

Planning Agreement

Under s.93F of the *Environmental Planning & Assessment Act 1979*

The Minister administering the *Environmental Planning & Assessment Act 1979*
ABN 38 755 709 681

CSR Ltd
ABN 90 000 001 276

Draft



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Section 93F checklist

| | Section 93F provision | Clause in Deed |
|----------------|---|---|
| s.93F(1) | Parties | |
| | <ul style="list-style-type: none"> ▪ Developer | CSR Ltd |
| | <ul style="list-style-type: none"> ▪ Planning Authorities | Minister administering the EP&A Act |
| | Developer has: | |
| | (a) sought a change to an planning instrument; | No |
| | (b) made, or proposes to make, a development application; | Yes - Part 3A application |
| | (c) entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies. | No |
| s.93F(3)(a) | Land affected by this planning agreement. | cl.1 - Definitions |
| s.93F(3)(b) | Description of | |
| | (i) planning instrument affected by planning agreement - | Not applicable |
| | (ii) development affected by planning agreement | cl.1 - Definitions |
| s.93F(3)(c) | Nature and extent of provisions made by developer and timing | cl.5 - Developer's Obligations cl.8 - Payments |
| s.93F(3)(d)(e) | Application of s.94, s.94A or s.94EF | cl.4 - Application of s.94, s.94A |
| s.93F(3)(f) | Dispute resolution | cl.3 - Dispute resolution |
| s.93F(3)(g) | Enforcement mechanism | cl.6 - Caveat and Compulsory Acquisition |

- D. The Developer has offered to the Minister to enter into a Planning Agreement to give effect to its obligations under this biodiversity offset arrangement.
- E. This deed sets out the terms of the Planning Agreement.

OPERATIVE PROVISIONS

1. INTERPRETATION

1.1 Definitions

The following definitions apply in this Deed:

Authorised Representative means those persons listed in **Schedule 4**;

Authority means a government, semi-government, local government, statutory, public, ministerial, civil, administrative, fiscal or judicial body or other authority or body.

Biodiversity means the vegetation communities referred to in section 4.2 of the BMP, being Coastal River Flat Forest, Shale Plains Woodland and Shale Hills Woodland;

Biodiversity Corridor means the lands listed in the table headed "Biodiversity Corridor Area" in the Subdivision Plan within the column headed "Corridor" (and identified in the Subdivision Plan) as follows:

- 1a;
- 1b;
- 1c;
- 1d;
- 2a;
- 2b;
- 2c;
- 2d;
- 2f;
- 2h;
- 3b;
- 3c;
- 3d;
- 3e;
- 4a; and
- 7a.

BMP means the document entitled "Biodiversity Management Plan Erskine Park Employment Area dated May 2006 prepared by HLA Envirosiences Pty Ltd", as amended by the New South Wales Department of Environment and Conservation and attached in **Schedule 4**;

BMGW2's Lands means Lot 141 DP 843899;

Business Days means a day other than a Saturday, Sunday or public holiday in NSW and specifically excluding 27, 28, 29, 30 and 31 December;

CLM Act means the *Contaminated Lands Management Act 1997* (NSW) (as amended);

Commencement Date means the later of:

- (a) the date of the last EPBC Act Approval issued in relation to the damage and/or destruction of any Biodiversity upon all or part of the Lands. Fitzpatrick's Lands and

BMGW2's Lands when undertaking the Development and development on Fitzpatrick's Lands and BMGW2's Lands; and

- (b) the date the Establishment Fund first contains \$3 million less, if applicable, the Initial Order Sum; and
- (c) the date the Maintenance Fund first contains \$1 million; and
- (d) the date of receipt by the Minister of the fee of \$500,000.00 referred to in **Recital C**; and
- (e) the date of the last registration of the Covenant upon the titles to all the Covenant Lands (where the Covenant Lands have not been transferred to the Minister).

