

HUNTER DEVELOPMENT CORPORATION ABN 94 688 782 063

[INSERT]

# Newcastle Mines Grouting Fund Contribution Deed

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# Funding Deed

## Parties

**Hunter Development Corporation ABN 94 688 782 063** of Suite B, Level 5, PricewaterhouseCoopers Centre, 26 Honeysuckle Drive, Newcastle, NSW (**HDC**)

[INSERT] (**Applicant**)

## Recitals

- A. The New South Wales Government has established the Newcastle Mines Grouting Fund (the "**Fund**") to address the critical issue of mine subsidence and its impact on property development within Mine Subsidence districts in the Newcastle central business district and to thereby enhance the Hunter's economic and social infrastructure including transport, education, water and health infrastructure to support economic growth and enhance the liveability of the Hunter region.
- B. HDC administers this Fund.
- C. The Applicant wishes to make an application for a contribution from the Fund to the Grouting Works.
- D. The Government agrees to pay the Applicant the Contribution Amount to be used for the Grouting Works on the terms and conditions of this deed.

## Operative Provisions

### 1. Definitions and Interpretation

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

- (a) **Act of Insolvency** means an event that occurs in any of the following circumstances:
  - (i) if the Applicant is a local council, the council is suspended or an administrator is appointed to the council under the *Local Government Act (1993)*;
  - (ii) the Applicant cannot pay its debts as and when they fall due;
  - (iii) the Applicant is, or states that it is, insolvent or bankrupt; or
  - (iv) anything analogous, having a substantially similar effect to any of the events specified above happens under the law of the applicable jurisdiction.
- (b) **Application** means an application to the Fund for a contribution to mine subsidence remediation works.
- (c) **Application Criteria** means the following:
  - (i) the Project site is located in the Newcastle City Centre as described in the Mine Subsidence Board 2012, Newcastle City Centre Area Mine Subsidence Categories Revision Date 8 June 2012;
  - (ii) the Applicant has not commenced mine remediation works for the relevant Project site before the Application is granted by HDC;
  - (iii) the Applicant has obtained an approval from SANSW for the mine remediation strategy for the relevant Project site;

- (iv) the Applicant has obtained development consent for the relevant Project from the applicable Authority;
  - (v) the Applicant has provided HDC with all material HDC reasonable requests in connection with the Grouting Works including a project delivery plan and a program satisfactory to HDC, acting reasonably;
  - (vi) the Applicant has provided HDC with evidence of the anticipated grouting volumes for the Project site; and
  - (vii) the Applicant agrees to comply with the NSW Government Procurement Guidelines in connection with the Grouting Works.
- (d) **Approval** includes any consent, authorisation, registration, filing, agreement, notification, certification, permission, licence, approval, permit, authority or exemption issued from time to time by an Authority.
  - (e) **Approved Costs** means the costs of the Grouting Works listed in Item 4.
  - (f) **Approved Value** means the estimated value of the Grouting Works set out in Item 3.
  - (g) **Approved Grouting Plan** means the plan of the Grouting Works approved by SANSW and as set out in **Schedule Three** to this deed.
  - (h) **Authority** means any government, statutory, public or other authority or body having jurisdiction in connection with the Project.
  - (i) **Business Day** means a day that is Monday to Friday (inclusive) of any week (excluding a public holiday).
  - (j) **Contribution Amount** means any Approved Costs above the Approved Value.
  - (k) **Grouting Sunset Date** means the date described in Item 6.
  - (l) **Grouting Works** means the grouting works to be undertaken by the Applicant described in accordance with the Approved Grouting Plan.
  - (m) **GST** has the meaning it has in the GST Act and associated imposition Acts.
  - (n) **GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
  - (o) **Intellectual Property Rights** includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, circuit layouts and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.
  - (p) **Item** means an item in the Reference Schedule.
  - (q) **Minister** means the Minister for Planning, New South Wales.
  - (r) **NSW Government Procurement Guidelines** means the NSW Government document entitled "NSW Government Procurement Guidelines - Tendering Guidelines" dated December 2011.
  - (s) **Project** has the meaning set out in Item 1.
  - (t) **Report** means the report described in item 5.
  - (u) **Reference Schedule** means the schedule set out in Schedule One to this deed.

