

[DRAFT 22.09.25]

Draft Management Agreement Payneham Memorial Swimming Centre

The Corporation of the City of Norwood Payneham & St Peters

[Manager]

Draft

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DATE

PARTIES

THE CORPORATION OF THE CITY OF NORWOOD PAYNEHAM & ST PETERS
ABN 11 390 194 824 of 175 The Parade, Norwood SA 5067 (**Council**)

[INSERT] ACN **[insert]** of **[insert]** (**Manager**)

BACKGROUND:

- A. The Aquatic Centre is a redeveloped public aquatic facility that has been constructed for the Council pursuant to the Construction Contract.
- B. Pursuant to a Request for Tenders process, the Council sought submissions from suitably qualified parties to manage the Aquatic Centre.
- C. The Manager has represented to the Council that it has capability in the operation and management of facilities of the same or a substantially similar type as the Aquatic Centre.
- D. The Manager submitted a tender, and the Council accepted it.
- E. The Manager now agrees to manage the Aquatic Centre on the terms of this Agreement.

1. INTERPRETATION

1.1 Background

The Background forms part of this Agreement and the Parties agree that the Background is true and accurate.

1.2 Definitions

In the interpretation of this Agreement unless the contrary intention appears or unless the context otherwise requires, the following expressions have the following meanings:

- 1.2.1 **Agreement** means this agreement including the Background, all Annexures and all terms and conditions contained herein.
- 1.2.2 **Agreement Commencement Date** means the date on which this Agreement is fully executed.
- 1.2.3 **Agreement Term** means the Pre-Opening Period, the Initial Operating Period and, if this Agreement is extended for the Extension Period, then it also includes the Extension Period, subject to earlier termination in accordance with this Agreement.
- 1.2.4 **Annual Business Plan and Budget** means the annual business plan and budget required to be prepared by the Manager, and approved by the Council, under clause 11.2.
- 1.2.5 **Annual Operating Subsidy** has the meaning given to it in clause 6.5.1.

- 1.2.6 **Annual Report** means the annual report required to be prepared by the Manager under clause 12.5.
- 1.2.7 **Aquatic Centre** means the Payneham Memorial Swimming Centre, 194 O G Rd, Felixstow SA 5070, which is further identified in the site plan at **Annexure A**, and it includes the Council's Fixtures, Fittings and Plant and all improvements to the Aquatic Centre during the Agreement Term and where the context permits it includes any part or parts of the Aquatic Centre.
- 1.2.8 **Aquatic Centre Accounting Ledger** means the ledger required to be established by the Manager pursuant to clause 6.2.1(a).
- 1.2.9 **Authorisation** means any authorisation, agreement approval, licence, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them by or with a Governmental Agency, including in respect of the operation of the Aquatic Centre as a public pool and recreation facility.
- 1.2.10 **Background IP** means any Intellectual Property Rights of a party which were in existence prior to the Agreement Commencement Date, or which are subsequently developed by that party independently of and for purposes unconnected with this Agreement as advised in writing by that Party to the other.
- 1.2.11 **Business Day** means a day that is not a Saturday, Sunday or Public Holiday in South Australia.
- 1.2.12 **Café Operating Hours** means the operating hours detailed at **Annexure G**, or such other hours as may be approved by the Council in writing, acting at its absolute discretion in all things.
- 1.2.13 **Claim** means in relation to any person, a claim, action, proceeding, damage, loss, cost, expense or liability incurred by or to, or made or recovered by or against that person, however arising and whether present, unascertained, immediate, future or contingent.
- 1.2.14 **Confidential Information** means all information disclosed or made available to a recipient by or on behalf of a Party and includes:
- (a) information that is by its nature confidential;
 - (b) information that is identified as confidential;
 - (c) information that the recipient knows or ought to know is confidential;
 - (d) information comprised in or relating to any Intellectual Property Rights;
 - (e) information relating to the financial position of any person; and/or
 - (f) information that has any actual or potential commercial value;
- but specifically does **not** include any financial information of the Aquatic Centre except for the quantum of the Fees and the quantum of any Profit Share payment.

- 1.2.15 **Construction Contract** means [insert].
- 1.2.16 **Contract Year** means each 12-month period commencing on and from the Operating Period Commencement Date.
- 1.2.17 **Corporate Services Fee** means the amount of \$[insert] (ex GST) per annum based on the Manager's tender submission.
- 1.2.18 **Council** means the City of Norwood Payneham & St Peters and where the context permits, includes the Council's employees, agents, contractors and invitees.
- 1.2.19 **Council Capital Expenditure** means any capital expenditure on the Aquatic Centre provided by the Council (whether the funds are managed and administered by the Council or the Manager);
- 1.2.20 **Council Equipment** means all equipment owned or provided by the Council to the Manager for use at the Aquatic Centre and all equipment purchased during the Agreement Term using funds from the Aquatic Centre Accounting Ledger (whether those funds are provided 'up front' or provided as a reimbursement or repayment of an up-front investment by the Manager over the Agreement Term).
- 1.2.21 **Council Fixtures, Fittings and Plant** means all fixtures, fittings, plant and other improvements and assets (but not equipment) at the Aquatic Centre which are owned by the Council and which are provided to the Manager for use at the Aquatic Centre, including all fixtures, fittings, plant, improvements and other assets purchased during the Agreement Term using funds from the Aquatic Centre Accounting Ledger, whether those funds are provided 'up front' or provided as a reimbursement of an up-front investment by the Manager over the Agreement Term, and unless otherwise determined by the Council.
- 1.2.22 **Council's Contact Officer** means such person as the Council nominates from time to time as its contact officer for the purposes of this Agreement.
- 1.2.23 **Customer** means a customer or customers of the Aquatic Centre.
- 1.2.24 **Data** means all documents and information in connection with this Agreement and includes all technical, performance, sales, financial, commercial, Customers, user groups, contractual and marketing information possessed by the Manager including CCTV Data and all reports, plans and other documentation prepared by the Manager as required by or otherwise for the purposes of this Agreement but does not include Background IP.
- 1.2.25 **Employee** means an employee employed or otherwise engaged by the Manager during the Agreement Term who performs duties for the provision of the Services.
- 1.2.26 **Equipment** means the Manager Equipment and the Council Equipment.
- 1.2.27 **Expenses** means all the operating costs and expenses incurred wholly and directly for the operation of the Aquatic Centre during the Agreement Term, and includes:

- (a) the Fees; and
- (b) the dollar sum of the wages, leave entitlements, payroll tax, workers compensation levies, superannuation and other employment related entitlements in respect of Employees (**Employment Costs**) paid to Employees during the Agreement Term, **provided always that** such Employment Costs are wholly and directly attributable to the Services and the Aquatic Centre and not any other facility the Employees may be required to perform work;
- (c) all other direct operating expenditure incurred in relation to delivering the Services;

but does **not** include:

- (d) any internal project management or other administrative or internal costs of the Manager; or
- (e) Council Capital Expenditure.

- 1.2.28 **Extension Period** means the period of seven years commencing immediately after the end of the Initial Operating Period.
- 1.2.29 **Fees** means collectively the Corporate Services Fee and the Management Fee.
- 1.2.30 **Financial Year** means each 12-month period from 1 July to 30 June.
- 1.2.31 **Governmental Agency** means any government or any government, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.
- 1.2.32 **GST** means any tax on goods and/or services including any value added taxes, broad based consumption tax, or other similar tax introduced in Australia, including that tax imposed under GST Law.
- 1.2.33 **GST Law** means a *New Tax System (Goods and Services Tax) Act 1999* and any other act, order, ruling or regulation which imposes or otherwise deals with the administration of imposition of GST in Australia.
- 1.2.34 **Income** means all income derived from the operation of the Aquatic Centre, including User Charges, all income derived from the operation of cafes within the Aquatic Centre, amounts derived from merchandise sales, rent from subtenants and sublicensees amounts paid into vending machines located within the Aquatic Centre and any Annual Operating Subsidy.
- 1.2.35 **Initial Operating Period** means the period of three years commencing on the Operating Period Commencement Date.
- 1.2.36 **Intellectual Property Rights** means and includes rights in respect of or in connection with copyright, know how, inventions or other proprietary rights.
- 1.2.37 **Key Performance Indicators** means:

- (a) for the Pre-Opening Period, the key performance indicators detailed at **Annexure B**;
 - (b) for the period from the Operating Period Commencement Date until the following 30 June, the key performance indicators detailed at **Annexure B**; and
 - (c) thereafter, for each Financial Year of the Agreement Term the key performance indicators finalised by the Council in accordance with clause 5.2.
- 1.2.38 **Legislation** includes any relevant Statute or Act of Parliament (whether State or Federal) and any regulation, order or by-law including by-laws issued by any local government body or authority or other document enforceable under any Statute, Regulation, Order, Rule or subordinate legislation.
- 1.2.39 **Maintenance Plan** means the maintenance plan required to be prepared by the Manager as part of the Annual Business Plan and Budget, and which is to contain detailed proposals for the maintenance of the Aquatic Centre and the Council Fixtures, Fittings and Plant, Council Equipment and the Manager Equipment at the Aquatic Centre, having have regard to the Key Performance Indicators.
- 1.2.40 **Management Fee** means the amount of \$**insert** (ex GST) per annum based on the Manager's tender submission
- 1.2.41 **Management Objectives** means the objectives described in clause 3.1.
- 1.2.42 **Manager** means **insert** and where the context permits, includes its employees, agents, contractors and invitees.
- 1.2.43 **Manager Equipment** means any and all equipment owned or hired by the Manager that the Manager uses for carrying out its obligations under this Agreement, the details of which as at the Agreement Commencement Date is detailed at **Annexure I**.
- 1.2.44 **Market Rates** means the user fees and charges charged by comparable aquatic and leisure facilities.
- 1.2.45 **Marketing Plan** means each marketing plan required to be prepared by the Manager, and approved by the Council, as part of the Annual Business Plan and Budget, and which is to contain detailed proposals for the marketing of the Aquatic Centre for the relevant Financial Year.
- 1.2.46 **Minimum Operating Services Specifications** are those specifications detailed at **Annexure E**.
- 1.2.47 **Monthly Meeting** has the meaning given to it in clause 17.1.1.
- 1.2.48 **Monthly Reports** means the monthly reports required to be prepared by the Manager under clause 12.2.

- 1.2.49 **Net Loss** means the loss remaining after Expenses are deducted from Income.
- 1.2.50 **Net Profit** means the profit remaining after Expenses are deducted from Income.
- 1.2.51 **Operating Hours** means the minimum operating hours specified at **Annexure G** and such additional operating hours as are required to ensure that the Manager meets or exceeds the Key Performance Indicators and approved by the Council.
- 1.2.52 **Operating Period** means the period commencing on the Operating Period Commencement Date and expiring at the end of the Agreement Term.
- 1.2.53 **Operating Period Commencement Date** means a date to be notified by the Council as the date on which the Aquatic Centre is complete and ready for commencement of public operation, provided always that the Council has given the Manager no less than 28 days written notice.
- 1.2.54 **Operating Services** means the management services for the Aquatic Centre which the Manager is to perform during the Operating Period pursuant to this Agreement and which are further detailed in the Minimum Operating Services Specifications.
- 1.2.55 **Parties** means both of the Council and the Manager, and **Party** means one of the Parties.
- 1.2.56 **Pre-Opening Period** means the period commencing on the Agreement Commencement Date and expiring on the day immediately prior to the Operating Period Commencement Date.
- 1.2.57 **Pre-Opening Services** means the services which the Manager is to perform during the Pre-Opening Period the details which are detailed at **Annexure C**.
- 1.2.58 **Pre-Opening Services Budget** means the budget attached at **Annexure D**.
- 1.2.59 **Profit Share** is as defined in clause 6.6.
- 1.2.60 **Programs** mean all programs run by the Manager at the Aquatic Centre in accordance with clause 4.5.
- 1.2.61 **Public Health and Safety Plan** means the plan at **Annexure #J**.
- 1.2.62 **Quality Plan** means the quality management plan or system required to be prepared (or procured) by the Manager under clause 4.7.
- 1.2.63 **Related Entity** has the meaning given to it in the *Corporations Act 2001* (Cwth).
- 1.2.64 **Royal Lifesaving Society of Australia Guidelines** means all guidelines for safe pool operation published by the Royal Lifesaving Society of Australia, as updated and replaced from time to time.

- 1.2.65 **Security** means an irrevocable and unconditional bank guarantee from an Australian banking institution, or such other form of security that is acceptable to the Council, with no expiry date in the amount of [\$TBA].
- 1.2.66 **Services** means the Operating Services and the Pre-Opening Services.
- 1.2.67 **Standard for the Operation of Swimming Pools and Spa Pools** is as issued by the South Australian Health Commission (Revised 2013), or other recognised government authority, and any updated and /or replacement standard, as applicable.
- 1.2.68 **Statutory Requirements** means all relevant and applicable Legislation and all lawful conditions, requirements, notices and directives issued or applicable under any such Legislation.
- 1.2.69 **Supply** and **Supplier** have the meanings given to them in GST Legislation;
- 1.2.70 **Swimming Pools** mean the designated swimming areas within the Aquatic Centre including zero depth water play and water slide areas, and **Swimming Pool** means one of the Swimming Pools.
- 1.2.71 **Three Year Budget** means the budget forecast attached at Annexure (as may be amended pursuant to clause 6.1.4).
- 1.2.72 **User Charges** means any charges which the Manager may charge Customers for use of the whole or any part of the Aquatic Centre or participation in any Program, which, as at the Agreement Commencement Date are the charges detailed at **Annexure F**.
- 1.2.73 **User Groups** means Norwood Swimming Club and such other groups that may engage in Services from time to time.
- 1.2.74 **Variation** means any change to the Services including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Services.
- 1.2.75 **WHS Management System** means the system required to be prepared by the Manager under clause 9.2.1.
- 1.2.76 **Work Health and Safety Legislation** means the *Work Health and Safety Act 2012*, *Work Health and Safety Regulations 2012* and relevant codes of practice (as amended from time to time).

1.3 General

Unless the contrary intention appears:

- 1.3.1 the Background is correct;
- 1.3.2 headings do not affect interpretation;
- 1.3.3 singular includes plural and plural includes singular;
- 1.3.4 a reference to a party includes its executors, administrators, successors and permitted assigns;

- 1.3.5 a reference to a person includes a partnership, corporation, association, government body and any other entity;
- 1.3.6 an agreement, representation, warranty or indemnity by two or more Parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 1.3.7 an agreement, representation, warranty or indemnity in favour of two or more Parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 1.3.8 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 1.3.9 a provision is not construed against a party only because that party drafted it;
- 1.3.10 an unenforceable provision or part of a provision may be severed, and the remainder of this Agreement continues in force, unless this would materially change the intended effect of this Agreement;
- 1.3.11 a reference to any policy document of the Council is to a policy document appearing on the Council's website or as otherwise advised to the Manager and refers to that policy as amended, varied or replaced from time to time;
- 1.3.12 any approval or consent given by the Council under this Agreement is given in its capacity as the owner of the Aquatic Centre only and the Manager must, in addition, obtain all other applicable approvals and consents for the relevant matter;
- 1.3.13 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
- 1.3.14 an expression defined in the *Corporations Act 2001* (Cth) has the meaning given to it by that Act at the date of this Agreement; and
- 1.3.15 examples are to assist in interpretation of this Agreement but do not form part of this Agreement.

