in subclause (e) the Holder may by notice in writing served on the Minister require that the Minister redetermine the rent pursuant to the provisions of sections 142 and 143 of the CLA. Where the Holder requires the Minister to redetermine the rent under this subclause he shall pay on demand the costs of the Minister (or so much of the cost as the Minister may require) in making that determination.
- (h) A redetermination of rent made as provided for in subclause (e) shall take effect and be due and payable on the next Due Date following the date of issue of the notice of redetermination (or where the said Due Date and the date of issue of the notice of redetermination are the same - then that date) even if an objection or appeal under section 142 of the CLA has been lodged. On the completion of the objection and appeal process any necessary adjustments shall be made.

For the purposes of this subclause the term "next Due Date" does not include a Due Date falling between the date of issue of the notice of redetermination and the relevant Market Rent Review Date.

- (i) A redetermination of rent as provided for in subclauses (f) and (g) shall take effect and be due and payable from the next Due Date following the date of issue of the notice of redetermination under section 142 of the CLA even if an objection or appeal under that Section has been lodged. On the completion of the objection and appeal process any necessary adjustments shall be made.
- (j) The Holder acknowledges that the Minister may make a direction under section 152 (alteration of due date) of the CLA in respect of any rent payable under this Lease. (4.028)

22. Continuing Obligation

The obligation of the Holder to pay the Rent shall be a continuing obligation during the term of this Lease and shall not abate in whole or in part or be affected by any cause whatsoever. (4.038)

23. No Reduction in Rent

Subject to the other provisions of this Lease, the Holder will not without written consent of the Lessor by any act matter or deed or by failure or omission impair reduce or diminish directly or indirectly the Rent hereby reserved or imposed or cause or permit to be imposed on the Lessor any liability of the Holder under or by virtue of this Lease even though entitled so to do whether by statutory instrument proclamation order or moratorium (present or future) or otherwise. (4.039)

24. Holder to Pay Rates etc.

The Holder will when the same become due for payment pay all (or in the first and last year of the term of this Lease the appropriate proportionate part) rates taxes (including Land Tax) assessments duties charges and fees whether municipal local government statutory or otherwise which are at any time during the currency of this Lease lawfully charged upon imposed or levied in respect of the Premises or on the Lessor or the Holder on

Lease No.:LE 341566

account thereof and will if required by the Lessor produce to the Lessor the receipts for such payments within ten business days after the respective due dates for payment AND in case such rates taxes duties and fees so covenanted to be paid by the Holder are not paid when the same shall become due the Lessor may if it thinks fit pay the same and any such sum or sums so paid may be recovered by the Lessor as if such sums were rent in arrears. (4.040)

25. Goods and Services Tax

(a) Definitions

In this clause the expressions "GST", "supply", and "taxable supply" have the meanings given to those expressions in the A New Tax System (Goods and Services Tax) Act 1999.

(b) Amounts GST Exclusive

With the exception of any amount payable under this clause, unless otherwise expressly stated all amounts stated to be payable under this Lease are exclusive of GST.

(c) Responsibility for GST

(i) Despite any other provision in this Lease, if GST is imposed on any supply made under this Lease, the recipient must pay to the supplier an amount equal to the GST payable on the taxable supply.

(ii) The recipient must pay the amount referred to in subclause (c)(i) in addition to and at the time payment for the taxable supply is required to be made under this Lease.

(d) Valuer/Umpire to return GST Exclusive Value

Any valuer or umpire returning a valuation must return a GST exclusive market value for it in any case where the valuation is for the purpose of determining a supply value to which GST is to be added under this Lease. (4.040A)

26. Holder to Pay for Services

The Holder will as and when the same become due for payment pay to the Lessor or to any other person or body authorised to supply the same all proper charges for gas electricity water sewage or other services supplied to or consumed in or on the Premises and will also pay all charges in respect of any telephone services connected to the Premises. (4.041)

27. Holder not to Impose Liability on Lessor

Subject to any other provision of this Lease the Holder will not without the written consent of the Lessor by any act matter or deed or by failure or omission cause or permit to be imposed on the Lessor any liability of the Holder under or by virtue of this Lease even though the Holder is entitled so to do under any law (present or future) or otherwise. (4.042)

28. Permitted Use

(a) This Lease confers on the Holder a right to occupy and use the Premises for the purpose specified or referred to in Column 2 of Item 36 of Schedule 1.

(b) The Holder will not use the Premises or allow them to be used for any purpose other than the purpose specified in Column 2 of Item 36 in Schedule 1. (4.043)

29. No Residence on Premises

The Holder will not reside or permit any other person to reside on the premises. (4.045)

30. Lessor's Consent to Development Application

The Holder covenants with the Lessor that the Holder will obtain the Lessor's consent to the lodgement of any development application in respect of the Land. (4.047)

31. Holder not to undertake Development without consent notwithstanding any other provision of this Lease

The Holder will not undertake any development within the meaning of the Environmental Planning and Assessment Act 1979 contrary to the provisions of that Act or in breach of any restriction condition or prohibition imposed by an Environmental Planning Instrument or condition of a development consent. (4.048)

32. Development Consent

- (a) The Holder will not undertake any activity on or within the Premises for which consent is required under the Environmental Planning and Assessment Act 1979 or any Instrument made thereunder without first obtaining such consent.
- (b) Where the Holder obtains consent in accordance with the provisions of this clause the Holder will not undertake any activity on or within the Premises except in accordance with any conditions or requirements of that consent. (4.049)

33. Compliance with Statutes

- (a) The Holder will comply with the requirements of all statutes regulations or by-laws and requirements of all relevant public and local authorities in so far as they apply in relation to the use and occupation of the premises.
- (b) The Holder will forthwith on being served with a notice by the Lessor comply with any notice or direction served on the Lessor or the Minister by a competent authority relating to the destruction of noxious animals or plants or pests or the carrying out of repairs alterations or works on or to the Premises. (4.050)

34. Occupational Health and Safety Act 1983

The Holder accepts responsibility for the control of the whole of the Premises for the purposes of the Occupational Health and Safety Act 2000 and agrees to keep and maintain the Premises in the manner which complies with the said Act. (4.051)

35. Lessor may Charge Fee

The Lessor may charge such fees as may be prescribed in the Regulations made under the CLA for dealing with any application by the Holder for consent to assign transfer sublease or otherwise part with possession of the Premises. (4.055)

36. Provision of Guarantees

In the case of an application for consent to a proposed assignment transfer or declaration of trust of this Lease in favour of a company the Lessor may require guarantees by such persons and in such form as the Lessor requires. (4.056)

Lease No.:LE 341566

37. Forfeiture

- (a) The Holder expressly acknowledges that this Lease may be forfeited pursuant to the provisions of section 129(1) of the CLA in the circumstances set out in that section.
- (b) For the purposes of this Lease the Holder will be taken not to have failed to comply with a condition covenant or provision of this Lease until a period of 28 days (or such further period as may be specified in the notice) has elapsed after the service of a notice in writing on the Holder specifying the covenant conditions or provision which the Holder has failed to comply with.
- (c) The Lessor and the Holder expressly acknowledges that if one or both of the events specified hereunder occurs the Holder will for the purposes of this clause and for the purpose of section 129(1) of the CLA be taken to have failed to comply with a provision of this Lease and the provision of subclause (b) shall not apply to such a default.
- (i) **Winding Up**
- the Holder (being a company) - an order is made or a resolution is effectively passed for the winding up of the Holder (except where such winding up is for the purpose of reconstruction or amalgamation with the written consent of the Lessor which consent shall not be unreasonably withheld); or
- (ii) **Liquidation**
- the Holder goes into liquidation or makes an assignment for the benefit of or enters into an arrangement or composition with its creditors or stops payment or is unable to pay its debts or if execution is levied against the Holder and not discharged within 30 days.
- (d) Demand or acceptance of Rent or any other money due under this Lease by the Lessor after forfeiture does not operate as a waiver of forfeiture. (4.059)

38. Abandonment

If the Holder vacates or abandons the Premises during the continuance of this Lease (whether or not the Holder ceases to pay the Rent and other amounts payable pursuant to this Lease) then in the absence of written notice by the Lessor accepting the surrender of the Holder's interest under this Lease or the forfeiture of the Lease neither acceptance of the keys nor entry into the Premises by the Lessor or by any person on the Lessor's behalf for the purpose of inspection or for the purpose of showing the Premises to prospective lessees or licencees nor the advertising of the Premises for re-letting shall constitute a waiver of the Lessor's rights to recover in full all Rent and other amounts from time to time payable by the Holder pursuant to this Lease and this Lease shall be deemed to continue in full force and effect until the date on which any forfeiture thereof takes effect or the date of expiration of the term whichever shall first occur. (4.060)

39. Interest on Overdue Money

The Holder shall pay interest on any money due and payable under this Lease at the rate prescribed from time to time under the provisions of section 148 of the CLA and any such interest shall for the purposes of this Lease be deemed to be Rent in arrears. (4.061)

40. Failure to Pay Money or Undertake Works

- (a) For the purposes of this clause the word "cost" shall include any sums paid for any insurance indemnities under the laws relating to workers' compensation.
- (b) Where under this Lease the Holder is required to pay any money to a third party and neglects to do so for a period of 14 days after the money became due and payable it shall be lawful for but not obligatory upon the Lessor (and without prejudice to any rights and powers arising from such default) to pay such

Lease No.:LE 341566

money as if it were the Holder and the Holder will reimburse the Lessor in respect of any such payments on demand.

- (c) Where under this Lease the Holder is required to do or cause to be done any work or thing and the Holder neglects to do the work or thing for a period of 14 days after that work or thing was due or required to be done it shall be lawful for but not obligatory upon the Lessor (and without prejudice to any rights and powers arising from such default) to do or effect such work or thing as if the Lessor were the Holder and for that purpose the Lessor the Lessor's officers agents contractors and workmen may enter upon the whole or any part of the Premises and there remain for the purposes of doing or effecting any such work or thing and the Holder will reimburse the Lessor for the cost of the doing or effecting the work or thing on demand.
- (d) The Holder expressly agrees that any money or cost payable to the Lessor under this clause shall constitute a debt owed by the Holder to the Crown in the right of the State of New South Wales and may be recovered accordingly.
- (e) Where the Premises has a common boundary with other land owned leased or held by the Holder (hereinafter called the "other land") the Holder irrevocably grants to the Lessor the Lessor's officers agents contractors and workmen a Licence to enter upon the said other land for the purpose of gaining access to the Premises or for the purpose of undertaking any work or thing authorised permitted or contemplated by this Lease.