Confidential Information means any information and all other knowledge at any time disclosed (whether in writing or orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:

- (a) is by its nature confidential;
- (b) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);
- (c) any party knows or ought to know is confidential; or
- (d) is information which may reasonably be considered to be of a confidential nature;

Contaminated means the presence in, on or under land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment, when the land is used for purposes consistent with the BMP;

Corridor 3a and 6b means the lands identified as Corridor 3a and 6b in both the table headed "Biodiversity Corridor Area" in the Subdivision Plan within the column headed "Corridor" and in the Subdivision Plan;

Costs includes costs, charges and expenses, including those incurred in connection with advisers.

Covenant means a covenant in registrable form in the terms set out in **Schedule 3** with any amendments or additions needed to impose it on the parcel of land in question;

Covenant Lands means the lands listed in **Schedule 1** to the extent that they are located in the Biodiversity Corridor;

Delayed Covenant means the Covenant amended so that the obligations contained therein take effect 27 months from the date the Landfill ceases or will cease to lawfully accept waste as specified in the Developer's notice under **clause 5.4**;

Developer's Corridor Lands means the lands identified in the Subdivision Plan and listed in the table headed "Biodiversity Corridor Area" in the Subdivision Plan within the column headed "Corridor" as follows:

- 1a;
- 1c;
- 2a; and
- 2d;

Development means development of the land in accordance with approvals granted to the applications described in **Recital B**;

Effect the Transfer of Title means do all things necessary to cause the transfer of title to land as a separate parcel to the Minister free of any encumbrance (other than as are described on the Subdivision Plan) including without limit:

- (a) preparing all necessary plans;
- (b) making and diligently prosecuting all necessary applications;
- (c) fulfilling all necessary conditions to approvals;
- (d) signing and executing all necessary documents;
- (e) attending to registration of all necessary documents with Land & Property Information NSW; and
- (f) ensuring the land is not Contaminated prior to transfer.

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW) (as amended);

EPBC Act means the *Environment Protection and Biodiversity Conservation Act 1999* (CW) (as amended);

EPBC Act Approval means a controlled activity approval under Part 9 of the EPBC Act or a notice under Part 7 of the EPBC Act that an activity does not need approval;

Establishment Fund means a separate Hour Glass Facility account held by the New South Wales Treasury Corporation and named EPOG – Establishment Fund, holding funds for the Establishment of the Biodiversity, being a fund for Establishing the Biodiversity;

Establishing the Biodiversity means establishing the Biodiversity on the Biodiversity Corridor in accordance with the BMP;

Fitzpatrick's Lands means:

- Lot 197 DP 1087837
- Lot 10 DP 253678 and
- Lot 8 DP 253678;

Initial Contractor means the contractor retained under the Initial Order;

Initial Order means any costed quotation procured by CSR and approved by the Minister disclosing:

- (a) a specification of initial works to be performed and goods to be supplied in connection with Establishment of the Biodiversity; and
- (b) the price for (a);

Initial Order Sum means any sum which by the time the Establishment Fund is created has been paid by the LOG under the terms of an Initial Order;

Landfill means the landfill operating on the land identified as 6a in the Subdivision Plan and in the table headed "Biodiversity Corridor Area" in the Subdivision Plan within the column headed "Corridor";

Lands means:

- Lot 25 DP1098147
- Lot 10 DP 1094045

Maintenance Fund means a separate Hour Glass Facility account held by the New South Wales Treasury Corporation and named EPOG – Maintenance Fund, holding funds for the Maintenance of the Biodiversity, being a fund for Maintaining the Biodiversity;

Maintain the Biodiversity means maintain the Biodiversity on the Biodiversity Corridor in accordance with the BMP after Establishing the Biodiversity;

Mediator means a person appointed as mediator under **clause 14.5**;

Planning Agreement means a planning agreement under s.93F of the *Environmental Planning & Assessment Act 1979* as amended;

Subdivision Plan means the plan annexed as **Schedule 2**.

Transferable Corridor Lands means the Developer's Corridor Lands (other than the land marked 'BIO' in the Subdivision Plan).

