

2006

STATE OF WESTERN AUSTRALIA

AND

Serco Australia Pty Limited

ACACIA PRISON SERVICES AGREEMENT

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Acacia Prison Services Agreement

Table of Contents

1.	DEFINITIONS AND INTERPRETATION	1
1.1	Definitions	1
1.2	Rules for interpreting this Agreement	17
2.	APPLICABLE ACTS	18
2.1	Prisons Act	18
2.2	Exercise of Statutory Powers by Contractor and Contract Workers	19
2.3	Contractor within jurisdiction of Ombudsman	19
2.4	State officer of the Contractor	19
2.5	State officer of Subcontractors and other persons	20
3.	CONDITIONS PRECEDENT AND INITIAL OBLIGATIONS	20
3.1	Satisfaction and waiver of conditions	20
3.2	Result of non-satisfaction of conditions	21
3.3	Certificate of Commencement	21
3.4	Transition Plan	21
3.5	Asset Register	21
4.	COMMENCEMENT OF AGREEMENT AND OPERATION PERIOD	21
4.1	Duration of this Agreement	21
4.2	Option to extend Operation Period	22
4.3	Informal continuation of Services	22
5.	ADMINISTRATION OF AGREEMENT	22
5.1	The Contract Manager	22
5.2	The Contractor Representative	23
5.3	The Contractor Superintendent	23
5.4	Notification of appointments	24
5.5	Qualifications, imputation of knowledge and other requirements of appointed representatives	25
5.6	Joint Management Board	25
6.	SERVICES	26
6.1	Contractor's appointment and acceptance of appointment	26
6.2	Compliance with laws	26
6.3	Compliance with standards and maintenance of accreditation	26
6.4	Operation Service Requirements	27
6.5	Development of and compliance with Industry Participation Plan	27
6.6	Best Industry Practice	27
6.7	Prison operating manuals	27
6.8	Compliance with Prison Operating Manuals	29
6.9	Obligations to act fairly and dealings with local community	29
6.10	Consultation and minimising disruption	29
6.11	Conflicting requirements	30
7.	PRISONER SERVICES AND PRISONER WELFARE TRUST FUND	30
7.1	Prison Canteen Services	30

Acacia Prison Services Agreement

7.2	Vending Machines	31
7.3	External Prisoner Purchases	31
7.4	Prisoner Welfare Trust Fund	32
7.5	Application of Prisoner Welfare Trust Fund	32
7.6	Records and audit	33
7.7	Monthly Sales Statements by Contractor	33
7.8	Annual Sales Statement	33
7.9	Prisoner Trust Account	34
7.10	Prisoner Property	34
8.	PRISON INDUSTRY	34
8.1	Prison Industry	34
8.2	Prison Industry Amount	34
8.3	Calculation and payment of Prison Industry Amount	35
8.4	Verification of Prison Industry Payments against audited accounts	35
8.5	Calculations and payments for the first and last Operation Years	35
8.6	Application of Prison Industry Amount	36
8.7	Records and audit	36
8.8	Prison Industry Reference Group	36
8.9	No Prison Industry for Contract Workers	36
9.	CONTRACT WORKERS	36
9.1	Provision of Contract Workers	36
9.2	Engagement of Contract Workers	36
9.3	Requirements for performance	37
9.4	Approval of Training Programs	38
9.5	Training and qualifications of Contract Workers	40
9.6	Contract Worker uniforms	41
9.7	Use of force by Contract Workers	41
9.8	Removal of Contract Workers	41
9.9	High-Level Security Work	42
9.10	State's approvals under this clause	43
9.11	Contractor to keep records relating to Contract Workers	43
9.12	Payment of Contract Workers	43
9.13	Withholding payment	43
9.14	Form of statutory declaration	44
9.15	Direct payments	44
9.16	Effect of direct payment	44
10.	INDUSTRIAL RELATIONS	44
10.1	Good relations	44
10.2	Industrial disputes	44
10.3	Minimising adverse effects	45
11.	PRISON, PRISON ACCESS AND PRISON MAINTENANCE	45
11.1	Access to Prison	45
11.2	Contractor to provide space and facilities	46
11.3	Maintenance and repair of the Prison	47
11.4	Utility Services	49

Acacia Prison Services Agreement

11.5	Cell Condition	49
11.6	Nuisance, injurious conduct and misuse	50
11.7	No alterations or damage	50
11.8	Not to pollute	51
11.9	Removal of garbage	51
11.10	Inflammable substances	51
11.11	Compliance with Environmental Law	51
11.12	Removal of Contamination	51
11.13	Expansion of the Prison	52
12.	CONTRACTOR RESOURCES	52
12.1	Provision of Contractor Resources	52
12.2	Materials	53
12.3	Warranties	53
12.4	Contractor Resources Register	53
13.	REPORTING AND RECORDS	53
13.1	Reporting of Notifiable Incidents	53
13.2	Notification of defective performance	54
13.3	Periodic reporting by Contractor	54
13.4	Monthly meetings	55
13.5	Annual performance reviews	56
13.6	Annual Prisons Act reporting by CEO	57
13.7	Reporting future disruption to Services	57
13.8	Contractor to keep records	57
13.9	Financial records	58
13.10	Ongoing access to records and information	58
13.11	Records to be held	59
13.12	Legible reproductions	59
13.13	Electronic Prisoner information	59
13.14	Retention of CCTV and telephone communications recordings	60
13.15	Inquiries under the Prisons Act	60
13.16	Periodic testing	60
13.17	Access to Contract Workers	60
14.	INTELLECTUAL PROPERTY	61
14.1	Intellectual Property Rights warranties by Contractor	61
14.2	Intellectual Property Rights of State	61
14.3	Licence by Contractor to pre-existing Intellectual Property Rights	62
14.4	Licence by Subcontractors	62
14.5	Sublicensing by State	62
14.6	Moral Rights	62
14.7	No right to compensation	63
14.8	Contractor's assistance	63
14.9	Intellectual Property Rights indemnity	63
14.10	Survival of this clause	63
15.	PAYMENTS	63
15.1	Operation Payments	63

Acacia Prison Services Agreement

15.1A	DAP Transition Payments	64
15.1B	Initial Transition Payment	64
15.2	Innovation Bonus	65
15.3	Performance Linked Fee	67
15.4	Abatement Amounts	67
15.5	GST	67
15.6	Overpayment, adjustments and disputes	68
15.7	Set-off	68
15.8	Payment not acknowledgment that Services satisfactory	69
15.9	Interest on overdue payments	69
15.10	Interest to accrue daily	69
16.	VARIATIONS	69
16.1	Contractor Proposal	69
16.2	Variations by the State	70
16.3	Contractor to comply	70
16.4	Price for variation	70
16.5	Changes after Signature Date	71
16.6	Expansion or modification of Prison	71
16.7	Directions	72
17.	PERFORMANCE IMPROVEMENT REQUEST AND DEFAULT	72
17.1	Performance Improvement Requests	72
17.2	Default Notice	73
17.3	Cure of Default	73
17.4	Suspension of payments	74
18.	TERMINATION	75
18.1	Termination by the State	75
18.2	State's costs of preparation and service of termination notice	76
18.3	Termination by agreement	76
18.4	Statutory termination by CEO	76
18.5	Rights preserved on termination	76
19.	STATUTORY INTERVENTION, SUSPENSION AND TERMINATION	77
19.1	Definitions in this clause	77
19.2	Operation of Prisons Act	77
19.3	Intervention in Agreement under section 15W	77
19.4	Consequences of intervention	78
19.5	Suspension or termination under section 15X	78
19.6	Consequences of termination or suspension	78
19.7	Consequences of termination or suspension under section 15X(2)(e) of the Prisons Act	79
19.8	Intervention in and termination or suspension of part of Services	79
19.9	Compensation for requisitioning Contractor Resources	80
19.10	No consequential or economic loss for intervention, suspension or termination	80
20.	SERVICE HANDOVER AND RETENDERING OF SERVICES	80
20.1	Retendering of prison services	80
20.2	Preparation for Service Retender	80

Acacia Prison Services Agreement

20.3	Service Handover	81
20.4	Continuing obligations of Contractor	82
20.5	Service Handover Plan	82
20.6	Non-frustration of Service Handover	83
20.7	Contract Workers	83
20.8	Variation of Terms and Conditions of Employment in Service Handover Period	84
20.9	Third party contracts and the supply of goods and services	84
20.10	Transfer of Contractor Resources	85
20.11	Transfer price	85
20.12	Time for payment of transfer price	85
20.13	Removal of Contractor Resources	85
20.14	Rectification of damage	85
20.15	Contractor Resources left	86
20.16	Condition of the Prison and State's Property	86
20.17	Additional Powers	86
20.18	Return of Information	86
21.	INSURANCES	87
21.1	Contractor to effect and maintain insurances	87
21.2	Insurance provisions	89
21.3	Evidence of insurance	89
21.4	Failure to insure	90
21.5	Subcontractors	90
21.6	Notification	90
21.7	No variation to insurances	90
21.8	Certification by Insurer	91
21.9	Access to Insurer	91
21.10	Admissions and settlement	92
21.11	No effect on Contractor's other obligations	92
22.	BANK GUARANTEE	92
22.1	Provision of Bank Guarantee	92
22.2	Demands under Bank Guarantee	92
22.3	Repayment by the State	93
22.4	Notice of demand under Bank Guarantee	93
22.5	Guarantee to be kept in force	93
22.6	Return of Bank Guarantee	93
22.7	Review of Guarantee Amount	94
22.8	Contractor to provide additional or substitute guarantees	94
22.9	Failure to provide substitute or additional Bank Guarantees	94
22.10	Survival of this clause 22	94
23.	RISK, INDEMNITIES AND LIMITATION OF LIABILITY	94
23.1	Assumption of risk by Contractor	94
23.2	Indemnity	95
23.3	Duration of Indemnities	96
23.4	Contractor Release	96
23.5	Exclusion of indirect or consequential loss	96

Acacia Prison Services Agreement

23.6	Lost property	97
23.7	Liability of officers, employees and agents	97
23.8	State trustee	97
24.	FORCE MAJEURE	97
24.1	Notice by Force Majeure Party	97
24.2	Notice to provide particulars	98
24.3	Force Majeure Party will implement reasonable procedures	98
24.4	Force Majeure Party to keep Non Affected Party advised of developments	98
24.5	Reduction in Operation Payment	98
25.	CONFIDENTIAL INFORMATION	98
25.1	Contractor's obligations of Confidentiality	98
25.2	Departmental System	99
25.3	Permitted disclosure	99
25.4	Third parties	99
25.5	Compulsory disclosure	99
25.6	Media releases	100
25.7	Public Documents	100
25.8	Continuing Obligation	100
26.	DISPUTE RESOLUTION	100
26.1	Negotiation by Contract Manager and Contractor's Representative	100
26.2	Negotiation by senior representatives of the parties	101
26.3	Referral to Joint Management Board	101
26.4	No effect on available rights and remedies	101
26.5	Independent expert	101
26.6	Contractor must continue to perform Services	102
27.	DEALING WITH AGREEMENT AND CHANGE IN CONTROL	102
27.1	Contractor may not Deal With Agreement	102
27.2	State may Deal With Agreement	102
27.3	Notice of change in control	102
28.	SUBCONTRACTING AND THIRD PARTY SERVICES	103
28.1	Prohibition on subcontracting all of the Services	103
28.2	Permitted subcontracting	103
28.3	Application for Consent to Subcontractors	103
28.4	Conditions for Subcontractors	103
28.5	State's Approval of Subcontract	103
28.6	Information requirements	104
28.7	Contractor's liability not affected	104
28.8	Liability for Subcontractors	104
28.9	No contractual relationship with Subcontractors	105
28.10	Third party services and supplies	105
29.	WARRANTIES AND REPRESENTATIONS	105
29.1	Representations and warranties	105
29.2	State's reliance on Contractor's representations and warranties	108
29.3	Continuation, repetition and survival of Contractor's representations and warranties	108

Acacia Prison Services Agreement

29.4	State's representations and warranties	108
29.5	No other representations or warranties by State	109
30.	CONTRACTOR'S RELATIONSHIP WITH THE STATE	109
30.1	Independent contractor	109
30.2	Relationship	109
30.3	No agency	110
30.4	No employment	110
30.5	Contrary Legislative Requirement	110
31.	PROTECTION OF THE INTERESTS OF STATE AND STATE'S ASSOCIATES	110
31.1	Reputation	110
31.2	Conflict of interest	111
31.3	Good faith	111
31.4	No association	111
31.5	Provisions of any permitted association	111
31.6	Corrupt Gifts and Payments of Commission	111
32.	NOTICES	112
33.	GENERAL	112
33.1	Costs	112
33.2	Stamp duty	113
33.3	Approvals, consents, determinations or waivers	113
33.4	Authority to date	113
33.5	Enforcement of indemnity	113
33.6	Ensure compliance by others	113
33.7	Entire Agreement	113
33.8	Exercise of Powers	113
33.9	Further assurances	114
33.10	Governing law	114
33.11	Prohibition, enforceability and severance	114
33.12	Statutory powers	114
33.13	Survival	114
33.14	Variation and waiver	114
33.15	Counterparts	115
33.16	Attorneys	115
	SCHEDULE 1	117
	SCHEDULE 2	120
	Payments Schedule	120
	SCHEDULE 3	127
	Operational Philosophy and Regime	127
	SCHEDULE 4	152
	Operation Service Requirements	152
	SCHEDULE 5	271
	Performance Measures and Performance Linked Fee Percentages	271

Acacia Prison Services Agreement

ANNEXURE A	285
Site Plan	285
ANNEXURE B	287
Parent Guarantee	287
ANNEXURE C	300
Agreed Staff Numbers	300

Acacia Prison Services Agreement

Date	2006
Parties	
1.	Ian Johnson in his capacity as Chief Executive Officer of the Department of Corrective Services, of 141 St George's Terrace, Perth, Western Australia, 6000, for and on behalf of the State of Western Australia (the State)
2.	Serco Australia Pty Limited ABN 44 003 677 352 of Level 10, 90 Arthur Street, North Sydney, New South Wales, 2060 (the Contractor)
Recitals	
A	The Contractor submitted, in response to the Request for Proposal number 2464 - 2005 issued by the State on 4 November 2005, a proposal to provide the Services to the State (Contractor's Proposal) and the State, after considering the Contractor's Proposal and the subsequent written and oral submissions of the Contractor, wishes to engage the Contractor to provide the Services.
B	The CEO is empowered pursuant to the Prisons Act to enter into agreements for and on behalf of the State for the provision of prison services.
C	The State and the Contractor have agreed to enter into this Agreement to set out their respective rights and obligations in relation to the Services. This Agreement is an agreement for the provision of prison services within the meaning of the Prisons Act.

It is agreed as follows.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement unless the context otherwise requires, the following definitions apply.

Abatement Amount means each abatement amount set out in Item 3 of Schedule 1.

Act means any Act of the Parliament of the Commonwealth or of the State of Western Australia.

Adjustment Note has the meaning given by the GST Law.

Affiliate means, in relation to a body corporate, each of:

- (a) that body's related bodies corporate;
- (b) that body's directors; and

Acacia Prison Services Agreement

- (c) the persons who have a substantial holding (as that term is defined in the Corporations Act) in that body.

Agreement means this agreement.

Annual Report means the report referred to in clause 13.6(a).

Anticipated Commencement Date means the date specified in Item 7 of Schedule 1.

Approved Auditor means an independent auditor appointed by the Contractor and the State.

Assault means an act of physical violence against a Prisoner or any other person at the Prison resulting in physical harm or injury which does not require medical intervention or requires short-term medical intervention of a non-hospitalised nature.

Bank Guarantee means each bank guarantee provided by the Contractor pursuant to clause 22.

Best Industry Practice means practices, methods and acts undertaken in accordance with that degree of skill, diligence, prudence and foresight and that would reasonably be expected from leading internationally respected operators operating in the same or similar type of undertaking, under the same or similar circumstances and conditions.

Business Day means a day other than Saturday, Sunday or a public holiday in Western Australia.

Canteen Goods has the meaning given in clause 7.1(e).

CEO means the chief executive officer as defined in the Prisons Act and includes, where the context permits, any person exercising delegated Power of the CEO.

Change has the meaning given in clause 16.5(a).

Change of Control means, in respect of a person, that:

- (a) the person becomes a subsidiary of another person (of which it was not a subsidiary at the Signature Date); or
- (b) another person's voting power in the person increases from below 50% to 50% or above after the Signature Date; or
- (c) another person is able to control the person where that other person was not able to control the person at the Signature Date,

but, in respect of the Contractor, does not include an Excluded Change of Control. In this definition and the definition of Excluded Change of Control, 'voting power' has the meaning given in section 610 of the Corporations Act, 'control' has the meaning given in section 50AA of the Corporations Act and 'subsidiary' has the meaning given in the Corporations Act, in each case applied as if the relevant person were incorporated under that Act.

Claim means any claim, action, proceeding or demand made against the person concerned and whether in contract, tort, under any Act, or otherwise, or present or future, fixed or unascertained, actual or contingent.

Acacia Prison Services Agreement

Commencement Date means the date on which the last of the conditions set out in clause 3.1 is satisfied as certified in writing by the State in accordance with clause 3.3.

Confidential Information means all information, documents, reports, notes, memoranda, material or knowledge which is designated as confidential, or which is confidential by nature, in whatever form, including stored in writing, in a computer, in software or otherwise, relating to:

- (a) this Agreement;
- (b) anything done or to be done under this Agreement;
- (c) the Prison;
- (d) the State and the State's Associates;
- (e) the Services;
- (f) the Contract Workers or the Contractor Resources;
- (g) the Contractor;
- (h) any Prisoner; or
- (i) business systems and assets and affairs which may impact on the security of the Prison or prisons in the State,

disclosed, communicated or delivered under or in connection with this Agreement, or in providing the Services.

Consideration has the meaning given by the GST Law.

Contamination means the presence, in or under the Prison or the surrounding environment, of a substance (whether solid, liquid, or gas, heat, sound, vibration, radiation or any other Hazardous Material) at a concentration above the concentration at which the substance is normally present in the relevant locality, being a presence that presents a risk of harm to human health or to any other aspect of the Environment or makes, or may make, the Prison or the surrounding environment:

- (a) unsafe or unfit for habitation or occupation by persons or animals;
- (b) degraded in its capacity to support plant life; or
- (c) otherwise degraded or harmed.

Contract Manager means the person appointed by the State under clause 5.1.

Contract Worker means a 'contract worker' within the meaning of section 15A of the Prisons Act for the purposes of Part IIIA, engaged to provide any part of the Services and, for the avoidance of doubt, includes a natural person engaged to provide any part of the Services who is:

- (a) an employee or agent of the Contractor; or
- (b) a Subcontractor or an employee or agent of a Subcontractor.

Contractor Computer means the computer system, software and ancillary facilities established by the Contractor among other things to record data and information relating to the Prison, the provision of the Services and this Agreement.

Acacia Prison Services Agreement

Contractor Representative means the person appointed as the representative of the Contractor under clause 5.2.

Contractor Resources has the meaning given in clause 12.1.

Contractor Resources Register has the meaning given in clause 12.4(a).

Contractor Superintendent means the person appointed by the Contractor and authorised by the CEO under clause 5.3.

Contractor's Associates means any Affiliate of the Contractor.

Contractor's Obligations means the obligations of the Contractor under this Agreement or imposed by law in relation to the provision of the Services.

Contractor's Proposal has the meaning given in Recital A.

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

Cost has the meaning given in clause 15.5(e).

CPI means the Consumer Price Index compiled by the Australian Bureau of Statistics for Perth (Capital City) (all groups) provided that:

- (a) if the Consumer Price Index is at any time updated, the Consumer Price Index is to be appropriately adjusted as from the same time;
- (b) if the Consumer Price Index is discontinued, then the Consumer Price Index means any alternative cost of living index adopted in its place by the Commonwealth Government; and
- (c) if:
 - (i) the Consumer Price Index is discontinued and the provisions of subclause (b) do not apply; or
 - (ii) the Index Number is discontinued,

there is to be substituted for the Consumer Price Index the index for measuring increases in the cost of living in Perth which is determined by an economist appointed by the President of the Law Society of Western Australia on the application of the State, whose decision will be final and binding on the State and the Contractor and whose fees will be paid by the State and the Contractor in equal shares.

CPI Adjustment means, for any Review Date, the figure calculated in accordance with the following formula:

$$CPIA = \frac{NCPI}{OCPI}$$

Where:

CPIA means the CPI Adjustment;

NCPI means the Index Number for the Operation Quarter ending 31 March in the calendar year in which the Review Date occurs; and

Acacia Prison Services Agreement

OCPI means the Index Number for the quarter ending 31 March 2005.

Custodial Functions means a power, duty, responsibility and authority that a superintendent or a prison officer has under the Prisons Act except a function referred to in section 15J.

DAP means the daily average population being the daily average number of Prisoners at the Prison during an Operation Month which, for the purposes of this Agreement, is the total number of Prisoners at the Prison at midnight on each day of the Operation Month divided by the number of days in that Operation Month.

Deal With includes sell, novate, assign, transfer, encumber, grant any option, lease or licence in respect of, or in any manner alienate, dispose of, or part with possession of, or declare oneself trustee of or in relation to.

Default means any breach or default by:

- (a) the Contractor, of the Contractor's Obligations; or
- (b) the State, of the State's Obligations.

Default Notice means a notice by either Party to the other Party given under clause 17.2:

- (a) stating that it is a default notice; and
- (b) specifying the Default which is the subject of the notice.

Default Rate means the rate which is 2% above the Interest Rate.

Department means Department as defined in the Prisons Act which, as at the Signature Date, is known as the Department of Corrective Services.

Departmental System means the information system as used by the Department in relation to the operation and management of prisons in Western Australia at the Commencement Date, including:

- (a) software such as TOMS, AIPR and Registrar;
- (b) all other software used at the Prison for the purposes of operating the Prison and managing the Prisoners;
- (c) all hardware, including cabling and network racking; and
- (d) any upgrade of that information system after the Commencement Date.

Emergency means a situation, actual or imminent, which, in the opinion of the State, endangers or threatens to endanger life, property or the environment and requires immediate action to be taken to ensure proper management, control, safety and security of the Prison or the safety and welfare of the Prisoners or other persons at the Prison.

Encumbrance means any mortgage, charge, licence, lease, lien, option over or other encumbrance or third party interest of any nature, and encumber and encumbrancer have corresponding meanings.

Environment means all components of the earth, including:

- (a) land, air and water;
- (b) any layer of air atmosphere;

Acacia Prison Services Agreement

- (c) any organic or inorganic matter;
- (d) any living organism; and
- (e) natural or man-made or modified features or structures, and includes ecosystems and all elements of the biosphere.

Environmental Law includes:

- (a) any Act; and
- (b) any Legislative Requirements,

regulating or otherwise relating to the Environment.

Escape means an escape by a Prisoner from lawful custody of the Contractor or from a cell or place within the Prison in which he is confined or from any place where he is obliged to remain by prison routine or any order.

Essential Service means the provision of the following services:

- (a) accommodation;
- (b) food and water;
- (c) visits required by law;
- (d) security and supervision;
- (e) medical services; and
- (e) any other services which, if not provided, may result in death or serious health problems or disruption to the maintenance of good government, good order and security in the Prison,

as required to be provided by the Contractor as part of the Services during the Operation Period.

Excluded Change of Control means, in respect of the Contractor, a Change of Control following which the Contractor remains controlled, and all of its issued shares and voting power are held by:

- (a) Serco Group plc; or
- (b) one or more entities each of which (either directly or through one or more intermediate entities) is controlled by, and all of the issued shares and voting power of which are held by, Serco Group plc.

External Prisoner Purchases is defined in clause 7.3.

Force Majeure means any of the following events or occurrences, and the effect of the following events and occurrences, but only to the extent that a Party is prevented from, or delayed in, performing that Party's obligations under this Agreement, taking into account contingency measures that Party should reasonably have in place particularly in regard to the primacy of the security of the Prison:

- (a) acts of God, including fire (except where caused by a Prisoner within the Prison), bushfire, lightning, storm, tidal wave, cyclone, earthquake, landslide, mudslide, washouts and flood;

Acacia Prison Services Agreement

- (b) epidemics (other than epidemics arising within the Prison);
- (c) war, revolution or other state of armed hostility of a like nature;
- (d) insurrection, civil disturbances, riot or terrorism (except where arising within the Prison); and
- (e) collisions or accidents which constitute a major catastrophe, an example being an aircraft crash.

Force Majeure Party means a Party that is unable to perform that party's obligations under this Agreement as a result of Force Majeure.

Further Period has the meaning given in clause 4.2(a).

Government Agency means any:

- (a) government or governmental, semi-governmental or judicial entity or authority; or
- (b) minister, department, office, commission, delegate, instrumentality, agency, board, authority or organisation of any government.

Government Authorisation means:

- (a) a licence, approval or authorisation from a Government Agency; and
- (b) any approval or authorisation regarded as given by a Government Agency due to the expiry of the period specified by an Act within which the Government Agency should have acted if the Government Agency decided to refuse the approval or authorisation.

Grievance means an issue or concern that a Prisoner believes has not been adequately dealt with at Unit level and which the Prisoner wishes to pursue further. The following matters are excluded from the Prisoner Grievance process:

- (a) Prisoner placement and assessment (refer to Director General's Rule 18 or any replacement rule for the applicable appeal procedures);
- (b) Unit Conference decisions (refer to Director General's Rule 18 or any replacement rule for the applicable appeal procedures);
- (c) statutory disciplinary decisions;
- (d) the application or content of Legislative Requirements or any other direction governing prisons;
- (e) offences or acts of a criminal nature;
- (f) serious misconduct by the Contract Workers (refer to Policy Directive 41 for incidents to be reported to the Manager Internal Investigations Unit); and
- (g) a grievance lodged on behalf of another Prisoner.

Gross Prison Industry Revenue means the total gross revenue received by the Contractor from third parties in respect of Prison Industry.

Gross Canteen Sales means the total sale price of all goods sold from the Prison Canteen Service after deduction of any credits for goods which have been returned to the Contractor as a result of being defective.

Acacia Prison Services Agreement

GST has the meaning given by the GST Law.

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

GST Group has the meaning given by the GST Law.

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

Guarantee Amount means the amount set out in Item 5 of Schedule 1.

Guarantee Expiry Date has the meaning given in clause 22.1(c).

Guarantor means the person identified as the Guarantor in Item 8 of Schedule 1.

Hazardous Material means anything that, if it escapes while being produced, stored, moved, used or otherwise dealt with, may cause personal injury or death, or damage to property or the Environment.

High-level Security Work means high-level security work within the meaning of section 15M of the Prisons Act or as declared under section 15N of the Prisons Act.

Illicit Substance means any substance not lawfully issued to a Prisoner and includes opiates, cannabinoids, amphetamines and benzodiazepine.

Index Number means the index number compiled and issued by the Australian Bureau of Statistics for the CPI for and in respect of a particular quarter.

Individual Management Plan or **IMP** has the meaning given in section 3.2(a) of Schedule 4.

Industrial Instruments means awards, workplace agreements, industrial agreements of any kind, contract determinations or orders of any industrial tribunal or court.

Industry Participation Plan means the industry participation plan developed in accordance with clause 6.5.

Innovation has the meaning given in clause 15.2(a).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Insolvency Event means the occurrence of any of the following in respect of a corporation:

- (a) the corporation is or becomes, or any action is taken to make that corporation, insolvent within that meaning as specified in section 95A(2) or section 922 of the Corporations Act;
- (b) the corporation has a controller appointed, as defined in section 9 of the Corporations Act, in respect of any of that corporation's property;
- (c) the corporation informs any party, or creditors generally, that that corporation is insolvent, or is financially unable to proceed with this Agreement;

Acacia Prison Services Agreement

- (d) execution is levied against the corporation in an amount exceeding \$500,000 and the execution is not satisfied or withdrawn within 20 Business Days of being issued;
- (e) the Corporation gives or has given in relation to the corporation a notice of a meeting of creditors;
- (f) the corporation is, or becomes the subject of, an application or resolution for:
 - (i) its winding up; or
 - (ii) the appointment of a liquidator or provisional liquidator of the corporation;
- (g) the corporation is or states that it is unable to pay its debts when they fall due;
- (h) by operation of section 459F(1) of the Corporations Act, the corporation is taken to have failed to comply with a statutory demand;
- (i) the corporation implements any procedure to obtain protection or is granted protection from its creditors, under any applicable legislation; or
- (j) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Insurer means any corporation that carries on an insurance business and has provided a policy of insurance under clause 21.