In exercising any power conferred by this subclause the Lessor the Lessor's servants employees and agents will not be liable for any reasonable damage suffered or occasioned to the other land or anything constructed thereon.

- (f) The Holder expressly agrees that the provisions of this clause shall continue after the expiration or sooner determination of this Lease and the Lessor may make any payment or effect any work or thing authorised by this clause after the expiration or sooner determination of this Lease as if such expiration or sooner determination had not taken place. (4.062)

41. Holder to take as if Owner

The Holder shall take and be subject to the same responsibilities in regard to persons and property and otherwise to which the Holder would be subject as if during the Term the Holder was the owner of the freehold of the Premises. (4.063)

42. Release of Lessor from Accident Damage

- (a) For the purposes of this clause the term Lessor shall include Her Majesty the Queen Her Heirs and Successors the Minister and the agents servants employees and contractors of the Lessor Her Majesty Her Majesty's Heirs and Successors and the Minister.
- (b) The Holder agrees to occupy use and keep the Premises at the risk of the Holder and hereby releases to the full extent permitted by law the Lessor from all claims and demands of every kind resulting from any accident damage or injury occurring therein and the Holder **EXPRESSLY AGREES** that the Lessor shall have no responsibility or liability for any loss of or damage to fixtures and/or the personal property of the Holder.
- (c) The Holder expressly agrees that the obligations of the Holder under this clause shall continue after the expiration or other determination of this Lease in respect of any act deed matter or thing occurring before such expiration or determination. (4.064)

43. Indemnities

- (a) For the purposes of this clause the term Lessor shall include Her Majesty the Queen Her Heirs and Successors the Minister and the agents servants employees and contractors of the Lessor Her Majesty Her Majesty's Heirs and Successors and the Minister.
- (b) The Holder covenants with the Lessor to indemnify and keep indemnified the Lessor from and against all claims for injury loss or damage suffered by any person or body using or being in or upon the Premises or any adjoining land or premises of the Lessor arising out of the Holder's use of the Premises and against all liabilities for costs charges and expenses incurred by the Lessor in respect of the claim of any such person or body except to the extent that any such claims and demands arise wholly from any negligence or wilful act or omission on the part of the Lessor.
- (c) The indemnity contained in this clause applies notwithstanding that this Lease authorised or required the Holder to undertake or perform the activity giving rise to any claim for injury loss or damage.
- (d) The Holder expressly agrees that the obligations of the Holder under this clause shall continue after the expiration or sooner determination of this Lease in respect of any act deed matter or thing occurring before such expiration or determination. (4.065)

44. Insurance - Public Risk

The Holder will (without in any way limiting the liability of the Holder under any other provision of this Lease) forthwith take out and thereafter during the Term keep current a public risk insurance policy for the amount not less than that specified in Column 2 of Item 39 of Schedule 1 for any one claim (or such other reasonable amount as the Lessor may from time to time specify in writing to the Holder) whereby the Lessor shall during the continuance of this Lease be indemnified against all actions suits claims demands proceedings losses damages compensation costs charges and expenses mentioned or referred to in this Lease to which the Lessor shall or may be liable. (4.066)

45. Insurance - Workers Compensation

The Holder will (without in any way limiting the liability of the Holder under any other provision of this Lease) forthwith take out and thereafter during the Term keep current insurance against any liability which may arise at common law or by virtue of any relevant workers compensation legislation in connection with the performance of work or provision of services on or about the Premises and the operation thereof so that the Lessor will be indemnified against all claims for death or bodily injury by any person at all times. (4.067)

46. Construction of Improvements

- (a) For the purposes of this clause "Improvement" means any building structure facility or work.
- (b) The Holder may construct effect erect or undertake any Improvements specified or referred to in Column 2 of Item 40 of Schedule 1.
- (c) Any Improvements constructed erected effected or undertaken shall be constructed erected effected or undertaken in accordance with the plans conditions and specifications contained or referred to in Column 2 of Item 41 of Schedule 1.
- (d) The Holder will not construct effect erect or undertake any Improvements on the Premises other than the Improvements specified or referred to in Column 2 of Item 40 of Schedule 1 or which may be authorised or required under any other provision of this Lease. (4.077)

47. Improvements to be Property of Holder

- (a) For the purpose of this Clause -

Lease No.:LE 341566

"Constructed" means constructed, erected, effected or undertaken.

"Improvement" means any building, structure, facility, work, equipment or pontoon.

"Remove" means to demolish and take away.

- (b) The Lessor and the Holder acknowledge that subject to subclause (d) the Improvements specified or referred to in Column 2 of Item 54A of Schedule 1 constructed on the Premises by the Holder shall be the property of the Holder.
- (c) The Holder shall within the period after the Termination Date specified or referred to in Column 2 of Item 54B of Schedule 1 (or such further period as the Minister may allow) remove the Improvements specified or referred to in subclause (b) and rehabilitate the land in the manner specified or referred to in Column 2 of Item 54C of Schedule 1.
- (d) Where the holder fails to remove the Improvements referred to in subclause (b) within the time provided for in subclause (c) the property in the Improvements shall become the property of the Lessor after the lapse of 28 days from the end of the period provided for in subclause (c) and the Holder shall not be entitled to any compensation in respect thereof. (4.091A)

48. Removal of Plant on Expiration of Term

- (a) The Holder will (unless the Lessor and Holder otherwise agree in writing) remove from the Land all Holder's Plant within one month (or within such further period as the Lessor may allow) after the expiration of the Term of this Lease and make good any damage to the Premises caused by such removal. The property in any of the Holder's Plant not removed within that time shall upon the expiration of the said period automatically pass to and vest in the Lessor without compensation.
- (b) For the purposes of this Clause the term "Holder's Plant" shall mean such plant and equipment as is specified or referred to in Column 2 of Item 58 of Schedule 1. (4.095)

49. Removal of Plant on Forfeiture

- (a) If this Lease is forfeited by the Lessor or is abandoned by the Holder the Holder will (unless agreed otherwise in writing) not be entitled to remove any of the Holder's Plant and upon such forfeiture of the Lease or abandonment the property in the Holder's Plant shall automatically pass to and vest in the Lessor without compensation PROVIDED THAT if the Lessor requires the Holder to remove the Holder's Plant or any part thereof and notifies the Holder in writing of such requirement the Holder will within 30 days after such written notification remove the Holder's Plant or the part thereof and make good any damage to the Premises caused by such removal and in default thereof the Lessor may remove such Holder's Plant at the expense of the Holder and sell the Holder's Plant so removed and the proceeds of such sale shall vest in the Lessor.
- (b) For the purposes of this clause the term "Holder's Plant" shall mean such plant and equipment as is specified or referred to in Column 2 of Item 59 of Schedule 1. (4.096)

50. Removal of Signs

Upon the Termination Date the Holder will at the Holder's expense remove any signs advertisements lights embellishments names notices or hoardings erected painted displayed affixed or exhibited upon to or within the Premises by or on behalf of the Holder and make good any damage or disfigurement caused by reason of such erection painting displaying affixing exhibiting or removal thereof. (4.097)

51. Premises to be kept in clean and tidy condition

The Holder will at all times during the Term keep the Premises in a clean and tidy condition and will (subject to any other provision of this Lease) on the Termination Date leave the Premises in a clean and tidy condition. (4.104)

52. Lessor's Right to Enter Inspect and Repair

The Lessor and the Lessor's agents may at all reasonable times upon giving to the Holder reasonable notice (except in the case of emergency when no notice shall be required) enter upon the Premises and view the state of repair thereof and may serve upon the Holder a notice in writing of any defect (the repair of which is the Holder's obligation hereunder) requiring the Holder within 14 days to repair the same. (4.106)

53. Notification of Accident

The Holder will give to the Lessor prompt notice in writing of any serious accident to or serious defect or want of repair in any of the Improvements facilities devices contrivances services to or fittings in the Premises which in any way is likely to cause any serious danger risk or hazard to the Premises or any person therein unless such defect unsafeness weakness or want of repair is capable of being and is promptly remedied by the Holder. (4.115)

54. Relics

- (a) Unless authorised to do so by a permit under section 87 or a consent under section 90 of the National Parks and Wildlife Act 1974 and subject to observance and compliance with any conditions imposed on the grant of such permit or consent the Holder will not knowingly disturb destroy deface or damage any aboriginal relic or place or other item of archaeological significance within the Premises and shall take every precaution in drilling excavating or carrying out other operations or works in the Premises against any such disturbance destruction defacement or damage.
- (b) If the Holder becomes aware of any aboriginal relic or place or other item of archaeological significance within the Land the Holder will within 24 hours notify the Director National Parks and Wildlife Service of the existence of such relic place or item.
- (c) The Holder will not continue any operations or works on the Land likely to interfere with or disturb any relic place or item referred to in subclause (b) without the approval of the Director National Parks and Wildlife Service and the Holder will observe and comply with all reasonable requirements of the Director in relation to the carrying out of the operations or works. (4.120)

55. Artefacts

All fossils artefacts coins articles of value articles of antiquity structure and other remains or things of geological historical or archaeological interest discovered on or under the surface of the Premises shall as between the Lessor and the Holder be deemed to be the absolute property of the Lessor and the Lessor shall be authorised by the Holder to watch and examine any excavations and the Holder will take every precaution to prevent such articles or things being removed or damaged and shall immediately upon discovery thereof notify the Minister of such discovery and carry out at the reasonable expense of the Holder the Lessor's orders as to the delivery up or disposal of such articles or things. (4.121)

56. Holder to provide Security

- (a) (a) The Lessor and the Holder agree that this clause shall apply during the period specified or referred to in Column 2 of Item 69A.
- (b) The Holder will on or before the date specified or referred to in Column 2 of Item 70 of Schedule 1 lodge with the Lessor a Bank Guarantee or Indemnity Guarantee for the sum specified or referred to in Column 2 of Item 71 of Schedule 1 as security for the fulfilment of the obligations of the Holder under

Lease No.:LE 341566

this Lease. In the event that the Holder fails to fulfil any of his obligations under this Lease the said sum may be applied at the absolute discretion of the Lessor towards the cost of fulfilling such obligations. For the purpose of this clause the Holder will be taken to have failed to fulfil the Holder's obligations under this Lease if the Holder fails to comply with any condition covenant or provision of the Lease any provision of the CLA or any condition requirement or direction imposed or given pursuant to a condition covenant or provision of this Lease or any provision of the CLA.