- (v) **SANSW** means Subsidence Advisory New South Wales and any successor entity.
- (w) **Validation Report** means the Validation Report issued to, and endorsed by, the SANSW.

1.2 Unless the contrary intention appears:

- (a) The singular includes the plural and vice versa;
- (b) This document should not be construed against the party who drafted it;
- (c) a reference to:
  - (i) a person includes the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
  - (ii) a law includes regulations and other instruments under it and amendments or replacements of any of them;
  - (iii) a thing includes the whole and each part of it;
  - (iv) a reference to a recital, clause, schedule or annexure is to a recital, clause, schedule or annexure to this deed;
  - (v) a reference to any agreement or document is to that agreement or document as varied, amended, novated, supplemented or replaced from time to time;
  - (vi) "include" in any form or "for example" or "such as" when introducing a list does not limit the list to those items or to items of a similar kind; and
  - (vii) Headings, examples and notes are for guidance only and do not govern the meaning of this deed.

## 2. Grouting Works

2.1 The Applicant must carry out the Grouting Works by the Grouting Sunset Date in accordance with:

- (a) the Approved Grouting Plan;
- (b) the requirements of SANSW and any other Authority;
- (c) all laws;
- (d) the requirements of this deed; and
- (e) diligently, effectively and to a high professional standard.

2.2 The Applicant must give HDC and SANSW seven days advance notice of commencement of the proposed Grouting Works.

2.3 If the Applicant becomes aware that the cost of the Grouting Works may exceed the Approved Value by more than 15%, it must immediately:

- (a) notify HDC and provide HDC with any additional information it requests in connection with the Grouting Works; and
- (b) notify SANSW and do all things required by SANSW in connection with the Grouting Works; and
- (c) obtain approval from SANSW to any variations to the Approved Grouting Plan and provide the revised Approved Grouting Plan to HDC.

- 2.4 The Applicant must permit reasonable access to the Project site to HDC and SANSW and each of their employees, contractors and agents for inspections of the Grouting Works at any time during the delivery of the Grouting Works.
- 2.5 The Applicant must use all reasonable endeavours to diligently progress the Grouting Works and any associated activities as soon as reasonably practicable from commencement and in any event within the time period that the SANSW approval of the Approved Grouting Plan remains valid.
- 2.6 The Applicant must not vary the Grouting Works without the prior written approval of HDC and SANSW.
- 2.7 The Applicant must immediately notify HDC if the upper limit of the grout volume range specified in the Report is reached.
- 2.8 Within seven days of the completion of the Grouting Works the Applicant must notify HDC if a claim for a Contribution Amount is anticipated, and if such a claim is anticipated, the Applicant must provide an estimate of the amount of that Contribution Amount in that same notice.
- 2.9 The Applicant must provide the Validation Report to HDC as soon as reasonably practicable after receiving notification from SANSW that the report has been endorsed by it.

### **3. Submission of a Claim Payment of the Contribution Amount**

- 3.1 On receipt of confirmation that SANSW has endorsed the Validation Report, the Applicant may submit a formal claim to HDC for payment of the Contribution Amount. The Applicant's Claim must include the following information:
  - (a) evidence satisfactory to HDC, acting reasonably, that the Application Criteria have been satisfied;
  - (b) evidence of the cost of the Grouting Works in a form, and with particulars, required by HDC, acting reasonably,
  - (c) the Fund's Schedule of Prices form set out in **Schedule Two** properly completed;
  - (d) the total Contribution Amount claimed;
  - (e) a copy of the Validation Report endorsed by SANSW showing that the Grouting Works have been satisfactorily completed;
  - (f) details of any part of the Grouting Works that were not successfully completed or that needed to be redone and the cost of the reworks; and
  - (g) any other information reasonably requested by HDC(the "**Claim**").
- 3.2 HDC will consider a Claim to be valid if:
  - (a) the Applicant has complied with the requirements of this Deed;
  - (b) HDC considers the Application Criteria have been satisfied;
  - (c) the Applicant has successfully completed the Grouting Works and has not claimed for any costs associated with unsuccessful works;
  - (d) the Applicant has provided the information set out in clause 3.1 in a manner satisfactory to HDC, acting reasonably; and
  - (e) the Applicant has properly substantiated the Contribution Amount claimed in a manner satisfactory to HDC, acting reasonably.