Intellectual Property means anything, whether tangible or intangible, that attracts, or is susceptible of protection by, Intellectual Property Rights.

Intellectual Property Rights means any and all intellectual and industrial property rights and rights relating to all systems and information (including the Confidential Information and in any developments, improvements, modifications and enhancements to the Confidential Information), trade secrets, know-how, goodwill and business reputation, whether registered or unregistered, including, without limitation, rights in or to or arising under copyright, patents, inventions, trade marks, designs, plant varieties, circuit layouts or laws relating to breach of confidence or passing off.

Interest Rate means the rate specified in Item 2 of Schedule 1.

Legislative Requirement means a requirement imposed or arising under any of the following, whether now in existence or coming into existence in the future:

- (a) an Act;
- (b) an ordinance, rule, regulation, by-law, proclamation, licence, permit, authorisation, code, order or other instrument made or issued under an Act, including a Director General's Rule, Policy Directive and Operational Instruction; and
- (c) any other enforceable requirement of a Government Agency.

Loss means any loss, cost, claim, action, damage, diminution in value, expense or liability, including:

- (a) all interest and all amounts payable to third parties; and

Acacia Prison Services Agreement

- (b) all legal (on a full indemnity basis) and other expenses incurred in connection with investigating or defending any claim or action and all amounts paid or payable in settlement of a claim or action.

Loss of Control means a situation where the Contractor does not exercise proper management, control and security in respect of:

- (a) a significant part of the Prison or a significant number of Prisoners at the Prison; or
- (b) the welfare of a significant number of Prisoners at the Prison.

Maintenance Agreement means the agreement dated 15 February 2000 made between the Minister for Works and the Original Contractor for the maintenance of the Prison and includes any agreement that amends, supplements or novates, and any agreement or arrangement that replaces, that agreement.

Maintenance Contractor means the Original Contractor, any assignee of the Maintenance Agreement or any other person appointed by the State to maintain the Prison Building and the Prison Equipment.

MAP means a Management and Placement Checklist – Remand or MAP-Remand as that term is defined in section 3.1(a) of Schedule 4 or a Management and Placement Checklist – Sentenced or MAP-Sentenced as that term is defined in section 3.1(a) of Schedule 4, as the context requires.

Material Subcontractor has the meaning given in clause 28.5(b).

Medication Effect means the effect of prescribed medication on the test result obtained in respect of a urine sample provided by a Prisoner.

Minister means the Minister of the State from time to time responsible for the administration of the Prisons Act.

Minister for Works means a body corporate constituted under the *Public Works Act 1902*.

Mitigation Event means:

- (a) where a Positive Urine Sample Test Result is impacted by a Medication Effect;
- (b) where a Positive Urine Sample Test Result has resulted from testing during the Window Period (noting that an increased level for cannabis compared to a prior test within the Window Period will be regarded as a Positive Urine Sample Test Result); or
- (c) the existence of any Residual Effect.

Moral Rights means the moral rights set out in the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

Non Affected Party means the Party that is not the Force Majeure Party.

Notifiable Incident means:

- (a) an Escape;
- (b) the death of a Prisoner who is in the custody of the Contractor or the death of any other person at the Prison;

Acacia Prison Services Agreement

- (c) an Emergency;
- (d) Loss of Control;
- (e) the charging of a Contract Worker with an offence;
- (f) the Serious Assault of a Prisoner or any other person at the Prison;
- (g) attempted suicide of a Prisoner at the Prison;
- (h) a fire at the Prison;
- (i) any incident compromising the security of the Prison;
- (j) any medical emergency in relation to a Prisoner or any other person at the Prison;
- (k) any incident of Serious Self-harm by a Prisoner at the Prison;
- (l) any incident that may result in media attention or the need for written notification to the Minister;
- (m) any accident, serious irregularity or other unusual event which affects the good order or security of the Prison;
- (n) any incident which might escalate into any of the above incidents;
- (o) any incident which is required to be notified under the Prison Operating Manuals;
- (p) any incident involving the use of force or an instrument of restraint that must be notified to the State under Policy Directive 5; and
- (q) voluntary starvation by a Prisoner.

Ombudsman means the person who holds the position of Commissioner under the Ombudsman Act.

Ombudsman Act means the *Parliamentary Commissioner Act 1971*.

Ongoing Training Programs has the meaning given in clause 9.4(a)(iii).

Operation Month means each month during an Operation Year, provided that:

- (a) the first Operation Month will commence on the Commencement Date and end on the last day of the month in which the Commencement Date falls; and
- (b) the last Operation Month will commence on the first day of the last month in the Operation Period and end on the last day of the Operation Period.

Operation Payment means, in respect of an Operation Month, the Operation Payment calculated for that Operation Month in accordance with Schedule 2.

Operation Period means the period of time for the performance of the Services specified in clause 4.1(b).

Operation Quarter means each period of 3 months, ending on the last day of March, June, September and December during the Operation Period provided that:

- (a) the first Operation Quarter will commence on the Commencement Date and end on the last day of the quarter in which the Commencement Date falls; and
- (b) the last Operation Quarter will commence on the first day of the last quarter in the Operation Period and end on the last day of the Operation Period.

Acacia Prison Services Agreement

Operation Service Requirements means the minimum objectives, requirements and performance standards for the provision of the Services during the Operation Period as set out in Schedule 4.

Operation Year means each period of 12 months ending on 30 June during the Operation Period, provided that:

- (a) the first Operation Year will commence on the Commencement Date and end on the 30 June following the Commencement Date; and
- (b) the last Operation Year will commence on 1 July immediately preceding the date of expiry or termination of the Operation Period and end on the last day of the Operation Period.

Operational Philosophy and Regime means the Contractor's operational philosophy and regime as set out in Schedule 3.

Original Contractor means Australian Integration Management Services Corporation Pty Ltd.

Original Services Agreement means the agreement dated 21 December 1999 between the State and the Original Contractor for the provision of services at the Prison.

Other Assault means an act of physical violence against a Prisoner or any other person at the Prison that neither results in physical harm or injury nor requires any form of medical intervention.

Party means a party to this Agreement and Parties has a corresponding meaning.

Parent Guarantee means the guarantee referred to in clause 3.1(b).

Performance Improvement Request has the meaning given in clause 17.1.

Performance Linked Fee means, for any Operation Year, the Performance Linked Fee for that Operation Year as determined in accordance with clause 15.3.

Performance Linked Fee Percentages means those percentage parts of the Performance Linked Fee described in Schedule 5.

Performance Measures means the performance measures described in Schedule 5.

Positive Urine Sample Test Result means a test result obtained from an accredited laboratory in respect of a urine sample provided by a Prisoner that indicates the presence in the sample of an Illicit Substance exceeding the allowable benchmark as specified in the State's testing protocols. A Refusal will be deemed to be a Positive Urine Sample Test Result.

Power means a right, power, remedy or authority under this Agreement, or otherwise at law or in equity and includes any statutory power.

Pre-Service Induction Program has the meaning given in clause 9.4(a)(i).

Price Adjustment Notice has the meaning given in clause 16.4(a).

Prison means the prison for male, medium security Prisoners constructed on the Site and declared a prison under section 5 of the Prisons Act, and includes:

Acacia Prison Services Agreement

- (a) the Prison Building, Prison Equipment, fixtures and fittings and other improvements forming part of the Prison; and
- (b) the Site.

Prison Building means each building or permanent structure which forms part of the Prison.

Prison Canteen Service has the meaning given in clause 7.1(a).

Prison Equipment means each item of plant and equipment which is attached to and forms part of the Prison Building but does not include any Contractor Resources.

Prison Industry means:

- (a) the provision of domestic services within the Prison, including food preparation, gardening and cleaning; and
- (b) the manufacture or assembly of goods, or the provision of services or other commercial activity,

undertaken in the Prison by Prisoners.

Prison Industry Amount has the meaning given in clause 8.2.

Prison Industry Payment has the meaning given in clause 8.3.

Prison Operating Manuals means documents covering each of the areas listed in clause 6.7(b), as approved by the State in accordance with clause 6.7, and pending approval under that clause, means the Prison Operating Manuals of the Original Contractor, as contemplated under clause 6.7(j).

Prison Vending Machine means a vending machine required to be provided by the Contractor pursuant to clause 7.2(a).

Prisoner means a person who is a prisoner within the definition contained in section 3 of the Prisons Act.

Prisoner Property means the personal property of each Prisoner which is held in storage on behalf of the Prisoner while he is at the Prison, including credit cards and other valuable personal property, but excluding any personal property retained by the Prisoner in his cell.

Prisoner Trust Account means the trust account established in accordance with clause 7.9.

Prisoner Welfare Trust Fund means the trust fund established in accordance with clause 7.4.

Prisons Act means the *Prisons Act 1981*.

Prisons Regulations means the *Prisons Regulations 1982* and any other Regulations issued under the Prisons Act.

Quarterly Report means the report referred to in clause 13.3(a)(i).

RDT List means a monthly Random Drug Test List issued by the State.

Refusal means the refusal by a Prisoner to provide a urine sample for testing.

Acacia Prison Services Agreement

Residual Effect means the residual effect of drug use which has previously been detected in a Positive Urine Sample Test Result.

Revenue has the meaning given in clause 15.5(d).

Review Date means each date described in Item 4 of Schedule 1.

Secure Transactional Environment for Prisoners System or **STEPS** has the meaning given in clause 13.13.

Security Interest includes any mortgage, pledge, lien or charge or any security or preferential interest or arrangement of any kind or any other right of, or arrangement with, any creditor to have its claim satisfied in priority to other creditors with, or from the proceeds of, any asset.

Self-harm means an act of harm or injury that is performed by a Prisoner on his own body. It can take the form of deliberate harm by a Prisoner to himself, including, by lacerating his inner arms, banging his head against the wall causing blood loss or pulling out sutures.

Sentence Planning Documents means the sentence planning documents, such as IMPs and MAPs, developed for each Prisoner and located on the Departmental System.

Serious Assault means:

- (a) an act of physical violence against a Prisoner or any other person at the Prison resulting in actual bodily harm or injury including:
 - (i) an injury requiring medical treatment and assessment by a medical officer resulting in overnight hospitalisation in a medical facility such as the Prison clinic, infirmary or hospital or a public hospital; or
 - (ii) an injury requiring extended periods of ongoing medical treatment; and
- (b) any act of sexual assault against a Prisoner or any other person at the Prison, but excludes Assaults and Other Assaults.

Serious Self-harm means:

- (a) an act of Self-harm which:
 - (i) requires medical treatment and assessment by a Medical Officer resulting in overnight hospitalisation in a medical facility such as the Prison clinic, infirmary or hospital or a public hospital; or
 - (ii) requires extended periods of ongoing medical treatment; or
- (b) attempted suicide, being an act of self-harm that the Prisoner intends to lead to his death but which has a non-fatal outcome that causes self-harm or, without intervention by others, will do so, and includes ingesting a substance in excess of its generally therapeutic dosage.

Services means the management, control and security of the Prison and the welfare of Prisoners at the Prison in accordance with this Agreement including:

- (a) the specific services set out in this Agreement and the Operation Service Requirements;

Acacia Prison Services Agreement

- (b) any other service or function of the kind contemplated under the Prisons Act as services that may be provided by a contractor; and
- (c) any other services that would reasonably be required for the proper performance and provision of the services described in subclauses (a) and (b).

Service Handover has the meaning given in clause 20.3(a).

Service Handover Period means the period determined in accordance with clause 20.3(b).

Service Handover Plan has the meaning given in clause 20.5.

Service Retender has the meaning given in clause 20.1.

Signature Date means the date of execution of this Agreement.

Site means the land situated at Wooroloo in the State as shown bounded by a thick black line on the Site Plan and including:

- (a) the water main as shown on the Site Plan to its junction with the Water Corporation main; and
- (b) the pipeline from the wastewater treatment plant to the woodlots, which is not shown on the Site Plan.

Site Plan means the plan annexed and marked Annexure A.

Social Visits means those visits at the Prison that enable a Prisoner to maintain relationships with his family and friends in the community.

Specified Event means each event specified in Item 3 of Schedule 1.

Specific Training Programs has the meaning given in clause 9.4(a)(ii).

State's Associates means the State, the Department, the Minister, the CEO, the Contract Manager and any Western Australian Government Agency and any other employee, agent, contractor, consultant or adviser of or to the State, the Department, the Minister, the CEO, the Contract Manager or any Western Australian Government Agency, but does not include the Contractor or any Contract Worker or Subcontractor.

State's Obligations means the obligations of the State under this Agreement or imposed by law in relation to the provision of Services.

State Resources means any vehicle, plant, equipment, chattel or other property of the State or any of the State's Associates, other than the Prison, the Site and the Prison Equipment, as set out in the Asset Register provided to the Contractor pursuant to clause 3.5 and as that Asset Register is updated from time to time.

Statutory Power means any right, power, discretion, authority, duty or function exercisable by the State or any of the State's Associates or by a superintendent, prison officer or any other officer as defined in the Prisons Act, vested in them pursuant to any Act.

Structured Activity means any of the activities listed in section 2.16(c) of Schedule 4.

Acacia Prison Services Agreement

Subcontract means a contract, agreement or arrangement between the Contractor and a Subcontractor.

Subcontractor means a person engaged by the Contractor, other than as an employee of the Contractor, to provide any part of the Services described in subclauses (a) and (b) of the definition of Services in this clause 1.1.

Successor Operator means a person nominated by the State (including the State or any of the State's Associates) as succeeding the Contractor in the provision of all or any of the Services.

Superintendent means a superintendent as defined in the Prisons Act.

Taxable Supply has the meaning given by the GST Law excluding the reference to section 84-5 of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

Tax Invoice has the meaning given by the GST Law.

Termination Event has the meaning given in clause 18.1(a)(ii).

TOMS means the Department's information system known as the Total Offender Management System or any replacement of that system.

Training Program means any Pre-Service Induction Program, Specific Training Program or Ongoing Training Program.

Training Proposal means a proposal by the Contractor for approval of the Contractor's initial Pre-Service Induction Program, Specific Training Programs and Ongoing Training Programs submitted under clause 9.4(d) and any subsequent proposal submitted by the Contractor to amend or replace any of the approved Training Programs.

Transition Agreement means the agreement to be entered into between the Original Contractor and the Contractor for the transfer of staff and Resources and other handover matters.

Transition Plan means the plan for transition of the Services from the Original Contractor to the Contractor as incorporated in the Contractor's Proposal.

Trust Fund Purpose means the purpose of the welfare of the Prisoners, or any classes or groups of Prisoners, or any Prisoner, in the Prison.

Utility Service means gas, electricity, water, telecommunications and any other service which is required for the provision of the Services.

Variation Notice means a notice given by the State under clause 16.2.

Visitor means any person who is a visitor to the Prison, and is authorised to be at the Prison for that purpose.

Window Period means the period after reception into the Prison in which the effect of Illicit Substances taken prior to reception into the Prison can cause a Positive Urine Sample Test Result (e.g., the window period for cannabis is 72 days) as determined by the State's testing requirements.

Acacia Prison Services Agreement

1.2 Rules for interpreting this Agreement

Headings in this Agreement are for convenience only and do not affect its interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

(a) **Last day not a Business Day**

When the day or last day for doing an act is not a Business Day, the day or last day for doing the act will be the following Business Day.

(b) **Joint and several covenants**

If a Party comprises two or more persons, the covenants and agreements on their part bind and must be observed and performed by them jointly and each of them severally and may be enforced against any one or any two or more of them.

(c) **Reference to persons and bodies**

Unless contrary to the sense or context:

(i) a reference to a person includes the administrators, successors and assigns of that person, and if a person comprises two or more persons, the administrators, successors and assigns of each of those persons;

(ii) references to a person or body that has ceased to exist or has been reconstituted, amalgamated, reconstructed or merged, or the functions of which have become exercisable by any other person or body in its place, are taken to refer to the person or body established or constituted in its place or by which its functions have become exercisable; and

(iii) a reference to a person includes a natural person, corporation, partnership, joint venture, association, or other body corporate or unincorporated body, Government Agency or other legal entity.

(d) **Words importing number or gender**

(i) Words importing the singular include the plural and vice versa.

(ii) Words importing a gender include any gender.

(e) **Reference to other document**

Subject to any contrary provision in this Agreement, a reference to any other deed, agreement, instrument or contract includes a reference to that other deed, agreement, instrument or contract as amended, supplemented, varied or replaced from time to time.

(f) **Reference to a thing**

Reference to any thing (including any reference in a definition in clause 1.1) includes a reference to the whole and each part of that thing.

(g) **Reference to a clause or subclause**

Unless the context otherwise requires:

(i) a reference to a clause is a reference to a clause of this Agreement; and

Acacia Prison Services Agreement

(ii) a reference to a subclause is a reference to a subclause of the clause in which the reference occurs.

(h) **Continuing obligation**

Unless otherwise stated in this Agreement, any obligation under this Agreement will apply throughout the term of this Agreement.

(i) **Reference to certain expressions**

The expressions:

(i) 'comply with' includes observe and perform;

(ii) 'permit' includes allow, permit or cause including by way of omission;

(iii) 'including' and similar expressions are not words of limitation and if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing;

(iv) 'termination of this Agreement' and 'termination of the Operation Period' includes the expiry of this Agreement or the Operation Period as the case may be;

(v) 'related body corporate' has the same meaning as in the Corporations Act.

(j) **Reference to Legislative Requirement**

A reference to a Legislative Requirement or to a provision of a Legislative Requirement includes a modification or re-enactment of it, a provision substituted for it and, where relevant, a regulation or statutory instrument issued under it.

(k) **Reference to governmental department or position**

A reference to any government department, professional body, committee, council or other body, or to any position within any such body, includes the successors to that body or position or to any relevant activity or function of that body or position.

2. APPLICABLE ACTS

2.1 Prisons Act

(a) This Agreement:

(i) has been entered pursuant to section 15B of the Prisons Act;

(ii) does not affect the operation of the Prisons Act; and

(iii) is not to be construed as requiring a Party to breach any provision of the Prisons Act.

(b) If there is any inconsistency between the provisions of this Agreement and the provisions of the Prisons Act:

(i) the Prisons Act will prevail to the extent of the inconsistency; and

Acacia Prison Services Agreement

- (ii) the State and the Contractor must promptly consult with each other and negotiate in good faith, with a view to agreeing any appropriate amendments (if any) to this Agreement so that the intent of this Agreement may, to the extent possible, be achieved.
- (c) The Contractor must, and must ensure that all Contract Workers, at all times give full assistance to, and co-operate fully with, the person from time to time appointed to the office of Inspector of Custodial Services under the *Inspector of Custodial Services Act 2003* and, in particular, to enable the Inspector of Custodial Services and any person acting with his authority to carry out in relation to the Prison the functions set out in the *Inspector of Custodial Services Act 2003*.

2.2 Exercise of Statutory Powers by Contractor and Contract Workers

- (a) Where the performance of the Services or the Contractor's Obligations involves the use or exercise of any Statutory Powers by the Contractor, any Subcontractor or any Contract Worker, the exercise of these powers must be in accordance with all applicable Legislative Requirements.
- (b) The Contractor must assist the State and the State's Associates in exercising their Statutory Powers.

2.3 Contractor within jurisdiction of Ombudsman

The parties acknowledge the following.

- (a) For the purpose of section 3(1) of the Prisons Act:
 - (i) the Contractor is a contractor; and
 - (ii) a Subcontractor is a subcontractor.
- (b) Accordingly, for the purpose of sections 4A(1)(f) and 13 of the Ombudsman Act, the Contractor and each Subcontractor will be considered to be an authority:
 - (i) in any way affecting or applying to the Prison; or
 - (ii) in the performance of, or compliance with, the Contractor's Obligations, or the Services.
- (c) With regard to any decision or recommendation made, or any act done or omitted by the Contractor or any Subcontractor:
 - (i) the Ombudsman will have jurisdiction under the Ombudsman Act to investigate; and
 - (ii) in the event that the Ombudsman exercises a discretion to commence an investigation, the provisions of the Ombudsman Act will apply.

2.4 State officer of the Contractor

In accordance with section 15C(1) of the Prisons Act and for the purposes of the:

- (a) *Corruption and Crime Commission Act 2003*;
- (b) *Freedom of Information Act 1992*; and

Acacia Prison Services Agreement

(c) Ombudsman Act,

the principal officer of the Contractor is the person from time to time appointed as the Contractor Superintendent under clause 5.3.

2.5 State officer of Subcontractors and other persons

In accordance with section 15C(1) of the Prisons Act and for the purposes of the:

(a) *Corruption and Crime Commission Act 2003*;

(b) *Freedom of Information Act 1992*; and

(c) Ombudsman Act,

the principal officer of:

(d) a Subcontractor;

(e) a person with whom the Subcontractor contracts; and

(f) a person, with whom a person referred to in subclause (e) contracts,

is:

(g) in the case of a natural person, that person; and

(h) in the case of a body corporate, the secretary of that body.

3. CONDITIONS PRECEDENT AND INITIAL OBLIGATIONS

3.1 Satisfaction and waiver of conditions

(a) This Agreement (with the exception of this clause 3 and clauses 1, 2.1, 5, 14, 21, 25, 26, 27, 29, 30, 31, 32 and 33 is conditional upon, and does not become binding until, the satisfaction or waiver under subclause (c) of each of the conditions set out in subclause (b).

(b) The conditions referred to in subclause (a) are:

(i) expiry of the Original Services Agreement;

(ii) handover occurring under the Transition Agreement;

(iii) the Contractor having established a Prisoner Welfare Trust Fund in accordance with clause 7.4;

(iv) the Contractor having established a Prisoner Trust Account in accordance with clause 7.9;

(v) the State having approved all Contract Workers in accordance with the requirements of clause 9.2;

(vi) the Contractor complying with subclauses 21.3(a) and 21.8(a);

(vii) the State having received a Bank Guarantee which satisfies the requirements of clause 22.1;

(viii) the State having received a parent guarantee from the Guarantor in the form set out in Annexure C; and

Acacia Prison Services Agreement

- (ix) the representations and warranties in clause 29.1 remain true and correct as at the date each other condition in this subclause (b) is satisfied or waived.
- (c) The conditions in subclause (b) may only be waived by the State notifying the Contractor of its waiver.
- (d) The Parties must:
 - (i) use reasonable endeavours (other than waiver) to ensure that the conditions referred to in subclause (b) are satisfied on or before the Anticipated Commencement Date; and
 - (ii) keep each other informed of any circumstances which may result in any of those conditions not being satisfied in accordance with its terms.

3.2 Result of non-satisfaction of conditions

If the conditions referred to in clause 3.1 are not satisfied or waived in accordance with clause 3.1 on or before the Anticipated Commencement Date then all rights and obligations under this Agreement other than:

- (a) those arising under this clause 3 and clauses 1, 2.1, 5, 14, 21, 25, 26, 27, 29, 30, 31, 32 and 33; and
 - (b) rights that have accrued before that date,
- terminate on that date.

3.3 Certificate of Commencement

The State must issue a certificate of commencement in duplicate promptly on becoming aware that all the conditions precedent in clause 3.1 have been satisfied or waived. The certificate must specify as the Commencement Date the date on which the last of the conditions precedent is satisfied or waived. The State must deliver a copy of the certificate of commencement to the Contractor as soon as practicable after the Commencement Date.

3.4 Transition Plan

The Contractor must comply with the Transition Plan.

3.5 Asset Register

The State must provide a copy of the State's Asset Register to the Contractor on the Signature Date or within 7 days after the Signature Date.

4. COMMENCEMENT OF AGREEMENT AND OPERATION PERIOD

4.1 Duration of this Agreement

- (a) Subject to clauses 3.2 and 18, this Agreement commences on the Signature Date and expires on the last day of the Operation Period.

Acacia Prison Services Agreement

- (b) The Operation Period:
 - (i) commences on the Commencement Date; and
 - (ii) ends on the fifth anniversary of the Commencement Date, subject to:
 - (A) earlier termination of this Agreement under clause 18; and
 - (B) any extension under clause 4.2 or informal continuation under clause 4.3.

4.2 Option to extend Operation Period

- (a) The State may elect, at its absolute discretion, to extend the Operation Period for up to 2 consecutive further periods of up to 5 years each, commencing on the expiry of the Operation Period (each a **Further Period**), by giving notice to the Contractor:
 - (i) at least 3 months and at most one year before the end of the Operation Period (as extended under this subclause (a)); and
 - (ii) specifying the length of the Further Period.
- (b) Upon the State giving notice under subclause (a), the Operation Period will extend for the Further Period, on the same terms and conditions as this Agreement except that in the case of the second Further Period, subclause (a) will not apply.
- (c) The State may not exercise its option under subclause (a) during any extension of the Operation Period under clause 4.3.

4.3 Informal continuation of Services

- (a) Notwithstanding anything contained in this Agreement, the State may direct the Contractor to continue to perform the Services after the expiry of the Operation Period for a further period by notice to the Contractor at least 3 months before the expiry of the Operation Period (**Informal Further Period**). The terms and conditions of this Agreement will continue to apply until the arrangement in this subclause is terminated in accordance with subclause (b) or under clause 18.
- (b) At any time after the commencement of the Informal Further Period, either Party may terminate the arrangement in subclause (a) by giving at least 3 months notice to the other Party.

5. ADMINISTRATION OF AGREEMENT

5.1 The Contract Manager

- (a) The State:
 - (i) must, as soon as practicable after the Signature Date, appoint a person to be the Contract Manager; and
 - (ii) may replace the Contract Manager from time to time by notice to the Contractor.

Acacia Prison Services Agreement

- (b) Subject to subclause (e) and any other provisions of this Agreement, and except as otherwise specified by the State, the Contract Manager:
 - (i) is the agent of the State for the purpose of doing any thing to be done under this Agreement; and
 - (ii) has authority to make and give, or accept, on the State's behalf, any approvals, acceptances, directions, notices and other decisions that the State may make, give or accept under this Agreement.
- (c) The State must ensure that the person appointed as Contract Manager has the appropriate authority under the Prisons Act and any other applicable laws to perform the functions of a Contract Manager under this Agreement.
- (d) If the Contractor requests the Contract Manager to confirm an oral direction, the Contractor must promptly comply with the direction, but the Contract Manager must as soon as practicable confirm the direction in writing.
- (e) Where the Prisons Act requires anything to be done on behalf of the State by the CEO, the Contract Manager's authority and agency under subclause (b) will be deemed to exclude that thing, and the CEO will be the agent of the State, with the authority, as specified in subclause (b) in respect of that thing.

5.2 The Contractor Representative

- (a) The Contractor:
 - (i) must, as soon as practicable after the Signature Date, appoint a person to be the Contractor Representative; and
 - (ii) may replace the Contractor Representative from time to time by notice to the State.
- (b) The Contractor Representative:
 - (i) is the agent of the Contractor for the purpose of doing any thing to be done under this Agreement; and
 - (ii) has authority to make and give, or accept, on the Contractor's behalf, any approvals, acceptances, directions, notices and other decisions that the Contractor may make, give or accept under this Agreement.

5.3 The Contractor Superintendent

- (a) The Contractor:
 - (i) must, as soon as practicable after the Signature Date, notify the State of a suitable and appropriately qualified Contract Worker whom the Contractor wishes to be authorised by the CEO pursuant to section 15I of the Prisons Act to perform the functions of a Superintendent; and
 - (ii) may from time to time request that a replacement Contract Worker be authorised by the CEO pursuant to section 15I of the Prisons Act to perform the functions of a Superintendent by notice to the State.

Acacia Prison Services Agreement

- (b) Upon receipt of a notice pursuant to subclause (a), the CEO will determine whether to authorise the Contract Worker identified in the notice to perform the functions of a Superintendent. The CEO's authorisation of, or refusal to authorise, a Contract Worker shall be in his or her absolute discretion and may be subject to such conditions and limitations specified in the authorisation as the CEO thinks fit. If the CEO refuses to authorise the Contract Worker notified to the State under subclause (a), the Contractor must, as soon as practicable after receiving notification of the CEO's refusal, notify the State of an alternative Contract Worker whom the Contractor wishes to be authorised by the CEO pursuant to section 15I of the Prisons Act.
- (c) The CEO's authorisation of a Contract Worker to perform the functions of a Superintendent may specify any powers or duties that the Contract Worker may delegate to other Contract Workers.
- (d) The Contractor Superintendent is:
 - (i) the Contract Worker authorised by the CEO pursuant to subclause (b) who is responsible for performing the functions of a Superintendent of the Prison, to the extent authorised by the CEO in accordance with section 15I of the Prisons Act;
 - (ii) the person primarily responsible for supervising the day to day provision of the Services; and
 - (iii) the first point of contact for the Contract Manager in respect of any matter relating to the provision of the Services or any other matter under this Agreement.
- (e) Nothing in this clause requires or authorises the Contractor Superintendent to perform any functions of a Superintendent which may not be delegated to a Contract Worker under the Prisons Act.