- (c) (i) Subject to sub-paragraph (ii) the Lessor may after the expiration of the period of years specified or referred to in Column 2 of Item 72 of Schedule 1 from the Commencement Date of this Lease review at any time the amount of security required in accordance with subclause (b) hereof and by notice in writing served on the Holder increase or decrease the amount to be secured.
- (ii) Not more than one variation in the amount of security shall be made under sub-paragraph (i) during any period of years as specified or referred to in Column 2 of Item 73 of Schedule 1.
- (d) Where the amount of security has been increased or decreased pursuant to subclause (c) hereof the Holder will within two (2) months of being required so to do by the Lessor lodge a further security for the amount of security required in which case the Lessor shall release to the Holder the security previously lodged. (4.122.02)

57. Quiet Enjoyment

The Lessor covenants with the Holder that the Holder paying the rent and performing and observing the covenants and conditions herein shall and may peaceably and quietly possess and enjoy the Premises during the Term without any interruption from or by the Lessor or any person claiming from or under the Lessor. (4.214)

58. Holder not to remove Materials Except with Consent

- (a) The Holder will not mine remove extract dig up or excavate any sand stone gravel clay loam shell or similar substance or permit any other person to undertake any such action without the prior consent in writing of the Lessor and subject to such conditions as the Lessor may determine.
- (b) Subclause (a) shall not apply to any removal digging up or excavation as may be necessary to construct or undertake any improvement or alteration authorised by or under this Lease provided that any such removal digging up or excavation is undertaken in accordance with the requirements of that authority.
- (c) The Minister and the Holder expressly agree that a failure by the Holder to comply with any condition imposed pursuant to subclause (a) shall constitute a failure by the Holder to comply with a provision or covenant of this Lease. (4.227)

59. Holder Not to Consent to Encroachment

The Holder shall not during the Lease agree to or permit any encroachment or easement into upon over or against the Premises or any part thereof without the previous consent in writing of the Lessor. (4.229)

60. Holder to Give Notice of Encroachment

The Holder shall give immediate notice to the Lessor of any encroachment or attempted encroachment over or against the Premises or any part thereof and shall permit the Lessor to enter upon the Premises for the purpose of ascertaining the nature of the encroachment or attempted encroachment. (4.230)

61. Encroachment by Building - No Obligation on Lessor

The Lessor shall not be obliged to obtain any easement or other right in relation to any overhang or encroachment by the Premises onto any property including without limitation any street or road outside the Land. (4.231)

Lease No.:LE 341566

62. Encroachment by Holder onto Public land

The Holder expressly agrees that the Holder will not construct erect or effect any building structure or work which encroaches onto any adjoining "public land" as defined in section 153 of the CLA. (4.231A)

63. No Moratorium

Unless application is mandatory by law no statute ordinance proclamation order regulation or moratorium present or future shall apply to this Lease so as to abrogate extinguish impair diminish fetter delay or otherwise prejudicially affect any rights powers remedies or discretions given or accruing to the Lessor or Holder. (4.234)

64. No Holding Out

The Holder will not in connection with the Premises or otherwise directly or indirectly hold out or permit to be held out to any member of the public any statement act deed matter or thing indicating that the Premises or the business conducted or operated thereon or any part or parts thereof are or is being carried on or managed or supervised by the Lessor or the Minister nor shall the Holder act as or represent itself to be the servant or agent of the Lessor or the Minister. (4.236)

65. Holder to Pay Costs of Lessor

The Holder shall pay in full the Lessor's legal costs the fees of all consultants and all duties fees charges and expenses incurred by the Lessor in consequence of or in connection with or incidental to:

- (a) any cost of registration and stamping of this Lease;
- (b) any variation to this Lease made otherwise than at the request of the Lessor; and
- (c) any application for the consent of the Lessor under this Lease; and
- (d) any and every failure to comply breach or default by the ^{Holder}~~Lessee~~ under this Lease; and
- (e) the exercise or attempted exercise of any right power privilege authority or remedy of the Lessor under or by virtue of this Lease. (4.238)

66. Holder to Yield Up

The Holder will forthwith upon the determination of this Lease peaceably surrender and yield up to the Lessor the Premises in good condition reasonable wear and tear excepted together with all conveniences amenities and appurtenances relating thereto clear and free from rubbish and in good and substantial repair order and condition in every case having regard to the age of what is being surrendered or yielded up. (4.239)

67. No Right to Purchase etc.

The Holder expressly acknowledges that the grant of this Lease does not confer a right to purchase the land or to the grant of a further lease or to the grant of any licence. (4.242)

68. Special Conditions

The special conditions specified or referred to in Column 2 of Item 130 of Schedule 1 shall be deemed to be conditions and provisions of this Lease. (4.243)

***** End of Lease Clauses *****

SCHEDULE 1

Item	Paragraph No	Column 1 (description of variable particulars)	Column 2 (particulars)
1	15	Holder's Address for service of notices	Paul Welch Secretary Sunshine Renewable Energy 117 Pacific Hway BROADWATER NSW 2472 Peter McIlveen Secretary Delta Electricity Australia L1 12 Darling Park, 201 Sussex Street Sydney NSW 2000
2	15	Lessor's or Minister's Address for service of notices	Department of Lands PO Box 272 GRAFTON NSW 2460
3	16	Person and address for payment of rent	The Cashier Department of Lands PO Box 2155 DANGAR NSW 2309
6	21	Initial Rent	\$5,800
7	21	Market Rent Review Date (First)	1 May 2008
8	21	Market Rent Review Period	3 years
36	28	Permitted Use	Business Purposes (Biomass Co-generation Electricity Plant)
39	44	Insurance - Public Risk	\$20 million
40	46	Improvements that may be constructed	Pumps, Pipes, Electrical Services, Debris Strainers and Service Walkways to carry liquid to and from the river to the cogeneration plant.
41	46	Improvements - plans conditions and specifications	See Richmond Valley Council - DA 2004.0505
54A	47	Improvements - to be Property of Holder	All improvements
54B	47	Improvements - period for removal	28 days
54C	47	Manner of rehabilitation of land	All improvements are to be removed and the site rehabilitated to the satisfaction of the Manager, Crown Lands NSW, Far North Coast or their equivalent.
58	48	"Holder's plant" - Removal on Termination	All plant and equipment

Lease No.:LE 341566

Item	Paragraph No	Column 1 (description of variable particulars)	Column 2 - (particulars)
59	49	"Holder's Plant" - Removal on Forfeiture	All plant and equipment
69A	56	Period of Application of security clause	Whole of term of this lease
70	56	Date by which Security is to be provided	At the date of commencement of this lease
71	56	Amount of Security to be provided	\$10,000
72	56	First Security Review Period	Three (3) years from the date of commencement
73	56	Security Review Period	Three (3) years
130	68	Special conditions or provisions	See Schedule 2

***** End of Schedule 1 *****

SCHEDULE 2

69. Several rights and obligations of the Holders

All rights and obligations of the Holder or Holders under this Lease however expressed are "several" and not "joint" or "joint and several". Accordingly notwithstanding anything else in this Lease:

- (a) if a provision of this Lease is expressed to require the Lessor to pay an amount to the Holders or to the Holder then that provision will be interpreted to require the Lessor to pay to each of the named Holders a proportion of that amount which corresponds with the named Holder's share in the Joint Venture; and
- (b) if a provision of this Lease is expressed to require the Holders or Holder to pay an amount to the Lessor then that provision will be interpreted to require each named Holder to pay the Lessor a proportion of that amount which corresponds with its share in the Joint Venture; and
- (c) if the Holder or Holders become liable to the Lessor for breach of an obligation in this Lease which is expressed to be the obligation of the Holder or Holders then the liability of each named Holder will be limited to a proportion of the total liability to the Lessor which corresponds with its share in the Joint Venture.

70. No Assignment, Sublease, Mortgage or other dealing with Lease except with consent

- (a) Subject to clause (i), (ii) & (iii), The Holder will not assign transfer demise sublease mortgage charge or otherwise deal with the Holder's interest in this Lease or demise sublease or part with the possession of the Premises or by any act or deed procure any of the foregoing except with the consent in writing of the Lessor.
- (b) Subject to clause (i), (ii) & (iii), In the case of an application for the consent of the Lessor to a proposed mortgage, charge or encumbrance the Lessor may require that the proposed mortgagee or chargee enter into a covenant with the Lessor in the form reasonably required by the Lessor that the mortgagee or chargee will notify the Lessor if the Holder is in default under the terms of the mortgage or charge and that should the mortgagee or chargee enter into possession of the Premises for the purpose of realising its security or otherwise then the said mortgagee or chargee will duly perform and keep the covenants and agreements on the Holder's part herein contained.

Clauses:

(i) Charge in favour of Financiers

The Holders may charge in favour of the Financiers, or any of them, all or any part of their rights and obligations under this Lease for the purpose of securing the performance by the Holders of their obligations under the Finance Agreements. The Lessor agrees to enter into any agreement or deed reasonably required by the Financiers (and in the form reasonably required by the Financiers) to record or confirm the Financiers' security over the Holders' rights and obligations under this Lease and to provide the Financiers with reasonable assurances regarding the operation of this Lease, the Holders' and Lessor's performance of their obligations under this Lease and the enforcement of the Financiers' rights against the Holders.

(ii) Deed of Assumption

Other than an assignment or transfer permitted under clause (iii), no assignment or transfer of a party's rights under this Lease has any force or effect until such time as:

Lease No.:LE 341566

- (a) in the case of one of the Holders assigning or transferring its rights, the assignee or transferee has entered into a deed of assumption (under which the assignee or transferee assumes all of the obligations of that named Holder under this Lease) on terms and conditions reasonably acceptable to the other named Holder; and
- (b) in the case of the Lessor assigning or transferring its rights (or if such rights are assigned or transferred pursuant to any legislation), the assignee or transferee has entered into a deed of assumption (under which the assignee or transferee assumes all of the obligations of the Lessor under this Lease) on terms and conditions reasonably acceptable to the Holders.

(iii) Holder Assignment

Subject to the provisions of clauses (i) neither of the named Holders may assign or transfer its rights and obligations under this Lease without the prior written consent of the other named Holder. Either of the named Holders may withhold its consent to any proposed assignment or transfer of rights and obligations under this Lease if it considers on reasonable grounds that the proposed assignee or transferee is not capable of performing the other named Holder's obligations under this Lease.