1.2 Interpretation of words and phrases

- (a) Clause headings are for convenience only and will be ignored in the interpretation of the Deed.
- (b) References to a party include the successors and permitted assigns of that party.
- (c) Words importing the singular include the plural and words importing the plural include the singular.
- (d) Words importing a person include a corporation, firm or body corporate.
- (e) Nothing contained in this Deed will be deemed or construed as creating the relationship of partnership.
- (f) References to a month mean a calendar month.
- (g) References to any document include any permitted amendment, supplement to or replacement or novation of the document.
- (h) References to any legislation or to any section or provision of any legislation includes any:
 - (i) Statutory modification or re-enactment of or any statutory provision substituted for that legislation, section or provision.
 - (ii) Ordinances, by-laws, regulations and other statutory provision substituted for that legislation, section or provision.
- (i) No waiver of any breach of this Deed or of any of its terms will be effective unless the waiver is in writing and signed by the party against whom the waiver is claimed, and no waiver of any breach will operate as a waiver of any other breach or subsequent breach.
- (j) Other grammatical forms of defined words or expressions have corresponding meanings.

(k) 'Including' and similar expressions are not words of limitation.

2. PLANNING AGREEMENT UNDER THE EP&A ACT

The parties agree that this deed is a planning agreement within the meaning of section 93F of the EP&A Act.

3. APPLICATION OF THIS DEED

This Deed applies to the Land and the Development.

4. APPLICATION OF S.94 AND S.94A OF THE EP&A ACT TO THE DEVELOPMENT

Section 94, section 94A and section 94EF of the EP&A Act apply to the Development of the Lands. Benefits under the agreement are to be taken into consideration in determining any development contribution under section 94, section 94A or section 94EF of the EPA Act.

5. THE DEVELOPER'S OBLIGATIONS

5.1 Covenant and transfer

The Developer must, at its cost:

- (a) forthwith, and in any event, within **14 days** of signing the Planning Agreement, do all things necessary to cause the registration of the Covenant upon the title to the Developer's Corridor Lands; and
- (b) Effect the Transfer of Title to the Transferable Corridor Lands as soon as practicable after the Minister grants approval for application no.06_0216, and in any case within **12 months** of the Commencement Date.

5.2 Payments

Immediately upon receipt of the notice in **clause 7**, the Developer must pay the following non-refundable (subject to **clause 10**) amounts:

- (a) \$2,792,753.00 into the Establishment Fund less, if applicable, any sum paid by the Developer under **clause 5.5**;
- (b) \$660,000.00 into the Maintenance Fund, and
- (c) \$245,000.00 to the Minister.

5.3 Corridor 3a and 6b

The Developer must, at its cost:

- (a) do all things necessary to cause the registration of the Delayed Covenant upon the title to so much of CSR's Lands as are located within Corridor 3a and 6b within **14 days** of signing the Planning Agreement; and
- (b) Effect the Transfer of Title to so much of CSR's Lands as are located within Corridor 3a and 6b soon as practicable after the date the obligations contained in the Delayed Covenant take effect, and in any case within **2 months** of that date.

5.4 Delayed Covenant Commencement

As soon as the Developer becomes aware of the date that the Landfill ceases (or will cease) to lawfully accept waste, it must notify the Minister in writing of that date.

5.5 Initial Order

- (a) If requested to do so by the Minister, the Developer will do all things necessary to promptly procure the Initial Order and obtain the Minister's approval of the Initial Order.
- (b) The Developer must promptly pay the Initial Contractor the Developer's proportion of the Initial Order Sum (being the proportion which \$2,792,753.00 bears to \$3,000,000.00).

6. CAVEAT, COMPULSORY ACQUISITION AND REGISTRATION

6.1 Caveatable interest

The Developer agrees that clause 5.1 gives the Minister a caveatable interest in the Transferable Corridor Lands from the date this Deed is executed.