1.4 Order of precedence

In the interpretation of this Agreement, if there is any inconsistency between any of the following documents, they will be interpreted in the following order of precedence to the extent only of the inconsistency and only for as long as the inconsistency exists:

- 1.4.1 [insert Council's order of precedence]

[Drafting Note - this is to include the Agreement terms & conditions and all of the Plans]

2. SCOPE OF THE AGREEMENT

2.1 Provision of the Services

- 2.1.1 The Manager agrees:

- (a) during the Pre-Opening Period to provide the Pre-Opening Services; and
- (b) during the Operating Period to provide the Operating Services.

2.1.2 The Manager agrees, during the Agreement Term, to provide the Services in compliance with all Statutory Requirements and on the terms and conditions of this Agreement.

2.2 Term of Agreement

This Agreement is for the Agreement Term.

3. MANAGEMENT CRITERIA

3.1 Management Objectives

The Manager must, so far as reasonably practicable, develop an effective and accountable management arrangement with the Council in order to:

- 3.1.1 bring a best practice aquatic management approach to the operation of the Aquatic Centre;
- 3.1.2 maximise opportunities for community participation at, and utilisation of, the Aquatic Centre;
- 3.1.3 achieve and maintain a high standard of performance in the provision of the Services by the Manager using best practice methods and systems, including cleanliness and maintenance, health and safety and customer service;
- 3.1.4 continually seek to identify and cater for the changing needs within the community and provide a quality and range of programs, services and customer service at the Aquatic Centre;
- 3.1.5 align with the Council's strategic vision and objectives (as amended from time to time);
- 3.1.6 improve the financial sustainability of the Aquatic Centre over the Agreement Term;
- 3.1.7 ensure that the Aquatic Centre is managed in accordance with the approved Annual Business Plan and Budget at all times during the Agreement Term;
- 3.1.8 ensure the provision of ongoing effective communication and cooperation between the Council and the Manager;
- 3.1.9 fulfil the Council's obligations under all applicable Legislation; and
- 3.1.10 achieve the Key Performance Indicators.

3.2 Forecasted performance

The Manager acknowledges that:

- 3.2.1 it represented to the Council as part of its tender submission referred to in Background D that the Three-Year Budget reflects the Manager's anticipated performance of the Aquatic Centre during the Initial Operating Period, and includes appropriate sensitivity analysis, identification of key assumptions and operating risks;
- 3.2.2 the Council has relied on the Manager's representation described in clause 3.2.1 in deciding to enter into this Agreement; and
- 3.2.3 the Council has set the financial KPI's during the Operating Period for this Agreement using the information provided by the Manager in its tender submission.

4. PROVISION OF THE SERVICES

4.1 General provisions

- 4.1.1 During the Agreement Term, the Manager must provide the Council with the Services in respect of the Aquatic Centre as set out in this Agreement.
- 4.1.2 Throughout the Agreement Term the Manager must perform the Services diligently, expeditiously and in a timely manner in accordance with this Agreement.
- 4.1.3 The Manager must manage the Aquatic Centre and the activities conducted at the Aquatic Centre in accordance with any reasonable directions of the Council's Contact Officer.
- 4.1.4 The Council is entitled to appoint any other representatives in its discretion to oversee the provision of the Services by the Manager and to provide the Manager with reasonable directions in respect of the provision of the Services, provided such representatives act reasonably and in good faith in performing these duties.
- 4.1.5 The Manager must provide the Pre-Opening Services in accordance with the Pre-Opening Services Budget.
- 4.1.6 The Manager must provide the Operating Services in accordance with each Annual Business Plan and Budget approved by the Council under clause 11.2.
- 4.1.7 The Manager must carry out the Services with all the skill, care and diligence to be expected from a qualified, competent and experienced provider of services of a similar nature as the Services. During the Agreement Term the Manager will devote such of its time and ability as is appropriate and reasonably necessary for the proper performance of the Services.
- 4.1.8 The Manager warrants to the Council that it holds all Authorisations required for it to perform its obligations under this Agreement and undertakes to comply with all Authorisations (whether held by either the Council or the Manager) and all applicable Legislation, accepted industry standards, specifications and procedures in the performance of its obligations under this Agreement.

- 4.1.9 The Manager must at all times keep the Council fully and regularly informed as to those matters relating to the Services that are likely to have a negative impact on the Council and which the Manager becomes aware of and must provide to the Council such information as is reasonably requested by the Council from time to time for the purposes of monitoring the performance by the Manager of its obligations under this Agreement, including:
- (a) any matter which is likely to significantly affect the delivery of the Services by the Manager on either a short or long term basis;
 - (b) any alteration, including any reduction, to the nature of the Services being provided;
 - (c) any significant changes to the Manager's Employees who have managerial responsibilities at the Aquatic Centre;
 - (d) any significant matter which may give rise to an obligation on the part of the Manager to indemnify the Council;
 - (e) any significant matter which may result in any potential liability to the Council;
 - (f) any serious complaints or other significant matters or significant behavioural incidents which may cause reputational damage to the Council;
 - (g) any vandalism or theft at the Aquatic Centre; and
 - (h) any maintenance issues relevant to the Aquatic Centre and the provision of the Services.

4.2 Compliance with Statutory and Legal Obligations

- 4.2.1 The Manager must fully comply with all legal obligations that arise, whether by or under this Agreement, Legislation, in equity or at common law, as a consequence of or in connection with the performance of its obligations under this Agreement.
- 4.2.2 The Manager must have and maintain during the Agreement Term internal operating procedures that facilitate and support the Manager's compliance with its obligations under the Agreement.
- 4.2.3 For the avoidance of doubt, the Manager acknowledges that its obligations include:
- (a) where any person, premises, Equipment, or activity is required to be licensed, registered, approved or accredited, the Manager must ensure that the appropriate licence, registration, approval or accreditation is in force and current at all times during the Agreement Term and during the performance of the Services;
 - (b) other than a redevelopment under clause 26 of this Agreement or a demolition under clause 27 of this Agreement, where development consent is required to be obtained pursuant to any Legislation in respect of the use of any part of the Aquatic Centre,

the Manager must ensure such consent is obtained and is in force prior to the commencement of, and at all times during, such use; and

- (c) irrespective of who performs the Services, the Manager must ensure the Services are performed in a safe manner and in accordance with all applicable Legislation, Authorisations and codes of practice.

4.2.4 In providing the Services under this Agreement, the Manager must:

- (a) comply with all Legislation and the requirements of any Governmental Agency including the requirements of the *Work Health and Safety Act 2012* (SA) and any regulations made thereunder; and
- (b) comply with any reasonable requests of the Council, whether in relation to the manner of the performance of the Services or otherwise.

4.2.5 Without limiting the Manager's obligations under clause 4.2.4, the *Ombudsman Act 1972* (**Ombudsman Act**) provides that the Ombudsman may investigate any act of an individual or organisation done in the performance of functions conferred under a contract with certain public authorities. The Manager agrees to ensure timely compliance with all obligations arising under the Ombudsman Act, and any other applicable Legislation, in relation to any such investigation involving the Council.

4.2.6 The Manager acknowledges that in entering into a contract with the Council they will be considered to be public officers for the purposes of the *Independent Commissioner Against Corruption Act 2012* (SA) (**ICAC Act**) and will be obliged to comply with the ICAC Act and the directions and guidelines issued pursuant to the ICAC Act.

4.3 Licences and Certificates

4.3.1 The Manager must, at its expense, ensure that all licences required for the management and operation of the Aquatic Centre and the provision of the Services are obtained and maintained during the Agreement Term in accordance with Statutory Requirements.

4.3.2 The Manager must notify the Council's Contact Officer without delay of any proceedings which may lead to forfeiture of the Manager's licences or certificates, or if objections are lodged in relation to the Manager's application to renew the licences or certificates.

4.4 Hours of Operation

During the Operating Period, the Manager must ensure that the Aquatic Centre is open for business no less than the Operating Hours.

4.5 Program Development

4.5.1 The Manager must run Programs that meet the Management Objectives and will assist the Manager to meet the Key Performance Indicators.

- 4.5.2 The Manager must include a proposal for new Programs for each Financial Year within the Manager's draft Annual Business Plan and Budget.

4.6 Service Quality

4.6.1 Quality Assurance

- (a) The Manager must perform the Services in a way which:
- (a) complies with the Council's policies, practices and procedures concerning public health, and occupational health, welfare and safety;
 - (b) complies with the Manager's Quality Plan (or similar), which should include a methodology of regularly receiving customer feedback on the Manager's performance and reporting on that feedback to Council;
 - (c) ensures compliance with all Legislation; and
 - (d) complies with the Royal Lifesaving Society of Australia Guidelines.
- (b) The Council may conduct independent customer surveys to monitor the performance of the Manager and the operation of the Aquatic Centre. The Manager will be engaged on the survey methodology and will be provided access to the results of any survey.

4.6.2 Cleaning

(a) General Cleaning

- (a) The Manager must ensure that all Council Fixtures, Fittings and Plant, Council Equipment and Manager Equipment and public areas of the Aquatic Centre are maintained in a safe, clean and hygienic condition at all times during the Operating Period, including attending to the requirements set out at **Annexure H**.
- (b) Without limiting clause (a)(a), the Manager must:
 - (i) attend to any and all cleaning required by, and in accordance with, operations and maintenance manuals for Council Fixtures, Fittings and Plant, Council Equipment and Manager Equipment; and
 - (ii) comply with all reasonable directions of the Council regarding cleaning requirements and standards for the Aquatic Centre.

(b) Rubbish

The Manager must make proper arrangements and use best practice for the storage, disposal and recycling of waste and refuse

from all parts of the Aquatic Centre during the Operating Period, including by complying with all applicable environmental and/or sustainability policies and plans adopted by the Council (as updated from time to time).

4.6.3 Customer Service and Complaint Rectification - General

- (a) The Manager is responsible for customer service under this Agreement and will be the principal point of contact for customer enquiries and complaints about the Services.
- (b) The Manager must act on complaints by any Customer at the Aquatic Centre in an appropriate and timely manner.
- (c) The Manager must prepare and adopt a policy and procedure on Customer service and complaint resolution which deals with how complaints will be managed, including response times, escalation of complaints and so forth.

4.6.4 Urgent Complaints

In an instance where a Customer complaint is received that requires urgent attention, the Manager must as soon as practicable take steps to resolve the complaint and must first report the matter to Council's Contact Officer verbally, and then to the Council in writing as soon as practicable describing the steps and time taken to resolve the complaint. An urgent complaint includes, but is not limited to, a complaint that may impact on safety of any person(s) or property, traffic hazards, or public health.

4.6.5 Rectification of Complaints

The Manager must efficiently address all complaints that relate to the Services in a satisfactory and timely manner, and in accordance with the timeframes and processes specified in this Agreement.

4.6.6 Customer Service Reporting

- (a) The Manager must maintain a register of Customer complaints and other feedback and the steps taken to address or rectify each complaint.
- (b) Council may review the register of complaint and other feedback from time to time.

4.7 Quality Management

- 4.7.1 The Manager must ensure that it has a comprehensive Quality Plan in place for the Aquatic Centre which will monitor, control and manage the work being undertaken (including the provision of the Services) under this Agreement.
- 4.7.2 The Quality Plan must be provided to the Council by the Manager promptly on request.

4.8 Live and continuous reporting requirements

Unless otherwise agreed by the Council, the Manager must provide facilities for electronic transfer of information to and from the Council. As a minimum requirement, the Manager must provide the following live and continuous reports and data in relation to the Aquatic Centre and the Services:

Timing	Reporting Requirements
Continuous/live/at all times	The Manager must ensure that the Council has access at all times to a cloud-based operating system which provides continuous, live and up to date data on, at a minimum, agreed measures of Customer activity, revenue generation and such other additional information as is reasonably requested by the Council.
Daily (telephone or via email)	<u>Urgent (within one business hour)</u> notifying the Council of serious personal injury, damage to property, or any significant interruption to the Services for whatever cause; <u>Immediate (within four business hours)</u> notifying the Council of any major malfunction of the Council Fixtures, Fittings and Plant, Council Equipment or the Manager Equipment, industrial situations, serious complaints or non-availability of facilities at the Aquatic Centre that has the potential to interrupt the Services and any attendances by emergency services at the Aquatic Centre; <u>Routine (within one day)</u> notifying the Council of other service problems that may affect the provision of the Services at the Aquatic Centre.

4.9 Catering, Merchandising and Vending Machines

4.9.1 Catering Services

- (a) The Manager must provide a diverse range of catering services of a high quality at the Aquatic Centre during the Operating Period.
- (b) The Manager must ensure its catering services (including the supply of any products and equipment) comply with all Statutory Requirements and food industry codes.
- (c) Subject to clauses (d) - (g), the Manager must ensure any kiosks and/or cafes within the Aquatic Centre are open for business during the Café Operating Hours.
- (d) The Parties acknowledge that the kiosks and/or cafes within the Aquatic Centre should be operated by the Manager in a financially sustainable manner, including by ensuring that they are not open for business at times of low patronage and high Employee costs, and in a manner that seeks to achieve the anticipated financial performance for the Aquatic Centre detailed in the Annual Business Plan and Budget documents approved in accordance with this Agreement.

- (e) The Manager may submit a proposal to the Council to vary the Café Operating Hours if this is reasonably necessary taking into account clause (d).
- (f) The Council will consider any proposal given to it by the Manager in accordance with clause (e) and may direct the Manager to vary the Café Operating Hours in accordance with the proposal, and the Manager must comply with any such direction.
- (g) A proposal pursuant to clause (e) and a direction pursuant to clause (f) may be given on more than one occasion during the Agreement Term.
- (h) The Manager may sublicence the catering services with the Council's prior written consent, provided the Manager retains responsibility for delivery of the catering Services and compliance with this Agreement.

4.9.2 **Merchandising**

- (a) As part of the Services, the Manager may (with the Council's prior written consent) produce merchandise in respect of the Aquatic Centre.
- (b) With the Council's prior written consent, the Manager may sell or provide merchandise for promotional purposes using the name of the Aquatic Centre.
- (c) Naming rights for the Aquatic Centre remain the Council's at all times.

4.9.3 **Provision of Vending Machines**

- (a) The Manager may provide vending machines at the Aquatic Centre.
- (b) The Manager must comply with all Statutory Requirements for the provision, maintenance and proper operation of vending machines.
- (c) The Manager must not, without the prior written consent of the Council, enter into a lease or rental agreement for vending machines which extends beyond the Term of this Agreement.
- (d) All money paid into vending machines at the Aquatic Centre is Income for the purposes of this Agreement.

4.10 **Advertising**

- 4.10.1 The Manager must obtain the prior written approval of the Council (which approval will not be unreasonably withheld) before the installation of any interior electronic display signs or advertising or signage with bolts, screws or nails.

4.10.2 The Manager must not place any signs or advertisements on the exterior of the buildings at the Aquatic Centre, except a sign or signs advertising or promoting the Aquatic Centre and which:

- (a) are approved in writing by the Council (which approval will not be unreasonably withheld or delayed provided that the proposed signs or advertisements comply with applicable Council policies applying at the time that the Council's consent is sought by the Manager) prior to placement; and
- (b) comply with any relevant Legislation, and the requirements of any Governmental Agency.