71. Change in Shareholding

If one of the named Holders is a company, other than a company whose shares are listed on any Australian stock exchange, it will not without the prior written consent of the other named Holder, the Lessor and the Financiers, which consent will not in either case be unreasonably withheld, register, record or enter in its books any transfer of any share or shares in its capital or deal with any beneficial interest in any such share or shares or issue any new share or shares or take or attempt to take any action having the effect of altering its effective control or having the effect that its shareholders at the date hereof together beneficially hold or control less than 51% of the voting rights in its capital. Nothing in this clause 71 is intended to restrict or in any way prevent a named Holder registering, recording or entering in its books the transfer of any share or shares pursuant to the exercise by the Financiers of any rights they may have against either of the named Holders under an agreement, deed or other form of security of the kind referred to in or contemplated by Condition 70 clause (i).

72. Provisions re Policies

- (a) Notwithstanding anything expressed or implied in this Lease the following provisions apply to all policies of insurance required to be effected by the Holder under this Lease:
 - (i) All policies are to be placed with an Insurer and shall be for such amounts and cover such risks and contain such conditions endorsements and exclusions as are reasonably acceptable to or reasonably required by the Lessor having regard to insurance commonly effected in relation to the types of business or activity carried out on the Premises and the nature of the Premises.
 - (ii) All policies are to be taken out in the names of the Holders for their respective rights and interest (with the Lessor's interest noted on those policies) .
 - (iii) Duplicate or certified copies of the policies and all renewal certificates and endorsement slips are to be lodged by the Holder with the Lessor if required by the Lessor.
 - (iv) All premiums in respect of all such policies and renewals of policies are to be paid punctually by the Holder and the receipt for each premium payable in respect of each policy

Lease No.:LE341566

(or other proof of payment to the Lessor's satisfaction) is to be produced by the Holder to the Lessor at the request of the Lessor.

- (v) The Holder will not at any time during the Term do or bring upon the Premises anything whereby any insurance relating to the Premises against damage by fire and other risks may be rendered void or voidable. If the Holder brings anything onto the Premises whereby the rate of premium on such insurance shall be liable to be increased the Holder will obtain insurance cover for such increased risk and pay all additional premiums on the Premises (if any) required on account of the additional risk caused by the use to which the Premises are put by the Holder.
- (vi) The Holder will use all reasonable endeavours to ensure that full true and particular information is given to the office or company with which the said insurances are effected of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or policies of insurance or the payment of all or any moneys thereunder.
- (b) The Lessor in its own name or as the attorney of the Holder in the name of the Holder shall be entitled to institute all proceedings against any office or company which issues a policy of insurance required by this Lease to recover from it any amount for loss damage or injury or other money payable under any indemnity in favour of the Lessor. The Holder hereby appoints the Lessor the attorney of the Holder for the purpose as aforesaid.

73. Maintenance of Ground Areas

The Holder will at all times during the Term keep the ground areas of the land in the order and condition that they were at the commencement of this lease. If the Holder fails to keep such grounds in the said condition in the reasonable opinion of the Lessor the Holder will at the request of the Lessor enter into a contract with an appropriate person skilled in maintaining and caring for grounds with a view to keeping the grounds clean tidy and in a healthy condition.

74. Holder not to transfer specified land separately from Lease except with consent

Subject to Condition 70 The Holder expressly agrees that the Holder will not transfer mortgage or grant a lease of the land or interest in the land without first notifying the Lessor provided that such notification shall not be required if the transfer mortgage or lease is to a person to whom the Holder has contracted to transfer mortgage or sublease this Lease to following notification that action as provided for by the terms of this Lease.

75. Dispute Resolution Procedure

In the event that the Lessor and the Holder are in dispute regarding any matter relating to or arising out of this Lease other than -

- (i) in respect of any approvals or consents to be granted by the Lessor to the Holder; or
- (ii) where the Lessor or the Minister is acting in a statutory capacity or statutory authority; or
- (iii) where the dispute concerns a determination of the rent payable under this Lease

the Minister may either on his own initiative or on the request of the Holder refer the dispute to the Local Land Board for inquiry and report pursuant to section 22 of the CLA.

- (b) For the purposes of this clause "Local Land Board" means the local land board constituted under section 20 of the CLA for the land district in which the Land is situated.

Lease No.:LE 341566

76. Option to Renew

If:

- (a) at the end of the Term the Holder wishes to enter into a further lease of the Premises for the term of 20 years; and
- (b) the Holder gives the Lessor not less than 6 months' notice in writing to that effect prior to the expiration of the Term; and
- (c) both at the date of giving notice to the Lessor and at the date of expiration of the Term, the Holder has duly performed and observed all the covenants and agreements contained in the Lease; and
- (d) the Holder has duly and punctually paid the rent at the times appointed in the Lease for payment therefore; and
- (e) the Minister is able to satisfy the requirements of Sections 34 and 35 of the Crown Lands Act 1989 and any other law then in force in relation to the granting of a further lease to the Holder;

then the Lessor will at the cost of the Holder grant to the Holder a lease of the Premises for the further term of 20 years (with a further option to renew the lease till 10 October 2051) commencing on the date following the date of expiration of the Term:

- (a) at a rent to be determined by the Lessor; and
- (b) otherwise subject to the same covenants, terms and conditions as are contained in the Lease except for this clause.

77. Mortgage in Favour of Contractor

Notwithstanding any other provision of this Lease, the Holders may mortgage and/or charge this Lease in favour of the Contractor.

78. Definition of Contractor

Contractor means Downer Energy Systems Pty Limited ACN 067 158 954 and Clyde Babcock - Hitachi (Australia) Pty Limited ACN 010 975 256 and their successors and assigns.

79. Amendments to Annexure A

The parties agree that Annexure A is amended as follows:

- (a) Inserting the following definitions into clause 2:

"Finance Agreements" means any loan agreements, related charge agreements and related interest rate or currency hedging instruments between each of the Holders and the third party lender or lenders, to provide funds or any other form of financial accommodation to the Holders which is reasonably necessary for the design, construction, maintenance and operation of the power generating plant on Lot 1 DP1048202;

"Financiers" means the lenders providing funds or financial accommodation to the Holders or under the Finance Agreements;

"Joint Venture" means the joint venture conducted between the Holders, as more particularly discussed in the Joint Venture Agreement;

"Joint Venture Agreement" means the agreement of that name between the Holders and Sunshine Electricity Management Pty Limited ACN 097 037 860 executed on 11 October 2001.

Lease No.:LE 341566

- (b) The definition of "Holder" in clause 2 is replaced with the following definition:
- "Holder" or "Holders" means the two lessees named on the front page of this Lease or their permitted assigns or permitted transferees and where not repugnant to the context their agents, employees, invitees and licensees and a reference to a "named Holder" refers to either one of the other of these named lessees.
- (c) The definition of "Lessee" in clause 2 is replaced with the following definition:
- "Lessee" means the two named lessees or their permitted assigns or permitted transferees and where not repugnant to the context their agents, employees, invitees and licensees.
- (d) The definition of "Premises" in clause 2 is replaced with the following definition:
- "Premises" means the Land and the Improvements (if any) and where the context so permits any part of the foregoing.
- (e) Clause 5(c) is amended by inserting the words "and Annexures" after the word "Schedules" in both places the word "Schedules" appears in line 1 and inserting the words "and to" after the word "of" in line 2.
- (f) Clause 12 is amended by inserting the word "similar" after the word "other" in line 4.
- (g) Clause 15(a)(i) is amended by replacing the word "lease" with the word "Lease" in line 1.
- (h) Clause 15(e) is amended by inserting the words "or corporations" after the words "corporation" in line 1 and line 4.
- (i) Clause 24 is amended by replacing the words "on account thereof" in line 4 with the words ", in each case on account of the Premises".
- (j) the following new clause is inserted as clause 46(e):
- "Notwithstanding clause 46(a)-(d), the Lessee may construct, erect, effect or undertake to be constructed Improvements on the Land otherwise than in accordance with the plans, conditions and specifications in Column 2 of Item 40 of Schedule 1 if the Lessee obtains:
- (i) the consent of the Lessor (which must not be unreasonably withheld); and
 - (ii) development approval from the relevant consent authority to carry out the construction, erection, effecting or undertaking to construct."
- (k) Clause 56(b) is amended by inserting the words "(after being given reasonable notice)" after the word "comply" in line 7.
- (l) Clause 56(c)(i) is amended by inserting the words "(acting reasonably)" after the word "may" in line 1.
- (m) Clause 70(i) is amended by inserting the words "and mortgage" after the word "charge" in line 1.
- (n) Clause 73 is amended by replacing the word "lease" in line 2 with the word "Lease".

***** End of Schedule 2 *****

TABLE OF CONTENTS

1.	Authority for Grant of Lease.....	1
2.	Definitions	1
3.	Plurals and Genders	2
4.	Contra Proferentum.....	2
5.	Headings Code Numbers and References.....	2
6.	Statutes.....	3
7.	Provisions to be construed as Covenants.....	3
8.	Application of Conveyancing Act	3
9.	Performance of Functions etc.	3
10.	Lessor as Public Authority.....	3
11.	Approval by the Lessor or the Minister	4
12.	Opinion of the Lessor or the Minister.....	4
13.	Time to be of the essence.....	4
14.	Holder to pay Cost of Work.....	4
15.	Notices	4
16.	Manner of Payment of Rent and Other Moneys	5
17.	Waiver.....	5
18.	Severability of Provisions	5
19.	Applicable Law	5
20.	Exclusion of Warranties.....	5
21.	Payment of Rent (CPI).....	5
22.	Continuing Obligation	7
23.	No Reduction in Rent.....	7
24.	Holder to Pay Rates etc.....	7
25.	Goods and Services Tax.....	8
26.	Holder to Pay for Services	8
27.	Holder not to Impose Liability on Lessor	8
28.	Permitted Use.....	8
29.	No Residence on Premises.....	9
30.	Lessor's Consent to Development Application	9
31.	Holder not to undertake Development without consent notwithstanding any other provision of this Lease.....	9
32.	Development Consent.....	9
33.	Compliance with Statutes	9
34.	Occupational Health and Safety Act 1983	9
35.	Lessor may Charge Fee.....	9
36.	Provision of Guarantees.....	9
37.	Forfeiture	10
38.	Abandonment.....	10
39.	Interest on Overdue Money	10
40.	Failure to Pay Money or Undertake Works	10
41.	Holder to take as if Owner.....	11
42.	Release of Lessor from Accident Damage.....	11
43.	Indemnities.....	12
44.	Insurance - Public Risk.....	12
45.	Insurance - Workers Compensation.....	12
46.	Construction of Improvements	12
47.	Improvements to be Property of Holder	12
48.	Removal of Plant on Expiration of Term.....	13
49.	Removal of Plant on Forfeiture.....	13
50.	Removal of Signs.....	13
51.	Premises to be kept in clean and tidy condition.....	14
52.	Lessor's Right to Enter Inspect and Repair	14
53.	Notification of Accident	14
54.	Relics	14
55.	Artefacts.....	14