6.2 Compulsory Acquisition

- (a) In the event that the Developer does not comply with **clause 5.1(b)** or **clause 5.3(b)** within the time stipulated therein, the Developer, in accordance with section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*, consents to the Minister (or such the nominated Authority) compulsorily acquiring the Transferable Corridor Lands (and/or Corridor 3a and 6b as the case may be) for the amount of \$1.10 in full and final payment of compensation without having to go through the pre-acquisition procedure under that Act.
- (b) If the Minister or other nominated Authority must pay compensation to any person other than the Developer in accordance with the compulsory acquisition then the Developer must reimburse the amount of that compensation to the Minister upon request.
- (c) The Developer will reimburse the Minister for any and all expenses incurred by him in acquiring the Transferable Corridor Lands (or Corridor 3a and 6b as the case may be) pursuant to this **clause 6.2**.

7. ESTABLISHMENT OF FUNDS

The Minister will within **14 days** of the date of this Deed establish the Establishment Fund and the Maintenance Fund and notify the Developer in writing of their establishment.

8. ESTABLISHMENT OF BIODIVERSITY

8.1 No further payments

After the payments have been made pursuant to **clause 5**, the Developer will not be obliged to pay any further amounts towards Establishing or Maintaining the Biodiversity.

8.2 Establishment on Corridor 3a and 6b

The Developer will be liable to pay for any Costs of establishing the Biodiversity consistently with the BMP in Corridor 3a and 6b which cannot be paid out of the monies available in the Establishment Fund allocated for the Establishment of Biodiversity in Corridor 3a and 6b.

9. VERIFICATION OF ESTABLISHMENT

- (a) The Minister will engage a consultant to verify that the Biodiversity has been Established according to the BMP.

- (b) The Cost of the consultant under **clause 9(a)** will be paid from the Establishment Fund.
- (c) Once the consultant has verified that the Biodiversity has been Established according to the BMP, the Developer agrees that the Minister will:
 - (i) not be obliged to commit any further monies from the Establishment Fund;
 - (ii) not be obliged to pay for Establishing any Biodiversity;
 - (iii) cause any monies left in the Establishment Fund to be paid into the Maintenance Fund; and
 - (iv) cause the Establishment Fund to be closed.

10. COMMENCEMENT DATE NOT ACHIEVED

If for any reason the Commencement Date does not occur within 6 months of the date of this Deed then on the giving by one or more parties to this Deed of a notice (given before the Commencement Date occurs) this Deed will terminate and:

- (a) the Minister will authorise the release of the Covenant from any of the Developer's Corridor Lands which have been made subject to it;
- (b) the Minister will return any monies that have been paid pursuant to **clause 5**, less any monies which have been expended in the meantime; and
- (c) no party will have any obligation under it (although the termination will not affect any rights which have accrued prior to the date of termination).

11. PRESERVATION OF BIODIVERSITY BEFORE DEED

The Developer must not undertake any activity on any of its Lands which might damage or destroy any Biodiversity on its Lands other than in accordance with the terms and conditions of all necessary and lawfully granted approvals until the Commencement Date.

12. ASSIGNMENT OF LANDS

The Developer must not transfer, lease, part with or share the possession of, grant any licence affecting, charge, mortgage, encumber or otherwise deal with or dispose of the Developer's Corridor Lands (or any part of them) other than with the prior written consent of the Minister (which may be withheld in his absolute discretion) until the Covenant has been registered on the title to the Developer's Corridor Lands.

13. CONTAMINATION

13.1 Warranty and Indemnity

The Developer:

- (a) warrants that as far as it is aware (other than as may be disclosed in the Disclosure) as at the date it registers the Covenant on the Developer's Corridor Lands, the Developer's Corridor Lands are not Contaminated; and
- (b) in so far as the Developer's Corridor Lands are used for purposes consistent with the BMP, indemnifies the Minister and must keep him indemnified against all liability for and associated with all Contamination present in, on and under the Lands in question as at or prior to the date it registers the Covenant on the Developer's Corridor Lands, including full responsibility for compliance with and

any liability (in respect of Contamination as at or prior to the date the Developer registers the Covenant on the Developer's Corridor Lands) under the CLM Act and all other relevant legislation and the requirements of Department of Environment and Conservation and any other relevant authority.