5.4 Notification of appointments

Each Party must, as soon as practicable (and in any event within 5 Business Days) after the appointment, or any reappointment or replacement, of a person to represent that Party under the provisions of this clause 5, notify the other Party in writing of:

- (a) the name;
- (b) the contact address; and
- (c) the facsimile and telephone numbers,

of the person who has been appointed, reappointed or who has replaced the person previously representing that Party (as the case may be).

Acacia Prison Services Agreement

5.5 Qualifications, imputation of knowledge and other requirements of appointed representatives

- (a) The exercise of a right or the discharge of an obligation under this Agreement by:
 - (i) the Contract Manager, is to be taken to be performed by the State to the extent it is within the Contract Manager's authority under clause 5.1; and
 - (ii) the CEO, is to be taken to be performed by the State to the extent it is within the CEO's Statutory Powers under the Prisons Act; and
 - (iii) the Contractor Representative or the Contractor Superintendent, is to be taken to be performed by the Contractor.
- (b) Where a matter is known by:
 - (i) the Contract Manager, that matter will be treated as being known by the State; and
 - (ii) the Contractor's Representative or the Contractor Superintendent, that matter will be treated as being known by the Contractor.
- (c) Each Party must ensure that each person appointed under this clause 5 to represent that Party is:
 - (i) an appropriately qualified and experienced person to perform the responsibilities that person is required to perform under this Agreement; and
 - (ii) available at all reasonable times, on reasonable notice, to consult on behalf of that Party in connection with matters arising under this Agreement.

5.6 Joint Management Board

- (a) The Joint Management Board comprises:
 - (i) the following representatives of the State: the CEO, the Contract Manager, the Department's Executive Director Prison Services and the Department's Director Contracted Services or persons occupying equivalent positions within the State; and
 - (ii) the following representatives of the Contractor: the Contractor's Representative and three other senior executive nominees of the Contractor.

The CEO will be the Chairperson of the Joint Management Board.

- (b) Each of the Contractor and the State may replace any of its representatives on the Joint Management Board at any time by giving notice to the other Party at least 48 hours prior to the effective date of the replacement.
- (c) The functions of the Joint Management Board are to:
 - (i) monitor the performance of the Services, the operation of the Prison and performance of the State's Obligations and the Contractor's Obligations;

Acacia Prison Services Agreement

- (ii) seek to resolve any disputes that are referred to it in accordance with clause 26.3;
 - (iii) seek to resolve any failure to agree changes to the Performance Measures and the Performance Linked Fee Percentages referred to it in accordance with clause 13.5(f); and
 - (iv) consider any other matters as agreed.
- (d) Meetings of the Joint Management Board must be held at least once each Operation Quarter and on an adhoc basis for the purpose of seeking to resolve disputes or matters referred to it in accordance with clauses 13.5(f) and 26.3. The Contract Manager will be responsible for convening the meetings of the Joint Management Board. At least 14 days notice must be given of each meeting and of the agenda for the meeting.
- (e) The Contract Manager must arrange for a secretary to attend all meetings and record all resolutions and actions arising out of each meeting.

6. SERVICES

6.1 Contractor's appointment and acceptance of appointment

- (a) The State appoints the Contractor to provide the Services for the Operation Period in accordance with the terms of this Agreement.
- (b) The Contractor accepts the appointment under subclause (a).

6.2 Compliance with laws

The Contractor must provide the Services and perform the Contractor's Obligations in compliance with all applicable laws, standards and codes of practice from time to time applicable to the performance of the Services, including:

- (a) the Prisons Act, the Prisons Regulations and any rule, code, order, standard, direction or other instrument made under them;
- (b) all other Legislative Requirements; and
- (c) all policies of the State of which the State may, from time to time, give notice to the Contractor.

6.3 Compliance with standards and maintenance of accreditation

From the date that is 12 months after the Commencement Date, the Contractor must ensure that:

- (a) it is certified under AS/NZS ISO 9001:2000 Quality Management Systems – Requirements (*AS/NZS ISO 9001*) and the scope of its certification covers the provision of all of the Services and performance of all of the Contractor's Obligations;
- (b) it provides the Services and performs the Contractor's Obligations in compliance with the quality management system certified under AS/NZS ISO 9001; and

Acacia Prison Services Agreement

- (c) it is registered by the Training Accreditation Council of Western Australia, or an equivalent organisation in another State, to train, assess and award such qualifications to Contract Workers as are necessary for the Contractor to perform the Services and otherwise fulfil the Contractor's Obligations.

6.4 Operation Service Requirements

The Contractor must provide the Services and perform the Contractor's Obligations in accordance with the Operation Service Requirements.

6.5 Development of and compliance with Industry Participation Plan

- (a) The Contractor must prepare an Industry Participation Plan and consult with the State in a timely manner during its preparation for the purpose of ensuring that the Industry Participation Plan is adopted, in a form acceptable to the State, within 6 months after the Commencement Date.
- (b) The Contractor must adopt, implement and comply with the Industry Participation Plan developed in accordance with subclause (a) immediately upon the State giving the Contractor notice that the form and content of the Industry Participation Plan is acceptable to the State.

6.6 Best Industry Practice

The Contractor must provide the Services and perform the Contractor's Obligations in accordance with Best Industry Practice.

6.7 Prison operating manuals

- (a) The quality management systems established by the Contractor in accordance with AZ/NZS ISO 9001 must incorporate processes and procedures for the preparation and maintenance of Prison Operating Manuals as contemplated by this clause 6.7.
- (b) The Contractor must prepare and submit for the State's approval, in accordance with the timetable approved by the State under subclause (e), Prison Operating Manuals covering the following areas:
 - (i) the Contractor's Operational Philosophy and Regime;
 - (ii) custody and containment incorporating the systems and procedures described in section 1 of Schedule 4;
 - (iii) care and well-being, including Prison administration, Prisoner services and Prisoner management, incorporating the systems and procedures described in section 2 of Schedule 4;
 - (iv) rehabilitation and reintegration, including sentence and case management, Prisoner programs and other Prisoner matters, incorporating the systems and procedures described in section 3 of Schedule 4;
 - (v) reparation, including through the operation of Prison Industries and the provision of goods and services to the community, incorporating the systems and procedures described in section 4 of Schedule 4;

Acacia Prison Services Agreement

- (vi) business systems, including information management and operational and other matters, incorporating the systems and procedures described in section 5 of Schedule 4; and
 - (vii) human resources and occupational health and safety, including the development and implementation of relevant processes and the recruitment, training and management of appropriate personnel, incorporating the systems and procedures described in section 6 of Schedule 4.
- (c) The Prison Operating Manuals must:
- (i) except where otherwise agreed by the State, be consistent with the Contractor's Proposal, including the Operational Philosophy and Regime;
 - (ii) specify in detail the strategies and processes the Contractor proposes to use to deliver the Services;
 - (iii) demonstrate that the strategies and processes the Contractor proposes to use are based on sound operational practices; and
 - (iv) describe how the Contractor will use internal systems, such as performance indicators and complaints (including complaints by Prisoners and Contract Workers), to monitor and evaluate the Contractor's performance and compliance with its proposed strategies and processes.
- (d) The Contractor must prepare and submit to the State, within 1 month after the Commencement Date, a timetable setting out:
- (i) the date by which the Contractor will submit each proposed Prison Operating Manual to the State; and
 - (ii) the date by which the State is required to notify the Contractor that the State approves each proposed Prison Operating Manual, with or without amendment, or rejects it, which date must be no earlier than 20 Business Days after submission of the proposed Prison Operation Manual.
- The timetable must provide for the submission of all of the proposed Prison Operating Manuals to the State within 12 months after the Commencement Date.
- (e) The State must notify the Contractor within 20 Business Days of receiving the timetable that the State approves the timetable, with or without amendment.
 - (f) The Contractor must submit each proposed Prison Operating Manual to the State, and the State must notify the Contractor that the State approves each proposed Prison Operating Manual, with or without amendment, or rejects it, by the date specified in the timetable approved by the State under subclause (e).
 - (g) If the State does not approve a Prison Operating Manual or approves it with specified amendments, the Contractor must re-submit to the State the Prison Operating Manual revised to take account of the State's comments, provided that if the State does not approve the revised Prison Operating Manual within 20 Business Days of its re-submission then the dispute resolution provisions in clause 26 will apply.

Acacia Prison Services Agreement

- (h) At any time after the approval of a Prison Operating Manual under this clause, the Contractor may submit to the State a proposal to revise or replace that Prison Operating Manual, or the State may notify the Contractor of any amendment to or replacement of that Prison Operating Manual which it considers reasonably necessary. To the extent that any such revision is approved (with or without amendment), the Prison Operating Manual will take effect as revised under this subclause.
- (i) The Contractor acknowledges that an approval given by the State under this clause does not imply:
 - (i) any release of the Contractor from the Contractor's Obligations or its responsibility to provide the Services in accordance with the standards and any other requirements of this Agreement and the Prisons Act; or
 - (ii) any assumption by the State of any responsibility or liability as to the adequacy of the Contractor's arrangements to meet the standards and requirements of this Agreement and the Prisons Act.
- (j) Pending approval of a Prison Operating Manual under this clause, the equivalent Prison Operating Manual of the Original Contractor, as in force immediately prior to the Commencement Date, will be the Prison Operating Manual for the purpose of this Agreement.

6.8 Compliance with Prison Operating Manuals

The Contractor must comply with, and ensure that all Contract Workers comply with, all Prison Operating Manuals.

6.9 Obligations to act fairly and dealings with local community

The Contractor must:

- (a) act openly, fairly and reasonably in all the Contractor's dealings with; and
- (b) use the Contractor's reasonable endeavours to enhance good relations with, and minimise disruption and inconvenience to,

members of the local communities in the vicinity of the Prison, including the Shires of Mundaring and Northam and members of local and other relevant Aboriginal groups.

6.10 Consultation and minimising disruption

Without limiting the Contractor's obligations under subclause 6.9, the Contractor must:

- (a) consult on a regular basis with public interest groups which have a legitimate interest in the Prison or the Services and local communities to ensure that their interests are considered and, where possible, met; and
- (b) keep the State informed of any issues relating to the Prison or the Services which are of concern to the public interest groups or local communities.

Acacia Prison Services Agreement

6.11 Conflicting requirements

- (a) If the Contractor becomes aware of any conflict between any of the Contractor's Obligations, it must notify the State and the State must direct the Contractor as to the manner in which the Contractor should provide the Services and perform the Contractor's Obligations, provided that the State may not direct the Contractor to take any action which would place the Contractor in breach of any Legislative Requirements.
- (b) In the case of a conflict between any of the Contractor's Obligations, the Contractor will not be in breach of those obligations if it acts in accordance with them subject to any direction from the State under subclause (a).

7. PRISONER SERVICES AND PRISONER WELFARE TRUST FUND

7.1 Prison Canteen Services

- (a) The Contractor must continue to operate a Prison Canteen Service (***Prison Canteen Service***) which:
 - (i) provides a level and standard of service to Prisoners which is equal to, or exceeds, the level and standard of service provided by the Original Contractor immediately prior to the Commencement Date; and
 - (ii) complies with this clause 7.1.
- (b) The Contractor must offer, as a minimum, snacks, confectionary, non alcoholic drinks, toiletries, magazines, books, stationery and any other items as specified from time to time by the State.
- (c) The Contractor must make the Canteen Goods purchased by Prisoners available for collection by Prisoners at least once a week at a designated secure location in the Prison during designated hours. The Contractor must establish and maintain systems to minimise theft of Canteen Goods available for collection.
- (d) The Canteen Goods must be offered for sale at prices which are no higher than the prices at which those goods, or equivalent goods, are sold to Prisoners at the Wooroloo prison, or if that prison ceases to operate, the average of the prices at which those goods or equivalent goods are sold at all prisons operated in the Perth metropolitan area. To enable compliance with this subclause, the State must provide the Contractor with a copy of the canteen goods price list for the Wooroloo prison or, if that prison ceases to operate, the canteen goods price lists for the prisons operating in the Perth metropolitan area, within 10 Business Days after the Signature Date or after any revision to any such price lists.
- (e) The Contractor must provide to the State a list (***Canteen List***) of goods (the ***Canteen Goods***) available for sale through the Prison Canteen Service and the prices for those Canteen Goods (the ***Canteen Price List***) within 20 Business Days after the Commencement Date and within 5 Business Days after any change to the Canteen List or the Canteen Price List. The State must notify the Contractor whether or not it approves the Canteen List and the Canteen Price List within 10

Acacia Prison Services Agreement

Business Days after receipt of the Canteen List and Canteen Price List or any amendment to the Canteen List or the Canteen Price List. The State may require the addition or removal of specified goods from the Canteen List as a condition of its approval. The Contractor must comply with any condition of the State's approval. The Contractor must not sell any goods through the Prison Canteen Service which are not on the approved Canteen List, or at a price other than on the approved Canteen Price List. Until approval of the first Canteen List and Canteen Price List under this subclause, the Canteen List and Canteen Price List of the Original Contractor as in force immediately prior to the Commencement Date will be deemed to be the approved Canteen List and Canteen Price List.

- (f) Within 6 months after the Commencement Date, the Contractor must develop and submit to the State a proposal for improving the Prison Canteen Service in terms of range and availability of Canteen Goods and systems for payment and collection of Canteen Goods. If the State approves that proposal, the Contractor must implement the proposal within 2 months after receipt of the State's approval.

7.2 Vending Machines

- (a) The Contractor must establish and operate vending machines at appropriate locations accessible to Prisoners within the Prison. The vending machines must stock a broad range of brands and products which are generally available for sale by vending machine. The Contractor must obtain the State's approval of the number and location of vending machines, the goods to be sold through vending machines and the prices at which those goods are to be sold.
- (b) Within 20 Business Days after the Commencement Date, the Contractor must provide to the State a list of vending machines installed throughout the Prison together with the location of those vending machines, a list of goods to be sold through the vending machines and the prices at which those goods are to be sold (the ***Vending Machine List***). The Contractor must obtain the approval of the State prior to installing any new vending machines, removing any existing vending machines, changing the location of any vending machines or changing the goods sold, or the prices at which goods are sold (the ***Vending Machine List Change***). The State must notify the Contractor whether or not it approves the Vending Machine List or any Vending Machine List Change within 10 Business Days of receipt of the Vending Machine List or Vending Machine List Change. The State may require the addition or removal of specified vending machine goods or the removal or relocation of vending machines as a condition to its approval. The Contractor must comply with any condition of the State's approval. Until approval of the first Vending Machine List under this subclause, the vending machines and their locations, goods and prices in place as at the Commencement Date will be deemed to be approved.

7.3 External Prisoner Purchases

- (a) The Contractor must offer a service to Prisoners which enables Prisoners to order and purchase a reasonable range of goods which are not available through the

Acacia Prison Services Agreement

Prison Canteen Service or Prison vending machines (*External Prisoner Purchases*). The Contractor must obtain the State's approval to the range of goods available by External Prisoner Purchases within 20 Business Days after the Commencement Date, and within 5 Business Days after any change to the range of goods available. The State must notify the Contractor whether or not it approves the range of goods available through External Prisoner Purchases within 10 Business Days after receipt of a notice seeking approval under this subclause. The State may require the addition or removal of specified goods available for External Prisoner Purchase as a condition of its approval. The Contractor must comply with any conditions of the State's approval.

- (b) The Contractor must offer the External Prisoner Purchase service to Prisoners at a cost per item which is no greater than the aggregate of the actual cost to the Contractor (or the Contractor's Associates) of the item and the actual cost to the Contractor (or the Contractor's Associates) of transport of the item. The Contractor must use reasonable endeavours to negotiate arrangements with suppliers to minimise the transport costs incurred in the delivery of goods ordered through this service.

7.4 Prisoner Welfare Trust Fund

- (a) The Contractor must establish a Prisoner Welfare Trust Fund with effect from the Commencement Date.
- (b) The Contractor must open and operate an account with a commercial bank carrying on business in Perth that is approved by the State, which account must:
 - (i) be established for the sole purpose of deposits and withdrawals from the Prisoner Welfare Trust Fund in accordance with this clause;
 - (ii) be in the name of the Contractor;
 - (iii) incorporate in the account name - Acacia Prison Prisoner Welfare Trust Fund; and
 - (iv) be operated by two signatories, one nominated by the State and the other nominated by the Contractor.
- (c) The Contractor must pay into the Prisoner Welfare Trust Fund on a monthly basis an amount equal to 2% of Gross Canteen Sales in respect of the previous month.
- (d) Subject to subclause (e) all money paid into the Prisoner Welfare Trust Fund must be held on trust solely for the Trust Fund Purpose.
- (e) On termination or expiry of the Operation Period the balance of the Prisoner Welfare Trust Fund must be paid to the State.

7.5 Application of Prisoner Welfare Trust Fund

- (a) The proceeds of the Prisoner Welfare Trust Fund must be applied solely for the Trust Fund Purpose and with the approval of the State.
- (b) The State may make, and notify the Contractor of, rules concerning the manner in which the Contractor may apply the proceeds from the Prisoner Welfare Trust

Acacia Prison Services Agreement

Fund in accordance with this clause and the records which must be maintained in relation to the application of the Prisoner Welfare Trust Fund.

- (c) The Contractor must comply with any rules notified by the State in accordance with subclause (b).

7.6 Records and audit

- (a) The Contractor must keep and maintain accurate and fully detailed records of all transactions relating to the Prison Canteen Service, Prison vending machines and External Prisoner Purchases and the matters specified in this clause 7 in accordance with clause 13.8.
- (b) The records maintained by the Contractor in accordance with subclause (a) must be made available for inspection and audit by the State in accordance with clause 13.10.

7.7 Monthly Sales Statements by Contractor

Within 10 Business Days after the end of each Operation Month, the Contractor must provide to the State a statement setting out the following:

- (a) the value of Gross Canteen Sales during that Operation Month;
- (b) the value of sales from vending machines during that Operation Month;
- (c) the value of External Prisoner Purchases during that Operation Month, separately itemising the cost of each item and the cost of transport of each item, and providing verification of those costs; and
- (d) the amount deposited by the Contractor into the Prisoner Welfare Trust Fund in respect of that Operation Month in accordance with clause 7.4.

The statement must be accompanied by deposit slips or statements evidencing the deposits referred to in subclause (d).

7.8 Annual Sales Statement

- (a) Within 3 months after the end of each Operation Year, the Contractor must provide to the State a statement setting out the following:
 - (i) the value of Gross Canteen Sales during that Operation Year;
 - (ii) the value of sales from vending machines during that Operation Year;
 - (iii) the value of External Prisoner Purchases during that Operation Year, separately itemising the cost of each item and the cost of transport of each item, and providing verification of those costs; and
 - (iv) the amount deposited by the Contractor into the Prisoner Welfare Trust Fund in respect of that Operation Year in accordance with clause 7.4.
- (b) The statement specified in subclause (a) must be accompanied by a certificate from an Approved Auditor certifying the accuracy of the statement.

Acacia Prison Services Agreement

7.9 Prisoner Trust Account

The Contractor must establish and maintain a trust account for the deposit and withdrawal of Prisoners' personal funds with effect from the Commencement Date and throughout the Operation Period.

7.10 Prisoner Property

The State undertakes to transfer to the Contractor at the Commencement Date:

- (a) all items of Prisoner Property held at the Commencement Date;
- (b) any cash balances held by the State on behalf of Prisoners, required to be deposited in the Prisoner Trust Account at the Commencement Date; and
- (c) all records applicable to the Prisoner Property and balances under subclauses (a) and (b).

The State indemnifies the Contractor for any errors or omissions in the Prisoner Property or cash balances, or the records of subclause (c), transferred to the Contractor in accordance with this clause. This indemnity will continue until such time as an audit of Prisoner Property and cash balances is completed to the satisfaction of the Contractor and the State.

8. PRISON INDUSTRY

8.1 Prison Industry

- (a) The Contractor must arrange for Prison Industry to be undertaken by Prisoners at the Prison. Each Prison Industry activity must be approved by the State prior to it being undertaken by Prisoners.
- (b) The Prison Industry must comply with the Correction Industry Business Development Code of Practice adopted by Australian Corrective Service Ministers on 11 July 1997 or any other code of practice or policy nominated by the State from time to time.
- (c) The Contractor must ensure that products and services derived from Prison Industry are priced having regard to the spirit and intent of the National Competition Policy or any other competition policy nominated by the State from time to time. The State may require the Contractor to complete product pricing forms in a form notified by the State to determine the pricing of Prison Industry products and services in accordance with this subclause.

8.2 Prison Industry Amount

The Contractor must pay to the State an amount equal to 10% of all Gross Prison Industry Revenue (the *Prison Industry Amount*) at the times and otherwise in accordance with clauses 8.3 to 8.5.

Acacia Prison Services Agreement

8.3 Calculation and payment of Prison Industry Amount

- (a) The Prison Industry Amount must be calculated and paid by the Contractor for each 6 month period ending 31 December and 30 June during the Operation Period based on the Gross Prison Industry Revenue for that 6 month period (the *Prison Industry Payment*).
- (b) Within 10 Business Days after each 31 December and each 30 June occurring during the Operation Period, the Contractor must calculate the Prison Industry Payment for the preceding 6 month period and:
 - (i) submit a statement to the State setting out:
 - (A) the Gross Prison Industry Revenue for that 6 month period; and
 - (B) the Prison Industry Payment for that 6 month period; and
 - (ii) pay to the State the Prison Industry Payment for that 6 month period.

8.4 Verification of Prison Industry Payments against audited accounts

Within 3 months after the expiry of each Operation Year, the Contractor must submit to the State:

- (a) a statement of:
 - (i) the Gross Prison Industry Revenue for that Operation Year; and
 - (ii) the Prison Industry Amount for that Operation Year;
- (b) a certificate from an Approved Auditor certifying the correctness of the statement submitted under subclause (a); and
- (c) a reconciliation of the Prison Industry Amount for the Operation Year against the Prison Industry Payments made in respect of that Operation Year.

If the reconciliation demonstrates that:

- (d) the Prison Industry Payments for the Operation Year exceed the Prison Industry Amount for that Operation Year, the State must pay the Contractor the difference within one month of receipt of the statement under this clause; or
- (e) the Prison Industry Payments for the Operation Year are less than the Prison Industry Amount for that Operation Year, the Contractor must pay the State the difference within 4 months after expiry of the Operation Year.

8.5 Calculations and payments for the first and last Operation Years

The calculations and payments of the Prison Industry Payments for the first Operation Year will be made in respect of the period commencing on the Commencement Date and ending on the following 31 December. The calculations and payments of the Prison Industry Payments for the last Operation Year will be made in respect of the period commencing on the first day of that Operation Year and ending on the last day of the Operation Period.

Acacia Prison Services Agreement

8.6 Application of Prison Industry Amount

- (a) The State will determine the way in which the Prison Industry Amount is to be applied in its absolute discretion.
- (b) Without prejudice to subclause (a), the Contractor may make submissions to the State as to the basis on which the whole or part of the Prison Industry Amount should be applied for the welfare of Prisoners or other facilities at the Prison.

8.7 Records and audit

- (a) The Contractor must keep and maintain detailed records of every matter relating to the Prison Industry in accordance with clause 13.8.
- (b) The records specified in subclause (a) must be made available for inspection and audit by the State in accordance with clause 13.10.

8.8 Prison Industry Reference Group

The Contractor must establish and coordinate a Prison Industry reference group for the purpose of liaising with industry groups to establish opportunities for Prison Industry. The Contractor must incorporate a report on the activities and meetings of the Prison Industry reference group in the Quarterly Reports prepared under clause 13.3.

8.9 No Prison Industry for Contract Workers

The Contractor must ensure that no Prison Industry is undertaken by, or for the benefit of, the Contractor, any Contractor's Associates, any Subcontractor or any Contract Workers without the consent of the State. The purchase of goods produced by Prison Industry by the Contractor, any Contractor's Associates, any Subcontractor or any Contract Workers on terms available to the general public will not breach this clause.

9. CONTRACT WORKERS

9.1 Provision of Contract Workers

The Contractor is responsible for providing all Contract Workers and making all staffing arrangements required for the performance of the Services and the Contractor's Obligations in accordance with this Agreement, including staffing the Prison with adequate numbers of Contract Workers 24 hours a day and 7 days a week and, from time to time, providing Contract Workers as external escorts to Prisoners.

9.2 Engagement of Contract Workers

The Contractor must:

- (a) **(enquiry as to suitability)** in respect of each person who is proposed to be engaged as a Contract Worker, make all appropriate enquiries and carry out a proper investigation of the person and their suitability to perform the Services, including:
 - (i) any offence for which the person has been convicted or charged;

Acacia Prison Services Agreement

- (ii) any disciplinary proceedings conducted against the person in the course of his or her employment;
 - (iii) relevant academic and other qualifications obtained by the person; and
 - (iv) any other matter that is relevant to the suitability of the person to perform the Services, including the person's medical history;
- (b) **(provision of information to State)** make available to the State full details of each person who is proposed to be engaged as a Contract Worker, including the resume and any other information relating to that person and the results of the Contractor's enquiries and investigation carried out pursuant to subclause (a) in relation to that person, to enable the State to conduct checks of the person's criminal record within Australian and overseas and to determine whether to approve the engagement of the person as a Contract Worker;
- (c) **(State's prior approval to engagement)** obtain the State's prior approval to the engagement of each Contract Worker, provided that the Contractor must not seek the State's approval until it has fully complied with subclauses (a) and (b);
- (d) **(discrimination and other Legislative Requirements)** in connection with the engagement of each Contract Worker, comply with all Legislative Requirements including any requirements relating to discrimination, whether on the basis of gender, race or any other basis, and the Department's equal opportunity policy as notified to the Contractor from time to time; and
- (e) **(engagement of Aboriginal Contract Workers)** consult with Aboriginal groups in the vicinity of the Prison and any other relevant Aboriginal groups to promote and encourage the engagement of Aboriginals as Contract Workers in all categories of employment.

9.3 Requirements for performance

The Contractor must:

- (a) ensure that each Contract Worker:
 - (i) **(permits, accreditation, training, etc)** holds all appropriate qualifications, accreditation, permits and licences and has completed all training in accordance with the requirements of clause 9.4(h);
 - (ii) **(compliance)** complies and acts in a manner at all times consistent with the Prisons Act, any other Legislative Requirement and any requirements of this Agreement; and
 - (iii) **(substances affecting performance)** does not perform any of the Services and does not operate any vehicles, plant or equipment in connection with the Services, whilst under the influence of alcohol or any other substance which may impair such performance or operation;
- (b) **(codes)** comply, and must ensure that each Subcontractor and Contract Worker complies, with any codes (including codes of ethics and conduct) approved by the

Acacia Prison Services Agreement

CEO under the Prisons Act to apply to the Contractor, any Subcontractors and any Contract Workers; and

- (c) **(staff disciplinary procedures)** comply, and must ensure that each Subcontractor and Contract Worker complies, with any staff disciplinary procedures set out in the Prison Operating Manuals.

9.4 Approval of Training Programs

- (a) The Contractor must:
 - (i) develop a pre-service induction program for Contract Workers addressing all matters that may be reasonably required for the purpose of training new Contract Workers and providing them with the skills required to provide the Services in the manner and at the standard required by this Agreement (***Pre-Service Induction Program***), including the following matters:
 - (A) custody and containment including the training referred to in section 1 of Schedule 4;
 - (B) care and wellbeing including the training referred to in section 2 of Schedule 4;
 - (C) rehabilitation and reintegration including the training referred to in section 3 of Schedule 4;
 - (D) reparation including the training referred to in section 4 of Schedule 4;
 - (E) business systems including the training referred to in section 5 of Schedule 4;
 - (F) human resources and occupational health and safety including the training referred to in section 6 of Schedule 4;
 - (G) compliance with Legislative Requirements or other requirements applicable to the performance of Contract Workers' functions including where appropriate, the use of force and instruments of restraint and the handling and disclosure of information about the Prison and any Prisoners; and
 - (H) any other matter that the State considers (acting reasonably), and notifies the Contractor, should be the subject of a Pre-Service Induction Program;
 - (ii) develop other training programs addressing all matters that may be reasonably required in respect of the specific duties or functions that each Contract Worker or category of Contract Worker is required to perform to provide the Services, in the manner and at the standard required by this Agreement (***Specific Training Programs***), including:
 - (A) training in the performance of Custodial Functions;
 - (B) training in the performance of any other functions or which addresses any other specific matters that the State considers

Acacia Prison Services Agreement

(acting reasonably), and notifies the Contractor, should be the subject of a Specific Training Program; and

- (iii) develop ongoing training and staff development for Contract Workers who have completed the Pre-Service Induction Program or Specific Training Programs (*Ongoing Training Programs*), for the purpose of:
 - (A) updating and developing Contract Workers' skills required in the performance of their duties and functions, in the manner and at the standard required by this Agreement;
 - (B) where required, assisting Contract Workers to achieve the training qualifications referred to in section 6.9 of Schedule 4; and
 - (C) addressing any other matters that the State considers (acting reasonably), and notifies the Contractor, should be the subject of an Ongoing Training Program.