- 3.3 After undertaking a preliminary assessment of the Claim, HDC may notify the Applicant that it needs additional information to properly assess the Claim. The Applicant must provide any additional information requested by HDC.
- 3.4 HDC must assess the above Claim within 15 Business Days of the later of:
- (a) the date the Applicant makes the Claim; and
  - (b) the date the Applicant provides all information required by HDC.
- 3.5 If HDC assesses the claim as a valid claim it will issue a payment certificate to the Applicant. The Applicant must then provide HDC with a tax invoice for the amount set out in the payment certificate along with bank account details for payment. If the tax invoice complies with this clause HDC must make payment within 30 days from the date HDC received the invoice.
- 3.6 Notwithstanding any other provision of this deed, HDC will not pay costs relating to any portion of Grouting Works:
- (a) which were varied without the prior written approval of SANSW and HDC;
  - (b) which are not approved, endorsed or validated by SANSW; or
  - (c) which need to be, or were, rectified or reworked because the works are, or were, defective or unsuccessful (including, without limitation, where grout does not meet the specified strength or where a borehole fails)
- (the “**Non Compliant Works**”).
- 3.7 If HDC requests, the Applicant must provide HDC with:
- (a) a written confirmation certified as correct by a registered auditor that the Contribution Amount in the Claim is true and correct and does not include costs for any Unsuccessful Works; and
  - (b) a written confirmation certified as correct by a registered surveyor (or other relevant expert approved by HDC) of the quantity of grout installed during the Grouting Works.
- 3.8 The Contribution Amount is the maximum amount HDC will pay under this deed. HDC is not responsible for any other costs associated with the Grouting Works, except for the Contribution Amount.
- 3.9 Notwithstanding any other provision of this deed, HDC will not be liable for payment of any Contribution Amount unless the Grouting Works have been completed on or before the Grouting Sunset Date. If HDC has approved an Application and the Grouting Works have not been completed by the Grouting Sunset Date, the Application will lapse at that time.
- 3.10 The Applicant must comply with the NSW Government Procurement Guidelines in connection with the Project. On or before the Applicant receives payment of the Contribution Amount, the Applicant must provide HDC with a certificate signed by the Applicant (in a form acceptable to HDC) stating that the Applicant has complied with the NSW Government Procurement Guidelines. For the avoidance of doubt, HDC may determine not to pay the Contribution Amount if HDC becomes aware that the Applicant has not complied with this clause 3.9.

#### **4. Reporting Requirements**

- 4.1 The Applicant must provide HDC with weekly updates on the progress of the Grouting Works and the cumulative volume of grout that has been used in the Grouting Works each week.
- 4.2 The Applicant must also report to HDC on a weekly basis the actual costs to date of the Grouting Works, and any risks to the Grouting Works not being completed by the Grouting Sunset Date.

#### **5. Record Keeping and Audit**

- 5.1 The Applicant must keep full and accurate records of the conduct of the Grouting Works and retain these records for 7 years after the date HDC pays the Contribution Amount.
- 5.2 The Applicant must give HDC or its nominated person reasonable assistance to:
  - (a) inspect the performance of the Grouting Works;
  - (b) audit the Applicant's records to verify the cost of the Grouting Works; and
  - (c) access and make copies of any records held by the Applicant in connection with the Grouting Works.
- 5.3 If the auditor's report discloses that the Contribution Amount is incorrect having regard to the criteria in this deed, or the auditor concludes that the Applicant has not kept adequate records to allow the auditor to make an accurate determination based on the information supplied, then, without limiting HDC's other rights, the Applicant must (if HDC demands it):
  - (a) repay the Contribution Amount; and
  - (b) pay all of HDC's costs associated with the audit.