13.2 Remediation

- (a) Should the Minister become aware or reasonably suspect that any part of the Developer's Corridor Lands were Contaminated before the date the Developer registered the Covenant on the Developer's Corridor Lands, he shall as soon as practicable notify the Developer in writing to that effect, providing the Developer with as much information as the Minister has at the time.
- (b) As soon as practicable after receipt of the notice in **clause 13.2(a)**, the Developer will at its Cost (with the assistance of qualified experts) carry out all reasonable investigations (including investigations which the Minister reasonably directs in writing) to enable the parties to be informed of the full nature and extent of the Contamination in, on, under the surface of, and leaving from, the relevant part of the Developer's Corridor Lands, and provide copies of all reports on such investigations to the Minister (**Investigation Reports**).
- (c) As soon as practicable after receipt by the Minister of the Investigation Reports, the parties will meet to discuss in good faith the method by which Contamination on the relevant part of the Developer's Corridor Lands might be dealt with so that the Minister is able to Establish Biodiversity there.
- (d) Following the discussions in **clause 13.2(c)**, the Developer will, at its Cost, undertake all reasonable measures as the Minister may reasonably direct in writing to ensure that the relevant part of the Developer's Corridor Lands is no longer Contaminated and the Minister is able to Establish Biodiversity there.
- (e) Without limiting the indemnity in **clause 13.1(b)**, the Developer will be liable to pay for any Costs of establishing the Biodiversity consistently with the BMP, which due to Contamination and the measures undertaken pursuant to this **clause 13** cannot be paid out of the monies available in the Establishment Fund, including the restoration of any Biodiversity that had been damaged as a result of the Contamination and/or the measures undertaken.

13.3 Covenant Personal

Despite any other term of this document the Developer's obligations under this clause 13 are and remain personal to CSR whether or not part or all of the Developer's Corridor Lands are sold, transferred or otherwise disposed of.

14. DISPUTE RESOLUTION

14.1 Notice of Dispute

If a party claims that a dispute has arisen under this Deed (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**).

14.2 Response to Notice

Within 20 Business Days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

14.3 Negotiation

The nominated representatives must:

- (a) meet to discuss the matter in good faith within 10 Business Days after service by the Respondent of notice of its representative; and
- (b) use reasonable endeavours to settle or resolve the dispute within 15 Business Days after they have met.

14.4 Further Notice if not Settled

If the dispute is not resolved within 15 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute ("**Dispute Notice**").

14.5 Mediation

The parties agree that a dispute shall be mediated if it is the subject of a Dispute Notice, in which case:

- (a) the parties must agree the terms of reference of the mediation within 5 Business Days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the Mediator will be agreed between the parties, or failing agreement within 5 Business Days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply to appoint a mediator;
- (c) the Mediator appointed pursuant to this **clause 14.5** must:
 - (i) have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within 5 Business Days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (g) in relation to Costs and expenses:
 - (i) each party will bear their own professional and expert Costs incurred in connection with the mediation;
 - (ii) the Costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full Costs of the mediation to be borne by that party.

14.6 Litigation

If the dispute is not finally resolved in accordance with **clause 14**, either party is at liberty to litigate the dispute.

14.7 **Continue to Perform obligations**

Each party must continue to perform its obligations under this Deed, notwithstanding the existence of a dispute.

15. **SITE COVER OF DEVELOPMENT**

Subject to **clause 18**, the Minister agrees that for the purposes of assessing the site coverage of development of the Lands the site coverage will be calculated by reference to a site area that includes the Developer's Corridor Lands and Corridor 3a and 6b.

16. **COSTS**

The Developer agrees to pay or reimburse the Costs of the Minister in connection with:

- (a) the negotiation, preparation and execution of this planning agreement and the development of the biodiversity offset arrangement referred to in **Recital C**; and
- (b) advertising and exhibiting this planning agreement in accordance with the EP&A Act,

within 3 Business Days after receipt of a tax invoice from the Minister.