4.11 Storage of clothes, valuables and lost property

4.11.1 The Manager must operate a clothes and personal items storage system at the Aquatic Centre.

4.11.2 The Manager must manage and maintain a register for lost property at the Aquatic Centre.

4.11.3 The Manager must ensure that the lockers are cleaned and maintained on a regular basis, to the satisfaction of the Council's Contact Officer, to ensure an optimum level of service at all times.

4.12 Sustainability and energy efficiency

In the provision of the Services the Manager must:

4.12.1 use its best endeavours to operate the Aquatic Centre in a manner that optimises energy efficiency;

4.12.2 must work with Council Staff to schedule the use of plant and equipment (where possible) at times where favourable electricity tariffs are available under Council's energy plans; and

4.12.3 meet or exceed the Key Performance Indicators directed at energy usage.

4.13 User Groups

The Manager must use reasonable commercial endeavours to facilitate and accommodate the use of the Aquatic Centre by User Groups on their preferred days and at their preferred times.

4.14 Personal information and privacy

The Manager must ensure that it has appropriate policies and procedures in place to manage risks relating to the collection and storage of personal information and privacy.

5. KEY PERFORMANCE INDICATORS

5.1 Generally

The Manager must, during the Agreement Term provide the Pre-Opening Services and the Operating Services in a manner that achieves or exceeds the Management Objectives and the Key Performance Indicators.

5.1.1 The Key Performance Indicators for the first Contract Year are those set out at **Annexure B.**

5.1.2 The Manager must submit to the Council as part of each draft Annual Business Plan and Budget draft key performance indicators for the performance of the Services for the upcoming Financial Year.

5.1.3 The draft key performance indicators must include:

- (a) achievement of the approved budget; and
- (b) safety and compliance; and
- (c) Customer feedback processes,

and take into account the following requirements and objectives of the Council:

- (d) for the financial performance of the Aquatic Centre to achieve at least a Net Profit result (and for the avoidance of doubt the Net Profit is determined taking into account the Annual Operating Subsidy as part of the Income of the Aquatic Centre);
- (e) efficient and responsible use of utilities;
- (f) maintain or increase the Aquatic Centre's net promotor score or other relevant measure of customer satisfaction (as determined by the Council);
- (g) achieving the Council's required asset maintenance standards; and
- (h) maximising utilisation of the Aquatic Centre with a diversity of services that respond to community needs.

5.2 Achievement of Key Performance Indicators

5.2.1 If at any Monthly Meeting it is the Council's reasonable opinion that the Manager is likely to:

- (a) fail to meet any financial Key Performance Indicators; and/or
- (b) fail to achieve any other Key Performance Indicators;

then the Council may require the Manager to submit an action plan and proposal for the achievement of the Key Performance Indicators by the end of the next month (**Action Plan**). The Manager must comply with the Action

Plan. The Council may require the Manager to change any part of the Action Plan which the Council sees fit, acting reasonably at all times.

- 5.2.2 If by the end of any Financial Year in which the Manager was required to comply with an Action Plan the Manager fails to meet or achieve (as the case may be) the Key Performance Indicators then the Council may exercise their rights pursuant to clause 25.1.1 to:

(a) **TBA**

6. FINANCIAL ARRANGEMENTS

6.1 Management

- 6.1.1 The Manager will, during the Agreement Term:

- (a) collect all Income generated by the Aquatic Centre; and
- (b) pay all Expenses associated with the Aquatic Centre,

subject always to the provisions of the relevant approved Annual Business Plan and Budget.

- 6.1.2 All Income received and Expenses paid for the Aquatic Centre must be separately recorded in the Manager's accounting system which must be accessible to the Council for inspection immediately upon request by the Council.

- 6.1.3 The Manager must keep proper accounts of all Income generated at, and all Expenses associated with, the Aquatic Centre, and provide the Council with all records and systems information requested by the Council in respect of such Income and Expenses, including point of sales records, employment contracts and the like.

- 6.1.4 The Parties may by mutual agreement (acting at their absolute discretion in all things) in writing vary the Three-Year Budget at any time during the Initial Operating Period. Any variation of the Three-Year Budget in accordance with this clause is to be taken into account for the following purposes only:

- (a) the preparation and approval of an Annual Business Plan and Budget required by this Agreement; and
- (b) the determination of Key Performance Indicators for this Agreement.

6.2 Establishment of Aquatic Centre Accounting Ledger

- 6.2.1 The Manager:

- (a) must establish and maintain during the Agreement Term an accounting ledger specific to the Aquatic Centre (**Aquatic Centre Accounting Ledger**);
- (b) must not transfer money out of the Aquatic Centre Accounting Ledger except as permitted by this Agreement; and

- (c) warrants that all monies from the Aquatic Centre Accounting Ledger will only be used by the Manager for the operation of the Aquatic Centre.

6.3 Corporate Services Fee

NOTE that Section 6.3 and 6.4 can be aligned to tender responses

- 6.3.1 The Manager will, subject to the provisions of this clause 6.3, be paid the Corporate Services Fee during the Operating Period in accordance with this clause 6.3.
- 6.3.2 During the Operating Period the Manager may transfer the Corporate Services Fee from the Aquatic Centre Accounting Ledger to the Manager's operational account(s).
- 6.3.3 The Corporate Services Fee must be transferred by the Manager in monthly instalments in arrears.
- 6.3.4 The Corporate Services Fee forms part of the Expenses for the purposes of this Agreement.
- 6.3.5 The Corporate Services Fee covers overhead costs incurred by the Manager in providing the Services at the Aquatic centre and includes the following costs and expenses, which costs and expenses must not be charged separately as Expenses in addition to the Corporate Services Fee:
 - (a) payroll;
 - (b) preparation of reports required by this Agreement;
 - (c) banking reconciliation;
 - (d) contract administration;
 - (e) accounts payable;
 - (f) accounts receivable;
 - (g) production of financial statements;
 - (h) work cover administration;
 - (i) Aquatic Centre support;
 - (j) help desk IT support;
 - (k) onsite support and administration; and
 - (l) all other costs and expenses in relation to the administration of the provision of the Services.

6.4 Management Fee

- 6.4.1 The Manager will, subject to the provisions of this clause 6.4, be paid the Management Fee during the Operating Period in accordance with this clause 6.4.
- 6.4.2 The Management Fee forms part of the Expenses for the purposes of this Agreement.
- 6.4.3 The Management Fee is in consideration for the provision of the Services in accordance with the Key Performance Indicators and includes the following, which must not be charged separately as Expenses in addition to the Management Fee:
- (a) area manager support;
 - (b) implementation of all Programs and associated Services;
 - (c) implementation of all systems required to be implemented pursuant to this Agreement; and
 - (d) all other costs and expenses in relation to the management of the provision of the Services.

6.5 Operating Subsidy

6.5.1 *Payment of subsidy*

- (a) During the Initial Operating Period, and subject to clause 6.5.2 during the Extension Period, the Council agrees to provide financial assistance towards the costs of operating the Aquatic Centre by paying an operating subsidy into the Aquatic Centre Accounting Ledger as detailed at **Annexure L** (each operating subsidy payment for a Contract Year is an **Annual Operating Subsidy**).
- (b) Each Annual Operating Subsidy payable pursuant to this Agreement will be paid by the Council in monthly instalments in advance, with the first payment due on the Operating Period Commencement Date.
- (c) The Manager acknowledges and agrees that the Annual Operating Subsidy payments are to be treated as Income for the Aquatic Centre for the purposes of this Agreement and applied and used only in accordance with this Agreement.

6.5.2 *Review of subsidy and extension of this Agreement*

- (a) Before the expiry of the Initial Operating Period the Council will procure an independent review from a provider of Council's choosing, to consider the financial and operational performance of the Aquatic Centre.

- (b) The independent review for the purposes of clause (a) is to have regard to the following:
 - (a) the overall financial performance of the Aquatic Centre during the period from the Operating Period Commencement Date to the end of the second Contract Year (**Review Period**);
 - (b) whether the Manager has satisfied (or not) the Key Performance Indicators; and
 - (c) the level of achievement of the Management Objectives during the Review Period,in order to formulate a proposal for the Annual Operating Subsidy amounts (if any) for the Extension Period
- (c) The Council is required to provide the Manager with a copy of the independent review and the subsidy proposal for the Extension Period not less than six months prior to the end of the Initial Operating Period.
- (d) The Manager must notify the Council in writing within one month of receiving the subsidy proposal for the Extension Period if it accepts the subsidy proposal for the Extension Period or of its alternative proposal (**Manager's Notice**).
- (e) Within one month of the Council's receipt of the Manager's Notice, the Council may notify the Manager that this Agreement is extended for the Extension Period on the same terms and conditions as this Agreement except:
 - (a) that this clause 6.5.2 is deleted in its entirety (and there is no further right to extend this Agreement); and
 - (b) that the Annual Operating Subsidy amounts for the purposes of the Extension Period are in accordance with the Manager's Notice.
- (f) If the Council does not give notice to the Manager pursuant to clause (c) extending this Agreement for the Extension Period, then either party may refer the matter of Annual Operating Subsidy amounts for the Extension Period to expert determination in accordance with clause 33.3 and the Parties must continue to comply with their obligations under this Agreement until the Annual Operating Subsidy amounts for the Extension Period are determined.
- (g) Nothing in this clause 6.5.2 prevents the Parties negotiating and agreeing the Annual Operating Subsidy amounts for the purposes of the Extension Period without following the process provided for in this clause.

6.6 Initial Operating Period

6.6.1 During the first three years of the Operating Period and subject to the Manager complying with:

- (a) this Agreement;
- (b) the approved Annual Business Plan and Budget; and
- (c) the Three-Year Budget (taking into account, however, the matters in clause 6.6.2),

the financial performance of the Aquatic Centre is at the Council's risk and:

- (d) the Manager must collect all Income on behalf of the Council;
- (e) the Manager must pay all Expenses on behalf of the Council; and
- (f) the Council must reimburse the Manager for all Expenses for this period (excluding the Management Fee and Corporate Services Fee which are payable in accordance with clauses 6.3 and 6.4) that are in excess of the Income for the same period monthly in arrears.

6.6.2 For the avoidance of doubt, when determining the net position of any Financial Year, the results of previous Financial Years are to be disregarded.

6.7 Extension Period – Profit & Loss Share

6.7.1 The Parties acknowledge and agree that from the fourth Contract Year, that the intention of both Council and the Manager is to enter a profit share model whereby Net Profit or Net Loss for the Aquatic Centre's operations will be calculated and distributed as follows:

- (a) within 60 days of audited financial statements being prepared for the Aquatic Centre, where those financial statements identify that for the relevant Financial Year:
 - (a) the result is a Net Profit, then the Manager must, within seven days, pay 50% of the Net Profit to the Council; or
 - (b) the result is a Net Loss, the Manager will, within seven days:
 - (i) issue an invoice to the Council (with a 30-day payment period) for 50% of the Net Loss, to be paid into the Aquatic Centre Accounting Ledger; and
 - (ii) pay an amount equal to 50% of the Net Loss, into the Aquatic Centre Accounting Ledger.

6.7.2 For the purpose of determining the Income and the Net Profit or Net Loss of the Aquatic Centre for a Financial Year in accordance with this clause 6.7, previous Financial Year Net Profit and / or Net Loss results and payment on account of a Net Loss or Net Profit in accordance with clause 6.7.1(a) are to be disregarded.

- 6.7.3 An obligation to issue an invoice, make a payment or undertake a reconciliation that falls after the end of the Agreement Term, but which relates to a period during the Agreement Term survives the end of this Agreement.

6.8 Payments by Council

- 6.8.1 The Manager must issue to the Council (attention to the Council's Contact Officer) invoices for any amount payable by the Council to the Manager in accordance with this clause 6.
- 6.8.2 The Council must pay any amount payable by the Council to the Manager in accordance with this clause 6 within 30 days from the end of the month in which the Council receives a correctly rendered Tax Invoice from the Manager.

6.9 Effect of payment

Any payment, or acceptance of, money by the Council is not an acceptance of the Services or a waiver of a right or action of the Council.

6.10 Disputed invoice and transactions

- 6.10.1 If the Council disputes an invoice (or any part of an invoice) or any payment otherwise requested or made in accordance with clause 6.1.1 or any financial transaction completed by the Manager purportedly in accordance with clause 6.1.1 then the matter must be dealt with under clause 33.
- 6.10.2 The Council and the Manager must still pay all undisputed amounts in any disputed invoice on time.
- 6.10.3 On resolution of any dispute contemplated in clause 6.10.1:
 - (a) the Council must pay any amounts owing to the Manager as agreed between the Parties or determined under clause 33 within 10 Business Days of such resolution or determination; or
 - (b) the Manager must remedy any payments that are agreed or determined not to be in accordance with this clause 6.10.3 within 10 Business Days of such resolution or determination.

6.11 Right of set off

The Council may deduct from amounts otherwise payable to the Manager any amount due from the Manager to the Council.

6.12 Certification

From time to time, as required by Council, the Manager must certify to the Council that the Manager has paid all salary, wages, allowances, and invoices due and payable by the Manager to any employees, suppliers or sub-contractors in connection with the Services or the Aquatic Centre.

6.13 Loyalty program

- 6.13.1 Without derogating from any other provision herein, the Manager acknowledges and agrees that it must not participate in a loyalty program or scheme which involves the Aquatic Centre without the prior written consent of the Council, which consent may be granted or withheld by the Council at its absolute discretion.
- 6.13.2 The accounting treatment for income and expenses relating to loyalty programs and schemes which involve the Aquatic Centre is to be directed by the Council, and the Manager must comply with such direction.

6.14 Related party contracts

The Manager must not enter into any contracts with a Related Entity in connection with the provision of the Services, without the prior written consent of the Council.

6.15 Survival

An obligation to issue an invoice, make a payment or undertake a reconciliation that falls after the end of the Agreement Term, but which relates to a period during the Agreement Term survives the end of this Agreement.

7. USER CHARGES

7.1 Determination of User Charges

- 7.1.1 The User Charges as at the Operating Period Commencement Date are specified at **Annexure K**.
- 7.1.2 The Parties acknowledge and agree that the objectives in setting User Charges for the purposes of this Agreement (**User Charges Objectives**) are:

- (a) for User Charges to be consistent with and responsive to community expectations and means;
- (b) are set in accordance with Council's Competitive Neutrality requirements;
- (c) for User Charges to offer value for money for Customers;
- (d) for the Aquatic Centre to be financially sustainable; and
- (e) for the Aquatic Centre to achieve a Net Profit (after Council Subsidy),

the weighting and order of precedence of which are to be determined by the Council from time to time.

- 7.1.3 The Manager must prepare and submit to the Council for approval at the same time as the Manager submits a draft Annual Business Plan and Budget to the Council in accordance with clause 11.2 and as part of that draft Annual Business Plan and Budget, a schedule of proposed User Charges. The schedule of proposed User Charges must take into account the User

Charges Objectives and be supported by a list of comparable User Charges from other nearby Aquatic Centres and justifications for any proposed User Charges that are not consistent with the market rates.