#### **6. Intellectual Property**

- 6.1 The Applicant must grant to HDC (or procure that its consultants or contractors grant to HDC) a permanent, irrevocable, royalty free, worldwide, non-exclusive license to use, reproduce, adapt and exploit the Intellectual Property Rights in connection with the Grouting Works for any purpose whatsoever.

#### **7. Right to take and publish photographs**

- 7.1 The Applicant must grant to HDC (or arrange for the grant to HDC of) a permanent, irrevocable, royalty free, worldwide, non-exclusive licence to use, reproduce, adapt and exploit any photographs, pictures or other images of the Project for the purpose of publishing any information in connection with the Fund.

#### **8. Acknowledgement and Publicity**

- 8.1 The Applicant must, in all publications, promotional and advertising materials, public announcements and activities in connection with the Project, acknowledge the financial and other support received from the Fund in accordance with HDC's reasonable directions. HDC will provide the Applicant with pro forma wording which must be used in any such publications.
- 8.2 HDC reserves the right to publicise and report on the awarding of the Contribution Amount to the Applicant including the amount of funds given to the Applicant, the title and brief description of the Project and the Grouting Works and any images of the Project.
- 8.3 The Applicant must not publish any media releases, information memorandum or advertisements that refer to the Fund, the Minister, HDC or the Contribution Amount without HDC's consent, not to be unreasonably withheld.
- 8.4 The Applicant must give HDC reasonable advance notice of any significant promotional event in connection with the Project and comply with HDC's directions in connection with that promotional event. These directions may include allowing the Minister and/or any other person nominated by the Minister to speak at, or play any role in, the relevant promotional event.

8.5 The Applicant must incorporate signage at the Project Site approved by HDC, acting reasonably, that acknowledges the State Government's contribution to the Project.

## **9. Default and Termination**

9.1 HDC may terminate this deed by giving the Applicant written notice if:

- (a) an Act of Insolvency occurs;
- (b) the Applicant does not complete the Grouting Works by the Grouting Sunset Date;
- (c) the approval by SANSW of the Approved Grouting Plan lapses or is withdrawn; or
- (d) the Applicant does not comply with a term of this deed and does not remedy it within 45 days of the date HDC gives the Applicant notice to remedy the breach.

9.2 Without limiting HDC's other rights, if this deed is terminated under clause 9.1 then HDC is not required to pay the Applicant any of the Contribution Amount.

## **10. Assumption of Risk**

10.1 The Applicant undertakes the Grouting Works entirely at its own risk. HDC does not accept any risk associated with the Grouting Works. The Applicant is fully responsible for the Grouting Works and for ensuring compliance with the requirements of this deed and will not be relieved of this responsibility because of any:

- (a) involvement by HDC or a third party in connection with the Grouting Works;
- (b) inspection of the Grouting Works by HDC or its employees or contractors;
- (c) payment of the Contribution Amount under this deed; or
- (d) subcontracting all or part of the Grouting Works to a third party.

10.2 HDC does not accept any responsibility whatsoever in respect of the Grouting Works, or their sufficiency, all of which are subject to oversight by SANSW.

10.3 HDC is only involved in the Grouting Works in its capacity as the administrator of the Fund responsible for delivering the Contribution Amount.

## **11. Work, Health and Safety**

11.1 For the avoidance of doubt, HDC or the Minister each is not responsible for work, health and safety matters in connection with the Project. The Applicant is entirely responsible for compliance with all work, health and safety laws in connection with the Project.