(b) The Contractor must prepare and submit to the State, within 1 month after the Commencement Date, a timetable setting out:

- (i) the date by which the Contractor will submit each Training Proposal to the State; and
- (ii) the date by which the State is required to notify the Contractor that the State approves each Training Proposal, with or without amendment, or rejects it, which date must be no earlier than 20 Business Days after submission of the Training Proposal.

The timetable must provide for the submission of all of the Training Proposals to the State within 12 months after the Commencement Date.

- (c) The State must notify the Contractor within 20 Business Days of receiving the timetable that the State approves the timetable, with or without amendment.
- (d) The Contractor must submit each Training Proposal to the State, and the State must notify the Contractor that the State approves each Training Proposal, with or without amendment, or rejects it, by the date specified in the timetable approved by the State under subclause (c).
- (e) If the State rejects a Training Proposal or approves it with specified amendments, the Contractor must submit to the State a further Training Proposal within 10 Business Days of receiving the State's notice under subclause (d).
- (f) If the Contractor fails to submit any Training Proposal as required under this clause 9.4 or the State does not approve unconditionally a further Training Proposal submitted by the Contractor under subclause (e) then:
 - (i) the State may itself prepare or revise the Training Program the subject of the Training Proposal (as the case may be) and the State's Training Program or revised Training Program will apply under this Agreement; and

Acacia Prison Services Agreement

- (ii) the Contractor must reimburse the State on demand for any reasonable costs incurred in preparing or revising a proposed Training Program under this subclause.
- (g) The Contractor must review each Training Program approved by the State pursuant to this clause 9.4 every 12 months after its approval, to ensure its content is updated as may be required or appropriate and, within 20 Business Days of the date for review, submit a revised Training Program for approval by the State. The State must notify the Contractor within 20 Business Days after receipt of the revised Training Program whether the State approves the revised Training Program (with or without amendment) or rejects it. If the State rejects the revised Training Program or approves it with specified amendments, then subclauses (e) and (f) will apply as though each reference to 'Training Proposal' in those subclauses were a reference to 'revised Training Program'.
- (h) At any time after the approval of a Training Program under this clause, the Contractor may submit to the State a proposal to revise or replace that Training Program, or the State may notify the Contractor of any amendment to or replacement of that Training Program which it considers reasonably necessary. To the extent that any such revision is approved (with or without amendment), the Training Program will take effect as revised under this subclause (h).

9.5 Training and qualifications of Contract Workers

- (a) The Contractor must ensure that each Contract Worker:
 - (i) has satisfactorily completed the Pre-Service Induction Program approved by the State under clause 9.4 before the Contract Worker has any contact with Prisoners;
 - (ii) has satisfactorily completed all Specific Training Programs approved by the State under clause 9.4 before the Contract Worker commences performance of any duties and functions to which the Specific Training Program relates; and
 - (iii) satisfactorily completes any Ongoing Training Programs approved by the State under clause 9.4 as may be required from time to time for the purposes of this Agreement.
- (b) A Contract Worker will be deemed to have satisfactorily completed a Training Program if the Contract Worker has been formally assessed as having passed the relevant Training Program or, where no formal assessment is required to be made, the Contract Worker has completed the class hours scheduled for that Training Program.
- (c) The Contractor must provide the State with the information necessary for the State to assess the Contractor's compliance with this clause 9.5, or to determine that the Training Programs for Contract Workers have been satisfactorily completed, as the case may be, within 14 days after receiving a written request from the State for such information.

Acacia Prison Services Agreement

9.6 Contract Worker uniforms

- (a) Subject to subclause (b), the Contractor must ensure that all Contract Workers required to perform Custodial Functions wear uniforms at all times when performing the Services.
- (b) The style of any uniform to be worn by Contract Workers performing Custodial Functions:
 - (i) must be distinguishable from the style of uniform worn by the employees of the State and the State's Associates; and
 - (ii) is subject to the prior approval of the State.

9.7 Use of force by Contract Workers

- (a) The Contractor must not, and must ensure that Contract Workers do not, use force or instruments of restraint to control Prisoners or the behaviour of a Visitor other than:
 - (i) to the degree permitted by, and in accordance with the requirements of, the Prisons Act and any other Legislative Requirements; and
 - (ii) at the minimum level and for the minimum time necessary to control the relevant behaviour and only where no other means of control is reasonably available.
- (b) The Contractor must ensure that the use of force and instruments of restraint by Contract Workers pursuant to this clause 9.7, and the degree to which force and instruments of restraint are used, are reasonable in the circumstances.
- (c) The Contractor acknowledges that the Prisons Act empowers the CEO to authorise the use of force by Contract Workers against a Prisoner or Prisoners in certain circumstances, including the degree of force to be used.

9.8 Removal of Contract Workers

- (a) The State may, at any time by notice to the Contractor:
 - (i) withdraw its approval of the engagement of any Contract Worker; and
 - (ii) require the Contractor or, in the case of a Contract Worker engaged by a Subcontractor, require the Contractor to cause a Subcontractor, to terminate the engagement of any Contract Worker of whom the State has withdrawn its approval and remove that person from:
 - (A) the Prison; and
 - (B) the performance of any Services.
- (b) If the State issues a notice under subclause (a), the Contractor must comply with the State's notice and must not thereafter engage, or allow that person to be engaged by a Subcontractor:
 - (i) at the Prison without the State's prior consent; or

Acacia Prison Services Agreement

- (ii) in any capacity without the State's prior consent, which consent may not be unreasonably withheld.
- (c) The Contractor must provide the State with the information necessary for the State to determine whether to withdraw its approval of the engagement of any Contract Worker within 14 days after receiving a written request from the State for such information.

9.9 High-Level Security Work

- (a) The Parties acknowledge that the Prisons Act permits certain Contract Workers to perform High-level Security Work and the Contractor agrees that the requirements of Part IIIA Division 4 of the Prisons Act apply to any Contract Workers performing, or proposing to perform, High-level Security Work.
- (b) In addition to any requirements in this clause 9 applying to Contract Workers generally, the Contractor must ensure that each Contract Worker who performs High-level Security Work:
 - (i) holds the necessary permit and all other authorisations as may be required under the Prisons Act to perform that High-level Security Work;
 - (ii) performs the High-level Security Work in accordance with the relevant permit and any conditions and limitations specified in that permit and all other authorisations; and
 - (iii) has received all training as may be required under the Prisons Act to perform that High-level Security Work.
- (c) The Contractor acknowledges the CEO's power under the Prisons Act to:
 - (i) determine the suitability of any applicant for a permit to perform High-level Security Work having regard to the matters referred to in section 15P of the Prisons Act in respect of the applicant;
 - (ii) refuse to issue a permit to perform High-level Security Work in accordance with section 15S of the Prisons Act;
 - (iii) determine the suitability of a Contract Worker, in accordance with section 15T of the Prisons Act, to continue to perform High-level Security Work; and
 - (iv) suspend or revoke a permit issued to perform High-Level Security Work under section 15U of the Prisons Act.
- (d) The Contractor must, on request by the State:
 - (i) assist the State to make the enquiries contemplated under section 15T(1) and 15Q(1) of the Prisons Act about a Contract Worker who applies for a permit to perform High-level Security Work, including any enquiries about the honesty and integrity of the Contract Worker's known associates; and
 - (ii) provide to the State the information contemplated under section 15T(2) and 15Q(2) of the Prisons Act.

Acacia Prison Services Agreement

- (e) In this clause 9.9 the word “perform” includes the exercise of a power, responsibility or authority.

9.10 State’s approvals under this clause

The Contractor acknowledges that an approval given by the State under this clause 9 does not imply:

- (a) any release of the Contractor from the Contractor’s Obligations; or
- (b) any assumption by the State of any responsibility or liability as to the adequacy of the Contractor's staffing arrangements to meet the Contractor’s Obligations.

9.11 Contractor to keep records relating to Contract Workers

The requirements of clause 13 in relation to records apply to the Contractor’s Obligations under this clause and the Contractor must, in particular, keep records of the following matters relating to each Contract Worker:

- (a) the name, address and relevant personal details of the Contract Worker;
- (b) the results of the Contractor’s pre-engagement enquiries as to suitability to perform Services and the Contract Worker’s resume;
- (c) the qualifications, accreditation, permits and licences held, and training completed, by the Contract Worker;
- (d) any disciplinary proceedings conducted against the Contract Worker arising in connection with the performance of the Services;
- (e) any offence for which the Contract Worker has been charged; and
- (f) any other material matters relating to the Contract Worker or their performance of the Services and any matters of which the State may notify the Contractor from time to time.

9.12 Payment of Contract Workers

The State may, not earlier than 10 Business Days before a payment is due to be made to the Contractor under this Agreement, direct the Contractor to:

- (a) provide to the State a statutory declaration by a representative of the Contractor (or any Subcontractor where any Contract Workers are engaged by that Subcontractor) who is in a position to know the facts declared, that all Contract Workers have, at the date of the direction, been paid all moneys due and payable to them in connection with the provision of the Services; and
- (b) provide documentary evidence that, at the date of the direction, all Contract Workers have been paid all moneys due and payable to them in connection with the provision of the Services.

9.13 Withholding payment

If the Contractor fails, within 5 Business Days after a direction by the State, to provide any statutory declaration or the documentary evidence required under clause 9.12 the State

Acacia Prison Services Agreement

may withhold payment of any money due to the Contractor until the State receives that statutory declaration or documentary evidence.

9.14 Form of statutory declaration

Any statutory declaration that the Contractor provides must be in a form approved by the State.

9.15 Direct payments

- (a) Subject to subclause (b), the State may, on behalf of the Contractor or any Subcontractor, and out of monies payable to the Contractor, make payments directly to any Contract Worker as the State may determine.
- (b) The State must not make a payment under subclause (a), unless:
 - (i) the State has given notice to the Contractor that the State intends to make the payment; and
 - (ii) the Contractor does not, within 5 Business Days of service of the notice under subclause (b)(i), notify the State in writing that there is a dispute between the Contractor (or, where relevant, a Subcontractor) and the Contract Worker and that it is not appropriate for the State to make the payment specified in subclause (a).
- (c) If any Contract Worker:
 - (i) obtains a court order in respect of any unpaid money; and
 - (ii) produces to the State that court order and a statutory declaration that the money in question remains unpaid,the State may pay the amount of the order, and costs included in the order, to that Contract Worker.

9.16 Effect of direct payment

If the State makes a payment to any Contract Worker as contemplated in clause 9.15 or in compliance with any Act or requirement of a Government Agency, the State may deduct or set off that amount from or against any money payable by the State to the Contractor.

10. INDUSTRIAL RELATIONS

10.1 Good relations

The Contractor must use reasonable endeavours to maintain good industrial and employee relations with the Contract Workers.

10.2 Industrial disputes

If an industrial dispute, ban, limitation of work or denial of facilities or services involving any Contract Workers occurs, or is threatened, the Contractor must:

- (a) immediately inform the State and continue to keep the State informed throughout the course of the dispute, ban, limitation or denial;

Acacia Prison Services Agreement

- (b) take all reasonable action required to bring the dispute, ban, limitation or denial to an end in the shortest time practical, including notifying the dispute to the relevant state or federal Industrial Relations Commission;
- (c) take all reasonable action to ensure that the Contract Workers conform to the provisions of any dispute settling procedures provided for in an applicable Industrial Instrument; and
- (d) while appropriate steps are implemented to resolve the dispute, ban, limitation or denial:
 - (i) continue to provide Essential Services; and
 - (ii) use reasonable endeavours to provide all other Services.

10.3 Minimising adverse effects

The State and the Contractor must co-operate to endeavour to minimise the adverse effect of any actual or threatened industrial dispute, ban, limitation of work or denial of facilities or services involving any Contract Workers.

11. PRISON, PRISON ACCESS AND PRISON MAINTENANCE

11.1 Access to Prison

- (a) The State grants the Contractor, the Contract Workers and any Subcontractors access to the Prison for the purposes of providing the Services and performing the Contractor's Obligations. The Contractor must not use the Prison for any other purpose without the State's prior consent.
- (b) Except as expressly provided by this Agreement, the Contractor's access to the Prison ceases at the end of the Operation Period, and the Contractor must not, and must ensure that no Contract Worker or Subcontractor, uses or occupies the Prison for any purpose after that date, except with the State's prior consent.
- (c) The Contractor must, and must ensure that all Contract Workers and Subcontractors in the Prison:
 - (i) comply with those security measures in relation to the Prison as directed by the State;
 - (ii) carry suitable identification while in the Prison;
 - (iii) not examine, copy, remove or otherwise interfere with any thing on or in the Prison except for the purpose of performing the Services; and
 - (iv) comply with the directions given by the State from time to time in relation to its access to the Prison.
- (d) Where the State gives a direction under subclauses (c)(i) or (c)(iv) and the direction involves any variation of the Services, the provisions of clause 16.4 will apply as if the direction was given under clause 16.2.

Acacia Prison Services Agreement

- (e) The rights granted to the Contractor under this clause do not:
 - (i) create any proprietary interest in the Prison; or
 - (ii) confer any exclusive occupation of the Prison.
- (f) The Contractor must not:
 - (i) create, or permit to be created, any Encumbrance over the Prison; or
 - (ii) permit any person other than Contract Workers and Subcontractors, to use or occupy the Prison without the State's prior consent or except as otherwise specified in this Agreement.
- (g) The Contractor must not store any property (other than the Contractor's Resources), or permit any Contract Worker or Subcontractor, to store any property, at the Prison.
- (h) The Contractor acknowledges that the access rights under this clause are subject to the State's and the State's Associates' unfettered 24 hour access to enter onto the Site and to access any part of the Prison subject to compliance with the Contractor's security procedures applying to movement of persons within the Prison. In particular, the State may at any time:
 - (i) inspect the state of repair and condition of the Prison; and
 - (ii) carry out works to the Prison, subject to consulting with the Contractor to minimise any interference with the provision of the Services or the Contractor's Obligations.

11.2 Contractor to provide space and facilities

- (a) The Contractor must provide the State and the Maintenance Contractor with access to and use of those working areas and facilities at the Prison as they may reasonably require to perform their functions, including:
 - (i) a secure office area with sufficient working space for five employees or agents of the State in locations nominated by the State;
 - (ii) a secure office area with sufficient working space for two employees or agents of the Maintenance Contractor and a maintenance workshop and storage space for use by the Maintenance Contractor of a size and standard at least equivalent to those in existence immediately prior to the Commencement Date;
 - (iii) power, air-conditioning, desks, chairs, telephones and lockable storage facilities in office areas contemplated under subclauses (i) and (ii) and access to staff meal areas, toilets and meeting facilities;
 - (iv) reasonable use of office equipment at the Prison, including reasonable use of facsimile machines and photocopiers;
 - (v) meals at no cost for employees and agents of the State or the Maintenance Contractor while at the Prison; and

Acacia Prison Services Agreement

- (vi) for the State only, five computers which:
 - (A) provide continuous interface and access to the Contractor Computer on a 24 hour per day and 7 day per week basis (except when maintenance is required from time to time); and
 - (B) permit full electronic transfer from the Contractor Computer of all information concerning the Services and performance of the Contractor's Obligations.

11.3 Maintenance and repair of the Prison

- (a) The Contractor must undertake all necessary day to day maintenance, cleaning and gardening, required to maintain the Prison in a neat, clean and tidy condition including the following:
 - (i) the regular cleaning of all parts of the Prison including the grounds;
 - (ii) arranging all necessary minor painting to maintain the proper decoration and presentation of the Prison, including painting to remove any graffiti or marks on the walls within the Prison up to a height of 3 metres; and
 - (iii) all necessary gardening, including the tending of plants and the cutting of grass.

The Contractor is responsible for supplying, at its own cost, all equipment and consumables necessary to comply with this subclause.

- (b) Subject to subclause (a), the State and the Contractor acknowledge that the responsibility for:
 - (i) general preventative and reactive maintenance of the Prison Building; and
 - (ii) the servicing, repair and maintenance and, when necessary, the replacement of, Prison Equipment,

(Prison Maintenance) will be undertaken by the Maintenance Contractor.

- (c) The Contractor must consult and co-operate with the State and the Maintenance Contractor in relation to all aspects of Prison Maintenance. In particular, the Contractor must:
 - (i) promptly notify the State and the Maintenance Contractor of any servicing, repair, maintenance or replacement required to the Prison Building or Prison Equipment;
 - (ii) act reasonably in allowing the Maintenance Contractor and its employees, agents and contractors access to the Prison to carry out Prison Maintenance;
 - (iii) make prison escorts available to the Maintenance Contractor at no cost to enable the Maintenance Contractor to carry out Prison Maintenance, and
 - (iv) make Prisoners available to the Maintenance Contractor at no cost in the performance of Prison Maintenance as part of the Contractor's Prison Industry program.

Acacia Prison Services Agreement

- (d) The Contractor must perform the Contractor's Obligations and provide the Services in such a way as not to increase the scope or frequency of Prison Maintenance at the Prison. If the State, acting reasonably, forms the opinion that any of the Contractor's operational practices or procedures at the Prison are causing material increases in the scope or frequency of Prison Maintenance in breach of this subclause, the State may direct the Contractor to change its operational practices and procedures so as to comply with this subclause and the Contractor must comply with that direction except to the extent that the direction is inconsistent with applicable Legislative Requirements. The Contractor will not be entitled to any adjustment to the Operation Payments in respect of a direction under this subclause.
- (e) If any part of the Prison Building or any Prison Equipment or any of the State Resources is damaged or destroyed as a result of the act or omission of the Contractor, any Contractor's Associate, any Contract Worker, any Subcontractor or any Prisoner, the Operator must notify the State and indemnify the State for any Loss incurred by the State as a result of that damage or destruction, including any payments required to be made by the State to the Maintenance Contractor to repair, reinstate or replace the Prison Building or Prison Equipment or State Resources.
- (f) The State must monitor and manage the Maintenance Contractor's performance under the Maintenance Agreement. The Contractor must notify the State of any failure by the Maintenance Contractor to perform its obligations under the Maintenance Agreement and the State must take such action as is reasonable in the circumstances to investigate and seek remedy of any such failure. Nothing in this subclause requires the State to institute dispute processes or litigation against the Maintenance Contractor.
- (g) The State may establish a Maintenance Committee comprising representatives of the Contractor, the Maintenance Contractor and the State. The purpose of the Maintenance Committee will be to discuss any issues arising in respect of the Prison Maintenance and the interface between the Contractor and the Maintenance Contractor at the Prison. The State will determine the regularity, timing and procedures of the Maintenance Committee. The Contractor must make a member of its senior executive team available to be a member of the Maintenance Committee and to attend meetings of the Maintenance Committee.
- (h) The State may, by notice to the Contractor, request the Contractor to accept a novation of the Maintenance Agreement from the Maintenance Contractor. The State's notice under this subclause may be issued at any time within 12 months after the Commencement Date and must specify a novation date which is no earlier than two months after the date of the notice and no later than six months after the date of the notice. If the State issues a notice under this subclause, the Parties must negotiate in good faith the terms of the novation and any changes required to this Agreement. If the Parties have not reached agreement on the terms of the novation and changes required to this Agreement by the novation date specified in

Acacia Prison Services Agreement

the State's notice, their obligation to negotiate in good faith under this subclause will cease.

11.4 Utility Services

The Contractor must:

- (a) arrange the provision of each Utility Service to the Prison; and
- (b) pay all costs in respect of each Utility Service to the person or entity which provides the Utility Service including consumption costs, connection costs, rentals and minimum charges.

11.5 Cell Condition

- (a) The Contractor must not accommodate Prisoners in any cell at the Prison which is not fit for purpose. In order for a cell to be fit for purpose it must satisfy the following requirements:
 - (i) the cell alarm, which has an integrated cell call intercom system to allow for emergency communication during lock down periods, must be fully operational;
 - (ii) the fire and smoke detection system must be fully operational;
 - (iii) the officer lock on the cell door must be fully operational and the inspection window on the cell door must be enclosed with hardened transparent material;
 - (iv) the window and frame must be secure and in good condition;
 - (v) the toilet, shower and handbasin must be fully operational;
 - (vi) the cell must have access to a supply of potable water;
 - (vii) the cell inspection lights must be fully operational;
 - (viii) all power and light fittings must be safe;
 - (ix) if the cell is used for a special purpose such as punishment, observation or crisis care, it must be free of any hanging points and closed circuit television must be installed and operational;
 - (x) the furniture and fittings must be in serviceable condition; and
 - (xi) the cell must be free of health and safety hazards.
- (b) Except as set out in section 2.4(d) of Schedule 4, the Contractor acknowledges that all cells in the Prison are fit for purpose as at the Commencement Date, subject to any issues identified by a review of cell condition to be completed jointly by the Contractor and the State prior to the Commencement Date. The Contractor and the State must each maintain a register of cells which are fit for purpose.
- (c) The Contractor must notify the State as soon as practicable, but in any event within 24 hours, if any cell ceases to be fit for purpose and of the reasons why the cell has ceased to be fit for purpose. If the reason that the cell is not fit for purpose is due to a requirement for Prison Maintenance or an act or omission of the Maintenance

Acacia Prison Services Agreement

Contractor, the Contractor must notify the Maintenance Contractor at the same time as it notifies the State. The Contractor must notify the State as soon as practicable after it becomes aware that the cell is fit for purpose again. Each of the State and the Contractor must update its register of cells by reference to the notifications under this subclause.

- (d) If one or more Prisoners must be moved out of the Prison because of unavailability of cells due to a requirement for Prison Maintenance or an act or omission of the Maintenance Contractor, the State must continue to pay the Contractor the Operation Payments as if those Prisoners remained at the Prison, provided that the State may deduct an amount equal to any cost savings achieved by the Contractor as a result of the reduced number of Prisoners in the Prison. The Contractor must, on request by the State, provide the State with a reasonable estimate of the cost savings achieved as a result of the reduced number of Prisoners at the Prison.

11.6 Nuisance, injurious conduct and misuse

The Contractor must not, and must not permit any other person to:

- (a) do any act or thing or use any plant or machinery in the Prison that, through noise, odours, vibration or otherwise, is a nuisance, offensive or causes damage or disturbance to any person in or in the vicinity of the Prison;
- (b) use any plant, equipment or machinery in a way that is dangerous or likely to cause harm to any person in or in the vicinity of the Prison;
- (c) misuse or abuse the Prison Building, any Prison Equipment, the State Resources or the Contractor Resources or any amenities in the Prison;
- (d) use the Prison Building, any Prison Equipment, the State Resources or the Contractor Resources or any amenities in the Prison for any purpose other than the purpose for which they were constructed or installed or for any purpose which is prohibited by any Legislative Requirement; or
- (e) place in any Prison Equipment, any State Resources, any Contractor Resources or any amenity in the Prison, any sweepings, rubbish, rags or other things that may damage, block or harm the Prison Equipment, State Resources or any Contractor Resources or amenity.

11.7 No alterations or damage

The Contractor must:

- (a) not, and must not permit any other person to, alter or otherwise interfere with, or damage:
 - (i) the Prison, any State Resources or any amenity at the Prison; and
 - (ii) any of the Contractor Resources; and
- (b) take all reasonable steps to protect and preserve the property referred to in subclause (a) from loss, damage or destruction of any kind.

Acacia Prison Services Agreement

11.8 Not to pollute

The Contractor must not, and must not permit anyone else to, cause pollution in, or Contamination of, the Prison or the Site by garbage, waste matter, oil or other pollutants or Hazardous Material, whether by storm water or other run off, or arising from the use of the Prison or the Site.

11.9 Removal of garbage

The Contractor must promptly collect and dispose of all garbage, waste matter, oil and other pollutants from the Prison and the Site in a manner required or approved by the State and every Government Authority having control over the disposal of waste matter and the protection of the Environment.

11.10 Inflammable substances

The Contractor must not, and must not permit any other person to use within, or store in, the Prison or on the Site any chemicals, acetylene, petrol, alcohol or any solid, liquid or gas of any flammable, volatile or explosive nature for any purpose except:

- (a) to the extent that item is necessary for the provision of the Services; or
- (b) if the State has given the State's prior approval for the Contractor to use or store the item at the Prison or on the Site.

11.11 Compliance with Environmental Law

- (a) The Contractor must, and must ensure that all persons at the Prison other than the State's Associates and the Maintenance Contractor, comply with Environmental Law applicable to:
 - (i) performance of the Contractor's Obligations;
 - (ii) the provision of the Services; and
 - (iii) the Prison.
- (b) The Contractor must:
 - (i) maintain adequate procedures to monitor the Contractor's, each Contract Worker's and each Subcontractor's compliance with Environmental Law in relation to the provision of the Services; and
 - (ii) immediately notify the State if the Contractor, any Contract Worker or any Subcontractor, fails to comply with Environmental Law.

11.12 Removal of Contamination

- (a) If any Contamination or Hazardous Materials are discovered at the Prison or on the Site, the Contractor must immediately notify the State and:
 - (i) remove the Contamination or Hazardous Materials from the Site, including the cause of that Contamination or Hazardous Materials; and
 - (ii) comply in all respects with any Legislative Requirements in relation to any Contamination or Hazardous Materials.

Acacia Prison Services Agreement

If the Contractor does not remove the Contamination or Hazardous Materials within 10 Business Days of discovery, the State may remove the Contamination or Hazardous Materials and the Contractor must reimburse the State for the cost of that removal on demand from the State.

- (b) Sub-paragraph (a)(i) does not apply to Hazardous Materials which are kept at the Prison or on the Site for operational reasons and which, if used with care and in compliance with all Legislative Requirements, do not pose a risk to person, property or the Environment.

11.13 Expansion of the Prison

The Contractor acknowledges that the State may at any time carry out works to expand the Prison Buildings and the facilities at the Prison. The Contractor must co-operate with the State, the State's Associates and their respective contractors and employees in relation to any expansion works. The State must use reasonable endeavours to minimise disruption at the Prison during any expansion works. The State will bear the costs of any prison escorts, and utility usage charges, required to carry out the expansion works.

12. CONTRACTOR RESOURCES

12.1 Provision of Contractor Resources

- (a) The Contractor is responsible for providing all:
 - (i) goods, articles, vehicles, plant, and equipment;
 - (ii) computers and computer based systems, software, hardware, and programmes; and
 - (iii) other property,which are required to properly perform the Services and the Contractor's Obligations (***Contractor Resources***), but having regard to the Contractor's rights to access and use the Prison Equipment and, where agreed with the State, the State Resources.
- (b) The Contractor must ensure that the Contractor Resources are at all times fit and suitable for performing the Services and the Contractor's Obligations by:
 - (i) arranging for all necessary repairs, replacement of parts and components; and
 - (ii) replacing any Contractor Resources,as may be necessary from time to time or as directed by the State (acting reasonably) and otherwise to meet the requirements of Best Industry Practice.
- (c) The Contractor acknowledges that the State may, at its discretion:
 - (i) allow the Contractor to access and use the State Resources on terms acceptable to the State;

Acacia Prison Services Agreement

- (ii) provide any additional State Resources for access and use by the Contractor; and
- (iii) withdraw from access or use by the Contractor, any State Resources provided by the State, for any period.
- (d) The Contractor must not make any alterations or additions to any State Resources without the prior consent of the State.
- (e) The Contractor must acquire and hold Contractor Resources in a manner that will enable it to comply with clause 20.10 at the end of the Operation Period.

12.2 Materials

Where the Contractor must use any materials, parts or components in relation to the Contractor Resources, or otherwise in performing the Services, the Contractor must use suitable new materials, parts or components unless the State agrees otherwise.

12.3 Warranties

The Contractor must obtain, for the benefit of the Contractor and the State, all manufacturers' and other warranties available for the maximum periods that they are available in relation to the Contractor Resources.

12.4 Contractor Resources Register

- (a) The Contractor must maintain a register of Contractor Resources (***Contractor Resources Register***) listing and identifying each item of the Contractor Resources used in the performance of the Services and indicating the item's ownership. Each item of the Contractor Resources must be marked with its unique identifying number, which must also be shown in the Contractor Resources Register.
- (b) The State is entitled to inspect any Contractor Resources and review the Contractor Resources Register at any time without prior notification to the Contractor.