7.1.4 The Council may, on receipt of the proposed User Charges:

- (a) approve the proposed User Charges for the forthcoming Financial Year; or
- (b) require a meeting with the Manager to discuss changes to the proposed User Charges.

7.1.5 The Manager agrees to continue to work with the Council and to resubmit the proposed User Charges to the Council until they are approved by the Council.

7.1.6 The Manager may only charge Customers approved User Charges for attendance at and / or use of the whole or any part of the Aquatic Centre or participation in any Program.

8. ALTERATIONS AND ADDITIONS

8.1 The Manager must not carry out, cause or permit any alterations or additions to the Aquatic Centre without the prior written consent of the Council.

8.2 All approved alterations and additions to the Aquatic Centre will be the Council's property unless otherwise agreed by the Parties and without limitation to any rights of the Council pursuant to this Agreement to require the removal of such alterations and additions at the expiry or termination of this Agreement.

8.3 If the Council approves an alteration or addition pursuant to clause 8.1, such approval may be given subject to conditions, including conditions requiring that the proposed alteration or addition be undertaken or facilitated by the Council and the costs of the same be paid or reimbursed by the Manager.

9. WORK HEALTH AND SAFETY

9.1 General

9.1.1 The Manager will, in all respects, comply with its duties and obligations under the Work Health and Safety Legislation.

9.1.2 The Manager must maintain the Aquatic Centre as a safe workplace and must implement safe systems of work so as to protect Customers, other users of the Aquatic Centre, the Employees, Council employees and members of the public.

9.2 Work Health and Safety Obligations

9.2.1 At all times during the Agreement Term, the Manager must:

- (a) have in place and implement a comprehensive WHS management system (**WHS Management System**) for the Aquatic Centre which ensures the Manager's compliance with any Legislation, codes of practice, Australian standards and the Council's WHS Policy which

are in any way applicable to this Agreement or the performance of the Services and its obligations under this Agreement;

- (b) when requested by the Council, provide the Council with a copy of the WHS Management System and evidence of the Manager's ongoing performance with the WHS Management System;
- (c) when requested by the Council, provide reports on WHS inspections, audits or assessments undertaken during the course of this Agreement; and
- (d) permit the Council unrestricted access to the Aquatic Centre for any inspections, repairs, maintenance, upgrades or other works or actions the Council is required or permitted to attend to pursuant to this Agreement or that the Council considers necessary and reasonable in connection with any emergency.

9.2.2 If the Manager is required by the *Work Health and Safety Act 2012* (SA) or by any other Legislation to give any notice of an accident occurring during the performance of its obligations pursuant to this Agreement the Manager must at the same time or as soon thereafter as possible in the circumstances give a copy of the notice to the Council.

9.2.3 The Manager must promptly notify the Council of any accident, injury, property or environmental damage which occurs during the carrying out of the Services. All lost time incidents must be immediately notified to the Council. The Manager must and within three days of any such incident provide a report giving complete details of the incident, including results of investigations into its cause, and any recommendations or strategies for prevention in the future.

9.2.4 If, during the Agreement Term, the Council informs the Manager that it is of the opinion that the Manager is:

- (a) not conducting its obligations pursuant to this Agreement in compliance with the health and safety management procedures, relevant Legislation or health and safety procedures provided by the Council from time to time; or
- (b) conducting the work in such a way as to endanger the health and safety of the Manager's Employees or the Council or their contractors' and subcontractors' employees, plant, equipment or materials,

the Manager must promptly remedy that breach of health and safety.

9.2.5 The Council may direct the Manager to suspend the Services or such part of the Services as the Council determines until such time as the Manager satisfies the Council that the Services will be resumed in conformity with applicable health and safety provisions.

9.3 Compliance

- 9.3.1 If at any time the Council's Contact Officer reasonably considers that the Manager is not complying with any Statutory Requirements, then the Council's Contact Officer is entitled to:
- (a) instruct the Manager to take measures to ensure compliance with the Statutory Requirements;
 - (b) instruct the Manager to close the Aquatic Centre, or any part thereof, either immediately or within a specified period; and/or
 - (c) give any other reasonable instructions deemed necessary by the Council.
- 9.3.2 In the event the Manager fails to comply with any instructions issued by the Council under clause 9.3.1, the Council's Contact Officer may organise such actions to be taken as may be required. The Manager will pay, and indemnifies the Council against, any expenses so incurred by the Council directly caused by the Manager's failure to comply with any instructions issued by the Council under clause 9.3.1.

9.4 Maximum Occupancy Level

The Manager must control the occupancy level within the Aquatic Centre (if any) to ensure compliance with all Statutory Requirements.

9.5 Evacuation, Emergency and Incident Procedures

The Manager is responsible for the production and implementation of all plans, procedures, training and processes to deal with any emergencies which may occur within the Aquatic Centre.

9.6 Supervision and Operation

- 9.6.1 The Council recognises the Royal Lifesaving Society of Australia Guidelines as a minimum standard for safe pool operation and the Manager must adopt these guidelines as a minimum standard for safe pool operation and minimum staffing levels for the Swimming Pools.
- 9.6.2 The Manager must ensure that all thoroughfares are clear at all times and patrons of the Swimming Pools are requested to clear thoroughfares if considered a safety hazard.
- 9.6.3 The Manager must ensure that the Swimming Pools are checked regularly and, in any event, at least once every hour for objects or materials that may threaten the safety of patrons.
- 9.6.4 All Employees working in the Swimming Pools must be made aware of pool customers or groups who may pose a risk to water quality and implement preventative measures to minimise risk.

9.7 Dangerous Substances

- 9.7.1 The Manager must prepare and maintain a chemical register which individually lists all substances used at the Aquatic Centre, together with all relevant safety and storage information, within one month of the Commencement Date. The Manager must keep this list up to date in accordance with the *Work Health and Safety Regulations 2012 (SA)*.
- 9.7.2 The Manager must ensure that all substances hazardous to health and of a hazardous nature are used, stored and transported as required in accordance with Statutory Requirements and without risk to the Manager's Employees, Council employees and members of the public.

9.8 Environmental Conditions: Swimming Pools

9.8.1 Water Quality

- (a) Water quality of the Swimming Pools must meet or exceed the minimum requirements as specified in the *South Australian Public Health (General) Regulations 2013* and comply with the requirements of the Standard for the Operation of Swimming Pools and Spa Pools, as amended and replaced from time to time. Testing of water quality must be completed in accordance with the *South Australian Public Health (General) Regulations 2013* and the requirements of the Standard for the Operation of Swimming Pools and Spa Pools (as amended and replaced from time to time), as a minimum.
- (b) Water quality readings must be taken and recorded in a log book in accordance with industry standards and in compliance with all legislation and regulations.
- (c) The Council may, at any time, instruct the Manager to conduct additional tests, including microbiological testing.

9.8.2 Heating, Air Conditioning and Ventilation

The Manager must ensure that all air and water temperatures provide for a comfortable user experience, ventilation rates are maintained, and heating and air conditioning systems are operated, in accordance with industry standards and manufacturer specifications.

9.8.3 Lighting Levels

The Manager must maintain lighting levels to ensure a safe and comfortable level of illumination and operate all lighting at the Aquatic Centre in accordance with industry standards and safety standards.

10. KEYS AND SECURITY DEVICES

10.1 Keys

- 10.1.1 The Council will, immediately prior to the Operating Period Commencement Date, issue the Manager with keys for the Aquatic Centre.

- 10.1.2 The Manager is responsible for the safekeeping of all keys to the Aquatic Centre provided by the Council.
- 10.1.3 All keys issued to the Manager for use must be returned to the Council on or before the end of the Agreement Term.
- 10.1.4 The Manager must not install or change any locks or cut additional keys to the Aquatic Centre (or any areas within them).

10.2 Alarms and Monitoring

10.2.1 *Security alarms and services*

- (a) The Manager must ensure that all alarm equipment at the Aquatic Centre is serviced as and when required.
- (b) The Manager must maintain during the Agreement Term arrangements for contracted security services to be provided at the Aquatic Centre which include afterhours random patrols and on call response to alarm activations.

10.2.2 **CCTV**

- (a) This clause 10.2.2 only applies if a closed-circuit television system is installed and operated at the Aquatic Centre by the Council (**CCTV System**).
- (b) The Manager acknowledges and agrees:
 - (a) the CCTV System will be managed and operated solely and wholly by the Council and the Manager must provide the Council with reasonable access to the Aquatic Centre for the installation, repair, upgrade, maintenance, management and operation of the CCTV System;
 - (b) the Manager must not prevent or interfere with the operation of the CCTV System;
 - (c) the CCTV System and all images, video and data recorded by them (**CCTV Data**) is exclusively the Council property. The Manager consents to the Council use of CCTV Data for any and all purposes; and
 - (d) if the Manager wishes at any time to access, view or use any CCTV Data then the Manager must make an application to the Council for this purpose.

11. BUDGETS AND PLANS

11.1 Pre-Opening plan

- 11.1.1 The Manager is responsible for developing and executing a Pre-Opening plan. The Pre-Opening plan will include at a minimum:
 - (a) timeframes and tasks that need to be undertaken to facilitate the effective opening of the Aquatic Centre;

- (b) the Pre-Opening Services Budget to undertake these tasks; and
- (c) support requested from Council to support the effective opening of the Aquatic Centre.

11.1.2 The Manager must perform the Pre-Opening Services in accordance with the Pre-Opening Services Budget.

11.2 Annual Business Plan and Budget

11.2.1 The Manager must perform the Operating Services in accordance with the Annual Business Plan and Budget approved by the Council during each Financial Year of the Operating Period. The Parties expressly acknowledge and agree that during the period covered by the Three-Year Budget the Annual Business Plan and Budget must align to and reference the Three-Year Budget and describe and explain any proposed deviations from the Three-Year Budget.

11.2.2 The Annual Business Plan and Budget must include appropriate detail as to how the Operating Services will be provided for the Aquatic Centre in the forthcoming Financial Year and address, as a minimum, the following:

- (a) annual budget;
- (b) when season elements of the Aquatic Centre are to be in operation;
- (c) the Manager's proposed User Charges;
- (d) Marketing Plan;
- (e) Maintenance Plan;
- (f) environmental sustainability plan which addresses, at a minimum, water consumption, energy consumption and waste production and division;
- (g) risk management plan that covers safety risks as well as operational risks, and covers risk assessment, risk treatment and risk monitoring;
- (h) key planning activities and events;
- (i) proposed equipment purchases;
- (j) during the period covered by the Three-Year Budget, how the Manager will ensure achievement of the Three-Year Budget;
- (k) the Manager's proposed Key Performance Indicators;
- (l) how the Manager will ensure achievement of the Key Performance Indicators;
- (m) how the Manager will ensure achievement of the Management Objectives;

- (n) proposed Programs; and
 - (o) any other matters the Council reasonably deems relevant to the provision of the Services.
- 11.2.3 The first Annual Business Plan and Budget must be submitted to the Council for consideration and approval by 30 April 2025. For each subsequent Financial Year the Manager must provide the Council with a draft Annual Business Plan and Budget for consideration and approval by 28 February of each year of the Agreement Term.
- 11.2.4 The Council may, on receipt of the draft Annual Business Plan and Budget:
 - (a) approve the Annual Business Plan and Budget for the forthcoming Financial Year; or
 - (b) require a meeting with the Manager with a view to refining the terms of the draft Annual Business Plan and Budget.
- 11.2.5 The Manager agrees to continue to work with the Council and to resubmit the draft Annual Business Plan to the Council until it is in a form which is approved by the Council.
- 11.2.6 The Manager must respond to any request from the Council for further information or clarification as promptly as possible.
- 11.2.7 The Annual Business Plan and Budget must not contain any terms that negate or derogate from any provisions of this Agreement. The terms and conditions in this Agreement will override any terms or conditions in the Annual Business Plan and Budget which are contrary to those contained in this Agreement.
- 11.2.8 Once approved by the Council, the Parties may agree to vary the Annual Business Plan and Budget during any Financial Year. Such an agreement must be in writing and executed by the Parties.
- 11.2.9 The Manager agrees that it will not be entitled to perform the Operating Services in accordance with the draft Annual Business Plan and Budget until it is approved in writing by the Council.
- 11.2.10 The Council and the Manager may meet as and when required by either Party to assess whether management of the Aquatic Centre is being undertaken in accordance with the approved Annual Business Plan and Budget.
- 11.2.11 In circumstances where the Council, acting reasonably, determines that the management of the Aquatic Centre is not being undertaken in accordance with the approved Annual Business Plan and Budget, the Council's Contact Officer may give notice to the Manager directing the Manager to remedy the issue. Any notice given under this clause may specify a time within which the default must be remedied which is to be at the Council's discretion and must be reasonable.
- 11.2.12 If the Manager fails to remedy the default in accordance with a notice issued under clause 11.2.11, the Council may exercise its rights under clause 25,

but such termination will not absolve the Parties from any previous unresolved breaches of this Agreement.

- 11.2.13 The Council may, at its cost, order an internal audit of the financial operation of the Aquatic Centre at any time during the Agreement Term. The Manager must provide all relevant access, documents, records and explanations and assist in the discharge of the audit to the best of its ability.

12. REPORTING

12.1 Reporting

The Manager must maintain accurate information in respect of the Aquatic Centre and must report the information to the Council in accordance with this Agreement.

12.2 Monthly Operations Reports

During the Agreement Term, the Manager must provide the Council with written monthly reports (in electronic format or such other format as the Council requests) (**Monthly Reports**) which include the following information for the Aquatic Centre:

- 12.2.1 key operational updates, including new Programs and marketing initiatives;
- 12.2.2 management accounts detailing financial performance against budget; and
- 12.2.3 attendances / usage against budget.

Where reasonably requested by the Council, the Manager must provide the Council with copies of all relevant documents, records and explanations to substantiate the contents of its Monthly Reports.

12.3 Quarterly Reports

During the Agreement Term, the Manager must provide the Council with written quarterly reports (in electronic format or such other format as the Council requests) (**Quarterly Reports**) which includes the following information for the Aquatic Centre:

- 12.3.1 management accounts detailing financial performance against budget;
- 12.3.2 a 'Profit and Loss Statement' for the quarter that reflects actual performance for that quarter as compared to the approved budget (within the approved Annual Business Plan and Budget) and applicable commentary for any significant variances. During the period to which the Three-Year Budget applies, there must also be a comparison provided with the Three-Year Budget and commentary for any significant variances;
- 12.3.3 a Year-to-date 'Profit and Loss Statement' that reflects actual performance year to date as compared to the approved budget (within the approved Annual Business Plan and Budget) and an updated forecast end of year position. During the period to which the Three-Year Budget applies, the Three-Year Budget must also be taken into account;
- 12.3.4 an updated copy of the complaints register (including all response actions on the part of the Manager) and other customer services information;

- 12.3.5 all incidents and near misses under the Work Health and Safety Legislation and other work health and safety reporting requirements including a running log where such matters extend beyond the three month period;
- 12.3.6 any relevant issues relating to the Operating Services provided during the previous three months;
- 12.3.7 any issues that the Manager becomes aware of that may affect Operating Services in future;
- 12.3.8 graphical reports of Operating Services provision over the preceding three months, showing trends;
- 12.3.9 details of all equipment purchases in excess of \$500 per item and in the aggregate where the items are the same, similar or related and identification of whether they are Council Equipment or Manager Equipment in accordance with this Agreement;
- 12.3.10 details of all equipment leases the Manager has in place for equipment at the Aquatic Centre, confirmation that all lease payments have been made and that lease payments are up to date and any further information reasonably requested by the Council in relation to such equipment leases;
- 12.3.11 Customer / Attendance growth;
- 12.3.12 details of all Programs delivered in the previous quarter;
- 12.3.13 a summary of marketing activities undertaken and their effectiveness in the previous quarter and major marketing initiatives proposed to be undertaken for the ensuing quarter pursuant to the current Marketing Plan;
- 12.3.14 maintenance works undertaken in the previous quarter and an updated Maintenance Plan for the ensuing quarter;
- 12.3.15 failure of any plant and equipment during the period, which required remedy by the Manager;
- 12.3.16 an up-to-date list of the current Employees noting any change to key management staff (as relevant);
- 12.3.17 attendance / usage numbers and demographic records; and
- 12.3.18 the Manager's performance against:
 - (a) the Management Objectives;
 - (b) the Key Performance Indicators; and
 - (c) the approved Annual Business Plan and Budget.