17. **GST**

17.1 **Acknowledgment**

The parties acknowledge that:

- (a) it is the intention of this **clause 17** that in addition to entitlement to the payment or provision by a party (**recipient**) of any consideration otherwise required to be paid or provided to another party (**supplier**) under any provision of this document, including, but not limited to, the amount by which such consideration may be increased from time to time under the provisions of **clause 17.3** ("**Original Consideration**") the supplier must be fully indemnified by the recipient by payment to the supplier (in addition to payment or provision of the Original Consideration) of all of the GST the supplier must pay on any supply made by the supplier under or in connection with:
 - (i) this document; and
 - (ii) any of the transactions contemplated by this document,(each a "**Relevant Supply**"), and
- (b) the provisions of this Deed are to be interpreted and applied so as to give the fullest effect to the intention referred to in **clause 17(a)**.

17.2 **Original Consideration is GST Exclusive**

The Original Consideration and any other consideration given under this document is a GST exclusive amount.

17.3 **Original Consideration to be Increased for any GST**

- (a) In addition to payment or provision of the Original Consideration (being the consideration payable or to be provided under any other provision of this Agreement and including, but not limited to, the amount by which any consideration has been formerly increased in accordance with the operation of this **clause 17.3(a)**) the recipient must also pay to the supplier (by way of increase in the

Original Consideration for the Relevant Supply) the GST payable by the supplier on each Relevant Supply the supplier makes.

17.4 Reimbursement of expenses

If this planning agreement requires the supplier to pay for, reimburse or contribute to any expense or liability (“**reimbursable expense**”) incurred by the recipient, the amount to be paid, reimbursed or contributed will be the amount of the reimbursable expense reduced by the amount of any input tax credit to which the recipient is entitled in respect of the reimbursable expense. The recipient will be presumed to be entitled to a full input tax credit unless the Developer demonstrates otherwise.

17.5 Non-merger

This **clause 17** shall not merge on or by completion of this planning agreement and shall survive the termination of this planning agreement.

17.6 Interpretation

In this **clause 17**:

- (a) “**GST**” has the meaning it has in the GST Act and any general interest charge, special interest charge, other interest and any additional tax or penalty (howsoever described);
- (b) “**GST Act**” means the *A New Tax System (Goods and Services Tax) Act 1999* as amended or replaced from time to time;
- (c) “**GST law**” means the same as GST law means in the GST Act;
and
- (d) except to the extent that the provisions of this clause 17 require otherwise, any expression used that is defined in the GST law has that defined meaning.

18. NO FETTER

- (a) This Deed is not intended to operate to fetter, in any unlawful manner:
 - (i) the sovereignty of the Parliament of the State to make any Law;
 - (ii) the power of the Executive Government of the State to make any statutory rule; or
 - (iii) the exercise of any statutory power or discretion of any minister of the State or any Authority.(all referred to in this clause as a “**Discretion**”).
- (b) If, contrary to the operation of this **clause 16**, any provision of this planning Deed is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - (i) they will take all practical steps, including the execution of any further documents to ensure the objective of this clause is substantially satisfied;
 - (ii) in the event that this clause cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this Deed has full force and effect; and

- (iii) to endeavour to satisfy the common objectives of the parties in relation to the provision of this Deed which is held to be an unlawful fetter to the extent that is possible having regard to the relevant court judgment.

19. GENERAL

19.1 Notices

- (a) A party notifying or giving notice under this Deed must do so in writing sent by prepaid registered post or facsimile and the original by post to the Authorised Representative at the address or facsimile number specified in **Schedule 4**.
- (b) A notice given in accordance with **clause 19.1** will be deemed to have been given and received:
 - (i) if delivered, on receipt;
 - (ii) if posted, 3 Business Days after posting;
 - (iii) if sent by facsimile on confirmation of the correct transmission of the facsimile; and
 - (iv) Any notice received after 5.00 pm or on a day not a Business Day shall be deemed to have been received at 9.00 am on the next Business Day.

19.2 Authorised Representatives

- (a) The Authorised Representatives may perform any function of the respective parties under this Deed.
- (b) A notice or communication given or made to an Authorised Representative is effective as if it had been given by the party they represent.
- (c) A party may substitute an Authorised Representative after first giving written notice to the other party.