## **12. Release and Indemnity**

12.1 The Applicant is liable for and unconditionally and irrevocably indemnifies HDC and its employees, contractors and agents against all actions, demands, liability, loss, damage or costs (including legal fees on a full indemnity basis) incurred or suffered directly or indirectly by HDC or its employees, contractors and agents in connection with:

- (a) the Applicant's breach of this deed;
- (b) breach by the Applicant of any laws including, without limitation, work, health and safety matters;
- (c) breach by the Applicant of any third party Intellectual Property Rights;
- (d) any act or omission by the Applicant or its employees, contractors or agents; or
- (e) the Project and the Grouting Works

except to the extent the action, demand, liability, loss, damage or cost was caused or contributed to by HDC's breach of this deed or the negligent act or omission of HDC or its employees or agents whilst at the Project site.

- 12.2 Each indemnity is independent from the Applicant's other obligations and continues during this deed and after it expires or is terminated. HDC may enforce an indemnity before incurring an expense. The Applicant must pay amounts owed to HDC under the indemnity on demand.
- 12.3 The Applicant releases HDC and any committee members of the Fund and agrees that they are not liable for any action, demand, liability, loss, damage or costs suffered or incurred directly or indirectly by the Applicant in connection with the Project or the Grouting Works, howsoever caused.

### **13. Dispute Resolution**

- 13.1 This clause applies if there is a dispute between the parties under this deed.
- 13.2 If either party considers the parties are in dispute that party must serve a notice of dispute on the other party particularising the dispute in reasonable detail (the "**Notice of Dispute**").
- 13.3 Within 14 days of the service of the Notice of Dispute the general manager of the Applicant (or such other person in an equivalent position) must meet with the Chief Executive Officer of HDC to try and resolve the dispute.
- 13.4 If the parties do not agree within 7 days of the above meeting (or any further period agreed to in writing by them) as to:
- (a) the dispute resolution technique and procedures to be adopted;
  - (b) the timetable for steps in those procedures;
  - (c) the selection and compensation of the independent person required for such technique,
- the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of NSW. The parties must also request the President of the Law Society of NSW or the President's nominee to select the mediator and determine the mediator's remuneration.
- 13.5 Each party must equally pay the costs of the mediator and the mediator must be jointly engaged by the parties.
- 13.6 If the dispute is not resolved within a further 30 days from appointment of the mediator then either party may commence Court proceedings in relation to the dispute.
- 13.7 The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause 13 is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken pursuant to this clause 13 for any purpose other than in an attempt to settle the dispute.
- 13.8 Despite the existence of a dispute, both parties must continue to perform their obligations under this deed.

### **14. Subcontracting**

- 14.1 The Applicant is fully responsible for the performance of its obligations under this deed even if it decides to subcontract all or part of the Grouting Works.
- 14.2 The Applicant is fully responsible for ensuring that any contractor delivering the Grouting Works will be experienced in such works, and that the contractor will implement efficient and safe work practises.

### **15. Taxes, Duties and Government Charges**

- 15.1 Subject to this clause, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with this deed must be paid by the Applicant.
- 15.2 Without limiting clause 15.1, the Applicant must pay GST on the goods, services and other supplies made under this deed to the extent they are taxable supplies within the meaning of the GST Act.

15.3 To the extent any Contribution Amount is a taxable supply within the meaning of the GST Act, the Contribution Amount to be paid or provided under or in connection with this deed is inclusive of GST. In relation to any GST payable under clause 15.2, the Applicant must issue HDC with a tax invoice in accordance with the GST Act. For the avoidance of doubt, no payments will be due and payable under clause 15.2 or any other clause of this deed until a valid tax invoice is provided by the supplier to the recipient of the supply.

## **16. General**

16.1 **Variation:** No variation of this deed is of any force or effect unless confirmed in writing and signed by an authorised officer of HDC.

16.2 **Waiver:** The failure, delay, relaxation or indulgence on the part of any party in exercising any power or right conferred on that party by this deed does not operate as a waiver of that power or right, nor does any single exercise of that power or right preclude any other or further exercise of it.

16.3 **Entire Agreement:** This deed constitutes the sole and entire agreement between the parties in respect of the subject matter of this deed.

16.4 **Severance:** If any provision of this deed is invalid or unenforceable in accordance with its terms, other provisions which are self-sustaining and capable of separate enforcement with regard to the invalid provision are and continue to be valid and enforceable in accordance with their terms.