13. REPORTING AND RECORDS

13.1 Reporting of Notifiable Incidents

If the Contractor becomes aware of the occurrence of a Notifiable Incident, the Contractor must:

- (a) within 1 hour after becoming aware of its occurrence, notify the State of the occurrence; and
- (b) within 8 hours of becoming aware of its occurrence, provide to the State a written report in respect of the occurrence, prepared in accordance with the policies and content and format requirements of the State, as notified to the Contractor from time to time.

Acacia Prison Services Agreement

13.2 Notification of defective performance

- (a) The Contractor must promptly notify the State in writing of:
- (i) any defective or sub-standard performance of any of the Services; and
 - (ii) any:
 - (A) notice from a Government Agency;
 - (B) Court order; or
 - (C) notice or demand in writing from any third party,received by the Contractor relating to the Prison or the Services. The Contractor's notice must attach a copy of that notice, demand or order.
- (b) Where:
- (i) the Contractor informs the State of a matter specified in subclause (a); and
 - (ii) the State directs the Contractor to undertake a matter or thing arising from a matter specified in subclause (a),
- the Contractor must comply with the direction given by the State. A direction under this clause will not constitute a Variation Notice for the purpose of clause 16.

13.3 Periodic reporting by Contractor

- (a) The Contractor must monitor the performance of the Services and provide to the State the following reports:
- (i) by no later than 10 Business Days after the end of each Operation Quarter, a report including:
 - (A) a description of the performance of the Services in the relevant Operation Quarter, by reference to the Contractor's Obligations, including any incidents which are the subject of the Performance Measures;
 - (B) a summary of each Notifiable Incident that occurred in the Operation Quarter;
 - (C) particulars of any other matters arising under this Agreement during the relevant Operation Quarter which affected or may affect the nature, quality, function or performance of the Services or the Contractor's Obligations or which may diminish the respect or confidence of the public in, or otherwise impact on the reputation of, the Prison or the State;
 - (D) a summary of the activities and meetings of the Prison Industry reference group established under clause 8.8;
 - (E) any other particulars as the State may require in respect of any matter arising in connection with this Agreement; and

Acacia Prison Services Agreement

- (F) any actions taken or proposed to be taken by the Contractor to address the matters identified in respect of the Operation Quarter; and
 - (ii) by no later than one month after the end of each Operation Year, a report including the matters set out in subclauses (A) to (F) of subclause (a)(i) except that the report must address those matters in respect of the Operation Year.
- (b) As soon as practicable after the end of each financial year, and in any event not later than 4 months after the end of each financial year, the Contractor must provide to the State a copy of the most recently audited financial accounts of the Contractor and of the Guarantor. For the purposes of this subclause (b), *financial year* means, in respect of the Contractor, the financial year adopted for reporting purposes by the Contractor and, in respect of the Guarantor, the financial year adopted for reporting purposes by the Guarantor.
- (c) Each of the reports and accounts submitted under subclause (a) must be:
 - (i) prepared in accordance with the policies and content and format requirements as the State may notify to the Contractor from time to time; and
 - (ii) accompanied by any working papers and supporting documents which may assist interpretation or analysis of those reports or accounts.

The State must act reasonably in notifying the Contractor under subclause (i) of its requirements regarding the content and format of reports and accounts and must provide reasonable notice of any such requirements.
- (d) The State may at any time request, and the Contractor must provide to the State or the State's Associates within a reasonable period, any other information in relation to any specific event or generally in relation to the performance of the Services or the Contractor's Obligations.

13.4 Monthly meetings

- (a) The Contractor Superintendent and the Contract Manager must meet each month to discuss the Contractor's performance in providing the Services and performing the Contractor's Obligations during the preceding month and any other matters relating to the operation of the Prison.
- (b) At each monthly meeting following the receipt by the State of a Quarterly Report, the Contractor Representative and the Contract Manager must:
 - (i) discuss the contents of the Quarterly Report; and
 - (ii) endeavour to agree:
 - (A) whether any incidents occurring during the Operation Quarter to which the Quarterly Report relates (whether or not such incidents were reported in the Quarterly Report), are the subject of the Performance Measures; and

Acacia Prison Services Agreement

- (B) any actions to be taken to address any performance or other matters identified in respect of the Operation Quarter.
- (c) The Contract Manager is responsible for convening monthly meetings and may do so by giving not less than 5 Business Days' notice to the Contractor Representative. The Contract Manager may invite any other person to attend and participate in all or part of any monthly meetings.

13.5 Annual performance reviews

- (a) The Contractor acknowledges that the State may conduct an annual performance review of the Contractor's performance during each Operation Year, which will include consideration of:
 - (i) the information required to be included in the Annual Report for the relevant Operation Year;
 - (ii) the continuing appropriateness of the Performance Measures and the Performance Linked Fee Percentages; and
 - (iii) areas for improvement of the Services.
- (b) The Contractor must co-operate with, and provide any assistance reasonably requested by, the State in the conduct of the annual performance review contemplated by this clause. As soon as reasonably practicable after each annual performance review is completed, the State will provide to the Contractor a report in relation to the matters addressed by the annual performance review, including:
 - (i) the continuing appropriateness of the Performance Measures and the Performance Linked Fee Percentages; and
 - (ii) areas for improvement of the Services for the next Operation Year.
- (c) The Contract Manager and the Contractor Representative must meet within 10 Business Days after the Contractor receives a copy of the report specified in subclause (b):
 - (i) to discuss the report; and
 - (ii) agree any changes to the Performance Measures and the Performance Linked Fee Percentages.
- (d) Subject to subclauses (e) and (f), the Contractor must implement the State's recommendations contained in the report.
- (e) The State must give a direction in accordance with clause 16.2 if:
 - (i) the State's recommendations in the report involve a variation to the Services; and
 - (ii) the State considers it appropriate that they be implemented.
- (f) If the Contract Manager and the Contractor Representative cannot agree changes to the Performance Measures and the Performance Linked Fee Percentages, then, within 10 Business Days after either party gives notice to the other of such failure to agree, the Department's Director, Contracted Services (or a person occupying an

Acacia Prison Services Agreement

equivalent position within the State) and a senior executive of the Contractor must meet and must negotiate in good faith, to agree such changes. If these senior executives cannot agree such changes within 10 Business Days, the matter will be referred for consideration at the next meeting of the Joint Management Board.

13.6 Annual Prisons Act reporting by CEO

The Contractor:

- (a) acknowledges the requirement of section 15G of the Prisons Act for the CEO to prepare and deliver to the Minister by 30 September each year an annual report on each contractor who provided prison services under a contract in the preceding 12 months; and
- (b) without limiting any of the provisions of this clause 13, agrees to provide such information in relation to the performance of the Contractor's Obligations and the provision of the Services, and to provide reasonable assistance to the CEO as the CEO may require, to meet the requirements of section 15G of the Prisons Act in relation to the Contractor.

13.7 Reporting future disruption to Services

- (a) Whenever a Party becomes aware of any thing that will, or is likely to, disrupt the performances of the Services, that Party must promptly notify the other Party of:
 - (i) the cause of the disruption; and
 - (ii) the anticipated extent of the disruption,whether that thing is an event of Force Majeure or not.
- (b) Whenever the performance of the Services is, or will be, disrupted the State may (without affecting its other rights under this Agreement) give a direction to the Contractor to:
 - (i) defer the performance of those Services; or
 - (ii) omit that part of the Services.

13.8 Contractor to keep records

- (a) The Contractor must establish and maintain true, up to date and complete records relating to all aspects of the provision of the Services and compliance with the Contractor's Obligations including:
 - (i) the ownership, operation and maintenance of Contractor Resources;
 - (ii) its performance against the Operation Service Requirements and Performance Measures, as required by the State;
 - (iii) all its Intellectual Property Rights;
 - (iv) its collection, handling and use of Confidential Information;
 - (v) any information relating to the Prison or a Prisoner as the State may require to be recorded;

Acacia Prison Services Agreement

- (vi) any other records required to be kept as specified under any other clause of this Agreement.
- (b) The records referred to under subclause (a) must:
 - (i) incorporate the detail; and
 - (ii) meet the standards, reasonably required by the State, as notified to the Contractor from time to time.

13.9 Financial records

- (a) Without limiting any other provisions of this clause 13, the Contractor must maintain all those financial and financial planning records that would be expected of a private operator of prisons.
- (b) The records referred to in subclause (a) must:
 - (i) incorporate the detail; and
 - (ii) meet the standards, reasonably required by the State, as notified to the Contractor from time to time.

13.10 Ongoing access to records and information

- (a) The Contractor must, at the Contractor's cost:
 - (i) give the State and any persons authorised by the State (including its nominated auditors) full and free access to the records required to be kept in accordance with this clause 13, whether held at the Prison or elsewhere, and permit the State or such other authorised persons to remove or make copies of any of those records or any other original or copied documents or information held in the Contractor's possession relating to the Services or performance of the Contractor's Obligations; and
 - (ii) give the State all information required by the State to assess the Contractor's performance of the Services and the Contractor's Obligations.
- (b) Where any records or information required to be provided by the Contractor under this clause 13 are computerised, the Contractor must give the State and its authorised representatives the use of any computer facilities needed to access any of those records.
- (c) From the Commencement Date the Contractor must establish a link from the Contractor Computer to the Departmental System, using software and systems which are compatible with the Departmental System, so that the State, the State's Associates and their authorised representatives:
 - (i) have online 24 hour access to the records required to be kept in accordance with this clause 13; and
 - (ii) can print out and store the records required to be kept in accordance with this clause 13 on the Departmental System.

Acacia Prison Services Agreement

- (d) The Contractor must continually, as appropriate, upgrade the software and systems on the Contractor Computer.
- (e) When the Contractor undertakes an upgrade in accordance with subclause (d), the Contractor must as soon as practicable
 - (i) notify the State in writing; and
 - (ii) undertake the work and provide the facilities to ensure that it continues to comply with subclauses (b) and (c).

13.11 Records to be held

All records required to be maintained in accordance with this clause 13 must be held by the Contractor as required by the *State Records Act 2000* and all other applicable Legislative Requirements.

13.12 Legible reproductions

If any information or thing referred to in this clause 13 is stored or recorded in:

- (a) a medium other than paper; or
- (b) the Contractor Computer,

the Contractor must, as soon as practicable after the State's request, make available to the State a full, accurate and legible reproduction of that information or thing.

13.13 Electronic Prisoner information

- (a) From the Commencement Date, the Contractor must continue to operate and maintain the technology relating to electronic management of prisoner information as operated and maintained at the Prison immediately prior to the Commencement Date (the *Secure Transactional Environment for Prisoners System* or *STEPS*) and which has the following functionality:
 - (i) processing of orders and payment for purchases of Canteen Goods;
 - (ii) access to Canteen Goods price lists;
 - (iii) access to vending machine goods for purchase;
 - (iv) access to Prison policies and procedures;
 - (v) the storage of personal information in respect of each Prisoner and access by each Prisoner to his personal information including:
 - (A) Prisoner trust account details; and
 - (B) booked visits; and
 - (vi) monitoring of persons' movement around the Prison.

At any time after the Commencement Date, the Contractor may develop and, with the State's prior approval, implement manual systems for monitoring of persons' movement around the Prison to replace the function of STEPS described in subclause (vi).

Acacia Prison Services Agreement

- (b) The Contractor may submit to the State for its approval a proposal (including a timetable) for the development and implementation of systems utilising new or upgraded technology, which has at least the same functionality as STEPS, but which also communicates with, and is compatible with, the Departmental System. If the State approves the Contractor's proposal, the Contractor must implement the proposal in accordance with the timetable and the provisions of clauses 16.3 and 16.4 will apply as if the State's approval was a direction given under clause 16.2.

13.14 Retention of CCTV and telephone communications recordings

The Contractor must:

- (a) retain all CCTV recordings made within the Prison, in whatever media such recordings are made, for a period of 14 days and, at the State's request, promptly deliver any CCTV recordings to the State; and
- (b) promptly deliver all recordings of Prisoner telephone communications, in whatever media such recordings are made, to the State.

13.15 Inquiries under the Prisons Act

The Contractor:

- (a) acknowledges:
 - (i) the CEO's power under the Prisons Act to establish an inquiry into, and report on any matter, incident or occurrence concerning, the security or good order of the Prison, or concerning any Prisoner; and
 - (ii) the role of the Department's Internal Investigations Unit under Policy Directive 40, to conduct an investigation into any matter arising from, or that impacts on, the Prison; and
- (b) agrees to, and to ensure that the Subcontractors and Contract Workers do, cooperate fully, as may be required, with any inquiries or investigations referred to in subclauses (a)(i) and (ii) and any other inquiries carried out by the Corruption and Crime Commission, the Western Australia Police and other law enforcement agencies of the State or the Commonwealth in respect of any matter in relation to the Prison.

13.16 Periodic testing

The State may conduct periodic testing of any aspect of the Services or the Prison to verify that the Contractor has complied with the Contractor's Obligations, and the Contractor must fully co-operate in allowing those tests to be undertaken.

13.17 Access to Contract Workers

The Contractor must allow the State and the State's Associates to have unrestricted access to each Contract Worker and the Contractor will use the Contractor's reasonable endeavours to ensure that the Contract Worker:

- (a) is available for interview by;

Acacia Prison Services Agreement

(b) provides information as is required by; and

(c) otherwise co-operates with,

the State and the State's Associates in undertaking any matter under or for the purposes of this Agreement.

14. INTELLECTUAL PROPERTY

14.1 Intellectual Property Rights warranties by Contractor

The Contractor represents and warrants to the State that:

- (a) in performing the Services, the Contractor will not infringe or contravene any third party rights, including any third party Intellectual Property Rights, or any Legislative Requirements; and
- (b) use of any Contractor Resources or Intellectual Property by the Contractor will not infringe or contravene any third party rights, including any third party Intellectual Property Rights or any Legislative Requirements.

14.2 Intellectual Property Rights of State

- (a) All Intellectual Property Rights vested in the State, whether before or after the Signature Date, remain vested in and the property of the State, provided that the State grants to the Contractor a non-exclusive, royalty-free licence to use those Intellectual Property Rights of the State as may be required for the purposes of performing the Services during the Operation Period, subject at all times to the Contractor complying with its obligations under clause 25 in respect of the Confidential Information.
- (b) With the exception of subclause (a), the Contractor has no other entitlement or interest, and no right to acquire an entitlement or interest, in the Intellectual Property Rights referred to in subclause (a).
- (c) To the extent permitted by law, and subject to subclause (d), the Contractor irrevocably grants to the State all its right, title and interest in all Intellectual Property Rights in the Intellectual Property which has been invented, created or authorised by or on behalf of the Contractor, or a Subcontractor, specifically for use at, or in the course of operating, or providing the Services or performing the Contractor's Obligations at, the Prison, including:
 - (i) all data and statistics recorded or collected in relation to the operation of the Prison, the provision of the Services and compliance with the Contractor's Obligations;
 - (ii) all software used or developed for the recording or collecting of the data and statistics referred to in subclause (i); and
 - (iii) professional management, detention, case and medical files in relation to Prisoners.

Acacia Prison Services Agreement

- (d) Subclause (c) does not apply to any Intellectual Property Rights which the State has agreed in writing are to remain vested in the Contractor.

14.3 Licence by Contractor to pre-existing Intellectual Property Rights

- (a) All Intellectual Property Rights:
 - (i) vested in the Contractor prior to the Signature Date;
 - (ii) vested in the Contractor during the period commencing on the Signature Date and ending on the expiry or earlier termination of this Agreement, excluding those Intellectual Property Rights granted to the State pursuant to subclause 14.2(c); or
 - (iii) to which subclause 14.2(d) applies,
remain vested in and the property of the Contractor or the third party owner, but the Contractor grants to the State a non-exclusive, royalty-free and irrevocable licence (with a right to sub-license) to exercise for any purpose any and all Intellectual Property Rights that exist in the Intellectual Property which is used by the Contractor in connection with the performance of the Services or the Contractor's Obligations.
- (b) The licence granted under subclause (a) will continue in force for a period of 12 months commencing on the expiry or earlier termination of this Agreement.

14.4 Licence by Subcontractors

The Contractor must ensure that any Subcontract is entered into on the same terms as apply to the Contractor under this clause 14, provided that where a Subcontractor is the owner of any Intellectual Property Rights that exist in the Intellectual Property used in connection with the performance of the Services or the Contractor's Obligations the Contractor must procure the Subcontractor to grant to the State a non-exclusive, royalty-free, perpetual and irrevocable licence to exercise any and all Intellectual Property Rights that exist in the Intellectual Property that is owned by the Subcontractor.

14.5 Sublicensing by State

- (a) The State may sub-licence its rights under clauses 14.3 and 14.4.
- (b) The licences referred to in clauses 14.3 and 14.4 are separate, severable and independent with respect to each distinct item of Intellectual Property Rights and each distinct item of Intellectual Property.

14.6 Moral Rights

- (a) To the extent permitted by law:
 - (i) the Contractor must, and must ensure that the Subcontractors and the Contract Workers, unconditionally and irrevocably consent to any use, reproduction and modification of, and any and all acts in relation to, all Intellectual Property Rights that are the subject of the licences referred to in this Agreement and this consent is to apply even if the conduct referred

Acacia Prison Services Agreement

to constitutes an infringement of any Moral Rights of the Contractor, a Subcontractor or any Contactor Worker; and

(ii) the conduct referred to in subclause (a), and which is consented to, includes the omitting of any attribution of the author.

(b) The consents referred to in subclause (a) are granted to the State, the State's Associates and any Successor Operator.

14.7 No right to compensation

For the avoidance of doubt:

(a) the State is not obliged to make any payment or other compensation to the Contractor or any Subcontractor in relation to the rights, licences or consents granted to the State, the State's Associates and the Successor Operator under this clause; and

(b) the Contractor is not obliged to make any payment or other compensation to the State in relation to the rights, licences or consents granted to the Contractor under this clause.

14.8 Contractor's assistance

The Contractor must provide to the State all reasonable facilities and assistance to enable the State to fully exercise its rights under this clause.

14.9 Intellectual Property Rights indemnity

The Contractor must, at all times, indemnify and keep the State indemnified from and against every Claim and Loss arising from:

(a) any infringement by the Contractor or any Contract Worker of the State's Intellectual Property Rights; and

(b) the use by the State, the State's Associates or any Successor Operator of any Intellectual Property Rights in a manner contemplated by this clause.

14.10 Survival of this clause

This clause 14 survives termination of this Agreement.

15. PAYMENTS

15.1 Operation Payments

(a) Subject to the Contractor punctually complying with the Contractor's Obligations, the State must pay to the Contractor the Operation Payments calculated in accordance with Schedule 2 during the Operation Period.

(b) Within 5 Business Days after the end of each Operation Month, the Contractor must invoice the State for the Operation Payment payable in respect of that Operation Month using an invoice format approved by the State and providing a

Acacia Prison Services Agreement

sufficient level of detail to enable the State to verify the calculation of the Operation Payment for that Operation Month.

- (c) Subject to the Contractor punctually complying with the Contractor's Obligations and the State being satisfied as to the accuracy of the invoice, the State must pay the amount of any invoice issued under subclause (a) to the Contractor within 14 days of receiving the invoice.

15.1A DAP Transition Payments

- (a) If in any Operation Month (the **Transition Month**), the DAP increases so that it moves from one DAP Band to a higher DAP Band, the State must pay the Contractor a DAP Transition Payment equal to the aggregate of:
 - (i) the Band Entry Costs for the applicable DAP Band for the Transition Month; and
 - (ii) the Band Entry Costs for each DAP Band between the applicable DAP Band for the Transition Month and the applicable DAP Band for the preceding Operation Month.

The DAP Transition Payment will be paid once in any Operation Year in respect of the upwards transition into or through any DAP Band despite the fact that the DAP may move up and down between and below those DAP Bands in the Operation Year.

- (b) For the purpose of this clause:
 - (i) A **DAP Band** is each of the number ranges set out in column A of Tables A, B or C of Schedule 2 (as applicable) and the applicable DAP Band for any Operation Month is the DAP Band within which the DAP for that Operation Month falls; and
 - (ii) The **Band Entry Costs** applicable to a DAP Band is the amount set out in Column F of Tables A, B or C of Schedule 2 (as applicable), multiplied by the CPI Adjustment as at the Review Date which immediately precedes the Transition Month.
- (c) Within 5 Business Days after the end of the Transition Month, the Contractor must invoice the State for the DAP Transition Payment payable in respect of the Transition Month using an invoice format approved by the State and providing a sufficient level of detail to enable the State to verify the calculation of the DAP Transition Payment for the Transition Month.
- (d) Subject to the Contractor punctually complying with the Contractor's obligations, and the State being satisfied as to the accuracy of the invoice, the State must pay the amount of any invoice issued under paragraph (c) within 14 days of receiving the invoice.

15.1B Initial Transition Payment

- (a) Subject to the Contractor punctually complying with the Contractor's obligations and the receipt of the invoice required under paragraph (b), the State must pay the

Acacia Prison Services Agreement

Contractor a Transition Payment of \$2,533,306 at the time of payment of the Operation Payment for the Operation Month ending 30 June 2006.

- (b) The Contractor must invoice the State for the Transition Payment at the time that it invoices the State for the Operation Payment for the Operation Month ending 30 June 2006.

15.2 Innovation Bonus

- (a) Where the Contractor proposes to implement:
 - (i) a new or varied system or procedure;
 - (ii) a new or varied technology; or
 - (iii) any other matter or thing,in connection with the Services which has the effect, or potential effect, of:
 - (iv) a decrease in the cost of providing Services; or
 - (v) improving the operation or management of the Prison,(in each case an ***Innovation***) and the Innovation will be transferable to:
 - (vi) other prisons operated by or on behalf of the State; or
 - (vii) to the State's criminal justice system,the Contractor may lodge an Innovation Application in accordance with this clause. (For the purpose of this clause an Innovation does not include any matter or thing which the Contractor is required to perform or undertake pursuant to another clause of this Agreement.)
- (b) The Contractor's Innovation Application must:
 - (i) detail the nature of the Innovation; and
 - (ii) incorporate a business case which demonstrates how the Innovation will satisfy the requirements in subclause (a).
- (c) The State must consider each Innovation Application from the Contractor and determine whether or not to approve the Innovation Application. Any approval by the State must identify the amount of the Innovation Bonus which will be payable on implementation of the Innovation and any specific conditions or requirements which must be satisfied before the Innovation Bonus will be paid. The determination as to whether or not to approve the Innovation Application and the amount of the Innovation Bonus will be in the absolute discretion of the State.
- (d) The State must notify the Contractor of its determination under subclause (c) within 3 months after receipt of the Innovation Application.
- (e) If the State approves the Innovation Application in accordance with subclause (c) the Contractor must proceed to implement the Innovation in accordance with the proposal contained in its Innovation Application and any conditions and requirements of the State specified in the State's approval.

Acacia Prison Services Agreement

- (f) Within one month after the end of each Operation Year, the Contractor may invoice the State all Innovation Bonuses payable in respect of all approved Innovations which have been implemented in that Operation Year. The Contractor's invoice must demonstrate that:
 - (i) each Innovation has been fully implemented in accordance with the Contractor's Innovation Application;
 - (ii) the Innovation has been tested and proven as meeting the objectives set out in subclause (a) and the objectives set out in the Innovation Application; and
 - (iii) any conditions or requirements set out in the State's approval have been satisfied.
- (g) Subject to the State being satisfied, acting reasonably, that the Contractor has demonstrated the matters set out in subclauses (f)(i) to (iii), and being satisfied as to the accuracy of the calculation of the Innovation Bonuses claimed in an invoice submitted under subclause (f), the State must pay the amount of the invoice to the Contractor within one month of receiving the invoice.
- (h) All Intellectual Property Rights in any Innovation developed and implemented in accordance with this clause will vest in the State unless the Contractor can demonstrate to the reasonable satisfaction of the State that the Intellectual Property Rights of the Innovation were pre-existing and that the Innovation has application to other operations of the Contractor or its Affiliates.
- (i) If the Intellectual Property Rights in any Innovation will not vest in the State in accordance with subclause (h), the Contractor grants the State a perpetual, irrevocable, non-exclusive, transferable licence (with the right to sub-license) to use and apply the Innovation with effect from the date of payment of an Innovation Bonus in respect of that Innovation.
- (j) The maximum amount payable by the State in any one Operation Year by way of Innovation Bonuses pursuant to this clause is \$250,000.
- (k) An Innovation Bonus in the amount of \$250,000 will be payable for the Operation Year ending 30 June 2007 on successful implementation of the Transition Plan. Within one month of successful implementation of the Transition Plan, the Contractor may invoice the State for the Innovation Bonus payable under this subclause. The Contractor's invoice must demonstrate that the Transition Plan has been successfully implemented. Subject to being satisfied, acting reasonably, that the Transition Plan has been successfully implemented, the State must pay the amount of the invoice within one month of receiving the invoice. No other Innovation Bonus will be payable under this clause in respect of the Operation Year ending 30 June 2006.
- (l) If this Agreement is terminated due to a Termination Event, no Innovation Bonus will be payable in respect of the last Operation Year.

Acacia Prison Services Agreement

15.3 Performance Linked Fee

A Performance Linked Fee will be calculated and payable for each Operation Year in accordance with Schedule 5.

15.4 Abatement Amounts

- (a) The Operator acknowledges that the State's agreement to make the Operation Payments is subject to the Contractor operating the Prison, and providing the Services, in such a way as to avoid the occurrence of any Specified Event. In the event of the occurrence of a Specified Event the State may deduct from the Operation Payments an amount equal to the Abatement Amount in respect of that Specified Event in Schedule 1. If more than one Specified Event occurs, the State may deduct the aggregate of the Abatement Amounts applicable to those Specified Events. The State must notify the Contractor of the occurrence of a Specified Event and the Abatement Amount that must be deducted in respect of that Specified Event as soon as reasonably practicable after the occurrence of the Specified Event.
- (b) The Contractor acknowledges that that the Abatement Amount for each Specified Event:
 - (i) has been determined by the State in good faith; and
 - (ii) is a genuine pre-estimate of the reduction in value of the Services as a result of the occurrence of any Specified Event;
 - (iii) has been designed to avoid the difficulties of proof of damages in connection with the occurrence of a Specified Event; and
 - (iv) is reasonable and not intended to operate as a penalty.

15.5 GST

(a) GST to be added to amounts payable

If GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

(b) Tax Invoice and Adjustment Note

No payment of any amount pursuant to subclause (a), and no payment of the GST Amount where the Consideration for a Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.

(c) Liability net of GST

Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in

Acacia Prison Services Agreement

relation to the relevant cost, expense or other liability. A party will be assumed to have an entitlement to a full Input Tax Credit unless it demonstrates otherwise prior to the date on which the Consideration must be provided.

(d) **Revenue exclusive of GST**

Any reference in this Agreement to price, value, sales, revenue or a similar amount (**Revenue**), is a reference to that Revenue exclusive of GST.

(e) **Cost exclusive of GST**

Any reference in this Agreement (other than in the calculation of Consideration) to cost, expense or other similar amount (**Cost**), is a reference to that Cost exclusive of GST.

(f) **GST obligations to survive termination**

This clause 15.5 survives termination of this Agreement.

15.6 Overpayment, adjustments and disputes

(a) If the State makes an overpayment to the Contractor, the Contractor must:

(i) notify the State in writing of the overpayment immediately after it becomes aware of the overpayment; and

(ii) repay to the State the full amount of any overpayment, within 10 Business Days after it becomes aware of the overpayment.

(b) If the State discovers an overpayment to the Contractor, the State may notify the Contractor and the Contractor must repay the full amount of the overpayment within 10 Business Days after receipt of the State's notice.

(c) If the State fails to make any adjustment or deduction which the State is entitled to make to any payment, the State may make that adjustment or deduction at any later time.

(d) If the State disputes any amount claimed in an invoice:

(i) the State may withhold the disputed amount; and

(ii) any withholding will not:

(A) be a breach of the State's Obligations; or

(B) entitle the Contractor to suspend performance of the Services.

15.7 Set-off

(a) The State may set off against any Operation Payment or other payment payable by it under this Agreement any amount payable to the State under this Agreement. If the amount payable to the State is unascertained, the State may in good faith estimate that amount and set off in respect of the estimate, subject to the State accounting to the Contractor when that amount is ascertained.

(b) The Contractor must make all payments under this Agreement without set off or counterclaim and without any deduction.