19.3 Effect of Scheduled terms and conditions

The parties agree to comply with the terms and conditions contained in the Schedules as if those rights and obligations were expressly set out in full in the operative parts of this Deed.

19.4 New Laws

If the Developer is obliged by a new legal requirement to do something or pay an amount which it is already contractually obliged to do or pay under this Deed then, to the extent only that the relevant obligation is required under both the new legal requirement and this Deed, compliance with the new legal requirement will constitute compliance with the relevant obligation under this Deed.

19.5 Waiver

- (a) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or a breach of obligation by, another party.
- (b) A waiver by a party is only effective if it is in writing.
- (c) A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of

any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

19.6 **Governing Law**

This Deed is governed by New South Wales law.

19.7 **Prior Agreements Superseded**

This Deed:

- (a) wholly replaces and excludes all prior agreements, correspondence, negotiations, representations, explanations and statements between the parties covering or in connection with the matters covered by this Deed; and
- (b) is the entire agreement between the parties in respect of the matters covered by this Deed.

19.8 **Modification of Deed**

No modification or alteration of any provision of this Deed will be valid unless it is in writing and signed by all parties to this Deed.

19.9 **Representations and warranties**

The parties represent and warrant that they have power to enter into this Deed and comply with their obligations under the Deed and that entry into this Deed will not result in the breach of any law.

19.10 **Severability**

- (a) The parties agree that to the extent permitted by Law, this Deed prevails to the extent it is inconsistent with any Law.
- (b) If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- (c) If any clause or part of a clause is illegal, enforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

19.11 **Confidentiality, Media Releases and Enquiries**

- (a) The parties agree that the terms of this Deed are not confidential and this Deed may be treated as a public document and exhibited or reported without restriction by any party.
- (b) If requested by a party, the other party must:
 - (i) not issue, publish or authorise any media release or advertisement concerning this Deed, without obtaining the other party's prior written approval; and
 - (ii) obtain a similar obligation from their contractors.
- (c) The parties agree, and must procure that any Mediator agrees as a condition of their appointment:

- (i) Confidential Information has been supplied to some or all of the parties in the negotiations leading up to the making of this Deed; and
- (ii) the parties may disclose to each other further Confidential Information in connection with the subject matter of this Deed; and
- (iii) subject to paragraphs (iv) and (C) below, to keep confidential all Confidential Information, disclosed to them during or in relation to the expert determination or mediation; and
- (iv) a party may disclose Confidential Information in the following circumstance:
 - (A) to a party or adviser who has signed a confidentiality undertaking to the same effect as this **clause 19.11**; or
 - (B) in order to comply with a Law, State Government policy, local government policy or the ASX Listing Rules; or
 - (C) for a purpose necessary in connection with an expert determination or mediation.
- (d) The parties must keep confidential and must not to disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
 - (i) views expressed or proposals or suggestions made by a party or the expert during the expert determination or mediation relating to a possible settlement of the dispute;
 - (ii) admissions or concessions made by a party during the expert determination or mediation in relation to the dispute; or
 - (iii) information, documents or other material, including Confidential Information concerning the dispute which are disclosed by a party during the expert determination or mediation unless such information, documents or facts will have been otherwise discoverable in judicial or arbitral proceedings.

19.12 No fiduciary relationship

Nothing in this Deed will be construed or interpreted as constituting the relationship between the parties as that of a partnership, joint venture or any form of fiduciary relationship.

EXECUTED AS A DEED

Signed, sealed and delivered by the
Minister Administering the
Environmental Planning &
Assessment Act 1979 in the presence
of:

Signature of Witness

Name of witness (block letters)

Executed by **CSR Ltd** in accordance
with section 127(1) of the *Corporations*
Act 2001 (Cwlth) by authority of its
directors:

Signature of director

Name of director (block letters)

Signature of Minister

Name of Minister (block letters)

Signature of director/company
secretary*

*delete whichever is not applicable

Name of director/company secretary*
(block letters)