Lease No.:LE 341566

56.	Holder to provide Security.....	14
57.	Quiet Enjoyment.....	15
58.	Holder not to remove Materials Except with Consent.....	15
59.	Holder Not to Consent to Encroachment.....	15
60.	Holder to Give Notice of Encroachment.....	15
61.	Encroachment by Building - No Obligation on Lessor.....	15
62.	Encroachment by Holder onto Public land.....	16
63.	No Moratorium.....	16
64.	No Holding Out.....	16
65.	Holder to Pay Costs of Lessor.....	16
66.	Holder to Yield Up.....	16
67.	No Right to Purchase etc.....	16
68.	Special Conditions.....	16
	SCHEDULE 1.....	17
	SCHEDULE 2.....	19
69.	Several rights and obligations of the Holders.....	19
70.	No Assignment, Sublease, Mortgage or other dealing with Lease except with consent.....	19
71.	Change in Shareholding.....	20
72.	Provisions re Policies.....	20
73.	Maintenance of Ground Areas.....	21
74.	Holder not to transfer specified land separately from Lease except with consent.....	21
75.	Dispute Resolution Procedure.....	21
76.	Option to Renew.....	22
77.	Mortgage in Favour of Contractor.....	22
78.	Definition of Contractor.....	22
79.	Amendments to Annexure A.....	22
	SCHEDULE 3.....	24

***** End of Table of

LESSOR

Phillip Fogarty by delegation pursuant to section 180 of the Crown Lands Act 1989 and with authority under section 13L of the Real Property Act 1900 from the Minister administering the Crown Lands Act 1989 on behalf of the State of New South Wales

LESSEE

ANNEXURE "B"

This page comprises Annexure "B" referred to in the Lease between the STATE OF NEW SOUTH WALES as Lessor and DELTA ELECTRICITY AUSTRALIA PTY LTD, SUNSHINE RENEWABLE ENERGY PTY LTD as Lessee.

**Executed by Delta Electricity Australia Pty)
Ltd in accordance with section 127(1) of the)
Corporations Act 2001 (Cth):)
)**

.....
Signature of director

.....
Name (please print)

.....
~~Signature of director or company secretary*~~
*delete whichever does not apply

.....
Name (please print)

**Executed by Sunshine Renewable Energy)
Pty Ltd in accordance with section 127(1) of the)
Corporations Act 2001 (Cth):)
)**

.....
Signature of director

.....
Name (please print)

.....
~~Signature of director or company secretary*~~
*delete whichever does not apply

.....
Name (please print)

Annexure B

Various Leases between Minister Administering the National Parks and Wildlife Act 1974 and various commercial entities



Form: 07L
Release: 4-1

LEASE
New South Wales
Real Property Act 1900

AH549166Y

PRIVACY NOTE: Section 31B of the Real Property Act 1900 (RP Act) authorises the Registrar General to collect the information required by this form for the establishment and maintenance of the Real Property Act Register. Section 96B RP Act requires that the Register is made available to any person for search upon payment of a fee, if any.

STAMP DUTY	Office of State Revenue use only	NEW SOUTH WALES DUTY
		19-12-2012 0006922113-002
		TRANSFER
		DUTYABLE AMOUNT \$ 8400000850,527.00 DUTY \$ 8000008775.50

(A) **TORRENS TITLE**

Property leased Folio Identifier 1/1172991 and known as Valhalla Lodge, Cathays PERISHER VALLEY

(B) **LODGED BY**

Document Collection Box 813E	Name, Address or DX, Telephone, and Customer Account Number if any Crown Solicitor's Office DX 19 SYDNEY 9224 5079 Reference: CEA 1235890 201200736 D2012/517468	CODE L
--	---	------------------

(C) **LESSOR**

MINISTER ADMINISTERING THE NATIONAL PARKS AND WILDLIFE ACT 1974 ON BEHALF OF THE STATE OF NEW SOUTH WALES

The lessor leases to the lessee the property referred to above.

(D) Encumbrances (if applicable):

(E) **LESSEE**

LYNETTE JACQUELINE INGHAM, DEBRA NORMA KEPITIS, ROBERT CHRISTOPHER INGHAM and JOHN ANDREW INGHAM

(F) **TENANCY: JOINT TENANTS**

- (G) 1. **TERM** 15 YEARS 10 MONTHS
2. **COMMENCING DATE** 1 OCTOBER 2012
3. **TERMINATING DATE** 30 JUNE 2028
4. With ~~an~~ ^{3x} **OPTION TO RENEW** for a period of 10 YEARS + 10 YEARS + 10 YEARS
set out in clause 16 of ANNEXURE "A"
5. With an **OPTION TO PURCHASE** set out in clause N.A. of N.A.
6. Together with and reserving the **RIGHTS** set out in clause N.A. of N.A.
7. Incorporates the provisions or additional material set out in ANNEXURE(S) "A" hereto.
8. Incorporates the provisions set out in N.A.
No. N.A.
9. The **RENT** is set out in clause No. 2 of SCHEDULE 2

DATE 4 DECEMBER 2012.

(H) I certify I am an eligible witness and that the lessor signed this dealing in my presence.
[See note* below].

Certified correct for the purposes of the Real Property Act 1900 by the lessor.
Signed by the delegate of the Minister Administering the National Parks and Wildlife Act 1974 on behalf of the State of New South Wales;
Signature of lessor:

Signature of witness:

Name of witness:
Address of witness:

*LINDA SCOTT
43 BRIDGE ST
MURSTVILLE*

*Ann King
Head of National Parks &
Wildlife Service*

I certify I am an eligible witness and that the lessee signed this dealing in my presence.
[See note* below].

Certified correct for the purposes of the Real Property Act 1900 by the lessee.

Signature of witness:

Signature of lessee:

Name of witness:
Address of witness:

**ER GRINTER
NOTARY PUBLIC
THOMSONS LAWYERS
1 O'CONNELL STREET
SYDNEY NSW 2000**

(I) STATUTORY DECLARATION*

I _____
solemnly and sincerely declare that—

1. The time for the exercise of option to _____ in expired lease No. _____ has ended; and
2. The lessee under that lease has not exercised the option.

I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1900.

Made and subscribed at _____ in the State of New South Wales on _____
in the presence of _____ of _____

- Justice of the Peace (J.P. Number: _____) Practising Solicitor
 Other qualified witness [specify] _____

who certifies the following matters concerning the making of this statutory declaration by the person who made it:

1. I saw the face of the person OR I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering; and
2. I have known the person for at least 12 months OR I have not known the person for at least 12 months, but I have confirmed the person's identity using an identification document and the document I relied on was a _____ [Only ID No.]

Signature of witness: _____

Signature of applicant: _____

* As the services of a qualified witness cannot be provided at lodgment, the declaration should be signed and witnessed prior to lodgment. # If made outside NSW, cross out the witness certification. If made in NSW, cross out the text which does not apply.

CONTENTS

1	DEFINITIONS AND INTERPRETATION	7
1.1	Definitions.....	7
1.2	Interpretation.....	12
1.3	Headings	13
1.4	Currency	13
1.5	Governing Law	13
1.6	Entire Agreement.....	13
1.7	Performance on Next Working Day.....	13
1.8	Joint and Several Liability	14
1.9	Exclusion of Implied Covenants and Powers.....	14
1.10	Director-General	14
1.11	Counterparts	14
1.12	Lessee's Employees and Agents	14
2	GRANT.....	14
2.1	Grant.....	14
2.2	Term	16
2.3	Representations.....	16
3	LEASE PAYMENTS	17
3.1	To Pay Rent	17
3.2	Manner of Payment of Rent.....	17
3.3	Lease Grant Fee	17
3.4	3.3A Additional Beds Allocation Fee.....	17
3.5	Outgoings	17
3.6	Unpaid Monies.....	17
3.7	Bank Guarantee.....	18
4	GOODS AND SERVICES TAX.....	19
4.1	Consideration Exclusive of GST	19
4.2	Taxable Supply.....	19
4.3	Tax Invoice.....	19
4.4	Payments.....	19
4.5	GST Terms.....	19
5	USE OF PREMISES	20
5.1	Use of Premises.....	20
5.2	Onus of Proof as to Usage	20
5.3	Compliance with Statutory Requirements	20
5.4	No Noxious Use	21
5.5	Conduct of Business.....	21
5.6	Security of Premises.....	22
5.7	Movement of Vehicles	22
5.8	Public Access.....	22
5.9	Use of Inflammables, Chemicals and Explosives	22
5.10	Contamination	22
5.11	Fire Safety	23
5.12	No Livestock or Domestic Pets	23
5.13	Removal of Native Trees	23