Acacia Prison Services Agreement

- (c) Nothing in subclause (a) is effective to create a Security Interest. Subclause (a) is without prejudice to any right of set off or other right to which the State is at any time otherwise entitled (whether by operation of law, contract or otherwise).

15.8 Payment not acknowledgment that Services satisfactory

Payment by the State of the Operation Payments is not an acknowledgment or acceptance by the State that the Services have been carried out satisfactorily.

15.9 Interest on overdue payments

- (a) If either Party fails to pay any amount due to the other Party under this Agreement within 20 Business Days after the due date for payment, that party must pay interest to the other party at the Default Rate.
- (b) The provisions of subclause (a):
 - (i) do not affect any other right of a Party under this Agreement; and
 - (ii) are in addition to any other right of a Party under this Agreement.

15.10 Interest to accrue daily

Interest will accrue daily, and will be calculated from the due date of payment until the date of payment in full.

16. VARIATIONS

16.1 Contractor Proposal

- (a) The Contractor may, by giving notice in writing to the State at any time during the Operation Period:
 - (i) request the State to vary the Services by expanding or reducing the scope or volume of the Services (or any part of them) or by the inclusion of a new or improved service (provided that the new or improved service is not in breach of applicable Legislative Requirements) (*Contractor Proposal*); and
 - (ii) where the Contractor considers that the Contractor Proposal will result in a material increase in the cost to the Contractor in providing the varied Services as determined in accordance with clause 16.4(d), propose the adjustment to the Operation Payment that would apply in respect of the Contractor Proposal.
- (b) On receiving a Contractor Proposal, the State must negotiate in good faith with the Contractor regarding the Contractor Proposal, but the State shall be under no obligation to approve it. If the State approves the Contractor Proposal it shall be deemed to be a Variation Notice for the purpose of clause 16.2 and the adjustment to the Operation Payment, if any, approved by the State shall be deemed to be an adjustment to the Operation Payment agreed between the parties in relation to the Variation Notice for the purpose of clause 16.4(b).

Acacia Prison Services Agreement

16.2 Variations by the State

The State may, by giving notice in writing to the Contractor at any time during the Operation Period, direct the Contractor to vary the Services by expanding or reducing the scope or volume of the Services (or any part of them), by the inclusion of a new service (provided that new service is in the nature of the services contemplated by the Prisons Act) or by imposing higher or stricter standards or measures for performance of the Services (a *Variation Notice*).

16.3 Contractor to comply

The Contractor must comply with a Variation Notice given under clause 16.2 and either:

- (a) commence to perform any such varied or additional Services as soon as reasonably practicable after receipt of the Variation Notice, taking into account the nature of the variation and any arrangements required to be made by the Contractor to provide such varied or additional Services; or
- (b) cease to provide any Services as directed by a Variation Notice, from the date of receipt of the Variation Notice or other later date specified in it.

16.4 Price for variation

- (a) Where the State has given a Variation Notice to the Contractor and the State or the Contractor considers (acting reasonably) that the direction to vary the Services will result in a material increase or a material decrease in the cost to the Contractor in providing the varied Services as determined in accordance with subclause (d), the State or the Contractor (as the case may be) may give a notice to the other Party requesting an adjustment to the Operation Payments and setting out full details of why that Party considers that the variation of the Services will result in such material increase or material decrease (as the case may be) (*Price Adjustment Notice*). A Price Adjustment Notice given by:
 - (i) the State, must be given at the same time as the Variation Notice is given; and
 - (ii) the Contractor, must be given to the State within 10 Business Days after receipt of the Variation Notice.
- (b) Following a Party's receipt of a Price Adjustment Notice given by the other Party, the Parties must negotiate in good faith with a view to agreeing a reasonable adjustment to the Operation Payments to take into account the increased costs or decreased costs (as the case may be) of providing the Services as varied under this clause 16.
- (c) If the Parties cannot agree an adjustment to the Operation Payments within 20 Business Days after receipt of a Price Adjustment Notice and the State has not withdrawn the direction to vary the Services within that period, then the variation to the Operation Payments will be determined in accordance with clause 26.
- (d) For the purposes of subclause (a) there will be a material increase or decrease in the cost to the Contractor in providing the Services where the variation to the

Acacia Prison Services Agreement

Services results in a cost increase or decrease of \$10,000 or more. Where one or more variations to the Services in the same Operation Year result in a cost increase or decrease of less than \$10,000 each but, when aggregated, result in a total cost increase or decrease of \$10,000 or more in that Operation Year, those variations may be aggregated and will be deemed together to result in a material increase or decrease for the purpose of subclause (a). In determining whether a cost increase or decrease is equal to \$10,000 or more:

- (i) the netting effect of cost increases and decreases resulting from different variations in the same Operation Year will be taken into account; and
- (ii) any variation in the same Operation Year which has previously resulted in a variation to the Operation Payments will not be taken into account.

16.5 Changes after Signature Date

- (a) If at any time after the Signature Date:
 - (i) there is an amendment to the Prisons Act, the Prisons Regulations or any instrument issued under them which affects the provision of the Services or the performance of the Contractor's Obligations; or
 - (ii) there is an amendment to a Legislative Requirement which specifically applies to prisons in Western Australia, including the Prison, and not generally to the community,(each a **Change**) and the effect of the Change is that the Services are varied or there is a requirement to vary the Services, either Party may give the other Party a notice setting out the details of the Change and the provisions of subclause (b) will apply in respect of the Change as if it were a direction by the State to vary the Services under clause 16.2.
- (b) Where subclause (a) applies:
 - (i) a Party's notice setting out the details of the Change will be treated as a direction to vary the Services under clause 16.2; and
 - (ii) clause 16.4 will apply except that either Party may give to the other Party a Price Adjustment Notice within 10 Business Days after receipt of the notice setting out the details of the Change given under subclause (a).
- (c) If either Party disputes the occurrence, nature, or effect of a Change notified by the other Party under subclause (a), the dispute will be determined by an independent expert in accordance with clause 26.5.

16.6 Expansion or modification of Prison

For the avoidance of doubt, an expansion in the volume of the Services as a result of an extension or modification of the Prison by the State as contemplated in clause 11.13, or an increase in Prisoner numbers at the Prison, does not constitute a variation or a Change for the purposes of this clause 16.

Acacia Prison Services Agreement

16.7 Directions

For the avoidance of doubt, a direction given by the State will not constitute a Variation Notice unless it is expressed to be a Variation Notice.

17. PERFORMANCE IMPROVEMENT REQUEST AND DEFAULT

17.1 Performance Improvement Requests

- (a) Where the State assesses that the Contractor has breached a Contractor Obligation or has failed to perform any element of the Services in the manner or in accordance with the standards required under this Agreement, the State may request the Contractor to improve its performance of the Services, including by implementing a better or alternative method of performing the Services (*Performance Improvement Request*).
- (b) Each Performance Improvement Request:
 - (i) must specify the Contractor's breach or failure;
 - (ii) must outline the nature of the improvement being requested, what action or outcome the State reasonably considers is required in respect of the Services and the time frame for the Contractor to complete the action or achieve the outcome specified, provided that the Contractor must be given at least 10 Business Days to complete that action or achieve that outcome; and
 - (iii) may require the Contractor to:
 - (A) provide further information in respect of its performance of the relevant Services;
 - (B) meet with the State to discuss the Performance Improvement Request; and
 - (C) submit its plans to improve performance in the areas identified by the Performance Improvement Request,and in each case the State must specify the time frames for the Contractor to provide the information, meet with the State and submit its plans (as may be relevant).
- (c) The Contractor must respond to, and fully comply with, all Performance Improvement Requests and any failure by the Contractor to do so:
 - (i) will be deemed to be a Default that is not capable of being cured and in respect of which clause 17.3(b) applies; and
 - (ii) pursuant to clause 15.4, may result in the deduction of the Abatement Amount specified in Item 3(e) of Schedule 1.

Acacia Prison Services Agreement

17.2 Default Notice

If there is a Default by either Party then the other Party may give the defaulting Party a Default Notice.

17.3 Cure of Default

- (a) On receipt of a Default Notice in respect of a Default that is capable of being cured, the defaulting Party must at its own cost:
- (i) in the case of a Default in the payment of money, cure that Default, within 5 Business Days from the date of service of the Default Notice or within such longer period specified in the Default Notice;
 - (ii) in the case of a Default by the Contractor in relation to the provision of an Essential Service, cure that Default as soon as the Default may be rectified, and in any event, within 24 hours from service of the Default Notice; and
 - (iii) in any other case, cure the Default within 10 Business Days from the date of service of the Default Notice or within such longer period specified in the Default Notice.
- (b) Where the Contractor commits a Default that is not capable of being cured because of the nature of the Default or the passing of the time or date for performance of the relevant Contractor's Obligation or the Default is in respect of the Contractor's failure to comply with a Performance Improvement Request, the State may, at its discretion, after giving a Default Notice to the Contractor, direct the Contractor to rectify the Default by:
- (i) performing that Contractor Obligation despite the time for performance having elapsed;
 - (ii) paying compensation to the State in respect of that Default; and
 - (iii) taking such measures as may be necessary (and which may include the provision of additional Contractor Resources or Contract Workers) to prevent a recurrence of the Default.

The Contractor must comply with any direction of the State under this subclause within the timeframes specified by the State.

- (c) If a defaulting Party determines that it requires the benefit of an extended cure period under subclause (a)(iii) it must, as soon as reasonably practicable after receiving the Default Notice (but not later than the expiration of the then current cure period as specified in the Default Notice), give notice to the non-defaulting Party that the applicable cure period is insufficient to rectify the Default, giving a reasonable explanation as to why it is insufficient and requesting that the cure period be extended by the further period referred to in the defaulting Party's notice and the non-defaulting Party may, at its discretion, agree to extend the cure period by either:
- (i) the further period requested; or
 - (ii) an alternative further period determined by the non-defaulting Party.

Acacia Prison Services Agreement

- (d) If, during the period referred to in subclause (a)(iii) (as may be extended by subclause (c)), the cure of the Default is not, or is no longer being, diligently pursued, the cure period in respect of that Default will be deemed to have expired.
- (e) If the Contractor:
 - (i) fails to cure a Default referred to in subclause (a) within the cure period specified in respect of the Default, or
 - (ii) fails to comply with a direction by the State under subclause (b) in respect of a Default that is not capable of being cured; or
 - (iii) commits a Default which is not capable of being cured and the State does not issue a direction under subclause (b) in respect of that Default,the State may, at its discretion, cure or rectify the Default and take such measures as are necessary to prevent its recurrence and the Contractor must immediately, on written demand by the State, pay compensation to the State in respect of the Default and reimburse the State for all costs, charges and expenses incurred by the State in taking appropriate measures to prevent its recurrence.

17.4 Suspension of payments

- (a) If the Contractor commits a Default by failing to provide any of the Services or by providing Services which do not meet the requirements or standards set out in this Agreement the State may:
 - (i) deduct and retain amounts from any money owing to the Contractor and, in particular, any money owing to the Contractor in respect of the Operation Payment; or
 - (ii) suspend payment of the whole or part of the Operation Payments and the Performance Linked Fees to the Contractor,on the basis that the State considers commensurate with the reduction in the quantum or quality of the Services provided by the Contractor.
- (b) Where the State:
 - (i) deducts and retains amounts from monies due to the Contractor, whether in respect of the Operation Payment or otherwise; or
 - (ii) suspends payment of any money due to the Contractor whether in respect of the Operation Payment, the Performance Linked Fees or otherwise,and the Contractor disputes the entitlement of the State to make the deduction or the suspension or the amount deducted or suspended under subclause (a), the issue of whether the State is entitled to make the deduction or suspend the payment or as to the amount deducted or suspended will be determined by an independent expert in accordance with clause 26.5.

Acacia Prison Services Agreement

18. TERMINATION

18.1 Termination by the State

- (a) The State may terminate this Agreement by notice to the Contractor if:
- (i) the Contractor has committed a material Default which:
 - (A) is not remedied within the timeframe specified in clause 17.3(a);
or
 - (B) is not capable of being cured, whether because of the nature of the Default, the passing of the time or date for performance of the relevant Contractor's Obligation or any other reason and the State has not issued a direction under clause 17.3(b) in respect of the Default, or the Contractor has failed to comply with the direction issued by the State under clause 17.3(b); or
 - (ii) any of the following events (each a **Termination Event**) occurs:
 - (A) an Insolvency Event occurs in relation to the Contractor or the Guarantor;
 - (B) without the prior written consent of the State, there is a Change of Control in respect of the Contractor, the Guarantor or a Material Subcontractor;
 - (C) the Contractor breaches clause 27 or 31.6;
 - (D) it becomes unlawful for the Contractor to operate the Prison or provide the Services;
 - (E) a representation, warranty or statement by or on behalf of the Contractor in this Agreement or in a document provided under or in connection with this Agreement, including the Contractor's Proposal, is not true in a material respect or is misleading when made or repeated which, if it had been known to the State before signing this Agreement, would it have resulted in the State not entering into this Agreement or entering into this Agreement on materially different terms;
 - (F) the Contractor abandons, ceases or suspends the conduct of all or a substantial part of the Services or it threatens or expresses an intention to do so;
 - (G) there are in any Operation Year:
 - (1) 2 or more separate and isolated instances of a death of a Prisoner at the Prison, or outside the Prison while in the lawful custody, care and control of the Contractor, (being a death by other than natural causes as lawfully determined by a coroner under the *Coroners Act 1996* (WA));

Acacia Prison Services Agreement

- (2) 2 or more separate and isolated incidents involving an Escape (each incident may result in more than one Escape, but will be treated as a single incident for the purpose of this subclause); or
 - (3) 2 or more separate and isolated instances of a Loss of Control; or
 - (H) the Contractor performs the Services at a level which entitles the Contractor to receive 50% or less of the Performance Linked Fee for any Operation Year.
- (b) The State may exercise its right under subclause (a):
- (i) in the case of subclauses (ii)(A), (B), (C), (D) or (F) immediately on service of a notice to the Contractor; and
 - (ii) in the case of all other subclauses, by 3 days notice to the Contractor, and in each case, this Agreement will terminate on the date specified in that notice.

18.2 State's costs of preparation and service of termination notice

The Contractor must, on written demand by the State, reimburse the State for all costs, charges and expenses (including reasonable solicitor's costs on an indemnity basis), incurred by the State, in connection with the preparation and service of a termination notice referred to in clause 18.1.

18.3 Termination by agreement

This Agreement may be terminated by the agreement in writing of the State and the Contractor.

18.4 Statutory termination by CEO

This Agreement may be terminated by the CEO pursuant to an exercise of the CEO's Statutory Powers of termination under Division 5 of Part IIIA of the Prisons Act.

18.5 Rights preserved on termination

The termination of this Agreement will not affect any rights of a Party against the other Party in respect of any act, omission, matter, or thing occurring under this Agreement prior to termination or as a result of any Default by the other Party before the date of termination, nor will it affect the coming into force or the continuance in force of any provision of the Agreement which is expressly or by implication intended to come into, or continue in, force on or after termination, including the provisions in clause 20.

Acacia Prison Services Agreement

19. STATUTORY INTERVENTION, SUSPENSION AND TERMINATION

19.1 Definitions in this clause

In this clause:

- (a) **administrator** means a person appointed or engaged under section 15Y or 15Z of the Prisons Act; and
- (b) **intervene** has the meaning given in the Prisons Act.

19.2 Operation of Prisons Act

- (a) The Parties acknowledge:
 - (i) that nothing in this Agreement limits the operation of Division 5 of Part IIIA of the Prisons Act in respect of intervention in, suspension or termination of, this Agreement in certain prescribed situations or the appointment of an administrator for those purposes;
 - (ii) that the State's rights under clauses 17 and 18 are contractual rights existing under this Agreement and, to the extent permitted by law, are in addition to and do not limit in any way, any rights or remedies available to the State or the State's Associates including any Statutory Powers granted under Division 5 of Part IIIA of the Prisons Act; and
 - (iii) the requirements of section 15C(g) of the Prisons Act for this Agreement to specify the financial and other consequences of:
 - (A) intervening in this Agreement under section 15W;
 - (B) terminating or suspending this Agreement under section 15X; and
 - (C) requisitioning property under section 15ZC.

19.3 Intervention in Agreement under section 15W

- (a) The Contractor acknowledges that the Statutory Powers granted under the Prisons Act in respect of intervention in this Agreement authorise:
 - (i) the CEO to intervene in this Agreement in the circumstances prescribed in section 15W of the Prisons Act and:
 - (A) give directions as to the manner in which the Services are to be provided; and
 - (B) provide any Services;
 - (ii) the CEO, to appoint an administrator to do any of the things specified in subclauses (i)(A) and (i)(B), for an initial period not exceeding 1 year; and
 - (iii) the CEO and the administrator (with the CEO's approval), to requisition any property used in relation to the provision of the Services and use that property for the ongoing provision of the Services for a period not longer than 12 months,

in accordance with the requirements of Division 5 of Part IIIA of the Prisons Act.

Acacia Prison Services Agreement

- (b) The Contractor acknowledges its obligations to, and to ensure that each Contract Worker does, comply with the lawful directions of the CEO or an administrator appointed for the purposes of section 15W of the Prisons Act.

19.4 Consequences of intervention

- (a) If the CEO intervenes in this Agreement under section 15W of the Prisons Act:
 - (i) the State may reduce or suspend the Operation Payment and other payments under this Agreement in accordance with clause 19.8; and
 - (ii) except to the extent required under clause 19.9, neither the State nor the State's Associates nor any other person is liable to pay any compensation or make any other payment to the Contractor, a Subcontractor, Contract Worker or other person under this Agreement or in connection with the intervention.
- (b) The Contractor must pay to the State the reasonable costs of the CEO intervening in this Agreement under section 15W of the Prisons Act, without prejudice to any of the State's other rights.

19.5 Suspension or termination under section 15X

- (a) The Contractor acknowledges that the Statutory Powers granted under Division 5 of Part IIIA of the Prisons Act in respect of the termination or suspension of prison services contracts authorise:
 - (i) the CEO to:
 - (A) with the Minister's approval, terminate or suspend (wholly or partially) this Agreement in the circumstances prescribed in section 15X of the Prisons Act; and
 - (B) provide, or appoint an administrator for an initial period not exceeding 1 year to provide, any Services after the termination, or during the suspension, (as the case may be) of this Agreement; and
 - (ii) the CEO and the administrator (acting with the CEO's approval), to requisition any property used in relation to the provision of the Services and use that property for the ongoing provision of the Services for a period not longer than 12 months,
- in accordance with the requirements of Division 5 of Part IIIA of the Prisons Act.

19.6 Consequences of termination or suspension

- (a) If the CEO terminates or suspends this Agreement under section 15X of the Prisons Act:
 - (i) the State may reduce or suspend the Operation Payment and other payments under this Agreement in accordance with clause 19.8; and
 - (ii) except to the extent required under clauses 19.7 and 19.9, neither the State, nor the State's Associates nor any other person is liable to pay to the Contractor or any Subcontractor, Contract Worker or other person, any

Acacia Prison Services Agreement

compensation in respect of the termination or suspension of this Agreement under section 15X.

- (b) The Contractor waives any other rights it might have to pursue a claim of restitution of any kind, including a claim of unjust enrichment, as a result of suspension or termination of this Agreement under section 15X of the Prisons Act.
- (c) The Contractor must, in each Subcontract or order placed with any Subcontractor for the purpose of this Agreement, reserve a right of termination or suspension to take account of the CEO's Statutory Power to terminate or suspend this Agreement under Division 5 of Part IIIA of the Prisons Act.
- (d) Without prejudice to any of the State's other rights, the Contractor must pay to the State the reasonable costs of the CEO arising in connection with the termination of this Agreement under section 15W of the Prisons Act, including any costs arising in connection with the appointment or engagement of the administrator.

19.7 Consequences of termination or suspension under section 15X(2)(e) of the Prisons Act

- (a) If the CEO terminates or suspends this Agreement solely on the ground set out in section 15X(2)(e) of the Prisons Act and the State is not otherwise entitled to terminate this Agreement in accordance with its terms and the suspension or termination has the effect that the Contractor will not be providing any Services after the termination or during the suspension, the State:
 - (i) must, subject to subclause (b), indemnify the Contractor against any loss, liabilities or expenses which are reasonably and properly incurred by the Contractor in connection with this Agreement, to the extent that those liabilities or expenses were incurred in consequence of the termination or suspension of this Agreement under the Prisons Act; and
 - (ii) is not required to pay to the Contractor any amount by way of indemnity under subclause (i) in excess of an amount equal to 100 percent of the Operation Payment for the Operations Year in which the termination or suspension occurs.
- (b) The Contractor must do, and must ensure that each Contract Worker does, everything possible to mitigate the Contractor's losses, liability or expenses arising in consequence of termination or suspension of this Agreement under the Prisons Act.

19.8 Intervention in and termination or suspension of part of Services

- (a) If the CEO intervenes in, or suspends, this Agreement with the effect that the Contractor will no longer be providing any Services or performing any of the Contractor's Obligations for the period of the intervention or suspension, the State may suspend payment of all Operation Payments and other payments under this Agreement for the period of that suspension or intervention.
- (b) If the CEO intervenes in, or suspends or partially terminates, this Agreement (under clause 18 or as contemplated by this clause) with the effect that the scope

Acacia Prison Services Agreement

or volume of the Services required to be provided by the Contractor under this Agreement is reduced, the State may reduce the amount of, or suspend, payment of the Operation Payments and any other payments under this Agreement on the basis that the State considers, acting reasonably, is commensurate with the reduction in the Services.

- (c) Where the State reduces the amount of, or suspends, the Operation Payment or the Performance Linked Fees under subclause (a) and the Contractor disputes the entitlement of the State to make that reduction or suspension, the issue of whether the State is entitled to make the reduction or suspension or as to the amount deducted or the period suspended, will be determined by an independent expert in accordance with clause 26.5.

19.9 Compensation for requisitioning Contractor Resources

If any Contractor Resources are requisitioned under Division 5 of Part IIIA of the Prisons Act, the State must pay to the Contractor, as full and final compensation for the loss of the use of the Contractor Resources for the period in which they are requisitioned:

- (a) an amount agreed by the State and the Contractor; or
- (b) failing agreement under subclause (a) within 10 Business Days of the requisition, an amount as determined by an independent valuer appointed by the President of the Arbitrators Australia Western Australian Branch on the application of either Party.

19.10 No consequential or economic loss for intervention, suspension or termination

Neither the State nor any of the State's Associates nor any other person is liable to make any payment to the Contractor in respect of any indirect or consequential loss (within the meaning of clause 23.5) suffered by the Contractor, any Subcontractor, any Contract Worker or any other person in connection with the exercise of a Statutory Power of intervention, termination or suspension under the Prisons Act.

20. SERVICE HANDOVER AND RETENDERING OF SERVICES

20.1 Retendering of prison services

The State may, at its discretion, at any time and without derogating from the State's rights under clause 4.3, invite any person (including the Contractor) to tender for the operation of all or any part of the Services for the period commencing after the end of the Operation Period (*Service Retender*).

20.2 Preparation for Service Retender

- (a) The Contractor must, if requested by the State, provide the State and the State's Associates with reasonable access to the Contract Workers and the books, records and other material kept by or on behalf of the Contractor in connection with the Prison, the Services and this Agreement, for the purpose of the State and the State's

Acacia Prison Services Agreement

Associates preparing reports or other documents in connection with a Service Retender.

- (b) The Contractor must use reasonable endeavours to assist the State in the preparation for, and the conduct of, a fair and competitive Service Retender process. In particular, the Contractor must make available to the State and the State's Associates any information, assist in the verification of any information (including the provision of answers to verification questions) and make premises and activities undertaken at the Prison reasonably available for inspection by a prospective Successor Operator, as the State may reasonably require in connection with the Service Retender process. The Contractor's obligations under this subclause do not require the Contractor to undertake activities which will unduly interfere with the operation of the Prison and provision of the Services but the Contractor acknowledges that compliance with this subclause may cause some disruption or interference with the operation of the Prison and provision of the Services.
- (c) The Contractor warrants to the State that, to the best of its belief, all information it provides under subclause (b) will be, at the time it is provided, true and correct in all material respects and will not be misleading, by omission or otherwise. The State may not provide or purport to provide the benefit of this warranty to any other recipient of the information and must use reasonable endeavours to ensure that the Contractor obtains the benefit of any disclaimer or exclusion of liability in respect of the information which the State obtains from the recipient of the information.

20.3 Service Handover

- (a) The Contractor must assist and fully co-operate with the State, the State's Associates and the Successor Operator for the purposes of:
 - (i) achieving an efficient transition of the operation of the Prison and performance of the Services to a Successor Operator; and
 - (ii) facilitating the continuity of the operation of the Prison and all or any part of the Services on the last day of the Operation Period,

(Service Handover). In particular, the Contractor must comply with:

 - (iii) the Service Handover Plan;
 - (iv) the requirements of this clause 20; and
 - (v) any reasonable directions of the State.
- (b) The Parties agree that the Service Handover Period is the period:
 - (i) in the case of a termination of this Agreement under clause 18, or as contemplated under clause 19, commencing on the date on which the State serves a termination notice on the Contractor and ending on expiry or termination of the Operation Period; and

Acacia Prison Services Agreement

- (ii) in the case of a Service Handover as a result of the expiry of the Operation Period, the period commencing on the date which is 6 months prior to the expiry of the Operation Period and ending on the last day of the Operation Period.

20.4 Continuing obligations of Contractor

The Contractor acknowledges that it may be required pursuant to clause 4.3, to continue to provide the Services (or any part of them) in accordance with this Agreement after the end of the Operating Period.

20.5 Service Handover Plan

- (a) The Contractor must:
 - (i) prepare, with the assistance of the State, a plan providing for Service Handover in accordance with this clause (*Service Handover Plan*);
 - (ii) submit, within 6 months of the Signature Date, the proposed Service Handover Plan for approval by the State; and
 - (iii) review the Service Handover Plan approved by the State pursuant to this clause every 12 months after its approval and submit, within 20 Business Days of the date for review, any amendments to that Service Handover Plan for approval by the State.
- (b) The Service Handover Plan must specify the Contractor's estimate of the period of time likely to be required to effect the Service Handover and detail how the Contractor proposes to address the following further matters on Service Handover:
 - (i) management of Prisoners, including any transitional arrangements during the Service Handover Period;
 - (ii) management, care and identification of State Resources and Prison Equipment;
 - (iii) management, care, identification and transfer of Contractor Resources;
 - (iv) delivery of documentation, materials, records and other information;
 - (v) assignment of relevant contracts and Subcontracts;
 - (vi) management and transfer of Contract Workers, including any transitional arrangements during the Service Handover Period;
 - (vii) management and transfer of the Contractor Computer;
 - (viii) continuity of the Services and operation of the Prison; and
 - (ix) any other matters that the State requires to be addressed.
- (c) The State must review the Service Handover Plan submitted under subclause (a)(ii), and any proposed amendment submitted under subclause (a)(iii), within 20 Business Days of the date on which the Service Handover Plan or amendment was submitted for approval and either:
 - (i) approve the proposal, with or without amendment; or

Acacia Prison Services Agreement

- (ii) reject it.
 - (d) If:
 - (i) the State does not approve a proposed Service Handover Plan or any proposed amendment to the Service Handover Plan, or approves it with specified amendments, the Contractor must submit to the State a revised proposal, provided that if the State does not approve the revised proposal submitted by the Contractor within a further 20 Business Days; or
 - (ii) the Contractor fails to provide a Service Handover Plan or a revised Service Handover Plan in accordance with subclause (a)(ii) or (a)(iii),
- then the State may itself prepare or review the Service Handover Plan (as the case may be) and the State's Service Handover Plan or amendments (as the case may be) will apply on Service Handover. The Contractor, must, on demand by the State, pay the State's reasonable costs and expenses incurred in the preparation of the State's Service Handover Plan.

20.6 Non-frustration of Service Handover

The Contractor must not do anything which directly or indirectly avoids, or materially prejudices or frustrates the Service Handover.

20.7 Contract Workers

The Contractor must:

- (a) use reasonable endeavours to ensure that the Successor Operator has access to the Contract Workers immediately after the State notifies the Contractor that a Successor Operator has signed a contract with the State for the provision of the Services for the purpose of:
 - (i) receiving information in respect of the Prison and the Services; and
 - (ii) preparations by the Successor Operator for the Service Handover,but only to the extent that any of the above does not unduly interfere with the operation of the Prison or the provision of the Services;
- (b) ensure that an appropriate number of Contract Workers, having sufficient skills, qualifications and experience (having regard to the number, skills, qualifications and experience of employees required by the Contractor to operate the Prison and provide the Services), are available to be employed by and/or seconded to the Successor Operator following the expiry or termination of the Operation Period to enable the Successor Operator to operate the Prison and provide the Services. The Contractor must assist the State or the Successor Operator for that purpose:
 - (i) by releasing, subject to the Contractor being lawfully able to do so, those of the Contract Workers as the State may nominate, from any contract with the Contractor, so that the State or the Successor Operator may engage those persons if those persons are willing to be so engaged; and

Acacia Prison Services Agreement

- (ii) by the preparation of job specifications, advertising and the interviewing of persons for recruitment;
- (c) provide to the State and the Successor Operator the employment records of those Contract Workers currently engaged by the Contractor in the provision of Services; and
- (d) provide training to the Successor Operator and those of its staff to be engaged in the performance of prison services at the Prison.