*delete whichever is not applicable

SCHEDULE 1

Covenant Lands

| Owner | Land owned as at date of Deed (lot/DP) |
|------------------------------------|---|
| Penrith City Council | Lot 201 DP 1094523 |
| CSR Ltd | Lot 25 DP1098147 Lot 10 DP 1094045 |
| ING Industrial Custodian Pty Ltd | Lot 3 DP 559086 Lot 7 DP 238969 |
| Fitzpatrick Investments Pty Ltd | Lot 197 DP 1087837 Lot 10 DP 253678 Lot 8 DP 253678 |
| BMGW2 Pty Ltd | Lot 141 DP 843899 |
| The Trust Company of Australia Ltd | Lot 200 DP 1094523 |

SCHEDULE 2
Subdivision Plan

Draft

SCHEDULE 3

Covenant

PART 1 (Creation)

[To be inserted]

PART 2 (Terms)

Interpretation

Definitions

In this Instrument, unless the contrary intention appears, the following terms have the following meanings:

Act means the *Conveyancing Act 1919* (NSW) (as amended).

Authority Benefited means the Department of Planning.

Burdened Owner means the registered proprietor from time to time of the lot burdened (including those claiming under or through the registered proprietor).

Council means Penrith City Council.

Instrument means this section 88B instrument.

Native Fauna means any animal-life that is indigenous to New South Wales or is known to periodically or occasionally migrate to New South Wales, whether vertebrate or invertebrate and in any stage of biological development, but does not include:

- (a) humans; or
- (b) fish within the meaning of the *Fisheries Management Act 1994* (NSW).

Native Plants has the same meaning as in section 5 of the *National Parks & Wildlife Act 1974* (NSW).

Plan of Management means a plan of management prepared by the Authority Benefited providing for a scheme of operations for the protection of Native Plants and Native Fauna on the Site.

Restriction means, in respect of item 2, the restriction on the use of the land and right to access.

Site means that part of the lot burdened subject to the restriction.

2. Terms of Restriction on the use of land numbered 2 in the plan

2.1 The Burdened Owner must not carry out any act on the Site which may adversely affect any Native Fauna or Native Plants or their habitats on the Site, including, without limitation:

- (a) developing the Site;

- (b) destroying or causing the destruction or removal of any Native Plants on the Site;
or
- (c) destroying or causing the destruction or removal of any Native Fauna on the Site.

2.2 The Authority Benefited, and any person who, or authority which, is expressly authorised by the Authority Benefited, may, upon giving reasonable notice to the Burdened Owner:

- (a) by any reasonable means pass across the lot burdened, but only within the Site, for the purpose of:
 - (i) inspecting the Site to ensure due compliance by the Burdened Owner with clause 2.1 of this Restriction; and
 - (ii) maintaining the Site in accordance with the Plan of Management; and
- (b) do anything reasonably necessary for that purpose, including:
 - (i) entering the Site;
 - (ii) taking anything onto the Site; and
 - (iii) carrying out work within the Site.

2.3 In exercising its powers under clause 2.2 of this Restriction, the Authority Benefited must, at its own cost:

- (a) ensure all work is done properly;
- (b) cause as little inconvenience as is reasonably practicable to the Burdened Owner and any occupier;
- (c) cause as little damage as is practicable to the Site and any improvement on it;
- (d) restore the Site as nearly as is practicable to its former condition; and
- (e) make good any collateral damage.

2.4 This Restriction does not operate to prevent the Burdened Owner conducting earthworks within the Site prior to the establishment of "Biodiversity" (as that term is defined in a Planning Agreement between CSR Limited and the Authority Benefited dated #) provided the earthworks are conducted in accordance with development consent/s permitting or requiring the performance of the earthworks.

Name of person empowered to release, vary or modify this easement, profit a prendre, restriction or positive covenant numbered 2 in the plan:

Department of Planning

SCHEDULE 4

Authorised Representatives

| Party | Details |
|-----------|--|
| Minister | Name: Address: Fax: Telephone: |
| Developer | Name: Darren Searle / Betty Ivanoff Address: 9 Help Street, Chatswood Fax: 9235 8073 / 9235 8037 Telephone: 9235 8000 |

SCHEDULE 5

BMP

Draft