5.14	No Exotic or Ornamental Plants and Weed Control and Eradication	24
5.15	Fences	24
5.16	Signs	24
5.17	Amplified Sound	25
5.18	Lessor's Right of Entry	25
5.19	Waste Management	27
5.20	Maintenance of Ground Areas	27
5.21	Use of Plumbing Facilities	28
5.22	Infectious Illness	28
5.23	No Pest Affected Fittings or Furniture, Effects, Timber or Firewood	28
5.24	Animals, Vermin and Pests	29
5.25	Environmental Management System	29
5.26	Environmental Research and Rehabilitation	30
5.27	Geotechnical Fault	30
5.28	No Detrimental Impact to Significant Features.....	31
5.29	Aboriginal Objects and Historic Relics	31
5.30	Work Health and Safety	31
5.31	Filming Within Premises	32
5.32	No Auctions.....	32
5.33	Native Fauna.....	32
5.34	Commission for Children and Young People Act 1998.....	32
6	BED NUMBERS AND MAXIMUM PERSONS STAYING OVERNIGHT ON THE PREMISES.....	33
6.1	Bed Numbers and Maximum Persons Staying Overnight on the Premises.....	33
6.2	Accommodation Register	34
6.3	Lessor's Right of Entry	35
7	CONSTRUCTION, MAINTENANCE, REPAIR, ALTERATIONS, ETC.....	35
7.1	Condition of Premises at Commencement of Lease	35
7.2	Repair and Maintenance.....	36
7.3	Repair on Termination of Lease	36
7.4	Painting	36
7.5	Cleaning	36
7.6	Lessee's Equipment	36
7.7	Breakages.....	36
7.8	Building, Construction and Development Works.....	37
7.9	Premises Fire Safety, Services and Installations Certification.....	37
7.10	Standard of Work	38
7.11	Reporting of Defects, etc.....	38
7.12	Lessor's Right of Entry to do Certain Works.....	38
7.13	Services.....	39
8	IMPROVEMENTS AND LESSEE'S FIXTURES	39
8.1	All Improvements are Lessor's	39
8.2	Placing and Removal of Lessee's Fixtures.....	40
8.3	Repair and Maintenance.....	40
9	TANK MANAGEMENT	40
9.1	Hydrocarbon Storage Systems	40
9.2	Burying and Screening of Tanks.....	41
10	COVENANTS BY THE LESSOR.....	41
10.1	Quiet Enjoyment.....	41
10.2	Holding Over	41

11	INSURANCES	42
11.1	Required Insurances	42
11.2	Required Arrangements.....	43
11.3	Lessor May Insure	44
11.4	Lessor's Entitlement to Insurance Monies.....	44
11.5	Reinstatement	44
12	INDEMNITIES AND RELEASE.....	46
12.1	Acknowledgment	46
12.2	Release.....	46
12.3	Indemnity	47
13	ASSIGNMENT	48
13.1	General Restrictions on Assignment.....	48
13.2	Subleases, Licences and Mortgages.....	48
13.3	Application in Respect to Corporate Assignee	49
13.4	Company Changes	49
14	DEFAULT AND TERMINATION	49
14.1	Lessee's Obligation to Yield up Premises	49
14.2	Essential Terms of this Lease.....	49
14.3	Repudiation of this Lease	50
14.4	Termination of Lease for Default	51
14.5	Termination after Default	51
14.6	Notice of Default	52
14.7	Damages	52
14.8	Power of Attorney by Lessee to Lessor	53
14.9	Waiver.....	54
14.10	Lessor's Entitlements after Lessee Vacates during Lease Term.....	54
14.11	Removal of Improvements.....	55
14.12	Lessee to Accept Responsibility for Lessee's Employees and Agents	55
14.13	Disconnection of Community Services.....	55
14.14	Requirement of Premises or part for Community or Public Purposes.....	56
14.15	Native Title	56
15	PROCEDURAL MATTERS	56
15.1	Time for Determining Rights and Obligations	56
15.2	Variation or Waiver	57
15.3	Provisions to be Construed as Covenants	57
15.4	Consents Permissions or Approvals.....	57
15.5	Opinions by Lessor.....	57
15.6	Lessee Not Agent of Lessor	57
15.7	Communication with Lessee.....	57
15.8	Notices	58
15.9	Costs of Lease.....	58
15.10	Licences.....	58
15.11	Inspection by Prospective Lessees.....	59
15.12	Disclosure of Information	59
16	OPTION	59
16.1	Further Lease	59
16.2	Terms of Further Lease	60
17	ADJOINING LICENCE AREA.....	60

17.1	Adjoining Licence Area	60
17.2	Adjoining Licence Area Conditions	60
18	ADDITIONAL COVENANTS	60
	SCHEDULE 1 REFERENCE SCHEDULE	62
	SCHEDULE 2 RENT SCHEDULE	65
	SCHEDULE 3 ADDITIONAL COVENANTS	77
	SCHEDULE 4 ADJOINING LICENCE AREA SCHEDULE	81
	SCHEDULE 5 ADDITIONAL BED ALLOCATION	83
	EXECUTED as a Deed	84

THIS IS ANNEXURE 'A' TO THE LEASE BETWEEN

THE HONOURABLE ROBYN PARKER, Minister for the Environment being for the time being the **MINISTER ADMINISTERING THE NATIONAL PARKS AND WILDLIFE ACT 1974** on behalf of **THE STATE OF NEW SOUTH WALES** (Lessor)

and

LYNETTE JACQUELINE INGHAM, DEBRA NORMA KEPITIS, ROBERT CHRISTOPHER INGHAM and **JOHN ANDREW INGHAM** (Lessee)

DATED the 4th day of DECEMBER 2012

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Lease unless the contrary intention appears:

Aboriginal Object shall have the same meaning as that term has in the Act;

Act means the *National Parks and Wildlife Act 1974*.

Accommodation Register means an accommodation register in a form and with the content approved by the Department, that contains full information on persons staying overnight at the Premises including:

- a) the name of the Premises; and
- b) the Maximum Number of Persons Overnight; and
- c) the names of all Persons referred to in b) above and the room numbers of all Persons so accommodated; and
- d) the numbers of all persons being under five (5) years of age; and
- e) the time and dates the Persons referred to in c) above arrive at and depart from the Premises.

Additional Beds Allocation means an approval by the Lessor to the Lessee for the Lessee to use the number of additional beds in the Premises specified in Item 4A of the Reference Schedule subject to compliance with the terms of this Lease, in particular, clause 5.3 of this Lease and the Additional Beds Allocation Schedule. For the sake of clarity, if Item 4A of the Reference Schedule is marked 'NA' there is no Additional Bed Allocation.

Additional Beds Allocation Fee means the amount of money payable by the Lessee to the Lessor pursuant to clause 3.3A and as specified at Item 24 of the Reference Schedule.

Additional Beds Allocation Schedule means Schedule 5 of this Lease.

Additional Covenants Schedule means Schedule 3 of this Lease.

Adjoining Licence Area means any area or areas of land immediately adjoining or in the vicinity of the Premises, which is described at Item 10 of the Reference Schedule. For the sake of clarity, if Item 10 of the Reference Schedule is marked 'NA' there is no Adjoining Licence Area.

Assistance Animal means an animal referred to in section 9 (guide dogs, hearing assistance dogs and trained animals) in the *Disability Discrimination Act 1992* of the Commonwealth.

Australian Standards means any relevant Australian Standard developed by Standards Australia as amended, revised or replaced from time to time.

Authorised Officer means the Director-General and the Deputy Director-General and any other person performing the functions of either of them or any other person nominated by the Minister, the Director-General or the Deputy Director-General to act as an authorised officer for the purpose of this Lease.

Authority means a document issued by the Director General that identifies the Authorised Officer and which authorises that person to exercise the rights of the Lessor under this Lease.

Bank means the bank that provides the Bank Guarantee pursuant to clause 3.6.

Bank Guarantee means the bank guarantee required by clause 3.6 and from a bank and in a form approved by the Lessor for the sum stated at Item 2 of the Reference Schedule (which amount may be reviewed by the Lessor from time to time and may be increased as shall be determined by the Lessor having regard to all matters relevant in the opinion of the Lessor to the sufficiency of the security) to be held by the Lessor for the due and proper performance by the Lessee of all its obligations under this Lease or such other security as set out in clause 3.6.7.

Bed means a piece or a part of a piece of furniture on which a person may sleep.

Bed Numbers means the number of Beds stipulated at Item 4 of the Reference Schedule as may be increased as provided in clause 6.1.6 which may be used for the purpose of accommodating the Maximum Number of Persons Overnight on any given night. For the purposes of determining Bed Numbers:

- (a) a Bed that is designed to accommodate one (1) Person shall count as one (1) Bed; and
- (b) a Bed that is designed to accommodate two (2) or more Persons shall count as two or more Beds.

Breach means a breach, default or failure by the Lessee and/or the Lessee's Employees and Agents to comply with a term, covenant or obligation in this Lease including where relevant to the context, a default as described in clause 14.4.

Building Code means the building and development control codes, policies, regulations and requirements of a Relevant Authority which apply from time to time in respect to structures and improvements forming part of, or which are constructed or situated on, or within the Premises.

Commencing Date means the commencing date of this Lease stipulated at Item (G) 2 on the Lease cover page.

Consent Authority means the Relevant Authority, in each case vested with the authority

and mandate to grant development consent or approval under Part 4 or Part 5 of the *Environmental Planning and Assessment Act 1979*.

Community Service Contribution means a contribution by the Lessee for the cost of maintaining any community service in the Park, including but not limited to all expenses in connection with:

- a) the provision of medical services in the Perisher Range Resorts;
- b) snow clearing and road maintenance;
- c) the disposal of waste, water, sewerage; and
- d) water supply.

Contamination means any toxic or hazardous substance, gas liquid or material, any waste or discharge (other than properly and lawfully discharged sewerage) or any pollutant.

Department means the Office of Environment and Heritage, Department of Premier and Cabinet which context includes any department or authority replacing same.

Director-General means the Director-General of the Department of Premier and Cabinet, and includes any person for the time being acting as such or in such alternative position or office as the Lessor may notify from time to time.

Environmental Research and Rehabilitation Contribution means the amount at Item 21 of the Reference Schedule as a contribution to the cost of environmental monitoring, research and rehabilitation of ski resorts in the Park.

Exotics and Ornaments means any exotic or ornamental plants or seeds not indigenous to the locality.

Filming Activity has the same meaning as that phrase has in the *Filming Approval Act 2004*.

Fire Safety Measures has the same meaning as in the Environmental Planning and Assessment Regulation 2000.

Food Premises Charges means the amounts as are assessed by the Lessor from time to time pursuant to the Act for the cost of food-safety inspections of the Premises, food safety training and consultations, guidance and advice to assist the Lessee and the Lessee's Employees and Agents in complying with the Law in relation to food safety and developing safe working practices in relation to food storage and preparation.

Further Lease means a lease granted by the Lessor pursuant to the exercise of the Option by the Lessee.

Further Term means the term of the Further Lease noted at Item 13 of the Reference Schedule.

Historic Relic shall have the same meaning as the term 'relic' as defined in the *Heritage Act 1977*; and

Hydrocarbon Storage Systems means one or more completely buried, partially buried or above ground tanks and any pipes to and from or associated with the tanks that contain or are intended to contain hydrocarbon product (for example, diesel, heating oil, petroleum).