20.8 Variation of Terms and Conditions of Employment in Service Handover Period

The Contractor must not, without the prior written consent of the State (which may not be unreasonably withheld), vary, or purport or promise to vary, the terms or conditions of employment (including superannuation entitlements) of any Contract Worker employed by the Contractor where:

- (a) the variation takes effect in the Service Handover Period, unless it is in the ordinary course of business or is a variation imposed by a determination or order of the Australian Industrial Relations Commission and, when aggregated with any other variation which takes effect during that period, represents a percentage increase in the remuneration of the Contract Worker of no more than the percentage increase in CPI over the 12 month period ending on the month for which that index was last published;
- (b) all or part of the variation first takes effect after the end of the Operation Period;
- (c) the variation results in the employment being for a fixed term, the expiry of which is more than 6 months after the end of the Operation Period;
- (d) the variation relates to a payment or the provision of a benefit triggered by termination of employment (other than the employee's entitlements at law);
- (e) the variation relates to the provision of a benefit (but excluding base salary and the employee's legal entitlements) which the employee will, or may have, a contractual right to receive after the end of the Operation Period; or
- (f) the variation prevents, restricts or hinders the employee from working for a Successor Operator or from performing the duties the employee performed for the Contractor.

20.9 Third party contracts and the supply of goods and services

The Contractor must, at the State's option:

- (a) transfer or assign to the State or the Successor Operator (as the State may require) any contract of the Contractor with third parties relating to the Services, including Subcontracts and any leases or other agreements under which Contractor Resources are held or used, that are required by the State or the Successor Operator to perform the Services; and
- (b) otherwise provide reasonable assistance to the Successor Operator in securing the supply to the Successor Operator of goods and/or services to the extent that such

Acacia Prison Services Agreement

supply is necessary for the operation of all or any part of the Prison or provision of the Services.

20.10 Transfer of Contractor Resources

The Contractor must, if directed by the State, promptly on the termination or expiry of the Operation Period, transfer and deliver the Contractor Resources, or that part of them as the State may require, to the State or the State's nominee (including the Successor Operator), free from encumbrances, in that state of repair and condition that is in accordance with the Contractor's Obligations.

20.11 Transfer price

- (a) If the Contractor has transferred and delivered to the State or the State's nominee the Contractor Resources in accordance with clause 20.10, the State must pay, or procure that the State's nominee pays, to the Contractor that price for those Contractor Resources:
 - (i) as agreed between the Contractor and the State; or
 - (ii) failing agreement within 10 Business Days of that transfer and delivery, as determined by an independent valuer appointed by the President of the Institute of Arbitrators Australia Western Australian Branch on the application of either Party.
- (b) The valuer referred to in subclause (a)(ii) will act as an expert not an arbitrator and the valuer's determination will be final and binding on the State and the Contractor.
- (c) The State and the Contractor must each pay half of any costs of the valuer referred to in subclause (a)(ii).

20.12 Time for payment of transfer price

The State must pay the amount or price referred to in clause 20.11(a), within one month after:

- (a) the agreement as to the price; or
- (b) failing agreement as contemplated under clause 20.11(a), the valuer referred to in clause 20.11(a)(ii) determining that price.

20.13 Removal of Contractor Resources

Subject to clause 20.10, the Contractor must within 14 days after the end of the Operation Period remove from the Prison all the moveable Contractor Resources and other goods that the Contractor has installed or provided at the Prison, including any stock in trade relating to the Prison Canteen Service.

20.14 Rectification of damage

The Contractor must make good to the State's satisfaction all damage to the Prison caused by the Contractor removing the Contractor Resources.

Acacia Prison Services Agreement

20.15 Contractor Resources left

Subject to clause 20.10, if the Contractor fails to remove from the Prison any Contractor Resources or other goods within the period referred to in clause 20.13:

- (a) those Contractor Resources or goods:
 - (i) will be treated as abandoned by the Contractor; and
 - (ii) will become the property of the State; and
- (b) the State may elect to:
 - (i) retain the abandoned Contractor Resources; or
 - (ii) dispose of those Contractor Resources as the State thinks fit, and retain any money that the State may receive in respect of any disposal.

20.16 Condition of the Prison and State's Property

At the end of the Service Handover Period, the Contractor must:

- (a) vacate and leave in a clean and tidy condition and otherwise in a state of repair and condition that is in accordance with the Contractor's Obligations all of the Prison, Prison Equipment, Prison Building and other State Resources; and
- (b) deliver to the State all keys, security access cards and other devices associated with security and movement throughout the Prison.

20.17 Additional Powers

The State's Powers under this clause are in addition to any other Powers the State has, and the State may exercise its Powers under this clause notwithstanding that there has been no breach of this Agreement.

20.18 Return of Information

- (a) Subject to subclause (c), the Contractor must immediately on the end of the Operation Period, or on demand, deliver to the State all originals and copies of information of whatever kind (whether in hard copy or electronic format) which is owned by or is in the control or possession of the Contractor or its related bodies corporate (including Confidential Information) other than documents containing confidential or strategic planning information of the Contractor or which do not primarily relate to the Services or the performance of the Contractor's Obligations.
- (b) Where information (including Confidential Information) required to be delivered to the State under subclause (a) is stored in electronic form, the Contractor must destroy all electronic copies after delivery to the State of that information.
- (c) The Contractor may:
 - (i) retain copies of training manuals and policy and procedure manuals developed by the Contractor; and
 - (ii) retain originals or copies of information (including Confidential Information) required by the Contractor to comply with its obligations

Acacia Prison Services Agreement

under any Act or the requirements of a Government Agency, provided that the Contractor:

- (A) notifies the State in writing of the information or Confidential Information retained;
- (B) in the case of originals retained, delivers copies to the State;
- (C) in the case of copies retained, delivers the originals to the State; and
- (D) destroys any electronic copies after complying with subclauses (B) or (C), as the case may be.

21. INSURANCES

21.1 Contractor to effect and maintain insurances

The Contractor must effect and maintain the following insurances, with insurers having a Standard and Poor's rating of 'A' or higher or otherwise approved by the State, and on conditions approved by the State (including all exclusions and excesses), which approval the State may not unreasonably withhold:

(a) **Building insurance**

Building insurance to cover any damage or destruction arising from flood, fire, explosion, riot or other malicious act, act of God or any other risk against which a prudent owner of a correctional institution would insure extending to:

- (i) the Prison Building and Prison Equipment;
- (ii) the Contractor Resources;
- (iii) the State Resources; and
- (iv) any materials, plant, equipment and other things that are brought into the Prison by or on behalf of the Contractor for the purpose of providing the Services or that are entrusted to the Contractor for that purpose,

for an amount not less than the full replacement and reinstatement value of the items specified in subclauses (a)(i) to (a)(iv), and in any event not less than the amount set out in Item 1(a) of Schedule 1.

(b) **Employer's indemnity insurance**

Employer's indemnity and workers compensation insurance against all Claims against, and Loss suffered by, the Contractor for death, disability, illness or injury to Contract Workers arising out of their employment including liability arising:

- (i) under any Act;
- (ii) at common law; or
- (iii) otherwise.

The common law component of the insurance must be not less than the amount set out in Item 1(b) of Schedule 1.

Acacia Prison Services Agreement

(c) Public and product liability insurance

Public liability insurance and product liability insurance covering all Claims and Loss, caused by the negligence of the Contractor, including but not limited to:

- (i) Claims and Loss arising in respect of:
 - (A) any injury or illness to or death of any person;
 - (B) any physical loss, damage or destruction to any property including the State's property; or
 - (C) the loss of use of tangible property, including the State's property whether or not that tangible property that has been physically lost, destroyed or damaged; and
- (ii) Claims and Loss arising out of any sudden or accidental pollution, defined as Injury (including death or disease) or loss or damage to property arising from pollution or contamination which is unintended and unexpected and takes place in its entirety during the period of insurance and excluding fines or penalties.

These insurances must each provide cover in respect of each occurrence for not less than the amount set out in Item 1(c) of Schedule 1.

(d) Professional indemnity insurance

Professional indemnity insurance for not less than the amount set out in Item 1(d) of Schedule 1 to be maintained from the Signature Date until the second anniversary of the end of the Operation Period.

(e) Motor vehicle third party liability insurances

Motor vehicle third party liability insurance in respect of all motor vehicles used in connection with the provision of the Services, regardless of whether any motor vehicle is licensed as a motor vehicle, for an amount not less than the amount set out in Item 1(e) of Schedule 1, and unlimited in the aggregate, in respect of all Claims and Loss. The insurance must include third party bodily injury gap protection.

(f) Medical treatment insurance

Medical treatment insurance for not less than the amount set out in Item 1(f) of Schedule 1 to be maintained from the Commencement Date until the second anniversary of the end of the Operation Period.

(g) Other insurances

Any other insurance required by law or reasonably required by the State, in which case the State will meet the increased cost of the premiums for such insurances, under the provisions of section 4 of Schedule 2 where applicable.

Except where stated to the contrary, the insurances required under subclauses (c), (d) and (e) must be maintained from the Signature Date, and the insurances required under subclauses (a), (b), (f) and (g) must be maintained from the Commencement Date, to the end of the Operation Period.

Acacia Prison Services Agreement

21.2 Insurance provisions

The insurances referred to in this clause must:

- (a) except for those specified in subclauses 21.1(b), 21.1(d) and 21.1(f), and unless prohibited by law, be endorsed or amended to include:
 - (i) the State and the State's Associates as Additional Insureds with the Contractor; and
 - (ii) clauses whereby:
 - (A) the Insurers waive all express or implied rights of subrogation they may have against the State and the State's Associates;
 - (B) insofar as any insurance may cover more than one insured, all insuring agreements and endorsements with the exception of limits of liability will operate as if there were a separate policy of insurance covering each person comprising the insured;
 - (C) acts, omissions, non-disclosures or misrepresentations by any insured will not affect or prejudice the insurances in regard to any other insured;
 - (D) the Insurers will not:
 - (1) materially vary any insurances, or
 - (2) cancel any insurances or permit them to lapse, until the Insurers have given the State not less than 10 Business Days' notice of the intention to vary, cancel or permit the insurance to lapse; and
 - (E) if GST is payable by the State or the State's Associates in respect of, or otherwise arising out of, a payout by the insurers under the insurance policies, the total amount recoverable by the State and the State's Associates under the policies includes or is otherwise increased by an amount equal to that GST.

21.3 Evidence of insurance

- (a) The Contractor must, not later than 7 days prior to the Anticipated Commencement Date, provide to the State:
 - (i) such details of each policy of insurance taken out by the Contractor under this clause, as the State may reasonably require; and
 - (ii) written proof that each policy of insurance required to be maintained from the Signature Date under clause 21.1 is current and each policy of insurance required to be maintained from the Commencement Date under clause 21.1 will be current from the Commencement Date.
- (b) On, or prior to, the date for renewal of a policy of insurance specified in this clause, the Contractor must provide to the State proof of the renewal of that policy of insurance.

Acacia Prison Services Agreement

- (c) Where, in accordance with the provisions of clause 21.7, a policy of insurance is varied or replaced, the Contractor must, not later than 5 Business Days following the date of variation or replacement, provide to the State such details of each policy of insurance that has been materially varied or replaced, as the State may reasonably require.
- (d) The Contractor must, on reasonable request by the State at any time during the Operation Period (or the period during which an insurance is required to be maintained), provide to the State written evidence that a policy of insurance as specified by the State is current.

21.4 Failure to insure

If the Contractor fails to take out or maintain any insurance required under this clause, the State may in the State's discretion:

- (a) take out and maintain the insurance, and the cost incurred by the State in that regard will be a debt due to the State from the Contractor; or
- (b) treat that failure to insure, or failure to maintain insurance, as a Default of the Contractor.

21.5 Subcontractors

The Contractor must ensure that each Subcontractor takes out and maintains insurance of a kind consistent with that contemplated by this clause.

21.6 Notification

The Contractor must:

- (a) as soon as practicable, notify the State, in writing, of any occurrence associated with the Prison, the Services or this Agreement of which the Contractor becomes aware that, in the reasonable opinion of the Contractor, may give rise to a Claim under any policy of insurance taken out by the Contractor under this clause;
- (b) keep the State informed of subsequent developments concerning the occurrence; and
- (c) use the Contractor's reasonable endeavours to ensure that the Subcontractors, in respect of their operations, similarly inform the State.

21.7 No variation to insurances

The Contractor must not do or permit to be done anything whereby any insurance required to be taken out and maintained under this clause:

- (a) is materially varied; or
- (b) cancelled or allowed to lapse,

unless:

- (c) the Contractor has notified the State in writing of a proposed variation as specified in subclause (a) and the State has agreed to that variation; or

Acacia Prison Services Agreement

- (d) the Contractor has notified the State in writing of a matter specified in subclause (b), and the proposal of the Contractor to take out an alternative policy of insurance, and the State has granted approval in writing for the alternative insurance and the alternative policy of insurance has been obtained; or
- (e) the relevant insurance has become commercially unavailable at that particular time due to market conditions beyond the control of the Contractor, subject to the Contractor demonstrating such commercial unavailability to the reasonable satisfaction of the State.

21.8 Certification by Insurer

- (a) The Contractor must, not later than 7 days prior to the Anticipated Commencement Date, provide to the State, a written certification by each insurer or its duly authorised insurance broker that provides appropriate confirmation that each insurance policy issued by the insurer complies with the relevant provisions of this clause.
- (b) Where the Contractor takes out a new policy of insurance or a policy of insurance is:
 - (i) varied; or
 - (ii) cancelled or allowed to lapse,in accordance with the provisions of clause 21.7, the Contractor must, not later than 5 Business Days after the variation, or issue of a new policy, provide to the State:
 - (iii) a written certification by the insurer or its duly authorised broker; and
 - (iv) such details of the new policy of insurance as the State may reasonably require which complies with the relevant provisions of this clause.

21.9 Access to Insurer

- (a) Subject to subclause (b), the Contractor authorises:
 - (i) the State to communicate directly with each Insurer in writing, or orally, in respect of:
 - (A) any insurance taken out under this clause; or
 - (B) any occurrence that has been notified to an Insurer in respect of a policy of insurance under this clause; and
 - (ii) each Insurer to provide any information requested by the State in respect of any insurance taken out for the purposes of this clause, including any information requested by the State in respect of an occurrence or claim, under the policy of insurance issued by the Insurer.
- (b) The Contractor must, on written request from the State, provide to the State, in a form determined by the Contract Manager, an executed authority in writing from the Contractor to an Insurer that:
 - (i) confirms the authorities specified in subclause (a); and

Acacia Prison Services Agreement

- (ii) expressly authorises the Insurer to provide any information requested by the State in respect of a policy of insurance and any occurrence or claim under a policy of insurance issued by the Insurer under this clause.
- (c) The provisions of subclause (b) will not apply to the insurance specified in clause 21.1(d).
- (d) Where reasonable to do so, the State will accept communications with, and information from, an Insurer's duly authorised insurance broker in lieu of the Insurer in respect of subclauses (a) and (b).

21.10 Admissions and settlement

The Contractor must not, without the State's prior written consent:

- (a) make any admission of liability on behalf of the State or the State's Associates; or
- (b) settle, or instruct any Insurer to settle, any Claim relating to any insurance under this Agreement.

21.11 No effect on Contractor's other obligations

The effecting of any insurance referred to in this clause, does not limit any liability or obligation of the Contractor under the provisions of this Agreement.

22. BANK GUARANTEE

22.1 Provision of Bank Guarantee

The Contractor must, on or prior to the Commencement Date and on or prior to the commencement of any Further Period, procure the issue to the State of an unconditional bank guarantee:

- (a) with a face value equal to the Guarantee Amount;
- (b) issued by a bank approved by the State;
- (c) with an expiry date no earlier than 12 months after the expiry of the Operation Period (including any extension of the Operation Period under clause 4.2) (the *Guarantee Expiry Date*);
- (d) payable at an office of the issuer in Perth; and
- (e) in a form acceptable to the State.

22.2 Demands under Bank Guarantee

The State must not make a demand under the Bank Guarantee except in accordance with the following:

- (a) the State may make a demand under the Bank Guarantee in respect of any amount which the State considers:
 - (i) is payable (but which has not been paid) by the Contractor to the State under, or as a result of a breach of, this Agreement; or

Acacia Prison Services Agreement

- (ii) the Contractor may become liable to pay to the State under, or as a result of a breach of, this Agreement if a contingency occurs and that contingency is unlikely to occur until after the date the State is obliged to return the Bank Guarantee; and
- (b) the State may make a demand in respect of an amount referred to in subclause (a) irrespective of whether the amount is, or the circumstances relating to the amount are:
 - (i) in dispute;
 - (ii) subject to dispute resolution procedures set out in clause 26; or
 - (iii) subject to any court or other proceedings.

22.3 Repayment by the State

If a payment is made to the State as a result of a demand made under the Bank Guarantee and all or part of the amount in respect of which demand was made was not actually payable by the Contractor to the State, then State must pay to the Contractor:

- (a) all or, as the case may be, that part of the amount (***Relevant Amount***) which was not actually payable by the Contractor to the State or for which the Contractor did not in fact become liable to pay the State; and
- (b) interest at the Interest Rate on the Relevant Amount on a daily basis from (and including) the date the payment under the Bank Guarantee is made in respect of the Relevant Amount to the date the Relevant Amount is paid to the Contractor, which interest must be paid on the date the Relevant Amount is paid to the Contractor.

22.4 Notice of demand under Bank Guarantee

The State must, as soon as practicable after it has made a demand under the Bank Guarantee, give notice to the Contractor specifying the amount of the demand and the State's reasons for making the demand.

22.5 Guarantee to be kept in force

The Contractor must ensure that the Bank Guarantee is kept in full force and effect until the Guarantee Expiry Date.

22.6 Return of Bank Guarantee

The State will return the Bank Guarantee or the balance of the Bank Guarantee to the Contractor on the earlier of:

- (a) the Guarantee Expiry Date; and
- (b) when the State is satisfied that there are no amounts which are or may become payable as contemplated by clause 22.2.

Acacia Prison Services Agreement

22.7 Review of Guarantee Amount

On each Review Date the Guarantee Amount will be adjusted according to the following formula:

$$\text{GAN} = \text{GAO} \times \text{CPI Adjustment}$$

Where:

GAN means the Guarantee Amount to apply from and after the Review Date.

GAO means the Guarantee Amount as set out in Item 5 of Schedule 1.

22.8 Contractor to provide additional or substitute guarantees

- (a) The Contractor must, within 20 Business Days after any Review Date, provide an additional or substitute Bank Guarantee so as to ensure that the aggregate amount available to be drawn under all Bank Guarantees equals the adjusted Guarantee Amount for the increased Guarantee Amount.
- (b) If at any time prior to the Guarantee Expiry Date, the amount available to be drawn under the Bank Guarantee (or if there is more than one Bank Guarantee, the aggregate amounts available to be drawn under all Bank Guarantees) is less than the Guarantee Amount as at that time the Contractor must within 20 Business Days procure the issue to the State of an additional or substitute guarantee so as to ensure that the aggregate amounts available to be drawn under all Bank Guarantees equals the Guarantee Amount at that time.
- (c) If at any time prior to the Guarantee Expiry Date the credit rating of the issuer of any Bank Guarantee is downgraded, the Contractor must notify the State and the State may notify the Contractor that it requires the Contractor to procure a replacement of that Bank Guarantee from a bank or insurance company approved by the State and the Contractor must comply with that requirement within 20 business Days after the State's notification.
- (d) The provisions of clause 22.1(b), (c), (d) and (e) will apply to the additional or substitute Bank Guarantee provided in accordance with subclauses (a), (b) or (c).

22.9 Failure to provide substitute or additional Bank Guarantees

The State may make a demand under any Bank Guarantee if a Bank Guarantee is not provided to the State in accordance with clause 22.8, in the amount of the face value of the Bank Guarantee which is required to be provided under clause 22.8.

22.10 Survival of this clause 22

This clause 22 survives termination of this Agreement.

23. RISK, INDEMNITIES AND LIMITATION OF LIABILITY

23.1 Assumption of risk by Contractor

Except as otherwise provided in this Agreement, the Contractor operates and occupies the Prison, and provides the Services, at its own risk.

Acacia Prison Services Agreement

23.2 Indemnity

- (a) The Contractor indemnifies and must keep indemnified the State and the State's Associates from and against all Losses and Claims of every kind that may be incurred or sustained by any or all of them in respect of or arising from:
 - (i) any act, omission or neglect on the part of the Contractor, or any Contract Worker or any Subcontractor;
 - (ii) any breach by the Contractor, or any Contract Worker or Subcontractor, of the Contractor's Obligations;
 - (iii) the occurrence of any Termination Event;
 - (iv) any infringement by the Contractor or any Contract Worker or Subcontractor of any Intellectual Property Rights;
 - (v) any death, personal injury, loss or damage suffered by any Prisoner, the State, the State's Associates or by any third party arising at or within the Prison, or arising out of or in relation to this Agreement or the provision of the Services; or
 - (vi) any damage to or destruction of any Prison Building, Prison Equipment, State Resources or other property of the State.
- (b) The indemnity given in respect of subclauses (a)(v) and (vi) will not apply to a Force Majeure event, or other event or occurrence beyond the reasonable control of the Contractor, which the Contractor demonstrates to the reasonable satisfaction of the State is uninsurable or uninsurable on commercially acceptable terms.
- (c) This indemnity will not apply to the extent that the Loss or Claim is caused or contributed to by fraud, wilful default or a negligent act or negligent omission on the part of the State or the State's Associates or on the part of the Maintenance Contractor or its employees, agents and contractors.
- (d) The State and the State's Associates must use reasonable endeavours to mitigate the Losses that may be incurred or sustained by each of them respectively for which they are indemnified under this clause 23.2.
- (e) This indemnity will not exclude any other right of the State or the State's Associates to be indemnified by the Contractor.
- (f) For the avoidance of doubt (and subject to the obligation to mitigate under subclause (d)), the Losses which must be indemnified under subclause (a) include:
 - (i) the costs, charges and expenses of any administrator, agent, attorney or nominee appointed by the State to operate any or all of the Prison, or provide all or any part of the Services, on or after an occurrence of the Default of the Contractor or a Termination Event;
 - (ii) the costs, charges and expenses incurred by the State and the State's Associates in engaging a Successor Operator, including any retender and

Acacia Prison Services Agreement

transaction costs and the costs of any consultants and advisers engaged in connection with the appointment of the Successor Operator; and

- (iii) the amount of operation payments or other payments payable to any Successor Operator for operation of any or all of the Prison or provision of all or any part of the Services, for the remainder of the unexpired portion of the Operating Period, to the extent those payments exceed the payments payable under this Agreement,

provided that those Losses in subclauses (i) to (iii) do not exceed \$45 million (**Cap**).

- (g) On each Review Date the Cap will be adjusted according to the following formula:

$$CN = CO \times \text{CPI Adjustment}$$

Where:

CN means the Cap to apply from and after the Review Date.

CO means the Cap as set out in subclause (f).

23.3 Duration of Indemnities

All indemnities in this Agreement, including the indemnities in this clause 23, survive the expiry of termination of this Agreement.

23.4 Contractor Release

The Contractor releases to the full extent permitted by law the State and the State's Associates from all losses, damages, liabilities, actions, suits, claims, demands, costs and expenses of every kind which arise from:

- (a) the Contractor's operation of the Prison or the provision of the Services or the performance of the Contractor's Obligations; or
- (b) any act, omission, accident, loss of life, injury, damage, malfunction or other event in the Prison,

except to the extent caused or contributed to by the State, the State's Associates or the Maintenance Contractor or any of its agents, employees or contractors.

23.5 Exclusion of indirect or consequential loss

Despite any other provision of this Agreement, neither the State nor any of the State's Associates are liable to make any payment (by way of indemnity, damages or otherwise) to the Contractor in respect of any indirect or consequential loss incurred or sustained by the Contractor as a result of any breach or negligence of the State. Despite any other provision of this Agreement, the Contractor is not liable to make any payment (by way of indemnity, damages or otherwise) to the State or any of the State's Associates in respect of any indirect or consequential loss incurred or sustained by the State or any of the State's Associates as a result of any breach or negligence of the Contractor or any Contract Worker or Subcontractor. For the purpose of this clause it is agreed that:

Acacia Prison Services Agreement

- (a) the following losses are not included in the term "indirect or consequential": property damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death; and
- (b) the following losses are included in the term "indirect or consequential": loss of Operation Payments and Performance Linked Fees, loss of revenue, loss of profits, payment of liquidated sums, penalties or damages under any agreement (other than this Agreement), loss of goodwill or credit, loss of business reputation, future reputation or publicity, loss of use, loss of interest, damage to credit rating or increased overhead costs.

23.6 Lost property

If the Contractor loses or destroys or is otherwise not able to locate any property belonging to any Prisoner which is held by the Contractor on behalf of a Prisoner, the Contractor must pay compensation to that Prisoner for the value of the lost or destroyed property and the indemnity in clause 23.2 will apply to:

- (a) any Loss or Claim incurred by the State or the State's Associates as a result of the lost or destroyed property; and
- (b) any Loss or Claim incurred by and in respect of that lost property.

23.7 Liability of officers, employees and agents

Every:

- (a) exemption from, and limitation of, liability;
- (b) defence; and
- (c) immunity,

of whatever nature that applies to the State, or to which the State is entitled, will also be available and extend to protect every one of the State's Associates.

23.8 State trustee

For the purposes of clause 23.7, the State will be treated as acting as agent or trustee on behalf of or for the benefit of the State's Associates.

24. FORCE MAJEURE

24.1 Notice by Force Majeure Party

If a Force Majeure Party is unable, wholly or in part, by reason of Force Majeure:

- (a) to perform any obligation imposed on the Force Majeure Party under this Agreement (the *Affected Obligations*); and
- (b) notifies the Non Affected Party that the Force Majeure Party is affected by Force Majeure,

the Affected Obligations will be suspended during, and the time for undertaking the Affected Obligations under this Agreement will be extended by, the period:

Acacia Prison Services Agreement

- (c) from the giving of the notice that the Force Majeure Party is affected by Force Majeure; and
- (d) until the effects of Force Majeure on the Affected Obligations cease.

24.2 Notice to provide particulars

The notice claiming Force Majeure must contain:

- (a) the particulars of the Force Majeure; and
- (b) the extent to which the Force Majeure Party is unable to perform or will be delayed in performing an obligation under this Agreement.

24.3 Force Majeure Party will implement reasonable procedures

A Force Majeure Party must implement all reasonable procedures to remedy, or remove the Force Majeure, and the effect of the Force Majeure, as soon as practicable.

24.4 Force Majeure Party to keep Non Affected Party advised of developments

- (a) Where a Force Majeure Party gives a notice under this clause, the Force Majeure Party must, after the giving of the notice, and during the continuance of the Force Majeure, at least every 3 Business Days, give further notice to the Non Affected Party of:
 - (i) the extent to which the Force Majeure Party will be unable to perform, or be delayed in performing, the obligations of the Force Majeure Party; and
 - (ii) any significant changes in relation to the Force Majeure since the Force Majeure Party gave its last notice to the Non Affected Party.
- (b) The State may require the Contractor to give notice under subclause (a) at periods of less than 3 Business Days.
- (c) The Contractor must comply with any request made under subclause (b).

24.5 Reduction in Operation Payment

- (a) If the Force Majeure results in a reduction of Services provided under this Agreement, the Operation Payment will be reduced by agreement between the parties to reflect the reduction in the Services.
- (b) If agreement cannot be reached as to the reduction in the Operation Payment, the provisions of clause 26 will apply.

25. CONFIDENTIAL INFORMATION

25.1 Contractor's obligations of Confidentiality

Subject to clause 25.3, the Contractor must keep the Confidential Information confidential, and must not without the State's prior written consent:

- (a) disclose the Confidential Information to any person, other than those Contract Workers requiring the Confidential Information for the purposes of:

Acacia Prison Services Agreement

- (i) this Agreement;
 - (ii) provision of the Services or performance of the Contractor's Obligations;
or
 - (iii) complying with any Act or the requirements of any Government Agency;
and
- (b) use or permit any Contract Worker to use any of the Confidential Information for any purpose other than the purposes specified in subclause (a).