12.4 Administration and Record Keeping

- 12.4.1 The Manager must maintain accurate information and records in respect of the Aquatic Centre.

- 12.4.2 Without limiting clause 12.4.1, the Manager must maintain up to date contact and financial information and records for all Customers and the Manager must provide the Council with access to such information and records on request.

12.5 **Annual Reports**

By each 30 September during the Agreement Term, except for the first year of the Agreement Term, the Manager must provide the Council with a written annual report (**Annual Report**) which provides a consolidated report of the Manager's performance under this Agreement during the preceding Financial Year, including a report on the Manager's Performance against the relevant approved Annual Business Plan and Budget whether the Key Performance Indicators have been met. The Annual Report must be in a format approved by the Council and must contain all information and data specified by the Council, including, as a minimum, all information included within Quarterly Reports.

12.6 **Audits**

The Manager must, at its cost, provide audited annual financial statements for the income and expenditure of the Aquatic Centre during each Financial Year of the Agreement Term. The audit must be undertaken by an Independent Qualified Accountant who is a registered auditor in accordance with Australian Auditing Standards and an audit report produced by such auditor. A copy of the financial statements and audit report must be provided to the Council by 30 September of each year of the Agreement Term.

12.7 **Community Forums / Workshops / Council Meetings**

The Manager must when requested by the Council participate in community forums workshops and/or Council meetings.

12.8 **Benchmarking**

The Manager must when requested by the Council participate in any actions required to benchmark the performance of the Aquatic Centre against other nearby public aquatic facilities.

13. **INFORMATION, PUBLICITY AND MARKETING**

13.1 **Marketing**

- 13.1.1 The Manager must market the Aquatic Centre in accordance with:

- (a) the Pre-Opening Services Budget;
 - (b) the Marketing Plan; and
 - (c) the Annual Business Plan and Budget,
- (as applicable).

- 13.1.2 The Manager and Council will collaborate on creating a brand direction and maintaining a brand identity for the Aquatic Centre, and must arrange to market the Aquatic Centre so as to effectively promote the Aquatic Centre.

- 13.1.3 The Manager must ensure that all publicity, advertisements and public communications for the Aquatic Centre comply with:
 - (a) the branding for the Aquatic Centre (as updated from time to time);
 - (b) all applicable policies of the Council; and
 - (c) all relevant Legislation and Statutory Requirements.
- 13.1.4 The Manager must ensure that all notice boards are in a neat and tidy condition at all times and that the material displayed is reviewed regularly (with any non current notices and/or materials removed).
- 13.1.5 The Manager must allow the Council access to the Aquatic Centre for promotion of council events.

13.2 Standards of Publicity

- 13.2.1 The Manager must ensure that any promotional material for the Aquatic Centre is accurate, truthful and a fair representation of the services to be offered.
- 13.2.2 The Manager will be the principal in all transactions with all publicity media. All queries regarding the standard of publicity are to be directed to the Manager.
- 13.2.3 The Manager must compile a file which contains copies of all major promotional literature, notices, advertisements, media advertising, commercials and office stationery for the Aquatic Centre.
- 13.2.4 All Intellectual Property Rights and Data in relation to all marketing and advertising material for the Aquatic Centre belong to the Council on their creation.

13.3 Social Media

- 13.3.1 The Council will, with the support of the Manager, establish social media accounts for the Aquatic Centre. For the avoidance of doubt, the Council is the owner of all such social media accounts.
- 13.3.2 The Council will, during the Agreement Term, provide the Manager with unrestricted and unlimited access to any social media accounts established for the Aquatic Centre.
- 13.3.3 The Manager has day to day responsibilities for managing and promoting the Aquatic Centres social media accounts in accordance with the approved Marketing Plan.
- 13.3.4 Upon the expiry or earlier termination of this Agreement the Council will remove the Manager's access to all social media accounts established for the Aquatic Centre.

13.4 Sponsorship

- 13.4.1 The Manager is encouraged to:

- (a) seek sponsorship for events held at the Aquatic Centre, provided always that sponsorship related to tobacco, vaping, gambling and alcohol is not permitted;
 - (b) identify and use reasonable endeavours to enter into sponsorship arrangements in connection with the Aquatic Centre with suppliers of goods and services to the Aquatic Centre and businesses with activities compatible with the Aquatic Centre's operations.
- 13.4.2 The Manager must ensure that the sponsor(s) and their business activities are compatible with this Agreement and with any other sponsors the Council may have.
- 13.4.3 All revenue derived from sponsorship arrangements for the Aquatic Centre is Income for the purposes of this Agreement and all sponsorship arrangements for the Aquatic Centre that result in a reduction in the Manager's expenditure must be applied to reduce the Expenses.
- 13.4.4 Sponsorship for naming rights for any part of the Aquatic Centre must first be approved by the Council in writing.
- 13.4.5 The Manager must not, without the Council's prior written consent, enter into any commitment with sponsors which extends beyond the Agreement Term.

14. HUMAN RESOURCE MANAGEMENT

14.1 Staffing

- 14.1.1 The Manager must at all times have and make available appropriately skilled, trained and qualified personnel and such other resources as may be necessary from time to time for the proper, safe and efficient operation and management of the Aquatic Centre as required under this Agreement.
- 14.1.2 Notwithstanding the inclusion of Employee wages and entitlements in the Expenses for the Aquatic Centre for the purposes of this Agreement, the Manager solely is the employer of all Employees, and:
 - (a) is solely responsible for the appointment and employment conditions of the Employees, including any leave entitlements, payroll tax, workers compensation levies, superannuation and any other employment related entitlements and/or benefits. All positions must have detailed job descriptions, specifications and conditions of employment prior to the advertising of any position; and
 - (b) is solely responsible for the conduct of all Employees and for determining the working hours and duties they are to perform;
 - (c) is solely responsible for paying or allowing for any accrued employee entitlements owing to any existing employees transferred to the Aquatic Centre or any employee who has unrealised employee entitlements relating to previous or other work undertaken for the Manager (including annual leave, sick leave or long-service leave), noting specifically that these costs will

not be treated as Expenses in the Aquatic Centre Accounting Ledger.

- 14.1.3 The Manager must comply with all Legislation regarding the employment of its Employees.
- 14.1.4 The Manager must ensure that the Employees undertake regular training to ensure that the Aquatic Centre is operated professionally, efficiently and effectively and in accordance with all Statutory Requirements.
- 14.1.5 All Employees must wear:
 - (a) a uniform which is specific to and branded for the Aquatic Centre and is appropriate to their job function; and
 - (b) an identification badge (which may be embroidered) on the upper chest area. The badge and/or uniform must display the following information:
 - (a) name of the Aquatic Centre; and
 - (b) name of the staff member.

14.2 Aquatic Centre Manager

The Manager must ensure that a designated manager is present at the Aquatic Centre during the Operating Hours.

15. EQUIPMENT

15.1 Provision of Fixtures, Fittings and Plant and Equipment

- 15.1.1 The Council Fixtures, Fittings and Plant and Council Equipment belongs to the Council and must remain at the Aquatic Centre.
- 15.1.2 The Manager must ensure that there is sufficient equipment at the Aquatic Centre to maximise Customer attendances, membership and business opportunities at the Aquatic Centre (subject to the provisions of the approved Annual Business Plan and Budget).
- 15.1.3 The Manager is responsible for keeping the Council Fixtures, Fittings and Plant, Council Equipment and the Manager Equipment to a high standard of operation, maintenance and cleanliness, and must undertake regular preventative maintenance subject to and in accordance with the Maintenance Plan and any industry standards. Any reasonable repairs required to Council Fixtures, Fittings and Plant, Council Equipment and Manager Equipment must be undertaken (or procured) by the responsible Party as soon as possible.
- 15.1.4 The Council's Contact Officer must be notified of any item of the Council Fixtures, Fittings and Plant and Council Equipment reaching the end of its useful life.
- 15.1.5 Where an item of the Council Fixtures, Fittings and Plant reaches the end of its useful life, the Council may, in its absolute discretion, replace that item.

- 15.1.6 Where an item of the Council Equipment reaches the end of its useful life, subject to the Manager's compliance with its maintenance and repair obligations pursuant to this Agreement, the item may be replaced utilising funds from the relevant Aquatic Centre Account Ledger, subject, however, to the replacement being in accordance with the then current approved Annual Business Plan and Budget or as otherwise approved by the Council, which approval may be granted or withheld at the Council's absolute discretion.

15.2 Compensation for Loss or Damage to Council Fixtures, Fittings and Plant and Council Equipment

The Manager must compensate the Council if any item of the Council Fixtures, Fittings and Plant or Council Equipment is damaged or lost at any time before the end of the Agreement Term as a result of the Manager's negligence, excluding fair wear and tear. The compensation to be paid by the Manager to the Council must include the full cost of replacing, disposing of and reinstating the item and be by agreement between the Manager and the Council's Contact Officer or failing agreement, as determined by an independent valuer, whose costs will be borne by the Manager.

15.3 Control of Use of Equipment

The Manager must stop further use of, or remove from the Aquatic Centre, an item or category of Equipment for reasons that include:

- 15.3.1 Statutory Requirements;
- 15.3.2 health and safety considerations;
- 15.3.3 advice or recommendation of the manufacturers of that item of Equipment; or
- 15.3.4 advice of independent experts and/or specialist officers.

15.4 Ownership of equipment

- 15.4.1 All equipment purchased for the Aquatic Centre:

- (a) by the Council;
- (b) from funds in the Aquatic Centre Accounting Ledger and recorded as an Expense in the Aquatic Centre Accounting Ledger; and / or
- (c) for which there is an operational expense included in the Aquatic Centre Account Ledger in respect of the upfront cost of that Equipment (however such upfront cost was funded);

is the sole and exclusive property of the Council and must remain at the Aquatic Centre at all times.

15.5 Fixtures, fittings and equipment purchases by the Manager

- 15.5.1 The Manager must not purchase any equipment for the Aquatic Centre except in accordance with an approved Annual Business Plan and Budget without the prior written consent of the Council.

- 15.5.2 Notwithstanding, and in addition to, clause 15.5.1, the Manager must obtain the Council's prior written approval for all proposed equipment purchases (including replacements) over \$5,000.00 (ex GST).

15.6 Equipment register

- 15.6.1 The Manager must maintain an up-to-date equipment register for the Aquatic Centre (**Equipment Register**).
- 15.6.2 The Equipment Register must, at a minimum, include details of all:
- (a) Equipment (itemised);
 - (b) Equipment purchased during the Operating Period by the Manager in accordance with this Agreement for use at the Aquatic Centre;
 - (c) details of all Equipment that has reached the end of its useful life.
- 15.6.3 The Manager must provide the Council with a copy of the Equipment Register, and any associated information or documentation, on request.

16. MAINTENANCE, REPAIR AND DECORATION OF THE AQUATIC CENTRE

16.1 General

- 16.1.1 The Manager must ensure the Aquatic Centre and the Council Fixtures, Fittings and Plant, Council Equipment and the Manager Equipment are maintained to a high standard and that:
- (a) the standard of maintenance supports and facilitates the achievement of the Management Objectives and the Key Performance Indicators; and
 - (b) all maintenance is carried out by persons who are skilled and experienced in carrying out maintenance of public aquatic facilities.
- 16.1.2 The Manager must also keep the Aquatic Centre in a clean and well-maintained condition at all times, subject to fair wear and tear.
- 16.1.3 Without derogating from any other provision in this Agreement, the Manager must maintain the Aquatic Centre, the Council Fixtures, Fittings and Plant, Council Equipment and Manager Equipment at the times and in accordance with the standards specified in, and by undertaking the tasks identified in, the Maintenance Plan.
- 16.1.4 The Manager's obligations in this clause 16.1 are subject to clause 16.3 during the period of any defects liability period under the Construction Contract.
- 16.1.5 The Council Fixtures, Fittings and Plant and Council Equipment belong to the Council and must remain at the Aquatic Centre at all times, unless otherwise approved by the Council.
- 16.1.6 If the Manager does or omits to do anything that causes or contributes to any manufacturer's or supplier's warranties in connection with the Aquatic Centre being voided or of reduced benefit, the Manager must indemnify the Council

in respect of all loss or damage suffered or costs incurred by the Council as a result.

16.2 Standard of Maintenance

Without limiting clause 16.1.1, the Manager must undertake maintenance works to the following standard:

- 16.2.1 items that are subject to manufacturer's or supplier's warranties must be maintained so as to ensure the full benefit of those warranties are maintained;
- 16.2.2 items that are subject to manufacturer's or suppliers' instructions and/or recommendations are to be inspected and maintained in accordance with those instructions and/or recommendations. The Manager must forward all maintenance reports to the Council's Contact Officer;
- 16.2.3 items that are subject to statutory maintenance regulations (such as compressed air cylinders and fire extinguishers) must comply with Statutory Requirements. The Manager must keep certificates of inspection and make them available to the Council on request; and
- 16.2.4 preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation in accordance with manufacturer's instructions and / or recommendations and are performed by knowledgeable, trained and experienced personnel utilising proper equipment, tools and procedures;
- 16.2.5 appropriate monitoring, testing and calibration is done to ensure processes are functioning as designed and to provide assurance that processes will function properly under both normal and reasonably anticipated abnormal conditions;
- 16.2.6 in accordance with all Authorisations and applicable Statutory Requirements;
- 16.2.7 as otherwise required by the Maintenance Plan or, where the Maintenance Plan does not specify a standard, then to the standard reasonably determined by the Council (from time to time).

16.3 Defects Liability Period maintenance

- 16.3.1 Where any item at the Aquatic Centre is subject to a defects liability period under the Construction Contract, the Council will, and the Manager must not, attend to maintenance of that item for the duration of the defects liability period.
- 16.3.2 The Manager must allow the contractor under the Construction Contract, and its subcontractors, access to the Aquatic Centre at all reasonable times to attend to inspections of, and maintenance, repairs and other works to, items that are subject to a defects liability period under the Construction Contract.

16.4 Modifications

- 16.4.1 The Manager must not make any modifications to the Aquatic Centre without the prior written approval of the Council. A modification includes:

- (a) the addition to or removal of any attachment from any item of plant; and/or
- (b) the improvement to or reduction of performance of an item of plant.

16.4.2 If the Council approves a modification pursuant to clause 16.4.1, such approval may be given subject to conditions, including conditions requiring that the proposed modification works be undertaken or facilitated by the Council and the costs of the same be paid or reimbursed by the Manager.

16.5 Fire Servicing

- 16.5.1 Subject to clause 16.5.3, and unless directed otherwise, the Manager is responsible for servicing all fire Equipment at the Aquatic Centre, including but not limited to emergency exit lighting and fire safety equipment.
- 16.5.2 Without limiting clause 16.5.1, the Manager must undertake the tasks relating to fire and safety equipment identified in the Maintenance Plan.
- 16.5.3 The Manager will attend to testing of Residual Current Devices (**RCDs**) located at the Aquatic Centre in accordance with Statutory Requirements.

16.6 Sanitary Services and sharps disposal

The Manager must make arrangements for sanitary services and sharps disposal services to be provided at the Aquatic Centre.

16.7 Closure of the Aquatic Centre

- 16.7.1 The Council may instruct the Manager to close the Aquatic Centre (or any part or parts of it) for reasons of:
 - (a) maintenance and/or repairs;
 - (b) capital works to the Aquatic Centre or any one of them (or any part or parts of them);
 - (c) safety; and/or
 - (d) any Statutory Requirements.
- 16.7.2 The Council will meet with the Manager in determining times for closure of the Aquatic Centre. Both the Council and the Manager will act reasonably in considering the closure times. Where possible, any closures should be at low patronage periods and in stages, to avoid the whole Aquatic Centre being closed.
- 16.7.3 Closures of the Aquatic Centre must be communicated to the community via the Aquatic Centre' website, social media platforms, and notices at the Aquatic Centre.
- 16.7.4 The Manager expressly acknowledges and agrees that it will not be entitled to any compensation in respect of any closure of the Aquatic Centre in accordance with this clause 16.7 where:

- (a) the closure is of part or parts of the Aquatic Centre and is for a period of five consecutive trading days or less (or such other period as may be agreed by the Parties).
- (b) the closure of the whole of the Aquatic Centre and is for a period of three consecutive trading days or less;
- (c) the closure is required as a result of an act or omission of the Manager or is due to any circumstance beyond the reasonable control of the Parties; or
- (d) the closure is requested by the Manager;

and the Manager releases the Council in respect of all Claims for the same.

- 16.7.5 In respect of any closure of the Aquatic Centre where clause 16.7.4 does not apply then Council and the Manager will negotiate in good faith what if any compensation will be payable to the Manager.

16.8 Ground Maintenance

As part of the Services, the Manager must attend to any repairs, maintenance and cleaning obligations in respect of exterior areas of the Aquatic Centre and Common Areas in accordance with the Maintenance Plan.

16.9 Council right of entry

- 16.9.1 The Council may enter and remain at the Aquatic Centre at all reasonable times after giving the Manager not less than 48 hours' notice (except in the event of an emergency where no notice is required) to perform any maintenance, repair, cleaning and renewal obligations identified as being attributable to the Council in the Maintenance Plan, by an express provision of this Agreement or otherwise deemed necessary by the Council.
- 16.9.2 Notwithstanding any other provision of this Agreement, the Council has complete and unfettered discretion as to whether and when they complete any maintenance, repair, cleaning and renewal obligations identified as being attributable to the Council in the Maintenance Plan or by an express provision of this Agreement. The Council must take reasonable steps to minimise (except in emergencies) interference with the Services provided by the Manager when exercising their right of entry pursuant to this clause 16.9.

17. MEETINGS WITH THE COUNCIL

17.1 Monthly Meetings

- 17.1.1 During the Agreement Term, the Manager must attend monthly meetings with the Council's Contact Officer (each, a **Monthly Meeting**) to discuss all matters relevant to this Agreement, including the Manager's performance.
- 17.1.2 Not less than one weeks prior to each Monthly Meeting, the Manager must provide the Council with a report, in a form requested by the Council, on its performance for the relevant month in a form required by the Council.

- 17.1.3 Monthly Meetings will be chaired by the Council's Contact Officer and maybe attended by other Council staff as necessary, at a time and a place nominated by the Council's Contact Officer. Meetings may be conducted virtually at the discretion of Council's Contact Officer.

17.2 Annual Performance Reviews

- 17.2.1 During the Agreement Term, the Manager must also attend annual performance review meetings with the Council's Contact Officer (each, a **Manager Performance Review**).
- 17.2.2 Minutes of each Manager Performance Review must be kept by the Council's Contact Officer and issued to the Manager as soon as possible thereafter. If the Manager does not agree with the accuracy of the minutes, it must notify the Council's Contact Officer of the inaccuracy within 48 hours of receipt of the minutes. Failure to do so, will be deemed to be acceptance by the Manager of the minutes as a true and accurate record.

17.3 Additional Meetings

The Manager must attend such additional meetings as may be directed by the Council's Contact Officer, at a mutually agreed time. These meetings may be with the Council's Contact Officer, members or officers of the Council (including the CEO and/or Elected Members), users or potential users of the Aquatic Centre, community groups or the general public.

17.4 Documents and Information

The Council's Contact Officer must have full access to all records and documents required to be maintained by the Manager under this Agreement.

18. INTELLECTUAL PROPERTY RIGHTS AND DATA

- 18.1 Notwithstanding any other provision of this Agreement, each Party retains ownership of all rights to their Background IP. The Parties may only use the other Party's Background IP as outlined in this Agreement or as otherwise agreed in writing.
- 18.2 The Parties hereby acknowledge and agree that all Intellectual Property Rights and Data created in relation to, and in connection with, this Agreement during the Agreement Term, whether by the Manager or the Council will become the property of the Council immediately on their creation and unless specifically directed by the Council to the contrary, the Manager is hereby granted an irrevocable and royalty free licence to use such Intellectual Property Rights and Data during the Agreement Term for the purposes of providing the Services.
- 18.3 On expiry of the Agreement Term, the Manager must provide the Council with a backup copy of all Intellectual Property and Data created in electronic form during the Agreement Term.
- 18.4 For the avoidance of doubt, Intellectual Property Rights and Data include all membership Customer and User Group data and all information relating to the Aquatic Centre (other than Background IP).

- 18.5 The Manager must ensure that all contracts it enters into in relation to the Services permit the disclosure, provision and transfer of Intellectual Property Rights and Data to the Council and any other person nominated by the Council.
- 18.6 The Manager must store all Data in connection with this Agreement in accordance with the requirements of all applicable Council policies on the storage, management and destruction of Data (including privacy requirements) as if the Data was Council-generated Data.

19. **INSURANCE**

- 19.1 The Manager must, at its cost in all things, arrange and maintain during the Agreement Term, with a reputable insurance company acceptable to the Council, the insurance listed in this clause 19 in connection with the operation of the Aquatic Centre.

19.1.1 ***ReturnToWork***

The Manager must, during the Term, ensure that it is registered as an employer under the *Return to Work Act 2014* (SA) and it must pay all monthly levies due pursuant to that Act or any other law in respect of the Employees.

19.1.2 ***Public Liability***

The Manager must insure for public liability for an amount of not less than \$20,000,000 per occurrence and unlimited in the annual aggregate and note the Council's interest in the policy or policies.

19.1.3 ***Professional Indemnity Insurance***

The Manager must obtain professional indemnity insurance sufficient to cover its provision of the Services pursuant to this Agreement for an amount of not less than \$5,000,000 per claim.

19.1.4 ***Loss of Income / Theft Cover Insurance***

The Manager will effect loss of income and Fidelity Guarantee insurance for material loss or damage and consequential loss for an amount of not less than \$150,000 per claim (which amount is to be reviewed annually by the Manager) and note the Council's interest in the policy or policies.

19.1.5 ***Product liability***

The Manager must insure for product liability for an amount of not less than \$5,000,000 per occurrence and unlimited in the annual aggregate and note the Council's interest in the policy or policies.

19.1.6 ***Manager Equipment***

The Manager must maintain contents insurance in respect of the Manager Equipment for its full replacement value and note the Council's interest in the Manager Equipment and the policy.

19.2 Insurance Policies by Manager – General requirements

All insurances taken out by the Manager must be with reputable insurance companies. Evidence of currency must be provided to the Council by the Manager upon request.

19.3 Building insurance

19.3.1 The Council will maintain in connection with the Aquatic Centre and the Council Equipment building insurance for their replacement value.

19.3.2 If the Aquatic Centre or any item of the Council Equipment are damaged the Manager must, where requested by the Council:

- (a) as soon as reasonably practicable report the damage to the South Australia Police and obtain a report number and notify the Council of the report number; and
- (b) provide assistance to the Council in respect of the making and/or resolution of any claim made against the insurance maintained by the Council pursuant to clause 19.3.1.

19.4 Not to Void Insurance Cover

Neither party will do anything, or fail to do anything, which does or may render any policy of insurance taken out by the other party void or unenforceable (whether in part or in whole).

20. SUBCONTRACTING AND ASSIGNING

20.1 The Manager must not assign or subcontract this Agreement or any right or obligation under it without the prior written consent of the Council, which may be granted or withheld in the Council's absolute discretion.

20.2 Notwithstanding any other provision herein, no such assignment or subcontract relieves the Manager from any liability under this Agreement or pursuant to any Legislation in respect of the performance or purported performance of this Agreement and the Manager is responsible for the acts and omissions of any assignee or subcontractor or any assignee's or subcontractor's employees and agents as if they were the acts or omissions of the Manager.

21. LIQUOR LICENSING

21.1 The Manager may, with the Council's prior written consent, apply to obtain a liquor licence (**Liquor Licence**) under the *Liquor Licensing Act 1997* (**Licensing Act**) for the Aquatic Centre.

21.2 If the Manager is issued with a Liquor Licence the Manager must comply with and observe, and carry out and perform all of the requirements of the Liquor Licence and the Licensing Act and all directions and requirements relating to the Liquor Licence.

21.3 If the Manager is served with any summons, complaint or other legal process, or any notice, requirement or other communication from any person or authority acting under the Licensing Act or otherwise relating to the Liquor Licence or the Aquatic Centre, the Manager must immediately inform the Council of this fact and provide all relevant

and available particulars of the events and circumstances to the Council. The Manager must consult fully with the Council (or its nominated legal advisors) in relation to any defence and other legal action to be initiated and at all times will prosecute and conduct such legal action in a diligent manner and so as to protect and preserve the Liquor Licence.

21.4 Upon expiration or sooner termination of this Agreement for any reason whatsoever, the Manager must:

21.4.1 if requested by the Council, transfer to the Council or its nominee the Liquor Licence and all other licences, approvals and consents at no cost to the Council or its nominee, other than payment of any fee in order to effect such transfer; or

21.4.2 in all other cases, surrender the Liquor Licence.

22. DAMAGE AND DESTRUCTION

22.1 Damage Due to Negligence of the Manager

If the Aquatic Centre or any part or parts of it is damaged or destroyed as a consequence of some negligent act or omission on the part of the Manager or any of its servants or agents, then without limiting the rights and entitlements of the Council under this Agreement and at law, the Manager indemnifies the Council against all loss and damage suffered in consequence thereof.

22.2 Temporary Damage

If the Aquatic Centre sustains any temporary damage which impacts and/or limits the operation of the Aquatic Centre:

22.2.1 the Parties must negotiate in good faith adjustments to the Annual Budget that reasonably reflect any decrease in the Manager's duties and costs during the period while and until the damage is repaired;

22.2.2 if the Parties are unable to agree on the amount of any reductions pursuant to clause 22.2.1 the reductions are to be determined by an independent expert in accordance with clause 33.3;

22.2.3 if the Aquatic Centre has to be closed down for the purposes of repairs and reinstatement the Manager must do everything possible in the circumstances to minimise the Aquatic Centre's operating costs during the relevant period; and

22.2.4 if the Aquatic Centre remains open (whether in whole or in part) while such repair and reinstatement works are being carried out the Manager must provide such co-operation, accommodation and assistance as may be necessary and reasonable to allow such works to be completed as soon as practicable.

22.3 Substantial Damage

If the Aquatic Centre sustains any substantial damage, then the Council may terminate this Agreement by giving the Manager no less than 14 days' written notice. Neither party will have any further right, entitlement or interest under this Agreement after the date of such termination.

23. INDEMNITY AND RELEASE AND LIMITATION OF LIABILITY

23.1 Indemnity

23.1.1 The Manager must indemnify the Council and its employees, officers and organisations against all Claims which may be made against the Council arising from, or in connection with:

- (a) demands, expenses, loss or damage in respect of loss or damage to any property, or the death of or personal injury to any person, caused or contributed to by the Manager, a breach by the Manager of this Agreement, a wilful unlawful or negligent act or omission of the Manager in performing its obligations under this Agreement, and any claim action or proceeding by a third party against the Council or its employees officers and organisations caused or contributed to by the Manager; and
- (b) wages, long service leave, sick leave, annual leave, superannuation, and/or any other employee entitlement made by the Manager or any of its employees if they are deemed or found to be an employee of the Council.

23.1.2 This indemnity is reduced by the extent to which the Council and/or its employees cause or contribute to the event giving rise to the claim for the indemnity, including but not limited to failing to take reasonable steps to mitigate loss.

23.2 Release

The Manager must perform the Services at its own risk in all things and releases the Council and its employees, officers, members and organisations from all Claims, actions, proceedings, costs, expenses, losses, suffering, and liabilities incurred by the Manager or its employees, agents, subcontractors and third parties which arise from the performance of the Services, save and except to the extent that such a Claim, actions, proceedings, costs, expenses, losses, suffering, or liabilities are caused by or contributed to, by the Council and/or its employees.

24. NON-PERFORMANCE BY THE MANAGER

24.1 If the Manager breaches a provision of this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so, the Council may:

- 24.1.1 suspend any or all payment of the Management Fee until the breach is remedied, and upon such remedy, all suspended amounts will be paid to the Manager; and/or
- 24.1.2 remedy the breach itself whether by the use of the Council's employees or other organisations and deduct the cost of remediation from any

Management Fee or other payment due to the Manager or require the Manager to pay the cost of remediation as a debt due and owing to the Council (and such cost will **not** be an Expense of the Aquatic Centre); and/or

24.1.3 terminate this Agreement in accordance with clause 25; and/or

24.1.4 pursue any other legal remedies available to the Council.

25. TERMINATION

25.1 Termination by the Council for cause

25.1.1 The Council may immediately terminate this Agreement by giving notice to the Manager if the Manager:

- (a) ceases to carry on business or becomes otherwise unable to perform its obligations under this Agreement;
- (b) breaches a material or essential term of this Agreement and fails to remedy the breach within a reasonable time (being not less than seven days) after receiving notice requiring it to do so;
- (c) becomes an externally-administered body corporate or an insolvent under administration;
- (d) after receiving written notice from Council and being given a reasonable opportunity to rectify (being no less than 14 days):
 - (a) fails to maintain any other equipment as required by this Agreement;
 - (b) fails to make any payment required to be made to the Council in accordance with this Agreement;
 - (c) fails to meet any of its obligations pursuant to clause 35 in respect of Security;
 - (d) fails to provide any plans or reports to the Council as required by this Agreement;
 - (e) fails to maintain any insurance policy required by this Agreement;
 - (f) commits or permits to occur any breach or default in the due and punctual observance and performance of any of the terms of this Agreement, and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so;
 - (g) in the reasonable opinion of the Council, is unable (other than causes beyond the reasonable control of the Manager) to manage the Aquatic Centre within the parameters of the approved Annual Business Plan and Budget;
 - (h) repeatedly or continuously fails to meet or achieve the Key Performance Indicators or fails to meet or achieve multiple

Key Performance Indicators in a manner that has a significant or substantial impact on the standard of delivery of the Services;

- (i) fails to obtain the Council's approval for an Annual Business Plan and Budget for a Financial Year of the Agreement Term before the commencement of that Financial Year (whether due to a failure on the Manager's part to prepare and submit a draft Annual Business Plan and Budget for the Council's approval or due to any draft Annual Business Plan and Budget submitted by the Manager being unacceptable to the Council for any reason);
- (j) fails to obtain the Council's approval (which is not unreasonably withheld or delayed) for a Maintenance Plan for any Financial Year of the Agreement Term before the commencement of that Financial Year (whether due to a failure on the Manager's part to prepare and submit a draft Maintenance Plan for the Council's approval or due to any draft Maintenance Plan submitted by the Manager being unacceptable to the Council for any reason); and /or
- (k) fails to maintain, refurbish and renew the Council Fixtures, Fittings and Plant, the Council Equipment and/or Manager Equipment in accordance with this Agreement and the approved Maintenance Plan;
- (e) becomes insolvent or bankrupt.

25.1.2 In such circumstances the Council will not be liable to compensate the Manager for loss of potential profits or other consequential loss incurred by the Manager arising from termination by the Council pursuant to this clause.

25.2 Termination by the Manager for cause

The Manager may immediately terminate this Agreement if:

- 25.2.1 the Council breaches a material term of this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so; or
- 25.2.2 the Council fails to make any payment required to be made to the Manager in accordance with this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so.

25.3 Termination by the Council – financial performance of the Manager during the Initial Operating Period

- 25.3.1 At any time or times during the first three years from the Operating Period Commencement Date, the Manager acknowledges that the Council may at its discretion and cost appoint a suitably qualified and experienced expert to undertake one or more independent external reviews of the performance of the Aquatic Centre, including the Aquatic Centre's financial performance and the Manager's management of the Aquatic Centre's finances and community

satisfaction, safety, complaints management and other operational matters, (each an **External Review**).

25.3.2 In addition to the Council's other rights pursuant to this Agreement, if in the Council's reasonable opinion an External Review:

- (a) identifies that the Aquatic Centre's financial performance has not met or exceeded the forecast performance detailed in the Three-Year Budget; and / or
- (b) indicates that a Net Profit result will not be returned on and from the end of the Three-Year Budget,

then the Council may terminate this Agreement by giving not less than three month's written notice of termination to the Manager at any time after the first anniversary of the Operating Period Commencement Date. At the end of any period of notice given in accordance with this clause this Agreement will determine without the need for any further notice. In such circumstances the Council will not be liable to compensate the Manager for loss of potential profits or other consequential loss incurred by the Manager arising from termination by the Council pursuant to this clause and clause 29 will apply.

25.4 **Accrued rights and remedies**

Except where otherwise expressly provided by this Agreement, termination of this Agreement under this clause does not affect any accrued rights or remedies of either Party.

26. **REDEVELOPMENT**

Notwithstanding any other provision in this Agreement, if during the Agreement Term the Council proposes to carry out any redevelopment of the Aquatic Centre (or any substantial part of it), (**Redevelopment**) then:

- 26.1 the Council must give the Manager not less than six months' written notice of any Redevelopment proposal (**Redevelopment Proposal Notice**). Such notice must include details of the proposed Redevelopment, identification of which part or parts of it are affected by the Redevelopment (**Redevelopment Area**) and specifying the date on which the Redevelopment will commence, and the Council will require exclusive access to and use and possession of the Redevelopment Area (**Redevelopment Commencement Date**);
- 26.2 on and from the Redevelopment Commencement Date (or such later date determined by the Council and notified to the Manager in writing) during the period that any Redevelopment is carried out:
 - 26.2.1 the Manager's obligations to provide the Services in respect of the Redevelopment Area will be suspended and the Council will have the exclusive right to access and use the Redevelopment Area for the purposes of the Redevelopment;
 - 26.2.2 the Annual Operating Subsidy will be adjusted by an amount reasonably determined by the Council taking into account the anticipated reduction in Income for the Aquatic Centre, the anticipated reduction in operational costs for the Aquatic Centre, the anticipated number of days during which the

Aquatic Centre (or any part or parts of it)(as the case may be) will be closed or otherwise unavailable for use by Customers and any additional operating costs for the Aquatic Centre directly and solely attributable to the Redevelopment;

26.2.3 the Parties will, during the period of the Redevelopment, enter into negotiations on a varied or new agreement to apply to the Aquatic Centre following the completion of the Redevelopment; and

26.3 if within three months of the Redevelopment Commencement Date the Parties have not agreed varied or new arrangements to apply to the Aquatic Centre in accordance with clause 26.2.3, then the Council may by written notice to the Manager terminate this Agreement by giving the Manager written notice of the termination and specifying a date for termination of not less than six months after the notice of termination is given. At the end of the notice period, the rights and obligations of the Council and the Manager under this Agreement (except with regard to an existing breach) come to an end and the Manager is not entitled to any form of compensation whatsoever from the Council unless otherwise agreed.

26.4 If the Council terminates this Agreement under clause 26.3, then clause 29 will apply.

27. ASSET RATIONALISATION AND DEMOLITION

If as part of any asset rationalisation or other project conducted by the Council that includes the Aquatic Centre, or for any other reason, the Council wishes to demolish or acquire vacant possession of the Aquatic Centre or any part of it (**Proposed Demolition or Asset Rationalisation**) then the Council will be entitled to terminate this Agreement subject to the following provisions:

27.1 the Council must provide the Manager with details of the Proposed Demolition or Asset Rationalisation sufficient to indicate a genuine proposal to carry out that Proposed Demolition or Asset Rationalisation within a reasonably practical time after this Agreement is to be terminated;

27.2 the Council may at any time after providing the Manager with the information specified in clause 27.1, give the Manager a written notice of termination of this Agreement (**Termination Notice**) specifying the date on which this Agreement is to come to an end being a date not less than six months after the Termination Notice is given. This Agreement will then come to an end at midnight on the day specified in the Termination Notice;

27.3 when this Agreement is terminated by the Council under clause 27.2 subject to clause 27.4 the rights and obligations of the Council and the Manager under this Agreement will come to an end but if any breach by either party still exists at that time then the rights of the other party with regard to that existing breach will continue; and

27.4 If the Council terminates this Agreement under clause 27.3, then clauses 25.3 and 29 will apply.

28. EXEMPTION FROM LEASES ACT

28.1 The Parties acknowledge and agree that it is intended that all of the provisions of the *Retail and Commercial Leases Act 1995* (SA) (**Leases Act**) will not apply to this Agreement.

- 28.2 To reinforce the intention of the Parties, the Parties further acknowledge and agree that as soon as reasonably practicable after execution of this Agreement, the Council and the Manager will jointly make an application pursuant to Section 77 of the Leases Act for an exemption from the application of all of the provisions of this Agreement.
- 28.3 All costs incurred pursuant to this clause 28 will be borne by the Council.
- 28.4 If an exemption from the application of all of the provisions of the Leases Act to this Agreement is not granted on or before the day prior to the Operating Period Commencement Date, then this Agreement will be voidable by the Council on written notice to the Manager.

29. **HANDOVER OF THE AQUATIC CENTRE**

- 29.1 Without limiting any other provision of this Agreement, no less than four weeks prior to the expiry of the Agreement Term (or immediately following the earlier termination of this Agreement, if terminated on less than four weeks' notice in accordance with this Agreement), the Manager will if requested by the Council:
 - 29.1.1 thoroughly clean all surfaces of the Aquatic Centre;
 - 29.1.2 remove and reinstate any alterations or additions made to the Aquatic Centre by the Manager;
 - 29.1.3 attend to any outstanding repair, maintenance and decoration obligations of the Manager pursuant to this Agreement, excluding fair wear and tear;
 - 29.1.4 notify all Customers of the expiry of the Manager's role and advise of the new manager;
 - 29.1.5 deliver to the Council all manuals and maintenance records for the Council Fixtures, Fittings and Plant, the Council Equipment and all other equipment at the Aquatic Centre (other than Manager Equipment);
 - 29.1.6 advise the Council of all existing contractual arrangements for the Aquatic Centre and provide copies of same to the Council;
 - 29.1.7 provide the Council with all system and procedure manuals and Program manuals relating to the Aquatic Centre;
 - 29.1.8 provide the Council with all records (in soft and hard copy); including all Intellectual Property and Data, records relating to Customers and memberships for the Aquatic Centre, including prepaid memberships;
 - 29.1.9 transfer all licences, subscriptions, registers, procedures and databases;
 - 29.1.10 transfer ownership and control of all social media accounts for the Aquatic Centre to the Council;
 - 29.1.11 do anything else that the Manager is required under this Agreement to do at or prior to the end of this Agreement; and
 - 29.1.12 do anything else reasonably requested by the Council to ensure a smooth transition of the operations of the Aquatic Centre to the new manager (which may include the Council).

- 29.2 During any hand over, the Manager has a general responsibility to productively work with Council, and any new or future manager, to participate in any reasonable transition plan to ensure that all systems, processes and maintenance responsibilities are transitioned to new management arrangements.
- 29.3 On the expiry or termination of this Agreement, the Manager must:
- 29.3.1 hand over vacant possession of the Aquatic Centre in a condition that is commensurate with the condition of the Aquatic Centre as at the Operating Period Commencement Date, fair wear and tear excepted, and otherwise in the condition required by this Agreement; and
 - 29.3.2 hand over to the Council all keys and other security devices for the Aquatic Centre which the Manager has in its possession or control; and
 - 29.3.3 immediately transfer control of the Aquatic Centre Accounting Ledger (and all funds held in it) to the Council.
- 29.4 Where the Council has not requested the Manager pursuant to clause 29.1.2 to remove all or particular alterations or additions made to the Aquatic Centre by the Manager (**Alterations and Additions to Remain at the Aquatic Centre**) then at the time that possession of the Aquatic Centre is given back to the Council the Alterations and Additions to Remain at the Aquatic Centre must be left at the Aquatic Centre by the Manager and will vest in the Council absolutely for no consideration.
- 29.5 If at the time that possession of the Aquatic Centre is given back to the Council, the Manager has not complied with all or any of its obligations under this clause 29, the Manager will not be relieved of its obligation to comply with those requirements, or to compensate the Council for failure to do so, by reason of the fact that the Council has accepted or taken possession of the Aquatic Centre.
- 29.6 If, when this Agreement comes to an end, the Manager leaves any goods or equipment at the Aquatic Centre after twenty eight (28) days have elapsed since the Agreement came to an end (or such earlier period agreed by the Parties), then the Council will be entitled to deal with and dispose of those goods or equipment in its discretion.

30. **CONFIDENTIAL INFORMATION AND FREEDOM OF INFORMATION**

- 30.1 Subject to clause 30.2, each of the Parties agrees that it will not use any Confidential Information of the other Party or allow any Confidential Information of the other party to be used for any purpose whatsoever, except for the purposes of and in the manner contemplated by this Agreement, and agrees that it will:
- 30.1.1 keep confidential;
 - 30.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;
 - 30.1.3 maintain proper and secure custody of; and
 - 30.1.4 not use or reproduce in any form,

any Confidential Information belonging to the other Party. Any departure from a party's obligations pursuant to this clause may only be with the written consent of the other Party or as required by law or the terms of this Agreement.

30.2 Notwithstanding clause 30.1, both Parties consent to the disclosure of Confidential Information in the following circumstances:

- 30.2.1 in Council reports and at meetings of the elected members of the Council provided that the Council takes reasonable steps to maintain the confidentiality of such information;
- 30.2.2 where the Manager or the Council are legally required to do so under any law including to the extent required by the rules of any recognised stock exchange or in the course of legal proceedings;
- 30.2.3 in any Court matter or Government application that is connected to this Agreement;
- 30.2.4 to professional advisers of the Manager or the Council for the purposes of obtaining advice relating to the Manager's or the Council's obligations under this Agreement;
- 30.2.5 to any new potential operator or tenant of the Aquatic Centre, including as part of any procurement process of the Council, excluding however any information which the Manager has designated as commercial in confidence on the basis that:
 - (a) it relates only to the financial affairs and operations of the Manager (including the details of its submission in response to the procurement process for this Agreement) and is not relevant to the Aquatic Centre; or
 - (b) it contains proprietary systems or Background IP owned by the Manager;
- 30.2.6 where the Confidential Information has been included in any reports given to the Council by the Manager as required by this Agreement, the Council may use and disclose this information for all purposes as needed for the proper administration, management and operation of the Aquatic Centre; and
- 30.2.7 to the extent that such information is already or becomes in the public domain without breach of clause 30.1.

30.3 The Manager acknowledges and agrees that the Council may use Intellectual Property Rights and Data vested in or otherwise owned by the Council (including because of clause 18.1) as it sees fit and for any purpose.

30.4 The *Freedom of Information Act 1991* (SA) (**FOI Act**) gives members of the public rights to access Council documents. The FOI Act promotes openness in governance and accountability of government agencies and to achieve these objects confers on members of the public a legally enforceable right to be given access to documents, including Agreements, held by the Council subject but not limited to such restrictions as are consistent with the public interest, commercial in confidence and/or necessary for the preservation of personal privacy in respect of those from whom information is collected and held by the Council and other public authorities.

- 30.5 The Manager consents to any disclosures made as a result of the Council complying with its obligations under the FOI Act, subject to any legally required consultation.
- 30.6 For the purposes of the FOI Act, the following are confidential (**Confidential Sections**):
- 30.6.1 All reports, information and Data provided to the Council by the Manager in accordance with, and for the purposes of, this Agreement.
- 30.7 Unauthorised disclosure of the Confidential Sections and the subject matter contained therein constitutes a breach of a party's obligations under this Agreement.

31. NO PARTNERSHIP OR AGENCY

The Parties acknowledge and declare that:

- 31.1 they are not in partnership;
- 31.2 no agency relationship is created; and
- 31.3 the Manager will operate and manage the Aquatic Centre as an independent contractor and that there will be no employment relationship between the Council and any employees, contractors or others engaged by the Manager in connection with the management and operation of the Aquatic Centre.

32. GENERAL

32.1 Co-operation and Good Faith

The Parties will liaise and consult, and deal with each other in good faith and generally cooperate with each other with a view to ensuring that the requirements and objectives of this Agreement are fulfilled in all respects.

32.2 Costs

The Parties will bear their own costs of and in connection with preparation, negotiation and finalisation of this Agreement.

32.3 Notices

Any notice required or permitted to be given or served under this Agreement must be in writing and will, without prejudice to any other mode of service, be treated as being duly given or served if it is:

- 32.3.1 left at the recipient party's address;
- 32.3.2 sent by pre-paid mail to the recipient party's address (in which case it will be deemed to have been given three Business Days after the date on which it was posted); or
- 32.3.3 sent by electronic mail to the recipient party's address,

and for the purposes of this a reference to an address means the party's principal and current business address which in the absence of notice to the contrary is deemed to be the address stated herein.

32.4 **Variations**

No variation or waiver of, or any consent to any departure by either party from, a provision of this Agreement is of any force or effect unless it is confirmed in writing, signed by the Parties and then that variation, waiver or consent is effective only to the extent to which it is made or given.

32.5 **Waiver**

The failure, delay, relaxation, or indulgence on the part of either Party in exercising any power or right conferred upon that party by this Agreement does not operate as a waiver of that power or right, nor does any single exercise of any power or right preclude any other or further exercise of it or the exercise of any other right or power under this Agreement.

32.6 **Entire Agreement**

This Agreement constitutes the sole and entire agreement between the Parties and no warranties, representations, guarantees or other terms or conditions of any nature not contained and recorded herein will be of any force or effect.

32.7 **Severance**

If any provision of this Agreement is invalid and not enforceable in accordance with its terms, all other provisions which are self-sustaining and capable of enforcement without regard to the invalid provisions will be and continue to be valid and enforceable in accordance with their terms.

32.8 **Governing law**

32.8.1 This Agreement is governed by the law in South Australia.

32.8.2 The Parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

33. **DISPUTE RESOLUTION**

33.1 **General**

33.1.1 A Party must not commence arbitration or court proceedings (except for urgent equitable or injunctive relief) in respect of a dispute under this Agreement, unless it first attempts to resolve the dispute by negotiation and mediation under this clause.

33.1.2 A Party claiming that a dispute has arisen under this Agreement must give written notice to the other Party specifying the nature and details of the dispute.

33.1.3 On receipt of that notice by the other Party, the Parties must negotiate in good faith to resolve the dispute.

33.1.4 If the Parties are unable to resolve, or have agreed on a defined process for resolution, the dispute within 10 business days, they must promptly refer the dispute:

- (a) in the case of the Council, to the Chief Executive Officer; and
- (b) in the case of the Manager, to the Chief Executive Officer

33.1.5 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.

33.2 Mediation

33.2.1 If those persons are unable to resolve the dispute within 10 business days of referral, a Party may refer the dispute for mediation under the mediation rules of the Law Society of South Australia Inc to:

- (a) a mediator agreed by the Parties; or
- (b) if the Parties are unable to agree a mediator within five Business Days, a mediator nominated by the President of the Law Society or the President's nominee.

33.2.2 The role of a mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding on a Party unless that Party has agreed in writing.

33.2.3 Any information or documents disclosed by a Party under this clause:

- (a) must be kept confidential; and
- (b) may not be used except to attempt to resolve the dispute.

33.2.4 Each Party must bear its own mediation costs. The Parties must bear equally the costs of any mediator.

33.3 Expert Determination

33.3.1 General

- (a) If a dispute is unable to be resolved within 10 Business Days of referral to a mediator pursuant to clause 33.2, the Parties may agree to:
 - (a) jointly appoint an expert to decide the dispute; or
 - (b) ask the appropriate body under clause 33.3.2 to appoint the expert.
- (b) In deciding the dispute, the expert must act as an expert and not as an arbitrator.

33.3.2 Selecting expert

The expert must have at least 10 years current and continuous standing in the expert's profession at the date of the appointment and must be:

- (a) in the case of a legal matter, a practising barrister or solicitor appointed by the President of the appropriate governing body of barristers or solicitors;

- (b) in the case of a financial or accountancy matter, a practising chartered accountant appointed by the President of the Institute of Chartered Accountants in Australia;
- (c) in any other case, a qualified person appointed by the senior officer of an appropriate association, institute, society or board; or
- (d) if appropriate, a panel of experts representing more than one of the appropriate skills.

33.3.3 **Expert's decision**

The expert must give written reasons for the decision. The decision is final and binds the Parties except for any manifest error.

33.3.4 **Expert's fees**

The Parties must each pay one half of the expert's fees, unless the expert decides that one party should bear all or a greater part of the fees.

33.3.5 **Replacement expert**

If the expert appointed is unable to complete a decision of the dispute, another expert must be appointed under this clause to decide the dispute

33.4 **Performance**

If possible, each party must perform its obligations under this Agreement during negotiations, mediation and arbitration proceedings.

34. **GST**

- 34.1 Unless otherwise provided, all amounts specified in this Agreement are expressed to be exclusive of GST.
- 34.2 If GST applies to any Supply made by either party under or in connection to this Agreement, the consideration (or payment) provided or to be provided for that Supply will, upon production by the Supplier of an appropriate tax invoice, be increased by an amount equal to the GST liability properly incurred by the party making Supply.
- 34.3 If a payment to a party under this Agreement is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that Party, then the amount of the payment must be reduced by the amount of any input tax credit to which that Party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with the previous subclause.
- 34.4 Each party here warrants that at the time any Supply is made under this Agreement on which GST is imposed they are or will be registered under the GST Law. If the other party requests written evidence and registration, the first party will properly produce evidence satisfactory to the other party of such registration.
- 34.5 If an adjustment event has occurred in respect of a taxable supply made under this Agreement, any party that becomes aware of the occurrence of that adjustment event must notify each other party to that taxable supply as soon as practicable, and all of those parties agree to take whatever steps are necessary (including to issue an

adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that taxable supply, or any refund of GST (or part thereof), is paid no later than 28 days after the Supplier first becomes aware that the adjustment event has occurred.

35. SECURITY

- 35.1 The Manager must provide the Security to the Council within seven days of the Agreement Commencement Date.
- 35.2 The Council may have recourse to the Security, subject to giving prior reasonable written notice to the Manager, if the Manager fails to comply with any of its obligations under this Agreement.
- 35.3 Without limiting the rights of the Council under clause 35.2, the Council may deduct from the Security any sum payable to the Council under the terms of this Agreement.
- 35.4 In the event that the Council has recourse to the Security then the Council must notify the Manager within 14 days thereafter.
- 35.5 The Security will be returned to the Manager within one month of the conclusion of the Agreement Term providing and subject to all liabilities and obligations of the Manager arising under this Agreement having been met.
- 35.6 If the Council has applied the Security or any part thereof to rectify or part rectify any breach of, or failure under, this Agreement the Manager must within 30 days of service of the notice on the Manager pursuant to clause 35.4 provide a replacement Security or "top up" of the same amount to be held on the same terms, to the intent that the Security will be maintained in the amount specified within this Agreement.
- 35.7 The Manager irrevocably appoints the Council as its attorney to do any acts and execute any documents that may be necessary to ensure payment of the whole or part of the Security to the Council.
- 35.8 If the Manager fails to meet its obligations under this clause 35, the Council may immediately terminate this Agreement by written notice to the Manager.

36. FORCE MAJEURE

- 36.1 In this Agreement, an **Event of Force Majeure** means:
 - 36.1.1 the outbreak of hostilities (whether or not accompanied by any formal declaration of war), riot, civil disturbance or acts of terrorism;
 - 36.1.2 the act of any government or competent authority (including the cancellation or revocation of any approval, authority or permit);
 - 36.1.3 fire, explosion, flood, inclement weather, or natural disaster
 - 36.1.4 the declaration of a state of emergency or the invocation of martial law having an effect on commerce generally;
 - 36.1.5 industrial action (including strikes and lock-outs) that is of a widespread nature affecting the Manager personally or the industry or sector of which the Manager is a part (whether in a vertical sense or horizontal sense);

- 36.1.6 any other cause, impediment or circumstance beyond the reasonable control of any party:
- (a) which was not reasonably foreseeable as at the Agreement Commencement Date;
 - (b) whose consequences could not be avoided in this Agreement; and
 - (c) which makes performance of this Agreement impossible, not merely more onerous or uneconomic;
- however, does **not** include any event or circumstance which the Manager ought to have reasonably foreseen as at the Agreement Commencement Date from or as a result of the Existing Conditions.
- 36.2 Where an Event of Force Majeure takes place, the Party claiming this must **(Notifying Party)**:
- 36.2.1 immediately notify the other Party of this and provide complete details of the Event of Force Majeure; and
- 36.2.2 notify the other Party within a reasonable time after the giving of notification under clause 36.2.1 of any methods or procedures known to it to circumvent the Event of Force Majeure.
- 36.3 Where an Event of Force Majeure takes place:
- 36.3.1 neither Party is liable to the other for any failure to perform their obligations under of this Agreement (except for the payment of money due and owing up to the date that notice is provided in accordance with clause 36.2);
- 36.3.2 the Notifying Party must use all reasonable endeavours to circumvent, remedy or abate the Event of Force Majeure;
- 36.3.3 the Parties must immediately pay each other any moneys that are due and owing under this Agreement as at the date that notice is provided in accordance with clause 36.2; and
- 36.3.4 the unperformed obligations of this Agreement are suspended for the duration of the Event of Force Majeure unless otherwise agreed by the Parties.
- 36.4 Where an Event of Force Majeure continues for a period of three months, the Parties must consult with a view to determining whether or not this Agreement should continue to be in force. If it is decided that the Agreement will continue, the Parties must also consult with each other on whether any amendments to the Agreement ought to be made in order to take into account the Event of Force Majeure.
- 36.5 If it is decided that this Agreement will not continue, the Council will not be liable for any costs, loss, expenses or damages incurred by the Manager, including any claim relating to loss of anticipated profits or unperformed Services.
- 36.6 Where an event of Force Majeure ceases, the Parties must immediately re-commence performing the duties that were affected by the Event of Force Majeure.

- 36.7 In this clause, **Existing Conditions** means the impact of the wars in Ukraine and the Middle East (including with respect to goods and equipment supply and workforce availability) in the State of South Australia, Australia as at the Agreement Commencement Date.

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EXECUTED as an agreement.

Signed for **THE CORPORATION OF THE CITY OF NORWOOD PAYNEHAM & ST PETERS** by its authorised delegate in the presence of:

.....
Signature of witness

.....
Signature of authorised delegate

.....
Name of witness (print)

.....
Name of authorised delegate (print)

.....
Position of authorised delegate

Executed by **[insert]** pursuant to section 127 of the *Corporations Act 2001 (Cth)*

.....
Signature of Director

.....
Signature of Director/Company Secretary
(Please delete as applicable)

.....
Name of Director (print)

.....
Name of Director/Company Secretary (print)

or

.....
Signature of Sole Director and Sole Company Secretary

.....
Name of Sole Director and Sole Company Secretary (print)

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Annexure A Aquatic Centre

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Annexure B Key Performance Indicators

To be confirmed during contract negotiations and informed by Tender responses

Pre-Opening Period

[insert]

Operating Period – first year

[insert]

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Annexure C Pre-Opening Services

To be informed by tender responses

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Annexure D Pre-Opening Services Budget

To be informed by tender responses

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Annexure E Minimum Operating Services Specifications

To be informed by tender responses and negotiated with NPSP

Draft

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Annexure F Three Year Budget

To be informed by tender responses

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Annexure G Operating Hours

To be informed by tender responses

Aquatic Centre (excluding Café)

[insert]

Café

[insert]

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Annexure H Responsibility Matrix

Subject to negotiation

Element	Council (Owner)	Operator (Manager)	Service Contract Responsibility (where applicable)
Building Structure	Structural integrity, major repairs	Periodic inspections, reporting defects	Council
Roofing & Gutters	Repairs, replacement, waterproofing, cleaning of gutters.	Reporting issues	Council
External Walls & Cladding	Maintenance of finishes, repainting	Visual presentation, cleaning	Council
Windows & Glazing	Replacement, repairs	External & internal window cleaning	Operator
Doors (External & Internal)	Replacement, structural repairs	Cleaning, lubrication, minor adjustments	Operator (minor), Council (major)
Flooring (Tiles, Concrete, Carpet)	Replacement, major repairs	Cleaning, minor repairs	Operator (cleaning), Council (repairs)
Ceilings & Internal Walls	Structural repairs, repainting	Cleaning, touch-ups	Operator (cleaning)
Lighting (Fixed)	Replacement of fixed lighting systems	Bulb replacement, cleaning of fittings	Council (infrastructure), Operator (cleaning, bulbs)
Electrical Systems (Hardwired)	Switchboards, wiring, upgrades	Testing & tagging of plug-in equipment	Council (hardwired), Operator (plug-in)
Plumbing & Drainage	Pipes, sewer, stormwater systems	Unblocking minor drains, reporting issues	Council
HVAC Systems	Major servicing, replacement, Filter cleaning, basic maintenance	Monthly checks, reporting faults	Council
Fire Systems	Installation, compliance upgrades	Monthly checks, reporting faults	Council
Security (Infrastructure & Services)	CCTV, alarms, access control systems	Monitoring, access management, patrol coordination	Council (infrastructure) Operator (services)
ICT Infrastructure (Cabling, Wi-Fi)	Backbone infrastructure	Daily operation, troubleshooting	Council
Pool Shell & Structure	Repairs, resurfacing	Daily inspection, reporting issues	Council
Pool Plant (Pumps, Filters, Dosing)	Replacement, major servicing	Daily operation, water testing, minor maintenance	Council (plant) Operator (operation)
Water Quality Systems	Compliance systems, upgrades	Daily monitoring, chemical dosing	Operator
Water Play Area	Structural repairs, resurfacing, upgrades	Daily operation, cleaning, safety checks	Council (structure), Operator (operation)

Element	Council (Owner)	Operator (Manager)	Service Contract Responsibility (where applicable)
Water Slides	Structural integrity, mechanical systems	Daily operation, cleaning, safety checks	Council (structure), Operator (operation)
Furniture & Fixtures (Built-in)	Replacement, upgrades	Cleaning, minor repairs	Council (capital), Operator (presentation)
Loose Furniture & Equipment	Procurement, replacement	Cleaning, testing & tagging	Operator
Signage (Permanent)	Installation, replacement	Presentation, temporary signage	Council (permanent), Operator (temporary)
Horticultural Maintenance - within fenced area	Major works, tree management, irrigation systems, weeding, presentation	Reporting issues	Council
Horticultural Maintenance – external area incl garden beds (OG Road Frontage)	Design, structural changes, irrigation systems routine maintenance, weeding, presentation	Reporting issues	Council
Car park and external perimeter paths	Surface repairs, line marking, lighting infrastructure, street sweeping	Litter removal, cleanliness, reporting defects	Council (infrastructure), Operator (presentation)
Waste Management Infrastructure	Bins, enclosures	Daily waste removal, cleanliness	Operator (waste management contract)
Cleaning & Hygiene	N/A	All internal & external cleaning incl. amenities and hygiene services	Operator (cleaning contract including supply of consumables)
Pest Control	Structural pest treatment	Routine pest control services	Operator
Compliance & Audits	Building compliance, essential safety measures	Operational compliance, daily logs	Council (building), Operator (operations)

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Annexure I Manager Equipment

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Annexure J Public Health and Safety Plan

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Annexure K User Charges

To be informed by tender responses

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Annexure L Annual Operating Subsidy

To be informed by tender responses

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