Improvements means all buildings structures improvements erections and Services and includes any alteration or addition to the same which are constructed, installed or brought on the Premises, whether by the Lessee or Lessor, whether before or after the Commencing Date, whether in accordance with the covenants of this Lease or otherwise and whether completed or uncompleted, but does not include the Lessee's Fixtures.

Law means any law whether common law or any law under any statute, ordinance, regulation or code applicable in the State of New South Wales.

Lease means this Lease and all annexures plans and schedules to this Lease and any variations of this Lease.

Lease Grant Fee means the amount of money payable by the Lessee to the Lessor pursuant to clause 3.3 and as specified in Part C of the Rent Schedule and at Item 22 of the Reference Schedule.

Lease Grant Fee Payment Option means the Lease Grant Fee payment option elected by the Lessee as specified at Item 23 of the Reference Schedule.

Lessee means the Lessee stipulated as the Lessee on the lease cover page and means the successors and permitted assigns of the Lessee and where not repugnant to the context includes the Lessee's Employees and Agents.

Lessee's Employees and Agents means each of the Lessee's employees, agents, officers, contractors, service suppliers, sublessees, concessionaires, invitees and those persons who at any time are under the control of and in or on the Premises with the consent of the Lessee (expressed or implied).

Lessee's Fixtures means all fixtures and fittings constructed or installed on the Premises by the Lessee or brought onto the Premises by the Lessee and include: plant machinery, furnishings, equipment, utensils, shelving, counters, safes or other articles in the nature of trade or tenant's fixtures, but does not include the Improvements.

Lessor means the Minister for the time being administering the Act and includes his or her successors in office and where not repugnant to the context includes the servants and agents of the Lessor.

Licence Fee means the amount of money payable by the Lessee to the Lessor, if any, as determined by the Lessor from time to time, initially being the amount set out at Item 12 of the Reference Schedule.

Liquor has the same meaning as in the *Liquor Act 1982* (NSW).

Maximum Number of Persons Overnight means the maximum number of Persons permitted to remain at the Premises on any given night (including guests of the Lessee, the public, members, associates, agents, employees or contractors of the Lessee) stipulated at Item 5 of the Reference Schedule.

Minister shall mean the Minister for the time being administering the Act and includes his or her successors in office.

Native Title has the same meaning as in the *Native Title Act (Cth) 1993*.

NA means not applicable.

Objects shall mean Aboriginal Objects and/or Historic Relics.

Option means the option to take a Further Lease as provided in clause 16.

Outgoings means all amounts, costs, expenses of any kind whatsoever assessed, incurred or levied in relation to the Premises or upon the Lessor or the Lessee on account thereof including:

- a) Rates, Taxes and other charges imposed by any Relevant Authority;
- b) charges for the supply (including charges for installation and connection) of Services to the Premises;
- c) supplying, renting, operating, maintaining, servicing, repairing and replacing Services and upgrading Services to comply with requirements or orders of Relevant Authorities or any Law;
- d) Community Service Contribution;
- e) Environmental Research and Rehabilitation contribution; and
- f) Food Premises Charges.

Oversnow vehicle means such vehicles as snow cats, skidoos and other machines as approved by the Lessor for the transport of persons or freight over snow.

Park means the area of land permanently reserved under the Act and for the time being known as Kosciuszko National Park.

Perisher Range Resorts means those areas of the Park known as Perisher Valley, Smiggin Holes, Guthega and Blue Cow and, for the purposes of this Lease, also means Wilson's Valley, Diggers Creek and Kosciuszko Mountain Retreat.

Perisher Range Resorts Environmental Management System means the document or documents that specifies the Lessor's environmental management system for the Perisher Range Resorts applicable from time to time or such other document or documents that replaces it and fulfils in substance the same functions.

Permitted Use means the use prescribed at Item 3 of Reference Schedule.

Permitted Use of the Adjoining Licensed Area means the use prescribed at Item 11 of Reference Schedule.

Person means any human being whether man, woman or child who has attained five (5) years of age.

Plan of Management means the plan of management prepared and adopted for the Park by the Lessor as amended from time to time pursuant to the Act or such other plan that replaces it and fulfils in substance the same functions.

Plumbing Facilities means the toilets, sinks and sewerage and drainage system (including pipes, lines and connections) on, in or under the Premises.

Premises means the land described as the Premises at Item 1 of the Reference Schedule and where this Lease provides or the context of this Lease so admits any part of that land and includes any structures and improvements on that land (and includes the Improvements and the Lessee's Fixtures) and may by virtue of clause 17 of this Lease include the Adjoining Licence Area.

Prescribed Rate means the rate prescribed under the Act for overdue monies payable in respect to leases.

Rates means rates, land taxes, levies, assessments and other charges (including charges for consumption and garbage and waste removal), together with any interest, fines and penalties in connection with them.

Reference Schedule means Schedule 1 of this Lease.

Regulations means the Regulations, from time to time, made under the Act.

Relevant Authority means, in respect to a particular context or circumstances, any government, administrative or judicial body, department, commission, public authority, tribunal or entity having jurisdiction and responsibility in respect to that context or circumstance including but not limited to a Consent Authority and where not repugnant to the context includes the Lessor.

Rent means the rent as determined in accordance with Part A of the Rent Schedule.

Rent Schedule means Schedule 2 of this Lease.

Services means the services running through or servicing the Premises including but not limited to air conditioning, electricity, power, gas, oil, water, sewerage, telecommunications, fire hydrant, fire service sprinkler and public address and includes all pipes, wires, cables, ducts and other conduits in connection with them.

Taxes means taxes, levies, imposts, deductions, charges, withholdings and duties imposed by any authority (including stamp and transaction duties), (together with any related interest, penalties, fines and expenses in connection with them), except if imposed on the overall net income or capital gains of the Lessor.

Term means the Term of this Lease stipulated at Item (G) 1 on the Lease cover page.

Terminating Date means the terminating date of this Lease stipulated at Item (G) 3 on the Lease cover page.

Works means all works with respect to the Improvements (whether to the exterior or interior), and/or the Lessee's Fixtures and/or any other part of the Premises including, where the context of the provisions of this Lease so permits, installations, construction, repairs, renovations, maintenance, restoration, alterations (including structural alterations), additions, renovations and improvements, demolition and works to the Services.

There may also be other words, which have a prescribed meaning for the purposes of this Lease, which are set out in the Rent Schedule and Additional Covenants Schedule.

1.2 Interpretation

In this Lease unless the context otherwise requires:

- 1.2.1 words denoting the singular number shall include the plural and vice versa;
- 1.2.2 words denoting any gender shall include all genders;
- 1.2.3 words denoting individuals shall include corporations and vice versa;
- 1.2.4 reference to any Act of Parliament or regulation or ordinance or to any section or provision thereof shall include any statutory modification or re-enactment thereof or any statutory provision substituted therefore and ordinances, by-laws, regulations and other statutory instruments issued there under;

- 1.2.5 references to clauses, annexures and schedules are references to clauses, annexures and schedules of this Lease;
- 1.2.6 references to any deed, agreement, licence, instrument or any document or register shall be deemed to include references to that deed, agreement, licence, instrument or document or register as amended, novated, supplemented or replaced from time to time;
- 1.2.7 where a Schedule contains covenants or obligations of the Lessee or the Lessor then the covenant or obligation so expressed shall be read and construed and shall constitute a covenant or obligation on the part of the Lessee or the Lessor, as the case may be, to be performed or observed under this Lease;
- 1.2.8 a reference to any party or to a Relevant Authority or to any other person, corporation or association shall be a reference to them as so constituted from time to time and shall include their successors and permitted assigns and in the case of a Relevant Authority means the body which at the relevant time substantially fulfils the functions of the Relevant Authority;
- 1.2.9 a reference to anything (including any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually.
- 1.2.10 where a clause specifies that the Lessor has a right remedy action or power over or in relation to the Lessee such a clause is not to be construed as restricting limiting or prejudicing any other right remedy action or power of the Lessor arising from any Law or this Lease.

1.3 Headings

Headings are for ease of reference only and does not affect the construction of this Lease.

1.4 Currency

Unless otherwise stated all currencies referred to in this Lease are in Australian dollars.

1.5 Governing Law

This Lease is governed by, and construed in accordance with the law of New South Wales and the parties submit to the jurisdiction of the Courts of New South Wales.

1.6 Entire Agreement

This Lease constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior negotiations, understandings and discussions between the parties. No modifications to this Lease shall be effective unless in writing signed by the parties.

1.7 Performance on Next Working Day

Where under or pursuant to this Lease or anything done hereunder the day on or by which

any act, matter or thing is to be done is a Saturday, a Sunday or a public holiday in New South Wales, such act, matter or thing may be done on the next succeeding day which is not a Saturday, Sunday or public holiday.

1.8 Joint and Several Liability

Any covenant or agreement on the part of or in favour of two or more persons shall be deemed to bind them or be in favour of them jointly and each of them severally.

1.9 Exclusion of Implied Covenants and Powers

The covenants and powers implied in every lease by virtue of Sections 84, 85, 132, 133, 133A and 133B of the *Conveyancing Act 1919* shall not apply or be implied in this Lease except in so far as the same or some part or parts thereof are expressly included in the covenants contained in this Lease or are incapable by law of exclusion.

1.10 Director-General

For the purposes of administering this Lease, the Director-General, the Deputy Director-General and any authorised delegate of the Minister, Director-General or the Deputy Director-General have authorisation to act on the Lessor's behalf and exercise the Lessor's authority pursuant to the provisions of this Lease.

1.11 Counterparts

This Lease may consist of counterparts and the counterparts taken together constitute one and the same instrument.

1.12 Lessee's Employees and Agents

If this Lease prohibits the Lessee from doing a thing, then:

- 1.12.1 the Lessee must do everything necessary to ensure that the Lessee's Employees and Agents do not do that thing; and
- 1.12.2 the Lessee must not allow or cause any person to do that thing.

2 GRANT

2.1 Grant

2.1.1 Pursuant to the provisions of Section 151 of the Act the Lessor leases to the Lessee the Premises and the Lessee hereby accepts the lease subject to the provisions of this Lease.

2.1.2 The Lessor grants to the Lessee for the Term or sooner termination or surrender of this Lease:

- a) exclusive possession of the Premises subject to this Lease and the Law;

- b) use and enjoyment of the Improvements and Lessee's Fixtures; and
- c) the non-exclusive use of the Adjoining Licence Area subject to such restrictions as are specified by Law or this Lease and in accordance with clause 17 of this Lease.