25.2 Departmental System

The Parties agree that:

- (a) the information stored on the Departmental System forms part of the Confidential Information; and
- (b) the requirements of this clause 25 apply to all information stored on the Departmental System.

25.3 Permitted disclosure

The Contractor may disclose Confidential Information:

- (a) which is at the time lawfully in the possession of the proposed recipient of the information through sources other than the Contractor, or an Affiliate of the Contractor;
- (b) in enforcing this Agreement or in a proceeding arising out of or in connection with this Agreement;
- (c) in order to comply with any applicable Legislative Requirements or the applicable rules of any stock exchange on which the Contractor's or Guarantor's shares may be listed;
- (d) as required or permitted by this Agreement;
- (e) to its legal advisers for the purposes of this Agreement or for the purposes of advising the Contractor in relation to this Agreement; or
- (f) with the prior written consent of the State.

25.4 Third parties

The Contractor undertakes and warrants that any person to whom Confidential Information is made available, communicated or disclosed as permitted under this clause, will be subject to, and maintain, the obligations of confidentiality contained in this clause 25.

25.5 Compulsory disclosure

- (a) If the Contractor, or any person to whom the Contractor discloses the Confidential Information, becomes legally compelled to disclose the Confidential Information, the Contractor must immediately notify the State so that the State may seek a protective order or other appropriate relief.

Acacia Prison Services Agreement

- (b) The Contractor must only disclose that part of the Confidential Information which is legally required to be disclosed and will take all reasonable steps to obtain a protective order or other assurances that the confidentiality of the Confidential Information will be maintained.

25.6 Media releases

The Contractor must:

- (a) obtain the State's prior written consent to:
 - (i) issue any information, document or article in respect of the Services, the Prison or this Agreement for publication in any media; or
 - (ii) nominate the Prison or the Services for any award;
- (b) give due recognition to the State where the State consents to a matter specified in subclause (a); and
- (c) refer all enquiries from any media concerning the Prison, the Services or this Agreement to the State, and thereafter, promptly provide to the State details of all enquiries, and any material or information released by the Contractor following the State's consent.

25.7 Public Documents

- (a) The Contractor acknowledges that the State is obliged under the Prisons Act to lay before each House of Parliament:
 - (i) certain reports concerning the operations of the Contractor, the Services, the Prison and this Agreement; and
 - (ii) this Agreement and any amendments to this Agreement.
- (b) Nothing in this Agreement prevents or restricts the State from complying fully with its obligations under the Prisons Act.
- (c) The Contractor further acknowledges that this Agreement and any amendment to this Agreement will become public documents.

25.8 Continuing Obligation

This clause 25 will survive the termination of this Agreement.

26. DISPUTE RESOLUTION

26.1 Negotiation by Contract Manager and Contractor's Representative

If either party notifies the other party of a dispute between the parties relating to or arising out of this Agreement, then within 10 Business Days of the date of the dispute notice, the Contract Manager and the Contractor's Representative must meet and must use reasonable endeavours, acting in good faith, to resolve the dispute by joint discussions.

Acacia Prison Services Agreement

26.2 Negotiation by senior representatives of the parties

If the dispute is not settled under clause 26.1 within 15 Business Days after the date of the dispute notice then, within 20 Business Days after the date of the dispute notice the Director, Contracted Services, or person occupying an equivalent position within the State, and a senior executive of the Contractor must meet and must use reasonable endeavours, acting in good faith, to resolve the dispute by joint discussions.

26.3 Referral to Joint Management Board

If the dispute is not settled under clause 26.2 within 25 Business Days after the date of the dispute notice then the parties must refer the dispute to the Joint Management Board, which must use reasonable endeavours, acting in good faith, to resolve the dispute.

26.4 No effect on available rights and remedies

Clauses 26.1 to 26.3 do not:

- (a) prevent either party applying to a court at any stage for injunctive or other relief; or
- (b) apply to any dispute which is required under this Agreement to be referred to an independent expert or to any matter which this Agreement provides is to be determined by an accountant or independent valuer.

26.5 Independent expert

If either party notifies the other of a Dispute under a provision of this agreement which requires the Dispute to be determined by an independent expert, or which the parties agree is best resolved by an independent expert, the parties will submit to the following procedure:

- (a) the parties must choose and appoint an independent expert;
- (b) in the absence of agreement by the parties as to the independent expert within 5 Business Days of notice of a dispute, the independent expert will be appointed on the application of any party by the President of the Institute of Arbitrators Australia;
- (c) the independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within 15 Business Days, or such longer period as may be agreed between the parties;
- (d) the independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit subject to any provisions to the contrary in this Agreement;
- (e) the independent expert's decision will be final and binding on the parties; and
- (f) the costs of the independent expert will be borne by the parties equally or as the independent expert may otherwise determine and each party will bear its own costs relating to the independent expert's decision.

Acacia Prison Services Agreement

26.6 Contractor must continue to perform Services

The Contractor must continue to perform the Services and comply with the Contractor's Obligations, notwithstanding any Dispute, except for any obligations that cannot be performed because of the Dispute.

27. DEALING WITH AGREEMENT AND CHANGE IN CONTROL

27.1 Contractor may not Deal With Agreement

The Contractor may not Deal With:

- (a) this Agreement;
- (b) the Contractor's interest under this Agreement;
- (c) the right to any money or payment under this Agreement;
- (d) any other interest under this Agreement;
- (e) the Prison, the Site or any part of it; or
- (f) any of the Contractor Resources if such a Dealing could affect the Contractor's ability to provide the Services in accordance with, or to comply with the Contractor's Obligations,

without the State's prior written consent.

27.2 State may Deal With Agreement

The State may at any time, without the consent of the Contractor, Deal With:

- (a) this Agreement;
- (b) any payment or any right to receive payment under this Agreement; or
- (c) any other right, benefit or interest of the State under this Agreement,

provided that the performance of the State's Obligations remains undertaken or guaranteed by the State. The Contractor must, on the State's request, do everything reasonably necessary to give effect to any Dealing by the State, including the execution of documentation.

27.3 Notice of change in control

Without derogating from the State's rights under subclause 18.1(a), the Contractor must give notice to the State immediately the Contractor becomes aware of a Change of Control, of:

- (a) the Contractor;
- (b) the Guarantor; or
- (c) any Subcontractor.

Acacia Prison Services Agreement

28. SUBCONTRACTING AND THIRD PARTY SERVICES

28.1 Prohibition on subcontracting all of the Services

The Contractor may not subcontract any part of the Services described in subclauses (a) and (b) of the definition of Services in clause 1.1 except in accordance with the requirements of this clause 28.

28.2 Permitted subcontracting

- (a) Subject to subclause (b), the Contractor must obtain the State's prior consent to enter into any Subcontracts.
- (b) The Contractor may not subcontract the whole of the Services.

28.3 Application for Consent to Subcontractors

In seeking approval of a proposed Subcontract, the Contractor must clearly specify in writing:

- (a) the specific components of the Services that the Contractor proposes to Subcontract;
- (b) the scope of the proposed Subcontract; and
- (c) the identity, background and qualifications of the proposed Subcontractor and any other information required for a fit and proper person check.

28.4 Conditions for Subcontractors

Unless the State otherwise approves, all Subcontracts must:

- (a) contain requirements that the Subcontractor must:
 - (i) have established, and maintain, an occupational health and safety policy and plan approved by the State;
 - (ii) as a minimum, pay all the Subcontractor's employees the rates and allowances set out in applicable Industrial Instruments; and
 - (iii) have appointed, and use, in performing any Services, persons who possess appropriate skill, expertise and qualifications to meet the requirements of this Agreement;
- (b) contain an acknowledgment of the State's rights of intervention, suspension and termination in terms substantially equivalent to clause 19; and
- (c) provide that if this Agreement is terminated the Contractor's rights, benefits, obligations and liabilities under the Subcontract may be novated to the State, or to a person nominated by the State on terms acceptable to the State.

28.5 State's Approval of Subcontract

The State may:

- (a) approve or disapprove any proposed Subcontract in the State's discretion and may attach conditions of approval;

Acacia Prison Services Agreement

- (b) in approving a proposed Subcontract under subclause (a), notify the Contractor if it considers the Subcontractor to be material (*Material Subcontractor*) in terms of the nature of the services the Subcontractor provides under the Subcontract or the monetary value of the Subcontract; and
- (c) at any time during the Operation Period, withdraw approval of any Subcontract if:
 - (i) the Subcontractor's performance under the Subcontract is deficient;
 - (ii) material misrepresentations were made to the State by the Contractor or by the Subcontractor in relation to the Subcontract;
 - (iii) the State so determines on the basis of any other disputes or unsatisfactory dealings with the Subcontractor; or
 - (iv) the State has any other reasonable cause for doing so.

28.6 Information requirements

The Contractor must:

- (a) provide to the State a copy of the Subcontract after it has been executed;
- (b) keep the State informed in relation any material issues that may arise in relation to the Subcontract and its performance;
- (c) maintain an audit trail of processes undertaken to identify and select Subcontractors; and
- (d) ensure that each Subcontractor undergoes security screening and movement control and maintain, and give the State access to, records of the security screening and movement control in accordance with clause 13.

28.7 Contractor's liability not affected

If the Contractor enters into a Subcontract, the Contractor:

- (a) is not relieved of any obligation or liability under this Agreement;
- (b) must ensure the full and complete performance of the Services in accordance with this Agreement; and
- (c) must ensure that where any person is engaged or to be engaged as a Contract Worker by a Subcontractor, all provisions of this Agreement dealing with Contract Workers are fully complied with as if that person were engaged directly by the Contractor.

28.8 Liability for Subcontractors

The Contractor will be fully liable to the State for any Claim made against, or Loss suffered or incurred by, the State as a result of any:

- (a) act, default, neglect or omission on the part of; or
- (b) lack of skill or judgment by,

Acacia Prison Services Agreement

any Subcontractor or any employee, agent or contractor of the Subcontractor, as if that act, default, neglect or omission, or lack of skill or judgment (as the case may be) was the Contractor's.

28.9 No contractual relationship with Subcontractors

Nothing in this Agreement creates any contractual relationship between the State and any Subcontractor or supplier to the Contractor.

28.10 Third party services and supplies

- (a) Where any services or supplies are provided to the Contractor by a third party, including by an Affiliate of the Contractor, which are necessary for the ongoing continuity of the Services or for the operation, management or security of the Prison, but which are not themselves Services as contemplated in this Agreement, the Contractor must:
- (i) ensure that all the relevant arrangements relating to the provision of those services or supplies, including the nature and scope of the services or supplies and the terms and conditions applicable to their provision, are contractually documented;
 - (ii) advise the State of the matters contemplated in subclause (i) as soon as reasonably practicable after any arrangements are entered into and provide to the State copies of all executed contractual documents and all other relevant documents;
 - (iii) advise the State of any material variations to any of the matters in subclause (i) and provide to the State copies of all variation documents as soon as reasonably practicable after those variations are agreed; and
 - (iv) ensure that the Contract Manager is informed as soon as reasonably practicable as to any matters that arise in the course of the provision of those services or supplies that may have a significant impact on any aspect of the provision of Services in accordance with the terms of this Agreement.
- (b) Subclause (e) is without prejudice to the operation of this clause 28 in relation to any Subcontract in respect of any part of the Services.

29. WARRANTIES AND REPRESENTATIONS

29.1 Representations and warranties

The Contractor represents and warrants to the State that:

- (a) **authority:** the Contractor has full power and authority to enter into this Agreement, provide the Services and perform the Contractor's Obligations;
- (b) **authorisations:** the Contractor has taken all necessary action to authorise the execution, delivery and performance of this Agreement in accordance with its terms;

Acacia Prison Services Agreement

- (c) **transaction permitted:** the execution, delivery and performance by the Contractor of this Agreement do not and will not violate:
- (i) any law, regulation, authorisation, Government Authorisation, ruling, consent, judgment, order or decree of any Government Agency;
 - (ii) its constitution or other constituent documents; or
 - (iii) any Encumbrance or document that is binding on the Contractor or any of the Contractor's assets,
- and does not and will not result in:
- (iv) the creation or imposition of any Encumbrance, or restriction of any nature, on any of the Contractor's assets; or
 - (v) the acceleration of the date of payment of any obligation existing under any Encumbrance, or document that is binding upon the Contractor;
- (d) **Government Authorisation:** the Contractor has in full force and effect every Government Authorisation necessary to enter into this Agreement, provide the Services, perform the Contractor's Obligations and to permit this Agreement to be enforced;
- (e) **binding obligations:** this Agreement and the Parent Guarantee constitute legal, valid and binding obligations and, subject to any necessary stamping and registration, are enforceable in accordance with their terms, subject to laws generally affecting creditors' rights, and to principles of equity;
- (f) **statements in Contractor's Proposal:** all statements, representations and information contained in the Contractor's Proposal are true and accurate, and not misleading;
- (g) **own enquiries:** in entering into this Agreement, the Contractor has relied entirely on its own enquiries, inspections and investigations relating to this Agreement, the Services and the Prison and the Contractor has:
- (i) examined all information relevant to the risks, contingencies and other circumstances that could affect the Contractor's Obligations, and that the Contractor could have obtained by making usual and reasonable inquiries;
 - (ii) visited and examined the Site and its surroundings and done everything possible to inform itself fully as to any condition or characteristic of the Site affecting or that may affect the Contractor's performance of the Services;
 - (iii) fully considered all actual and potential risks, contingencies and other circumstances which could have an effect on the cost of performing the Services;
 - (iv) informed itself completely of the nature and extent of the work and Contractor Resources necessary to perform the Services;
 - (v) informed itself as to the availability and cost of:

Acacia Prison Services Agreement

- (A) labour in respect of Contract Workers, including the cost of complying with obligations imposed by any Industrial Instrument; and
 - (B) of any materials or other goods or plant and equipment required as part of the Contractor Resources;
- (vi) informed itself of the requirements of every applicable Act and in relation to the Prison and, in relation to measures necessary to protect the Environment from any adverse effect or damage arising from performance of the Services; and
- (vii) obtained all appropriate professional and technical advice on all matters and circumstances in respect of the matters referred to in this clause, prior to entering into this Agreement;
- (h) ***no inducements:*** the Contractor was not induced to enter into this Agreement by, and has not relied on:
 - (i) any statements, representations or warranties, whether orally or in writing, or contained in any brochures, expression of interest, tender or request for proposal documents provided by the State or the State's Associates including any statements, representations, or warranties relating to or in any way connected with this Agreement, the Services or the Prison, or about any financial return or income to be derived from the Services or this Agreement; or
 - (ii) any information or data made available or provided by the State or the State's Associates to the Contractor as to the Prison or the Site;
- (i) ***no collusive arrangements:***
 - (i) the Contractor had no knowledge of the price of any other proponent for the Services at the time the Contractor submitted the Contractor's Proposal;
 - (ii) except as disclosed in the Contractor's Proposal, the Contractor has not entered into any contract, agreement, arrangement or understanding to pay or allow any money, directly or indirectly, to or on behalf of any other proponent, in relation to the Contractor's Proposal or any contract to be entered into consequent thereon, nor paid or allowed any money on that account, nor will the Contractor pay or allow any money on that account;
 - (iii) the Contractor has not paid or allowed or entered into any contract, agreement, arrangement or understanding to pay or allow any money, directly or indirectly:
 - (A) to or on behalf of any other proponent; nor
 - (B) received any money or allowance from or on behalf of any other proponent in relation to the Contractor's Proposal or any contract entered into consequent thereon, nor will the Contractor pay or allow any person to receive any money on that account; and

Acacia Prison Services Agreement

- (iv) if the Contractor paid or allowed to another proponent any money in breach of these conditions:
 - (A) the Contractor must hold that money on trust for, and immediately pay that money to the State; and
 - (B) the State may withhold from any payment due to the Contractor on any account an equivalent sum as liquidated damages;
- (j) **ownership of Contractor Resources:** the Contractor is the beneficial owner of, and has good title to the Contractor Resources;
- (k) **fitness of Contractor Resources:** any Contractor Resources used, or that will be used, by the Contractor in performing the Services are and will be:
 - (i) of good and merchantable quality; and
 - (ii) fit in all respects for the purposes for which they are to be used;
- (l) **no conflict:** the Contractor has no professional or contractual obligations that as at the Signature Date, or during the Operation Period, will conflict with the performance of the Services;
- (m) **no trustee:** the Contractor is not entering this Agreement as the trustee of any trust or for and on behalf of any other person.

29.2 State's reliance on Contractor's representations and warranties

The Contractor acknowledges that in entering into this Agreement the State is relying on:

- (a) the Contractor's Proposal;
- (b) the Contractor's advice, skill and judgment in performing the Services; and
- (c) each of the Contractor's representations and warranties contained in this Agreement.

29.3 Continuation, repetition and survival of Contractor's representations and warranties

The Contractor warrants that all representations and warranties given by the Contractor under this Agreement:

- (a) will remain unaffected despite any review, comment, approval or direction by the State or any of the State's Associates;
- (b) survive the execution of this Agreement and the expiry of the Operation Period;
- (c) are regarded as repeated on each day during the Operation Period with respect to the facts and circumstances then subsisting; and
- (d) are independent, and are not limited by reference to any other warranties in this Agreement.

29.4 State's representations and warranties

The State represents and warrants that:

- (a) **authority:** the State has full power and authority to enter into and perform the State's Obligations;

Acacia Prison Services Agreement

- (b) **authorisations:** the State has taken all necessary action to authorise the execution, delivery and performance of this Agreement in accordance with its provisions;
- (c) **binding obligations:** this Agreement constitutes legal, valid and binding obligations and, subject to any necessary stamping and registration, is enforceable in accordance with its provisions, subject to principles of equity; and
- (d) **transaction permitted:** the execution, delivery and performance by the State of this Agreement does not and will not violate any law, regulation, authorisation, Government Authorisation, ruling, consent, judgment, order or decree of any Government Agency.

29.5 No other representations or warranties by State

The Contractor acknowledges that, except for:

- (a) the express representations and warranties set out in this Agreement;
- (b) those implied provisions or warranties that are imposed by any Act that are mandatory and cannot be excluded,

the State gives no warranties regarding:

- (c) this Agreement;
- (d) the Services, the Site, the Prison, the Prison Building or the Prison Equipment;
- (e) the State Resources or any other goods or services, supplied or to be supplied to the State; or
- (f) the accuracy or adequacy of any information provided to the Contractor as to the Prison or Site, and the State will not be liable to the Contractor, and the Contractor will have no Claim against the State, in respect of any information provided to the Contractor in respect of the Prison or the Services.

30. CONTRACTOR'S RELATIONSHIP WITH THE STATE

30.1 Independent contractor

The Contractor is an independent contractor and must, unless otherwise provided by this Agreement, exercise independent control, management and supervision in the performance of the Services.

30.2 Relationship

The relationship between the State and the Contractor is that of principal and independent contractor, and nothing in this Agreement is to be taken as constituting the Contractor or any Contract Workers or Subcontractors as employees or agents of the State or the State's Associates.

Acacia Prison Services Agreement

30.3 No agency

- (a) The Contractor acknowledges that, except to the extent otherwise expressly provided in this Agreement:
 - (i) the Contractor is not the legal representative, agent, joint venturer or partner of the State, or of any of the State's Associates for any purpose; and
 - (ii) neither the Contractor nor any Contract Worker has any right or authority to assume or create any obligations of any kind, or to make any representations or warranties on behalf of the State, or any of the State's Associates in any respect.
- (b) The State acknowledges that, except to the extent otherwise expressly provided in this Agreement:
 - (i) neither the State nor or any of the State's Associates is, for the purposes of this Agreement, the legal representative, agent, joint venturer or partner of the Contractor for any purpose; and
 - (ii) neither the State nor or any of the State's Associates has any right or authority to assume or create any obligations of any kind, or to make any representations or warranties on behalf of the Contractor or to bind the Contractor in any respect.

30.4 No employment

Notwithstanding that any person employed by the Contractor may be, or be treated as being under the control or direction of the State or the State's Associates:

- (a) neither the State, nor any of the State's Associates is to be considered the employer of that person; and
- (b) the Contractor is fully responsible for all obligations and liabilities arising out of the employment of that person in connection with any work under this Agreement whether in respect of the death of or injury to that person or anything else relating to that person.

30.5 Contrary Legislative Requirement

Clause 30.4 and each other provision of this Agreement is subject to any contrary Legislative Requirement.

31. PROTECTION OF THE INTERESTS OF STATE AND STATE'S ASSOCIATES

31.1 Reputation

The Contractor must take all reasonable action to protect the State's and the State's Associates' name, image, reputation and interests.

Acacia Prison Services Agreement

31.2 Conflict of interest

The Contractor must not engage in any activity that would in any way adversely affect:

- (a) the Contractor's ability to provide the Services independently and in the manner required under this Agreement; or
- (b) the interests of the State or any of the State's Associates.

31.3 Good faith

The Contractor will exercise a duty of good faith to the State and the State's Associates in the provision and performance of the Services and in complying with the Contractor's Obligations.

31.4 No association

The Contractor must not:

- (a) use the State or the State's Associates' name or attempt to obtain a benefit from the State or any of the State's Associates' image and reputation in any way; or
- (b) hold out to any third party that the Contractor has an association or connection with the State or any of the State's Associates other than the Contractor's engagement under this Agreement,

without obtaining the State's prior written consent.

31.5 Provisions of any permitted association

The Contractor acknowledges that the State may stipulate provisions in relation to the State's consent to any proposal or action by the Contractor by which the Contractor may benefit from association or connection with the State, including a condition requiring the payment of remuneration to the State on provisions to be agreed.

31.6 Corrupt Gifts and Payments of Commission

(a) The Contractor must not:

- (i) give, or offer or agree to give, to any person in the employ of the State any gift, benefit, incentive or consideration of any kind as an inducement or reward for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the State; and
- (ii) enter into this Agreement or any other contract with the State or any Government Agency if:
 - (A) the Contractor has paid or agreed to a commission (or other similar payment), or
 - (B) another person has paid a commission on the Contractor's behalf, or the Contractor is otherwise aware that such a commission has been paid,

unless before the contract is made, the Contractor has disclosed in writing to the State the particulars of the commission and the terms and

Acacia Prison Services Agreement

conditions of any agreement for its payment. The Contractor must ensure that each Contract Worker complies with this clause as if references to the Contractor were references to the Contract Worker.

- (b) Any breach of this clause by the Contractor or any Contract Worker (whether with or without the knowledge of the Contractor) or the commission of any criminal offence by the Contractor, or by any Contract Worker while the Contract Worker is at the Prison, will entitle the State to terminate this Agreement immediately by service of a notice on the Contractor specifying the reason for termination.

32. NOTICES

Every notice:

- (a) must be in writing and given in accordance with the following details, and where more than one person is specified under the details of a party, then to every person at the address or in accordance with the details specified in Item 6 of Schedule 1;
- (b) must be signed by:
 - (i) in the case of the Contractor – the Contractor’s Representative; and
 - (ii) in the case of the State - the Contract Manager; and
- (c) will be treated as having been given the sender and received by or served on the addressee:
 - (i) if by delivery in person - when delivered to the addressee;
 - (ii) if posted by registered post within Australia to an address within Australia on the day which is the third Business Day after the date of posting;
 - (iii) if posted by air mail registered post from a place within Australia to an address outside Australia or posted from a place outside Australia to an address within Australia on the day which is the eighth Business Day after the date of posting; or
 - (iv) if by facsimile transmission - on the date of transmission where a transmission report is produced by the facsimile machine by which the facsimile message was transmitted which indicates that the facsimile message was transmitted in its entirety to the facsimile number of the recipient. If the transmission is on a day which is not a Business Day, or is after 4.00 pm (addressee's time), it will be treated as having been duly given on the succeeding Business Day.

33. GENERAL

33.1 Costs

- (a) Unless otherwise stated, the Contractor must provide the Services and comply with the Contractor’s Obligations at the Contractor’s cost.

Acacia Prison Services Agreement

- (b) The State and the Contractor must each pay their own legal and other costs in connection with the preparation and signing of this Agreement.

33.2 Stamp duty

The Contractor is solely responsible for, and must indemnify the State against, any stamp duty that is payable on or in relation to:

- (a) this Agreement; and
- (b) any instrument or transaction that this document contemplates.

33.3 Approvals, consents, determinations or waivers

Subject to any express provision of this Agreement, where any approval, consent, determination or waiver is required from or to be made by the State:

- (a) the Contractor must obtain that approval, consent, determination or waiver in writing; and
- (b) the State may:
 - (i) grant or refuse that approval or consent, make that determination or waiver, in the State's absolute discretion, without giving any reason for that grant or refusal or making; and
 - (ii) grant that approval or consent, or make that determination or waiver, subject to any conditions the State may impose.

33.4 Authority to date

The State, and any employee or solicitor acting for the State, may date this Agreement.

33.5 Enforcement of indemnity

A party need not incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

33.6 Ensure compliance by others

Where a provision of this Agreement requires the Contractor to do a thing or prohibits the Contractor from doing a thing, or imposes on a Contract Worker any obligation, the Contractor must ensure that the Contract Workers, the Subcontractors and others over whom the Contractor exercises control comply with that provision or obligation.

33.7 Entire Agreement

This Agreement constitutes the entire agreement between the parties and supersedes any prior agreement between the parties.

33.8 Exercise of Powers

- (a) A party may exercise a Power at that party's discretion, and separately or concurrently with any other Power.
- (b) A single exercise of a Power, by a party does not prevent a further exercise of that, or of any other Power, by that party.

Acacia Prison Services Agreement

- (c) If a party fails to exercise, or delays in exercising, a Power, that does not prevent its exercise.
- (d) Subject to any express provision in this Agreement, the Powers of a party under this Agreement are cumulative, and are in addition to any other Powers of that party.

33.9 Further assurances

Each party will promptly, at that party's expense, do any thing that the other party reasonably requires to effect, perfect or complete the provisions of this Agreement.

33.10 Governing law

- (a) This Agreement is governed by the laws of Western Australia.
- (b) Each of the parties irrevocably submits to the exclusive jurisdiction of the courts of Western Australia.

33.11 Prohibition, enforceability and severance

- (a) Any provision of, or the application of any provision of, this Agreement or any Power of a Party under this Agreement which is prohibited in any jurisdiction or fetters or affects any statutory power is ineffective only to the extent of that prohibition or to the extent it fetters or affects any statutory power.
- (b) If any part of this Agreement is, or becomes, illegal, void or unenforceable, that part is or will be severed from this Agreement so that all parts that are not, or do not become, illegal, void or unenforceable remain in full force and effect and are unaffected by that severance.

33.12 Statutory powers

Nothing contained in or implied by this Agreement has the effect of constraining, or placing any fetter on, any person, in exercising any such power and, except to the extent inconsistent with this Agreement or permitted by law, Statutory Powers are cumulative and are in addition to, or in augmentation of, the Powers contained in this Agreement.

33.13 Survival

Nothing will release the Contractor from any of the Contractor's Obligations that are expressed to survive, or by their nature, survive completion of the Services or the termination of this Agreement, including all warranties and obligations of indemnity or confidentiality.

33.14 Variation and waiver

- (a) A provision of, or right created under, this Agreement may not be:
 - (i) waived except in writing signed by the Party granting the waiver; or
 - (ii) varied except by an instrument in writing signed by the parties, unless it is a variation of a Service made by the State in accordance with clause 16.

Acacia Prison Services Agreement

- (b) The waiver by a Party of a breach by another Party of any provision of this Agreement, does not operate as a waiver of another or continuing breach by that Party of the same, or any other, provision of this Agreement.

33.15 Counterparts

- (a) This Agreement may be executed in any number of counterparts.
- (b) All counterparts, taken together, constitute one instrument.
- (c) A party may execute this Agreement by signing any counterpart.

33.16 Attorneys

Each attorney who executes this Agreement acknowledges that, at the time of executing this Agreement, the attorney has received no notice of revocation of the power of attorney under which the attorney executes this Agreement.

Acacia Prison Services Agreement

Executed in Perth.

Each attorney executing this Agreement states that he or she has no notice of revocation or suspension of his or her power of attorney.

Signed by Ian Johnson for and on behalf of
the **Crown in Right of the State of
Western Australia** in the presence of:

Witness Signature

Signature

Print Name

Signed for Serco Australia Pty Limited by
its attorney in the presence of:

Witness Signature

Attorney Signature

Print Name

Print Name