

NABERS ACCREDITED ASSESSOR AGREEMENT

TERMS AND CONDITIONS

1. PURPOSE OF THIS AGREEMENT

- 1.1. The National Australian Built Environment Rating System (NABERS) is a performance based rating system that measures the environmental performance during operation of existing buildings in the following categories:
 - Commercial offices (whole building, base building and tenancies);
 - Hotels;
 - Shopping centres;
 - Data Centres (whole facility, infrastructure and IT equipment); and
 - Such other building types as may be adopted in the future.
- 1.2. The NSW Office of Environment and Heritage is the National Administrator of NABERS and in that role administers the accreditation of NABERS Assessors which allows them to carry out the NABERS Rating Process and obtain NABERS Ratings.
- 1.3. The Assessor wishes to be accredited by the National Administrator to carry out the NABERS Process to obtain NABERS Ratings.
- 1.4. The purpose of this Agreement is to provide for the effective administration of accreditation of NABERS Assessors and to set out the terms, conditions, rights and obligations applicable to the NABERS Rating Process.

2. OVERVIEW OF ASSESSOR OBLIGATIONS

This Agreement provides certain rights with respect to NABERS to allow the Assessor to carry out the NABERS Rating Process and obtain NABERS Ratings. This Agreement also sets out Assessor obligations including but not limited to:

- Complying with the Process Documents;
- Ensuring that any use of any NABERS Logos or marketing materials created for NABERS complies with the NABERS Brand Guidelines;
- Complying with obligations relating to use of NABERS Logos and NABERS Intellectual Property;
- Cooperating in respect of any Audit;
- Complying with requirements for Trainee Assessors (where applicable);
- Ensuring satisfactory insurances and indemnities are in place; and
- Disclosing and managing conflicts of interest.

Definitions of capitalised terms in this Agreement are set out at Clause 24.

3. TERM OF AGREEMENT

- 3.1. This Agreement commences on the date that the Assessor accepts these terms and conditions on the Assessor's Profile Page and shall continue until terminated in accordance with clause 12 of this Agreement.

- 3.2. The Assessor and the National Administrator acknowledge that this Agreement may be brought to an end with notice in accordance with clause 12.6 where this Agreement is to be replaced by a new version.

4. ASSESSOR DETAILS

The Assessor acknowledges that the National Administrator may from time to time during the term of this Agreement update the Assessor's Profile Page to reflect:

- (a) any change to the categories for which the Assessor is accredited, pursuant to the NABERS Accreditation Procedure;
- (b) any change to the Assessor's status as a Trainee Assessor for a NABERS Rating category in accordance with the NABERS Accreditation and Auditing Procedures;
- (c) any action or sanction imposed following an audit;
- (d) any suspension of the Assessor's accreditation under clause 11;
- (e) any other change to the Assessor's details; or
- (f) any change to the fee structure in accordance with the terms of this Agreement.

5. ASSESSOR ACCREDITATION

5.1. In consideration of the Assessor's initial and ongoing payment of the Annual Fee and acceptance of the terms and conditions of this Agreement, the National Administrator hereby provides Accreditation to the Assessor to carry out the Rating Process and obtain NABERS Ratings for those categories listed on the Assessor's Profile Page.

5.2. In addition to the obligations set out in this Agreement it is a condition of Accreditation under this Agreement that the Assessor:

- (a) must only carry out the Rating Process and obtain NABERS Ratings for those categories for which the Assessor is listed on the Assessor's Profile Page as being accredited;
- (b) must comply with:
 - (i) the Code of Practice;
 - (ii) Brand Guidelines; and
 - (iii) All other Process Documents listed in the NABERS Members website page (under Resources>Process Documents),
- (c) must comply with any measure to be taken or sanction imposed following an Audit carried out in accordance with the NABERS Rating Auditing Procedure;
- (d) must ensure that any activity carried out as part of the Rating Process and obtaining NABERS Ratings complies with the NABERS Rules for Collecting and Using Data (the Rules), including all NABERS documents formerly and currently called Validation Protocols, any published NABERS Rulings (Rulings) and any technical advice provided by the National Administrator;
- (e) must ensure that the Assessor's details on the Profile Page are correct and up to date and that the National Administrator is immediately advised of any changes to those details;
- (f) must not do anything in the course of carrying out any function as an Assessor that constitutes a libel or defamation.

5.3. The Assessor agrees and acknowledges that where the Assessor's Profile Page lists the Assessor as being employed by an Assessment Company then the Assessor's ongoing

Accreditation under this Agreement is conditional on an Assessment Company Agreement existing between the National Administrator and that Assessment Company.

- 5.4. The Assessor agrees and acknowledges that it is responsible for and must ensure the completeness and accuracy of all Rating Material provided to the National Administrator as part of the Rating Process and obtaining of NABERS Ratings and the Assessor agrees to place no reliance on the National Administrator to detect incomplete or inaccurate information in its management of NABERS or the conduct of any Audits under the NABERS Rating Auditing Procedure.

6. TRAINEE NABERS ASSESSOR

- 6.1. The Profile Page may list the Assessor as a Trainee Assessor in respect of certain building categories in accordance with the NABERS Accreditation Procedure.
- 6.2. Where the Profile Page lists the Assessor as a Trainee Assessor for the purposes of a certain rating category, the Assessor must:
- (a) not carry out any Rating Process or obtain any NABERS Ratings in respect of that rating category unless supervised in accordance with the NABERS Accreditation Procedure; or
 - (b) not use the "NABERS Accredited Assessor" Logo referred to in the NABERS Brand Guidelines in respect of the Rating Process or any related work or marketing carried out in relation to that rating category.
- 6.3. The Assessor agrees that breach of this clause may constitute a suspension event for the purposes of clause 11.4 or 11.6 of this Agreement.
- 6.4. This clause will cease to apply in respect of a rating category when the Assessor's Profile Page is updated by the National Administrator to reflect that the Assessor is no longer a Trainee Assessor for that rating category.

7. PAYMENT OF FEES

- 7.1. The Assessor shall pay to the National Administrator the Accredited Assessor Fees listed in the NABERS Fees and Payments Procedure in accordance with the payment terms set out in that document. These fees include but are not limited to an annual accreditation fee and rating lodgement fees.
- 7.2. The Assessor acknowledges and agrees that these fees are reviewed annually and are subject to change in accordance with the NABERS Fees and Payments Procedure.
- 7.3. The Assessor acknowledges and agrees that:
- (a) non-payment of a fee in accordance with the payment terms set out in the NABERS Fees and Payments Procedure may result the suspension of the Assessor's Accreditation under this Agreement in accordance with clause 11.1 and the loss of access to the NABERS website to lodge Rating Materials until such time as payment of overdue fees is made.
 - (b) where an Annual Accreditation Fee is outstanding for a period of two years or greater, Accreditation may be terminated in accordance with clause 12. Individuals whose Accreditation is terminated will need to successfully re-complete the required training in order to become accredited again.
- 7.4. For the purposes of this clause and the suspension and termination clauses under this Agreement any reference to a fee payable includes a reference to a fee that may be payable by an Assessment Company in respect of the Assessor.

8. NABERS AUDITS

- 8.1. The Assessor acknowledges that a NABERS Auditor, on the National Administrator's behalf, may carry out an Audit of the Assessor's Rating Materials and NABERS Ratings, and any other work carried out as part of the Rating Process, in accordance with the NABERS Rating Auditing Policy and Procedure as updated from time to time.
- 8.2. The Assessor must:
- (a) take all reasonable steps to cooperate with the National Administrator and the NABERS Auditor in respect of any Audit.
 - (b) upon written request and within a reasonable timeframe provide all documentation and information necessary to enable the NABERS Auditor to conduct an Audit of a NABERS Rating, including any of the Assessor's Rating Materials and activities carried out as part of the Rating Process, and including access to (and where relevant, copies of) all records, books of account, documents, information, premises, equipment and things which the NABERS Auditor reasonably considers necessary to satisfy itself that the Accredited Assessor has complied with the requirements of the Scheme, including the NABERS Rules, the NABERS Auditing Policy, Auditing Procedure, Code of Practice, and other Process Documents.
 - (c) work closely with the NABERS Auditor to ensure that the correct interpretation and application of the Rules, Rulings, and Process Documents have been made, and sufficient documentary evidence is provided.
- 8.3. The Assessor agrees and acknowledges that a range of measures and sanctions can be applied to the Assessor by the National Administrator following an Audit in accordance with the NABERS Rating Auditing Procedure. These include:
- (a) Revoking the NABERS Rating and re-issuing a different NABERS Rating Certificate
 - (b) Warning letter
 - (c) Requirement for future rating work to be supervised
 - (d) Requirement for future rating work to undergo an Audit
 - (e) Accreditation status for one or more categories be changed to Trainee Assessor
 - (f) Requirement to undergo training
 - (g) Payment of costs for any of the above
 - (h) Suspension of accreditation for one or more categories
 - (i) Termination of this Agreement.

9. ASSESSOR'S USE OF NABERS LOGOS

- 9.1. The Assessor agrees and acknowledges that all NABERS Logos are owned by the National Administrator and that the National Administrator reserves the right at all times to specify the manner in which any person may use the NABERS Logos.
- 9.2. The National Administrator grants to the Assessor a limited, personal, royalty free, non-exclusive and non-transferable right to use and refer to the NABERS Logos in connection with the Assessor's activities in respect of the Rating Process subject to these terms and conditions.
- 9.3. The Assessor agrees that in any exercise of the licence, it will comply in all respects with the NABERS Brand Guidelines and any other reasonable guidelines or policies regarding the use of NABERS Logos.

- 9.4. Except as provided in the NABERS Brand Guidelines, the Assessor has no right to:
- (a) Use or make reference to the NABERS Logos in any marketing, advertising or public announcements;
 - (b) Alter or modify the NABERS Logos in any way;
 - (c) Reproduce, use, sub-licence, or otherwise deal with the NABERS Logos, or allow any other person to do so, for any purpose.
- 9.5. The Assessor must not at any time during or after the term of this Agreement, register or attempt to register, or use as a trade mark, business or company name, email address, phone number or domain name, the NABERS Logos or any device or word substantially identical with or deceptively similar to any of the NABERS Logos.
- 9.6. Upon the suspension or termination of this Agreement the Assessor must cease to use or display the NABERS Logos for any purpose whatsoever including without limitation the use of NABERS Logos on stationery, advertising, promotional and sales material, websites and online material and any other materials which incorporate the NABERS Logos.

10. NABERS INTELLECTUAL PROPERTY

- 10.1. The Assessor warrants that in carrying out any activities under this Agreement the Assessor will not infringe any Intellectual Property rights of the National Administrator or of any third party.
- 10.2. The Assessor acknowledges and agrees that the National Administrator owns all Intellectual Property rights in:
- (a) all NABERS Software, Methodology, Algorithms, Rules, Rulings, Validation Protocols and NABERS Materials and the other Process Documents;
 - (b) all Rating Materials and NABERS Ratings, and that such rights in respect of these materials brought into existence after the date of this Agreement shall vest upon their creation in the National Administrator.
- 10.3. The Assessor acknowledges and agrees that the National Administrator may use, adapt and change the Rating Materials for any purpose.
- 10.4. The National Administrator grants to the Assessor a non-exclusive, non-transferrable licence to use NABERS Materials for the sole purpose of carrying out NABERS Ratings and for no other purpose whatsoever unless where otherwise agreed by the National Administrator.
- 10.5. The Assessor must ensure that it obtains irrevocable written consent, for the benefit of the National Administrator, from all authors of any work incorporated in the Rating Materials, for the use of such Rating Materials or work by the National Administrator in any manner and or any purpose it chooses.
- 10.6. The National Administrator acknowledges and agrees that any Background Intellectual Property of the Assessor remains vested in the Assessor and shall not be modified, adapted or altered without the express written approval of the Assessor and shall only be used by the National Administrator for the purpose for which it was provided.

11. SUSPENSION

11.1. Suspension in respect of fees and insurance

11.2. The Assessor's Accreditation under this Agreement may be immediately suspended by notice provided to the Assessor by the National Administrator where:

- (a) any fees required to be paid under clause 7 have not been paid in accordance with the "Payment Terms" set out in the NABERS Fees and Payments Procedure; or
- (b) evidence that insurances required to be effected under clause 13 has not been provided in the manner required by the NABERS Insurance Procedure.

provided prior notice of the outstanding matter has been provided to the Assessor by the National Administrator via the Assessor's Profile Page and such outstanding matter has not been addressed in the timeframe set out in that prior notice to the reasonable satisfaction of the National Administrator.

11.3. For the purposes of this clause any reference to fees payable or insurances required to be effected includes a reference to fees that may be paid or insurances that may be effected by an Assessor Company in respect of the Assessor.

11.4. Suspension following audit

11.5. The Assessor's Accreditation under this Agreement (including Accreditation in respect of a particular rating category) may be immediately suspended by Notice of Suspension provided to the Assessor by the National Administrator in response to a determination following an Audit, reached by the National Administrator in accordance with the NABERS Rating Auditing Procedure, that an Assessor has not properly applied the NABERS Rules, Rulings, or Process Documents and that the sanction of suspending the Assessor's accreditation as a NABERS Assessor should be applied pending further action including but not limited to further training.

11.6. Suspension for other breach

11.7. This clause 11.6 shall not apply to the matters set out at clauses 11.1 and 11.4 above (suspension in relation to fees or insurances or following an Audit determination) but does apply to the obligation at clause 5.2(c) to comply with an Audit sanction or measure.

11.8. Without prejudice to any other right which the National Administrator may have under this Agreement or at law, if a breach of this Agreement occurs, the National Administrator may give a Notice of Intention to Suspend to the Assessor.

11.9. Without limiting the bases on which such notice may be given, a Notice of Intention to Suspend may be given as a result of breach of any terms and conditions relating to:

- (a) Breach of Assessor obligations (clause 5.2);
- (b) Breach of Trainee Assessor obligations (clause 6);
- (c) Breach of obligations with respect to NABERS Logos (clause 9);
- (d) Breach of obligations with respect to NABERS Intellectual Property (clause 10);
- (e) Breach of Confidentiality obligations (clause 16);
- (f) Breach of Conflict of Interest obligations (clause 17).

11.10. The Notice of Intention to Suspend will state the breach that in the opinion of the National Administrator has occurred, shall contain any supporting information, and provide the Assessor with an opportunity to respond.

11.11. The time for response by an Assessor to a Notice of Intention to Suspend shall no more than 10 working days from the provision of the notice subject to such extension as the National Administrator in its absolute discretion may grant. Any such response shall be in writing.

11.12. If following a response referred to at 11.11 the National Administrator is satisfied that no breach has occurred it shall revoke the Notice of Intention to Suspend.

11.13. If following consideration of the response provided the National Administrator remains of the opinion that a breach has occurred it may give further notice in writing to the Assessor requiring that the following items be provided in writing to the National Administrator:

- (a) a plan for the cure of the breach within a timeframe specified by the National Administrator and/or
- (b) an undertaking that the breach will not occur again.

11.14. Where:

- (a) the National Administrator receives a response in accordance with clause 11.13 that is in its opinion satisfactory; and
 - (i) having allowed the specified time (referred to at clause 11.13(a)) during which the breach has in the opinion of the National Administrator been cured; and/or
 - (ii) an undertaking (referred to at clause 11.13(b)) has been given to the satisfaction of the National Administrator,

the National Administrator shall by notice in writing revoke the Notice of Intention to Suspend.

11.15. Where:

- (a) no response is provided by the Assessor in accordance with clause 11.11 in the timeframe specified; or
- (b) no plan for the cure of the breach, or undertaking (as required), is provided in accordance with 11.13; or
- (c) the plan for the cure of the breach, referred to at clause 11.13, is not complied with within the specified time; or
- (d) an undertaking, referred to at clause 11.13, not to commit a further breach has not been complied with,

then the National Administrator may immediately provide the Assessor with a Notice of Suspension.

11.16. Suspension where Assessment Company Agreement is Terminated

11.17. Notwithstanding any other provision of this Agreement, where the Assessor is employed by an Assessment Company and the Assessment Company Agreement with the National Administrator is terminated then the National Administrator may in its absolute discretion immediately provide the Assessor with a Notice of Suspension.

11.18. Commencement of, Effect of, and Lifting of Suspension

11.19. Suspension under clause 11.2 (fees and insurance) shall take effect immediately on the date set out in the prior notice referred to in that clause.

11.20. Suspension under clauses 11.4 (audit sanction), 11.6 (other breach) or 11.16 (termination of Assessment Company Agreement) shall take effect immediately upon the provision of a Notice of Suspension to the Assessor.

11.21. The Notice of Suspension shall state:

- (a) the reason for suspension; and
- (b) the actions to be undertaken by the Assessor to remedy the suspension (where applicable in the discretion of the National Administrator); and

- (c) the period of the suspension (where applicable in the discretion of the National Administrator).
- 11.22. Following suspension under clause 11.2 or following the provision of a Notice of Suspension the Assessor shall for the period of the suspension:
- (a) cease to have Accreditation for the period of the suspension;
 - (b) not have access to the NABERS Members Website with the exception of the Assessor's "My Profile", "My Organisation" and "Process Documents" pages;
 - (c) not directly or indirectly carry out any activities that constitute the NABERS Process; and
 - (d) cease to use or display the NABERS Logos for any purpose whatsoever.
- 11.23. Suspension under this clause shall cease:
- (a) in the case of suspension under clause 11.2 (relating to outstanding fees and/or insurance requirements), where the outstanding matter has been addressed to the satisfaction of the National Administrator and access to the NABERS Members Website is reinstated.
 - (b) in the case of suspension under any other provision of this clause upon the provision of a Notice of Lifting of Suspension from the National Administrator stating that:
 - (i) the cause of the suspension referred to in the Notice of Suspension (as applicable) has been remedied by the Assessor to the reasonable satisfaction of the National Administrator; or
 - (ii) the period of the suspension referred to in the Notice of Suspension (as applicable) has lapsed; or
 - (iii) (in the case of suspension under clause 11.16 – Suspension where Assessment Company Agreement is Terminated) the National Administrator is satisfied that the Assessor is able to comply with the obligations set out in this Agreement, and that the Assessor's Accreditation under this Agreement is re-instated.

12. TERMINATION

12.1. Termination for default

- 12.2. This Agreement may be immediately terminated by Notice of Termination provided to the Assessor by the National Administrator:
- (a) in response to a determination reached by the National Administrator following an Audit in accordance with the NABERS Rating Auditing Procedure that an Assessor has not properly applied the NABERS Rules, Rulings, or Process Documents and that the sanction of termination of this Agreement should be applied; or
 - (b) where an annual accreditation fee is outstanding for a period of two years or greater from the time it became due and the Assessor has been suspended on the basis of that outstanding fee in accordance with clause 11.2; or
 - (c) where Assessor's accreditation is suspended pursuant to a Suspension Notice under:
 - (i) clause 11.2 (Insurance),
 - (ii) clause 11.4 (audit outcome)
 - (iii) clause 11.6 (where the cause of the suspension may be remedied)
 - (iv) clause 11.17 (where Assessment Company Agreement is terminated)

and the cause of the Suspension Notice has not been remedied within 2 years of the date of the notice, or in the case of suspension under Clause 11.17 the Assessor has not within 2 years of the date of the notice satisfied the National Administrator that the Assessor is able to comply with the obligations set out in this Agreement.

12.3. The Assessor acknowledges that where this Agreement is terminated under this provision the Assessor will need to successfully re-complete the required training in order to become accredited again and enter into new Agreement (at the discretion of the National Administrator).

12.4. Termination by the Assessor

12.5. The Assessor may terminate this Agreement by giving 20 working days notice in writing to the National Administrator.

12.6. Termination by National Administrator

12.7. The National Administrator may terminate this Agreement by giving 3 months notice in writing that

- (a) the NABERS scheme is coming to an end; or
- (b) this Agreement will be replaced by a new Assessor Accreditation agreement applicable to all NABERS Assessors.

12.8. Arrangements upon termination

12.9. Upon termination of this Agreement (except where the Assessor becomes accredited under a replacement agreement referred to in clause 12.8(a)), the Assessor must within 20 working days:

- (a) cease use of all NABERS Intellectual Property and NABERS materials and products, including but not limited to computer software, and the Process Documents;
- (b) withdraw any publicly available promotional materials consisting of, incorporating or displaying the NABERS trademarks or NABERS Logos;
- (c) cease and thereafter refrain from representing that the Assessor is accredited or approved by, or associated in any way with the National Administrator or the NABERS Scheme.

12.10. Termination of this Agreement and withdrawal of Accreditation shall be without prejudice to the continuing enforceability of any rights or obligations of the National Administrator accrued at the time of termination.

12.11. Clauses to apply following termination

12.12. The operation of:

- (a) Clause 9 – NABERS Logos;
- (b) Clause 10 – NABERS Intellectual Property;
- (c) Clause 13 - Professional indemnity insurance;
- (d) Clause 14 – Indemnity;
- (e) Clause 15 – Release;
- (f) Clause 16 – Confidentiality; and
- (g) any other provision which expressly or by implication from its nature is intended to continue,

survive the termination of this Agreement.

13. INSURANCE

- 13.1. For the purpose of demonstrating compliance with this clause, certificates of currency and insurance expiry dates are to be provided to the National Administrator in accordance with the NABERS Insurance Procedure.
- 13.2. The Assessor acknowledges and agrees that failure to effect and maintain the insurances set out clause 13.4 in the manner described in clause 13.1 may result the suspension of the Assessor's Accreditation under this Agreement in accordance with clause 11.2 and the loss of access to the NABERS website to lodge Rating Materials until such time as the required insurances are effected.
- 13.3. The Assessor and the National Administrator acknowledge and agree where the Assessor is employed by an Assessment Company then the Assessment Company may take necessary action on behalf of the Assessor to ensure compliance with the Assessor's insurance requirements set out in this clause. However failure by the Assessment Company to effect and maintain insurances in respect of the Assessor in accordance with this clause may result in the National Administrator taking action under this Agreement to suspend the Assessor under clause 11.2 or terminate this agreement under clause 12.2(c).
- 13.4. The Assessor prior to carrying any activities pursuant to a NABERS Rating or the Ratings Process and at all subsequent times during the term of this Agreement must provide evidence to the satisfaction of the National Administrator that the following insurance policies have been effected:
- (a) **Workers' compensation** insurance that covers the Assessor and its employees. If the Assessor is not legally able to hold workers compensation insurance, the Assessor must ensure that it has effected a personal accident insurance policy to the level of risk associated with carrying out NABERS Ratings, a minimum cover of \$100,000 for death and permanent disability, and sufficient cover for temporary disability.
 - (b) **Public liability insurance** covering the Assessor, its employees and agents for any death, injury, damage or loss to other persons arising from the carrying out of NABERS Ratings. The Assessor must maintain such insurance current for the duration of this Agreement and for an amount of not less than ten (10) million dollars for any single occurrence.
 - (c) **Professional indemnity insurance** covering the Assessor for breaches of professional duty (whether owed in contract or otherwise) in carrying out NABERS Ratings. The Assessor must maintain such insurance current for the duration of this Agreement and six (6) years thereafter, and for an amount of not less than two (2) million dollars for any single occurrence.
- 13.5. The Assessor must not do anything or fail to do anything that would allow any insurer to reduce cover or void a policy of insurance required under this Agreement.
- 13.6. The National Administrator is not obliged to accept any material from the Assessor as part of a NABERS Rating or the Ratings Process, or provide a NABERS Rating unless and until the Assessor has complied strictly with the obligations of this clause.
- 13.7. For the purposes of meeting the requirements of this clause, the Assessor acknowledges that insurers must be listed by the Australian Prudential Regulation Authority (APRA) as being regulated by the APRA, or listed by Lloyds underwriters. Lists appear on the APRA website at: <http://www.apra.gov.au/>.

14. INDEMNITY

- 14.1. The Assessor and the National Administrator acknowledge and agree that where the Assessor is employed by an Assessment Company then this obligation to indemnify set out in this clause shall be taken to be satisfied by the indemnity provided by the Assessment Company to the National Administrator for as long as the agreement between the Assessment Company and the National Administrator is in force.
- 14.2. For the purposes of the indemnity set out in this clause, a reference to the National Administrator includes a reference to the Crown in right of the State of NSW, the Minister for the Environment, the Chief Executive of the Office of Environment and Heritage (OEH) and the employees and agents of OEH.
- 14.3. The Assessor will at all times indemnify, hold harmless and defend the National Administrator from and against any cost, claim, loss (including consequential loss arising from an inaccurate NABERS Rating or Ratings Materials) or damage, liability or expense which the National Administrator pays, suffers, incurs or is liable for (including legal costs on a solicitor and client basis) resulting from:
- (a) any act or omission of the Assessor, including any unlawful, negligent, reckless or deliberately wrongful act or omission of the Assessor (or its employees, agents or subcontractors) in the course of the Rating Process or in the carrying out of any activities as an Assessor or otherwise in the performance of this Agreement;
 - (b) any breach of this Agreement by the Assessor;
 - (c) the use of or reliance on by the National Administrator any Rating Materials provided by the Assessor as part of an NABERS Rating or Rating Process; or
 - (d) any change to a NABERS Rating based on the Assessor's Rating Materials following an Audit.
- 14.4. The Assessor's liability to indemnify the National Administrator under this clause will be reduced proportionally to the extent that any act or omission involving fault on the part of the National Administrator contributed to the relevant cost, liability, loss, damage or expense.
- 14.5. This proportional reduction does not apply in respect of anything resulting from a change to a NABERS Rating in accordance with a determination reached by the National Administrator following an Audit in accordance with the NABERS Rating Audit Procedure.
- 14.6. The Assessor's liability in connection with this Agreement or the performance of the Assessor's obligations under this Agreement, whether in contract, tort (including negligence) or equity, under statute or otherwise is limited to the amounts insured under the insurance policies required to be effected and maintained under clause 13.4.

15. RELEASE

- 15.1. The Assessor acknowledges and agrees that any activities carried out as an Assessor in the course of the Rating Process or in the performance of this Agreement or otherwise in connection with NABERS are done at its own risk.
- 15.2. The Assessor releases the National Administrator from and against all claims and proceedings relating to any cost, liability, loss, damage or expense to the Assessor that may arise from:
- (a) the carrying out of any activities as an Assessor in the course of the Rating Process or in the performance of this Agreement or otherwise in connection with NABERS;
 - (b) the consequences of any inaccurate Rating Material provided to the National Administrator in respect of a NABERS Rating in the course of the Rating Process;

- (c) the success or failure of the NABERS Scheme;
 - (d) any suspension of this agreement in accordance with clause 11; and
 - (e) any determination reached by the National Administrator in accordance with the NABERS Rating Audit Procedure.
- 15.3. Notwithstanding any other clause in this Agreement, neither party shall have any liability to the other for or in connection with any loss suffered by the other which is indirect or consequential (except for consequential loss referred to in clause 14.3 above) such as loss of profits, loss or opportunity or loss of bargain.

16. CONFIDENTIALITY

- 16.1. Subject to clause 16.2, the Assessor shall not, without the prior written approval of the National Administrator, make public or disclose to any third party any Confidential Information, and in giving such written approval, the National Administrator, may impose such terms and conditions as it thinks fit.
- 16.2. Notwithstanding clause 16.1 the Confidential Information belonging to the National Administrator shall only be disclosed by the Assessor to the Assessment Company as is necessary for the Assessor to fulfill its obligations under this Agreement.
- 16.3. The Accredited Assessor shall take all reasonable steps to ensure that it complies with this clause 16.
- 16.4. The Accredited Assessor shall not make or allow to be made copies of or extracts of all or any part of the Confidential Information except for the purpose of this Agreement.
- 16.5. This clause shall continue to bind the Assessor after the date of expiry of the Term, or any extension thereof, or the date of termination of this Agreement, as the case may be.
- 16.6.
- 16.7. Notwithstanding any other provision of this Agreement, the Assessor may:
- (a) pass on Confidential Information where it is reasonably necessary for the Assessor to seek professional advice or to defend itself from any suit or claim, provided that such Confidential Information is disclosed under terms no less onerous than the terms of this clause; and
 - (b) retain one copy of any document solely for the purpose of its own records and upon the continuing duty of confidence set out in this Agreement.

17. CONFLICTS OF INTEREST

17.1. Warranty as to Conflicts of Interest

- 17.2. The Assessor warrants that to the best of its knowledge after making diligent inquiry, at the date of entering into this Agreement:
- (a) it will comply with clause 17.5 (obligation to keep informed and prevent); and
 - (b) if there is a Conflict of Interest in relation to the performance of its obligations under this Agreement, the Assessor will immediately comply with clause 17.3 (notification of conflict of interest).

17.3. Notification of a Conflict of Interest

- 17.4. If, during the term of this Agreement, a Conflict of Interest arises or appears likely to arise, the Assessor must:

- (a) give Notice to the National Administrator as soon as is practicable after becoming aware that the Conflict of Interest has arisen, or appears likely to arise;
- (b) make full disclosure of all relevant information relating to the conflict, including but not limited to, the Assessor's strategy for managing the relevant Conflict of Interest;
- (c) take such steps as the National Administrator requires to resolve or otherwise deal with the Conflict of Interest;

17.5. Obligation to keep informed and prevent conflicts of interest

17.6. The Assessor must, at all times during the term of this Agreement, use its best endeavours to:

- (a) keep themselves informed of any potential Conflicts of Interest; and
- (b) take necessary steps to prevent and mitigate the effects of any Conflicts of Interest.

18. DISPUTE RESOLUTION

18.1. Any dispute in respect of this Agreement shall be dealt with under the NABERS Dispute Resolution Policy.

18.2. Nothing contained in the NABERS Dispute Resolution Policy to resolve a dispute will deny the National Administrator the right to:

- (a) Issue a Notice of Suspension under clause 11; or
- (b) seek injunctive or other urgent relief from an appropriate court where failure to obtain such relief would cause irreparable damage to the National Administrator or its business.

19. NATURE OF RELATIONSHIP

19.1. No employment or agency relationship arises between National Administrator and Assessor under this Agreement.

19.2. The Assessor must not represent or hold self out as being an agent of the National Administrator in respect of NABERS.

19.3. The Assessor acknowledges that the National Administrator makes no representations in respect of any work that may arise following Accreditation under this Agreement.

20. RECORDS

20.1. During the Term, the Assessor shall, upon receipt of written request and upon reasonable notice, provide the National Administrator, its authorised representatives and/or auditors appointed by it with access to (and where relevant, copies of) all records, books of account, documents, information, premises, equipment and things which the National Administrator reasonably considers necessary to satisfy itself that the Assessor is continuing to comply with the requirements of the Scheme, including the NABERS Rules, the NABERS Auditing Policy, Auditing Procedure, Code of Practice, and other Process Documents.

20.2. The Assessor shall provide the National Administrator or its authorised representative with the information and reports referred to in clause 20.1 within a reasonable time of any request.

20.3. The Assessor must retain all NABERS Rating Materials for seven years. Additional responsibilities of the Assessor with respect to records are listed in the NABERS Accredited Assessor Code of Practice and the NABERS Auditing Policy and Procedure..

21. NOTICES

- 21.1. Any notice that the National Administrator may serve on the Assessor under this Agreement shall be taken to be effectively served if sent to the email address listed on the Assessor's Profile Page.
- 21.2. Any notice that the Assessor may serve on the National Administrator under this Agreement must be served by sending the notice to nabers@environment.nsw.gov.au or in writing to:
- NABERS Team
NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

22. PROPER LAW

- 22.1. This Agreement shall in all respects be governed by the law of the State of New South Wales.

23. GENERAL

- 23.1. The parties shall do all acts and things necessary for the complete performance of their obligations under this Agreement.
- 23.2. This Agreement constitutes the entire agreement and understanding between the parties as to the subject matter of this Agreement. Upon execution of this Agreement, any prior arrangements, agreements, representations or undertakings as to the subject matter of this agreement are superseded.
- 23.3. No failure or delay on the part of any party in the execution of any right, power or remedy hereunder shall operate as a waiver thereof nor shall any exercise of such right, power or remedy preclude any other or further exercise of any other right, power or remedy hereunder.
- 23.4. No variation, modification or waiver of any provision of this Agreement nor consent to any departure by any party, shall in any event be of any force or effect unless the same shall be confirmed in writing, signed by the parties hereto or, in the case of waiver or consent, the party giving that waiver or consent, and then such variation, modification, waiver or consent shall be effective only to the extent for which it may be made or given.

24. DEFINITIONS

Accreditation – means the accreditation provided under clause 5 of this Agreement to the Assessor to carry out the NABERS Rating Process.

Annual Accreditation Fee – means the annual fee payable to the National Administrator to commence and thereafter extend the Assessors accreditation under this Agreement.

Assessment Company – means a company (and where applicable a sole trader) that has entered into a Company NABERS Agreement with the National Administrator and employs accredited NABERS assessors.

Assessor – means the person named on the NABERS Members Website Profile Page carrying out activities relating to NABERS Ratings and Ratings whether in the capacity of an Accredited Assessor, or an Trainee Assessor

Audit – means an audit of a NABERS Rating in accordance with the NABERS Auditing Policy and NABERS Rating Auditing Procedure – both available on the NABERS Members' website at www.nabers.gov.au/members.

Background Intellectual Property - means intellectual property in any information or literature owned by the Assessor that does not constitute any Rating Materials which is supplied by the Assessor to the National Administrator in the course of a NABERS Rating or the Rating Process.

Confidential Information – means any information that is by its nature confidential; and

- is designated by the National Administrator as confidential; or
- an Assessor knows or ought to know is confidential

but does not include information which:

- is in, or comes into, the public domain through no fault of the recipient;
- is lawfully received from a third party free of any obligations of confidence at the time of its disclosure;
- is independently developed by the recipient; or
- is required by law, by court or by government order to be disclosed where reasonable prior notice has been given to the National Administrator
- is the subject of a notice in writing from the National Administrator to the Assessor stating that the information is no longer confidential.

Conflict of Interest – means a situation where your actions as an Accredited Assessor may be at odds with another role or where there are circumstances which mean that:

- The NABERS Assessor is not capable of exercising objective and impartial judgement when conducting the NABERS rating; or
- A reasonable person, with full knowledge of all relevant facts and circumstances, would conclude that there is a real risk that the NABERS Assessor would not be capable of exercising objective and impartial judgment when conducting the NABERS rating.

Intellectual Property – means all present and future intellectual property rights, titles and interests, wherever subsisting throughout the world, whether registered or not, whether created before, on or after the date of this Deed including copyright, trademarks, patents, designs, trade secrets and know-how.

NABERS – means the National Australian Built Environment Rating System.

NABERS Accreditation Procedure – means NABERS Accreditation Procedure - available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members.

NABERS Auditor – means a person appointed by the National Administrator to conduct audits in accordance with the NABERS Rating Auditing Policy and Procedure.

NABERS Brand Guidelines – means the NABERS Brand Guidelines - available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members.

NABERS Code of Practice - means the NABERS Accredited Assessor Code of Practice - available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members

NABERS Dispute Resolution Policy – means the NABERS Dispute Resolution Policy - available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members.

NABERS Logos – means the NABERS trading name, NABERS logos and other trademarks developed by the National Administrator in the course of administering NABERS and set out in the Brand Guidelines as updated from time to time and available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members.

NABERS Materials - means the National Administrator's material and documentation relating to NABERS including but not limited to the NABERS Rate computer software and the Process Documents available under Resources>Process Documents on the NABERS Members' website at www.nabers.gov.au/members.

NABERS Methodology – means the algorithms and data that enable the calculation of a NABERS rating based on specified user inputs.

NABERS Rating – the accredited rating provided by the National Administrator in respect of a building based on the Rating Process performed by the Assessor and the provision of Rating Materials to the National Administrator.

National Administrator – means the Office Environment and Heritage acting for an on behalf of the Crown in right of the State of NSW.

Notice of Suspension - means a written notice provided to the Assessor by the National Administrator, which may include notices provided via the Assessor's Profile Page, advising of the Assessor's suspension of Accreditation and indicating the reasons for that suspension.

Notice of Intention to Suspend to the Assessor – means a written notice provided to the Assessor by the National Administrator, which may include notices provided via the Assessor's Profile Page, advising of the intention to suspend the Assessor's Accreditation and indicating the reasons for that intention to suspension.

Profile Page – means the 'My profile' page detailing (but not limited to); the Assessors name, title, employee status, contact details, accreditation status, preferences for this information to be shared to the public and with the administrators of the Commercial Building Disclosure program.

Process Documents - means the key processes and procedure documents that underpin and govern the NABERS Program, which include but are not limited to the;

- NABERS Rules for Collecting and Using Data (the Rules), including all NABERS documents formerly and currently called Validation Protocols;
- published NABERS Rulings (Rulings) and technical advice provided by the National Administrator;
- NABERS Accredited Assessor Code of Practice;

- NABERS Brand Guidelines;
- NABERS Process Outline;
- NABERS Dispute Resolution Procedure;
- NABERS Information Transfer Procedure;
- NABERS Renewal Procedure;
- NABERS Accreditation Procedure;
- NABERS Rating Auditing Procedure;
- NABERS Auditing Policy;
- NABERS Rating Auditing Procedure;
- NABERS Insurance Procedure;
- NABERS Fee and Payment Procedure.

These documents are amended periodically and are available on the NABERS Members' website at www.nabers.gov.au/members (under Resources>Process Documents).

Rating Materials - means anything brought into existence, or required to be brought into existence, as part of, or for the purposes of carrying out, or in connection with, any Assessment or Rating Process carried out by the Assessor under this Agreement including all data and information of the Assessor's client.

Rating Process – means all activities associated with the assessment of an existing building's overall environmental performance during operation required under this Agreement to be carried out in accordance with NABERS Rules for performing a Rating (including Validation Protocols), any relevant Rulings or technical advice provided by the National Administrator and includes the process for applying for obtaining an official rating based on a NABERS Rating.