16.5 **Further Assurance:** Each party must do, sign, execute and deliver and must procure that each of its employees and agents does, signs, executes and delivers all deeds, documents, instruments and acts necessary to carry out and give full effect to this deed and the rights and obligations of the parties under it.

16.6 **HDC Contractors:** Where HDC is entitled to do something under this deed it may appoint a contractor to do that thing on its behalf.

16.7 **Governing law and jurisdiction:** This deed is governed by, and is to be construed in accordance with, the law of NSW and the parties submit to the non-exclusive jurisdiction of the courts of NSW and any court hearing appeals from those courts.

### **16.8 Assignment by the Applicant**

If the Applicant sells the Project Site it may assign the rights and obligations under this deed to the purchaser of the Project Site. If it assigns this deed to the purchaser of the Project Site it must promptly notify HDC.

**EXECUTION PAGE**

**Date:**

**EXECUTED FOR AND ON BEHALF OF** )  
**HUNTER DEVELOPMENT CORPORATION** )  
**ABN 94 688 782 063** by its delegate, )  
without assuming any personal liability )  
and I hereby certify that I have no )  
notice of the revocation of such )  
delegation, in the presence of: )

.....  
Signature of Witness

.....  
Delegate

.....  
Name of Witness

**EXECUTED** by **[Insert]** in accordance )  
With section 127 of the *Corporations* )  
*Act 2001(Cth)* by authority of its )  
*director(s)* )

.....  
Signature of director

.....  
Signature of director/secretary

.....  
Name of director

.....  
Name of director/secretary

**SCHEDULE ONE: REFERENCE SCHEDULE**

<b>Item 1:</b>	<b>Project</b>	[Insert description of the relevant Project]
<b>Item 2:</b>	<b>Project Site</b>	[Insert Lot and DP and address of site]
<b>Item 3:</b>	<b>Approved Value</b>	[Insert the Approved Value- Note HDC pays Approved Costs above the Approved Value]
<b>Item 4:</b>	<b>Approved Costs</b>	<p><b>Approved costs include the following:</b></p> <ol style="list-style-type: none"> <li>1.1. Grout sampling and testing for trial program and production grout;</li> <li>1.2. Grout hole drilling through soil and rock, including casing to mine level;</li> <li>1.3. Supply and inject infill grout;</li> <li>1.4. Supply and inject void filling grout;</li> <li>1.5. Verification hole drilling (boring) through soil and rock, including casing to core level;</li> <li>1.6. Verification hole drilling (coring) through soil, grout, and rock;</li> <li>1.7. Provide full time borehole camera and operator;</li> <li>1.8. Provide borehole sonar and operator for grout holes and verification holes;</li> <li>1.9. Downhole geophysics and deviation for grout holes and verification holes;</li> <li>1.10. Survey location of grout holes and verification holes;</li> <li>1.11. Necessary supervision of the works;</li> <li>1.12. Completion of Validation Report, including all necessary liaison with HDC and the MSB,</li> </ol> <p><b>Other costs to which the Contribution will not apply include the following:</b></p> <ol style="list-style-type: none"> <li>1.13. All preliminaries and establishment;</li> <li>1.14. Utility clearance;</li> <li>1.15. Site fencing;</li> <li>1.16. Traffic management including traffic control, signs, pedestrian management as required;</li> <li>1.17. Water management including for drilling water and groundwater dispersed by injected grout;</li> <li>1.18. Offsite disposal of water and other waste; and</li> <li>1.19. All other works required for the satisfactory completion of the Grouting Works but not described elsewhere in the NMGF Schedule of Prices</li> </ol>
<b>Item 5:</b>	<b>Report</b>	[Insert description of the report and the date of the report setting out the grout volume range]
<b>Item 6:</b>	<b>Grouting Sunset Date</b>	[Insert sunset date for Grouting works to be completed]

**SCHEDULE TWO: NMGF SCHEDULE OF PRICES FORM**

**SCHEDULE THREE: APPROVED GROUTING PLAN**