2.1.3 The Lessee acknowledges and agrees that the Lessor reserves the right at any time to resurvey the area of the Premises and if that resurvey discloses any variation from the area of the Premises previously surveyed or a variation in the position of the boundaries of the Premises:

- a) the Lessee agrees to enter into a new lease for the balance of the Term then remaining unless otherwise agreed by the parties on the same terms and conditions as this Lease except that the definition of Premises shall be varied to reflect the correct area or boundary;
- b) the Lessee is not required to enter into a new lease as provided in clause 2.1.3 a) if in the opinion of the Lessee, reasonably held, the variation of the area or boundary has a material adverse effect upon the Lessee's business conducted on the Premises and if such is the case the Lessee must promptly execute and provide to the Lessor an executed surrender of Lease;
- c) the Lessee is not entitled to make any objection or claim compensation from the Lessor or to rescind this Lease nor have any other rights in respect to such variation except the right to surrender the Lease pursuant to clause 2.1.3 b).

2.1.4 The Lessee acknowledges and agrees that if the Lessor wishes to upgrade any adjoining road or track for the purposes of establishing a formed road, the Lessor reserves the right at any time to resurvey the area of the Premises to exclude the land on which the road (and its ancillary services) are located; and

- a) in the case where the area of the Premises is affected to a minor degree, the Lessee agrees to enter into a new lease for the balance of the Term then remaining unless otherwise agreed by the parties on the same terms and conditions as this Lease except that the definition of Premises shall be varied to exclude the land on which the road (and its ancillary services) are located;
- b) in the event that the Lessor does not require the Lessee to enter into a new lease as provided in clause 2.1.4 a) then if in the opinion of the Lessee, reasonably held, the variation of the area or boundary has a material adverse effect upon the Lessee's business conducted on the Premises and if such is the case the Lessee may promptly execute and provide to the Lessor an executed surrender of Lease;
- c) the Lessee is not entitled to make any objection or claim compensation from the Lessor or to rescind this Lease nor have any other rights in respect to such variation except the right to surrender the Lease pursuant to clause 2.1.4 b).

- 2.1.5 Where the Lessor forms the opinion, reasonably held, that easements or restrictions are required to be created to burden or benefit the Premises for the benefit of other lessees in the Park, the public, utility providers or the Lessor and serves a notice on the Lessee to that effect, then the Lessee must promptly execute all necessary documents evidencing consent to the creation of such easements or restrictions as described in that notice and will not prevent or hinder the Lessor in procuring the creation of the same by way of caveat or otherwise.
- 2.1.6 The Lessee must permit access to adjoining lessees in the Park and their invitees over such part of the Premises as is determined by the Lessor. The Lessor must only exercise his or her rights under this clause to enable the adjoining lessees to access their premises and only over such paths, tracks or roads traversing the Premises that are in existence as at the Commencing Date and which have been used by such lessees for sometime prior to the Commencing Date.
- 2.1.7 The Lessee permits the Lessor its agents, contractors and employees to enter and occupy the Premises for the purpose of performing maintenance works and works caused by the failures or faults in the Services or pipes and/or for purposes of performing works for the relocation of the Lessor's Services or pipes. To this end, the Lessor its agents, contractors and employees may operate, repaint, replace, maintain, remove, extend, expand, connect, disconnect, improve or do any other thing the Lessor considers are necessary or appropriate to any of its Services or to construct new Services and for these purposes the Lessor and the Lessor's employees agents and contractors may carry out any work on, below or above the surface of the Land. For the purposes of this clause, the Lessor will give the Lessee such reasonable notice requesting access as the nature of the situation requires and in the case of emergency no notice is required.
- 2.1.8 The Lessee is not entitled to make any objection or claim compensation from the Lessor or to rescind or terminate this Lease nor have any other rights if the Lessor exercises its rights under this clause 2, except where the Lessor exercises its rights under clause 2.1.3 or clause 2.1.4 and then the Lessee may exercise its right to surrender the Lease pursuant to clause 2.1.3 b) or clause 2.1.4 b) as the case may be.

2.2 Term

This Lease is granted for the Term unless otherwise terminated in accordance with this Lease.

2.3 Representations

The Lessee represents and warrants that:

- 2.3.1 it has power to enter into and observe its obligations under this Lease; and
- 2.3.2 it has in full force and effect the authorisations necessary to enter into this Lease, observe obligations under it, and allow it to be enforced; and

- 2.3.3 its obligations under this Lease are valid and binding and are enforceable against it in accordance with its terms; and
- 2.3.4 this Lease does not contravene its constituent documents (when the Lessee is a company) or any Laws or any of its obligations or undertakings by which it or any of its assets are bound or cause a limitation on its powers or, when the Lessee is a company, the powers of its directors, to be exceeded.

3 LEASE PAYMENTS

3.1 To Pay Rent

The Lessee must pay to the Lessor the yearly Rent without any deduction whatsoever.

3.2 Manner of Payment of Rent

The Lessee must pay all Rent and other monies payable by the Lessee to the Lessor at the address nominated by the Lessor from time to time and in such manner as the Lessor shall in writing direct.

3.3 Lease Grant Fee

In consideration of the Lessor agreeing to grant this Lease, the Lessee must pay to the Lessor the Lease Grant Fee. The Lease Grant Fee is not refundable in any circumstances including without limitation, if the Lease is terminated or surrendered.

3.4 3.3A Additional Beds Allocation Fee

If the Lessor grants to the Lessee an Additional Beds Allocation, in consideration of the Lessor agreeing to that grant, the Lessee must pay to the Lessor the Additional Beds Allocation Fee. The Additional Beds Allocation Fee is not refundable in any circumstances including without limitation, if the Lease is terminated or surrendered.

3.5 Outgoings

- 3.5.1 The Lessee must pay all Outgoings as and when Outgoings become due for payment.
- 3.5.2 The Lessee must, if required by the Lessor, produce to the Lessor receipts for payment of any Outgoing. If the Lessee fails to pay any Outgoing the Lessor may pay such amount and any amount paid by the Lessor may be recovered by the Lessor from the Lessee as if the amount was rent in arrears.
- 3.5.3 The Lessor may, at the cost of the Lessee, install meters on the Premises to determine the consumption of Services supplied to the Premises. Until such time as appropriate meters are installed, the Lessee must pay such amount as may be reasonably determined by the Lessor for such Services.

3.6 Unpaid Monies

- 3.6.1 On each and every occasion on which the Lessee omits or neglects (for a period of not less than twenty-eight (28) days from the date on which the Lessee is obliged to do the same) to pay any money which the Lessee has covenanted in this Lease to pay then the Lessor may (without prejudice to any rights and powers arising from such default) pay such money and all monies referred to in this clause 3.5.1 and 3.5.2 are recoverable on demand by the Lessor and a certificate by the Lessor as to any amount payable by the Lessee pursuant to this clause is prima facie evidence of the amount payable by the Lessee.
- 3.6.2 The Lessee must pay interest on any unpaid monies due under this Lease at the higher of the Prescribed Rate and the rate of three per cent (3%) per annum above the current overdraft rate from time to time charged by an Australian trading bank nominated by the Lessor, on such amounts as may be nominated by the Lessor computed from the due date for the payment of such monies until payment of such monies in full.

3.7 Bank Guarantee

The Lessee will promptly, upon execution of this Lease, provide to the Lessor the Bank Guarantee provided that:

- 3.7.1 the Bank Guarantee is a continuing obligation in favour of the Lessor until the obligations and liabilities of the Lessee under this Lease have in all respects been performed, observed and discharged;
- 3.7.2 the Lessor may claim against the Bank under his or her guarantee for any liabilities which may be incurred by the Lessor arising from any Breach without the Lessor having made any claim or instituting any proceedings against the Lessee in respect to such claims and Breaches;
- 3.7.3 the Lessor will inform the Bank that the guarantee is no longer required by the Lessor within a reasonable time after the expiration or other determination of the Lease or the expiration or other determination of any extension or renewal thereof;
- 3.7.4 the giving of such a guarantee by the Bank does not operate to relieve the Lessee from any of the obligations on its part under any other provision of this Lease nor does the guarantee limit the right of the Lessor to recover from the Lessee in full all monies payable to the Lessor under any other provision of this Lease;
- 3.7.5 in the event of the Bank making any payment or payments to the Lessor in full or partial discharge of the Bank Guarantee the Lessee must immediately provide to the Lessor a substitute Bank Guarantee for an amount not less than the amount specified at Item 2 of the Reference Schedule or as determined by the Lessor;
- 3.7.6 the Lessee must provide a fresh Bank Guarantee for any Further Term if the Lessee exercises its right to renew this Lease prior to the grant of the Further Lease or within twenty-eight (28) days of the grant of the Further Lease; and

3.7.7 the Lessor may, in circumstances where a Bank is no longer able to issue a Bank Guarantee in the form required by the Lessor, accept some other security from the Lessee that guarantees the Lessee's performance of the obligations under this Lease including but not limited to a bond or a personal guarantee.

4 GOODS AND SERVICES TAX

4.1 Consideration Exclusive of GST

Any consideration or payment obligation arising under or in connection with this Lease is exclusive of GST unless stated otherwise.

4.2 Taxable Supply

4.2.1 This clause applies if a Supply made under or in connection with this Lease is a Taxable Supply.

4.2.2 If this clause applies, the consideration for the Supply is increased by an additional amount equal to the amount of that consideration multiplied by the relevant GST rate.

4.2.3 The additional amount under paragraph 4.2.2 is payable at the same time and in the same manner as the consideration for the Supply to which the additional amount relates.

4.3 Tax Invoice

A party who makes a Taxable Supply must provide a Tax Invoice within twenty-eight (28) days of a request.

4.4 Payments

Unless otherwise stated in this Lease, the following principles apply when determining the amount of a payment under this Lease:

4.4.1 if a party is entitled under this Lease to be reimbursed or indemnified by the other party for an expense, claim, loss, liability or cost incurred in connection with this Lease, the reimbursement or indemnity payment must not include any GST component of the expense, claim, loss, liability or cost for which an Input Tax Credit may be claimed; and

4.4.2 if a party sets off an amount under this Lease, the same principles apply to calculate the amount to be set-off, as if the amount had been paid in accordance with paragraph 4.4.1.

4.5 GST Terms

In this clause 4: