



Department of Education

Department of Treasury

A photograph of three students in a chemistry laboratory. They are wearing white lab coats and safety goggles. The student in the center is smiling and looking down at a beaker. The student on the right is also smiling and holding a beaker. The student on the left is partially visible, also smiling. The background shows laboratory equipment and shelves.

# WA SCHOOLS PUBLIC PRIVATE PARTNERSHIP PROJECT

## PROJECT DEED

# WA Schools PPP Project Project Deed

The State of Western Australia

and

Minister for Works

and

Minister for Education

and

EduWest Project Co Pty Ltd in its personal capacity and in its capacity as trustee for the EduWest Project Trust

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## Contents

<b>1</b>	<b>Definitions.....</b>	<b>2</b>
<b>2</b>	<b>General rules of interpretation .....</b>	<b>52</b>
2.1	Interpretation.....	52
2.2	Composition of Deed and order of precedence.....	54
2.3	Inconsistency within Deed .....	54
2.4	Inconsistency between State Project Documents .....	55
2.5	Savings from resolution of inconsistency .....	55
2.6	Plans, reports and procedures .....	55
2.7	Version of documents Project Co must comply with .....	55
2.8	Approvals, directions and notices in writing.....	55
2.9	Prior approval or consent.....	55
2.10	Action without delay.....	55
2.11	Provisions limiting or excluding Liability, rights or obligations .....	55
2.12	Relationship of the parties .....	56
2.13	State's executive rights duties and functions.....	56
2.14	Reasonable endeavours of State .....	56
2.15	Reduction in State Liability for Relief Events.....	57
2.16	No State Liability for review .....	57
2.17	Indexation .....	58
2.18	Cost of carrying out obligations .....	58
2.19	Project Co and Project Co Associates.....	58
2.20	Cooperation during the Term.....	58
2.21	Final and binding .....	58
2.22	Transparent provision of information .....	59
2.23	Records.....	59
<b>3</b>	<b>Conditions Precedent.....</b>	<b>60</b>
3.1	Commencement .....	60
3.2	Satisfaction of Conditions Precedent.....	60
3.3	Waiver of Conditions Precedent .....	61
3.4	Failure to satisfy Condition Precedent Deadline .....	61
3.5	Model Output Schedule .....	61
<b>4</b>	<b>Term.....</b>	<b>61</b>
4.1	Commencement date .....	61
4.2	Expiry Date .....	61
<b>5</b>	<b>Overarching obligations.....</b>	<b>61</b>
5.1	Project Co's primary obligations .....	61
5.2	Disputed Directions.....	62
5.3	All risks.....	62
5.4	Fit For Purpose warranty .....	62
5.5	State Obtained Authorisations .....	62
5.6	Other Approvals.....	63
5.7	Conditional Approvals.....	63
5.8	Surrounding Works .....	63
<b>6</b>	<b>Site Conditions.....</b>	<b>64</b>
6.1	Environmental issues.....	64
6.2	Contamination.....	65

6.3	Project Co's entitlement to compensation for Remediation.....	66
6.4	Delay caused by Contamination Modification Event .....	66
6.5	Native Title Claims and Heritage Claims .....	67
<b>7</b>	<b>Utilities .....</b>	<b>68</b>
7.1	Project Co's obligations .....	68
7.2	Utilities procurement throughout the Operating Phase .....	68
<b>8</b>	<b>Parties, personnel and community .....</b>	<b>69</b>
8.1	Authorities .....	69
8.2	State Representative .....	69
8.3	Delegations .....	70
8.4	Project Co Representative .....	70
8.5	Design Manager .....	71
8.6	Principal .....	72
8.7	Powers of a Principal .....	72
8.8	Delegation by Principal .....	72
8.9	Contract Management Team .....	73
8.10	Appointment of Independent Certifier .....	74
8.11	Determinations of Independent Certifier .....	75
8.12	Replacement of Independent Certifier .....	75
8.13	Power of attorney .....	76
8.14	Media and public relations .....	76
8.15	Conflicts of Interest .....	76
<b>9</b>	<b>Key People and subcontracting .....</b>	<b>76</b>
9.1	Key People .....	76
9.2	Subcontracting .....	77
9.3	Key Subcontracts .....	77
9.4	Requirements for subcontracting .....	78
9.5	Payment of amounts owed to Subcontractors .....	79
9.6	Construction Contracts Act .....	79
9.7	Subcontractor payments, Claims and Dispute .....	80
9.8	Obligations as to Claims made on pass-through basis .....	80
9.9	Industrial relations issues .....	80
<b>10</b>	<b>Health and safety .....</b>	<b>80</b>
10.1	Project Co's general OHS obligations .....	80
10.2	NOT USED .....	82
10.3	New OHS Regulations .....	82
10.4	Occupational health and safety incident reports .....	82
10.5	Breach of OHS Laws .....	83
10.6	State may act if Project Co fails to comply .....	83
<b>11</b>	<b>Development Phase Plans, Reports and Development Phase Program .....</b>	<b>83</b>
11.1	Development Phase Plans and Development Phase Reports .....	83
11.2	Development Phase Program .....	84
<b>12</b>	<b>Interaction with Harrisdale Stage 1 Contractor .....</b>	<b>85</b>
12.1	Warranty regarding Harrisdale Stage 1 Works .....	85
12.2	Not Used .....	86
12.3	Completion of Harrisdale Stage 1 Works .....	86
12.4	State initiated Harrisdale Stage 1 Works Variation .....	86

	12.5	Defects in Harrisdale Stage 1 Works.....	87
<b>13</b>		<b>Design .....</b>	<b>88</b>
	13.1	Design warranties .....	88
	13.2	Purpose of Design Development Process.....	88
	13.3	Design Departures.....	89
<b>14</b>		<b>Minor Modifications .....</b>	<b>89</b>
	14.1	Purpose and timing.....	89
	14.2	Minor Modifications during Development Phase .....	89
	14.3	Minor Modification Running Schedule .....	90
	14.4	Minor Modifications meeting .....	90
	14.5	Value management.....	91
	14.6	Payment and other entitlements.....	91
	14.7	Changes to Minor Modification process .....	92
<b>15</b>		<b>FF&amp;E During Development Phase, Harrisdale Stage 1 And For Transportable Units ..</b>	<b>92</b>
	15.1	FF&E.....	92
	15.2	Status of Schedule 20 (FF&E).....	93
	15.3	Consultation with State .....	94
	15.4	Limitation of Liability in respect of FF&E Modifications .....	95
	15.5	Disputes.....	95
<b>16</b>		<b>Construction.....</b>	<b>95</b>
	16.1	Development Phase Licence.....	95
	16.2	Construction.....	96
	16.3	Access to Harrisdale Stage 1 Works .....	96
<b>17</b>		<b>State access during Development Phase.....</b>	<b>97</b>
	17.1	State's right to enter, inspect and test .....	97
	17.2	Site Access and Interface Protocols.....	97
	17.3	Project Co to assist.....	97
	17.4	Costs of inspection or testing .....	97
<b>18</b>		<b>Verge Works .....</b>	<b>98</b>
	18.1	Access .....	98
	18.2	Verge Works Commercial Acceptance.....	98
	18.3	Title to Verge Works .....	99
<b>19</b>		<b>Time.....</b>	<b>99</b>
	19.1	Primary obligation.....	99
	19.2	Independent Certifier's review of progress .....	100
	19.3	Delay to Commercial Acceptance .....	103
	19.4	Delays entitling Claim .....	103
	19.5	Modifications, Contamination and Change in Mandatory Requirements .....	103
	19.6	Change Notice .....	103
	19.7	Conditions precedent to extension .....	103
	19.8	Extension of Time determined by Independent Certifier .....	104
	19.9	Unilateral extensions .....	104
	19.10	Force Majeure Events.....	104
	19.11	Entitlement to Financing Delay Costs and Prolongation Costs .....	105
	19.12	Share of Savings .....	105
	19.13	Concurrent delays.....	105

19.14	Acceleration by Project Co .....	105
19.15	Acceleration notice .....	106
19.16	Reasonably achievable.....	106
19.17	Effect of acceleration on Extension Event.....	106
19.18	Acceleration .....	106
<b>20</b>	<b>Commercial Acceptance .....</b>	<b>107</b>
20.1	Notice before Commercial Acceptance .....	107
20.2	Commercial Acceptance Tests.....	107
20.3	Additional Commercial Acceptance Tests.....	108
20.4	Initial Commercial Acceptance Report .....	108
20.5	Independent Certifier to notify State of completion of Tests.....	108
20.6	Notice of Commercial Acceptance .....	109
20.7	Determination of Commercial Acceptance .....	109
20.8	Commercial Acceptance Outstanding Items .....	110
20.9	Date of Commercial Acceptance .....	111
20.10	Post Commercial Acceptance .....	111
20.11	Release after Commercial Acceptance .....	112
20.12	Commercial Acceptance of Project Co FF&E for Harrisdale Stage 1 Works .....	112
<b>20A</b>	<b>Major outstanding items.....</b>	<b>112</b>
20A.1	Major Outstanding Items.....	112
20A.2	Payment for Functional Units affected by Major Outstanding Items .....	113
20A.3	Date of Commercial Acceptance being prior to the Date for Commercial Acceptance .....	113
20A.4	Indemnity .....	114
<b>21</b>	<b>State right to require Project Co to call on Performance Bonds .....</b>	<b>114</b>
<b>22</b>	<b>Defects .....</b>	<b>114</b>
22.1	Correction of Defects in School Facilities .....	114
22.2	Correction of Defects in Verge Infrastructure .....	115
<b>23</b>	<b>Operating Phase Management Plans and Operating Phase Reports.....</b>	<b>117</b>
<b>24</b>	<b>Operating Phase Site Access .....</b>	<b>118</b>
24.1	Operating Phase Licences .....	118
24.2	Permitted use.....	118
24.3	State access to the School Facilities and records.....	118
24.4	Access by Harrisdale Stage 1 Contractor.....	119
<b>25</b>	<b>Operating Phase general obligations .....</b>	<b>119</b>
25.1	Delivery of the Services.....	119
25.2	Coordination of Services with School Activities.....	119
25.3	Caretaker Services .....	120
<b>26</b>	<b>Use of School Facilities.....</b>	<b>121</b>
26.1	School Facility Management Committees .....	121
26.2	School Terms and Academic Years .....	121
26.3	Use of a School Facility during Core Hours.....	122
26.4	Use of a School Facility outside of Core Hours .....	122
26.5	Increase of Additional Use Allowance .....	123
26.6	Project Co Third Party Use .....	123
26.7	Limitations on Project Co Third Party Use.....	124
26.8	Using the School Facilities for Elections.....	124

	26.9	Naming rights.....	124
<b>27</b>		<b>FF&amp;E.....</b>	<b>125</b>
<b>28</b>		<b>Asset Condition.....</b>	<b>126</b>
	28.1	Condition of School Facilities .....	126
	28.2	Asset Condition Survey .....	127
	28.3	Notification .....	127
	28.4	Parties' obligations.....	127
	28.5	Results of Asset Condition Survey .....	127
	28.6	Failure to carry out work .....	127
	28.7	Costs of Asset Condition Surveys .....	127
	28.8	Operating Phase Lifecycle Maintenance Plan.....	128
<b>29</b>		<b>Transportable Units .....</b>	<b>129</b>
<b>30</b>		<b>NOT USED.....</b>	<b>131</b>
<b>31</b>		<b>Intervening Events .....</b>	<b>131</b>
	31.1	Intervening Events entitling Change Notice.....	131
	31.2	Obligations suspended and no breach .....	132
	31.3	Payment continues for Intervening Events other than Force Majeure Events .....	132
	31.4	Intervening Event which is a Force Majeure Event .....	132
	31.5	Alternative arrangements.....	133
	31.6	Cessation of Intervening Event.....	133
<b>32</b>		<b>Repricing Reviewable Services .....</b>	<b>134</b>
	32.1	Reviewable Services Schedule .....	134
	32.2	Preparation for repricing .....	135
	32.3	Request for offer to reprice .....	135
	32.4	No offer made .....	136
	32.5	Competitive tender.....	136
	32.6	Outcome of competitive tender process .....	138
	32.7	Consultation.....	138
	32.8	Appointment.....	138
	32.9	Failure to agree.....	139
	32.10	Continued provision of Reviewable Services .....	139
	32.11	Probity of process .....	139
<b>33</b>		<b>Expiry obligations .....</b>	<b>139</b>
	33.1	Assistance in securing continuity.....	139
	33.2	Handover .....	140
	33.3	Appointment of Handover Reviewer .....	141
	33.4	Handover Reviewer Role.....	141
	33.5	State election .....	142
	33.6	Implementing Final Refurbishment Works.....	142
	33.7	Security for Final Refurbishment Works .....	143
	33.8	Handover Escrow Account .....	143
	33.9	Handover Bond.....	144
<b>34</b>		<b>Payments and Adjustments .....</b>	<b>144</b>
	34.1	Quarterly Service Payments and other payments .....	144
	34.2	Payment adjustments under the Abatement Regime .....	144
	34.3	Dispute.....	145
	34.4	Quarterly Service Payments .....	146

	34.5	Interest .....	147
	34.6	Refund .....	147
	34.7	Set-off .....	147
	34.8	Payment.....	148
<b>35</b>		<b>Minor Works .....</b>	<b>148</b>
	35.1	Process for performance of Minor Works .....	148
	35.2	Notice of Minor Works .....	149
	35.3	Variations to the approved Minor Works Costs .....	149
	35.4	Future maintenance or Lifecycle Works .....	149
	35.5	Completion.....	149
	35.6	Payment for Minor Works .....	149
	35.7	Subcontract provisions .....	150
<b>36</b>		<b>Modifications .....</b>	<b>150</b>
	36.1	Modification Request by the State .....	150
	36.2	Payment for Change Notice.....	151
	36.3	Change Notice .....	151
	36.4	Change Response .....	151
	36.5	Omission by State.....	151
	36.6	Modifications proposed by Project Co .....	151
	36.6A	Pre-Agreed Modifications .....	152
	36.7	Change in Mandatory Requirements.....	153
	36.8	Compensation for a Change in Mandatory Requirements .....	153
	36.9	Directions giving rise to Modification .....	155
	36.10	Extension of time .....	155
<b>37</b>		<b>Refinancing.....</b>	<b>155</b>
	37.1	Consent to Refinancing .....	155
	37.2	Details of Refinancing.....	156
	37.3	Refinancing documents .....	157
	37.4	Calculation and Sharing of Refinancing Gains .....	157
	37.5	Costs Relating to a Refinancing .....	158
<b>38</b>		<b>Risk and Liability.....</b>	<b>158</b>
	38.1	Risk of loss or damage .....	158
	38.2	Notification of Loss and Damage.....	158
	38.3	Repairing and rebuilding.....	158
	38.4	Uninsurable Risk or Day 1 Uninsurable Risk.....	159
	38.5	Minor damage.....	159
	38.6	Consequences of not repairing or rebuilding.....	159
	38.7	Damage to third party property.....	160
	38.8	Indemnity for Project Co breach .....	160
	38.9	General indemnity.....	160
	38.10	Release.....	160
	38.11	Limits on Project Co Liability to indemnify and release .....	160
	38.12	Third party Claim under indemnity.....	161
	38.13	Continuing obligation .....	162
	38.14	Indirect or Consequential Loss .....	162
<b>39</b>		<b>Insurance .....</b>	<b>162</b>
	39.1	Development Phase Insurances.....	162



39.2	Operating Phase Insurances .....	162
39.3	General Insurance requirements .....	162
39.4	Terms of Insurances .....	163
39.5	Additional Insurance .....	164
39.6	Insurances primary .....	165
39.7	Evidence of Insurance .....	165
39.8	Failure to produce proof of Insurance terms.....	165
39.9	Insurance claim.....	165
39.10	Subcontractor Insurance.....	166
39.11	Settlement of Claims.....	166
39.12	Uninsurable Risks.....	167
39.13	Damage caused by Day 1 Uninsurable Risk or Uninsurable Risk .....	167
39.14	Review of Uninsurable Risks.....	168
<b>40</b>	<b>Default.....</b>	<b>168</b>
40.1	Meaning of remedy or cure.....	168
40.2	Notice of Service Failure or Default by the State .....	169
40.3	Notice of Project Co Major Default .....	169
40.4	Project Co to provide remedy program and comply with Major Default Notice....	170
40.5	Extension of remedy program .....	171
40.6	Not Used .....	172
40.7	Default Termination Event .....	172
40.8	Effect of curing.....	172
<b>41</b>	<b>Termination.....</b>	<b>172</b>
41.1	Sole basis .....	172
41.2	Termination for convenience .....	172
41.3	Termination for Force Majeure Event .....	173
41.4	Termination for Default Termination Event.....	173
41.5	Termination and payments .....	173
41.6	Assistance .....	173
41.7	Payment on termination.....	173
41.8	Novation of Liabilities to the State .....	174
41.9	Waiver.....	174
41.10	Additional rights and obligations on termination.....	174
<b>42</b>	<b>Partial Termination.....</b>	<b>174</b>
42.1	State's Right of Partial Termination .....	174
42.2	Facilitation.....	175
42.3	Circumstances following Partial Termination.....	175
42.4	Project Co's Right of Partial Termination.....	175
<b>43</b>	<b>Dispute Resolution procedure.....</b>	<b>177</b>
43.1	Disputes .....	177
43.2	Consideration by Contract Management Team.....	177
43.3	Expert determination.....	178
43.4	Impact of application for adjudication under the Construction Contracts Act.....	179
43.5	Mediation .....	180
43.6	Litigation .....	180
<b>44</b>	<b>Representations and warranties .....</b>	<b>180</b>
44.1	State's representations and warranties .....	180

44.2	Project Co's representations and warranties .....	181
44.3	Repetition of representation and warranties .....	183
44.4	Undertakings in relation to the Project Trust .....	183
<b>45</b>	<b>Benefits held on trust for State Associates .....</b>	<b>184</b>
<b>46</b>	<b>Project Co to inform itself .....</b>	<b>184</b>
46.1	No representations from the State.....	184
46.2	Representations and Warranties by Project Co .....	184
46.3	Release and indemnity .....	185
<b>47</b>	<b>Restrictions on Project Co .....</b>	<b>185</b>
<b>48</b>	<b>Assignment and change in ownership .....</b>	<b>186</b>
48.1	Assignment and other dealings by a Project Entity .....	186
48.2	Financiers' securities .....	186
48.3	Initial status of ownership .....	186
48.4	Restrictions on Share Capital Dealings .....	186
48.5	State's right to withhold consent .....	187
48.6	Permitted Share Capital Dealings and on-market acquisitions .....	187
48.7	Consent to a Share Capital Dealing .....	188
48.8	Costs relating to a Share Capital Dealing.....	188
48.9	[Not disclosed] .....	188
48.10	Assignment by the State.....	188
<b>49</b>	<b>Financial Model .....</b>	<b>188</b>
49.1	Provision of the Base Case Financial Model .....	188
49.2	Status of the Financial Model .....	189
49.3	Varying the Financial Model .....	189
49.4	Principles for variations to the Financial Model .....	189
49.5	Procedures for variations to the Financial Model .....	189
49.6	Access to information .....	189
49.7	Auditing the Financial Model .....	190
<b>50</b>	<b>Records and Accounts .....</b>	<b>190</b>
50.1	Accounting records .....	190
50.2	Cost to complete information .....	190
50.3	Financial statements .....	191
50.4	Other information .....	191
50.5	Project Co Material .....	191
<b>51</b>	<b>Intellectual Property Rights .....</b>	<b>191</b>
51.1	Warranties .....	191
51.2	Background IP .....	192
51.3	Developed IP .....	192
51.4	Project Co licence for Project Co Background IP .....	193
51.5	Third Party Materials.....	193
51.6	Project Co Material and Relevant Infrastructure .....	193
51.7	Use of State Background IP .....	194
51.8	Indemnities .....	194
51.9	Moral Rights.....	195
<b>52</b>	<b>Confidential Information and disclosure .....</b>	<b>195</b>
52.1	Confidential Information and disclosure by the State .....	195

	52.2	Confidential Information and disclosure by Project Co.....	196
	52.3	Disclosure by Project Co .....	196
<b>53</b>		<b>Privacy .....</b>	<b>197</b>
<b>54</b>		<b>Taxes .....</b>	<b>197</b>
	54.1	GST General.....	197
	54.2	General Liability for Taxes .....	200
<b>55</b>		<b>Probity Events and Disciplinary Events .....</b>	<b>200</b>
	55.1	Probity Event .....	200
	55.2	Probity Investigation .....	201
	55.3	Notification of appointments of Relevant Persons.....	201
	55.4	Checks and notifications.....	201
	55.5	Unsuitable Third Parties .....	203
<b>56</b>		<b>Notices and bar to Claims .....</b>	<b>204</b>
	56.1	Notices .....	204
	56.2	Notices of Claims.....	205
	56.3	Prescribed notices .....	205
	56.4	Continuing events .....	205
	56.5	Notice to Financiers .....	205
<b>57</b>		<b>Miscellaneous.....</b>	<b>205</b>
	57.1	Governing Law and jurisdiction .....	205
	57.2	Entire agreement .....	206
	57.3	Further acts and documents .....	206
	57.4	Survival of certain provisions .....	206
	57.5	Waiver.....	206
	57.6	Consents, approvals and directions .....	206
	57.7	Amendments.....	207
	57.8	Expenses .....	207
	57.9	Not Used.....	207
	57.10	Counterparts .....	207
	57.11	Moratorium legislation.....	207
	57.12	Proportionate Liability .....	207
<b>58</b>		<b>Personal Properties Security Act .....</b>	<b>207</b>
	58.1	State's Personal Property .....	207
	58.2	Further assurance.....	207
	58.3	No requirement for PPSA notices.....	208
	58.4	Priority of State's interest.....	208
	58.5	Notices to be given to the State.....	208
	58.6	Negative undertakings .....	208
	58.7	Assistance with registration .....	208
	58.8	State's interest remains unaffected .....	209
	58.9	Costs and expenses relating to PPSA and registration.....	209
	58.10	Confidentiality for the purposes of the PPSA .....	209
	58.11	Severability of provisions .....	209

## Schedules

### Schedule 1 — Contract Particulars

- Schedule 2 — Conditions Precedent**
- Schedule 3 — Payment**
- Schedule 4 — Indexes**
- Schedule 5 — Change Compensation Principles**
- Schedule 6 — Information Documents**
- Schedule 7 — Termination Payments**
- Schedule 8 — Site Matters**
- Schedule 9 — Design Development**
- Schedule 10 — Programming Requirements**
- Schedule 11 — Commercial Acceptance Criteria**
- Schedule 12 — Review Procedures**
- Schedule 13 — Insurance**
- Schedule 14 — Confidential Information**
- Schedule 15 — Finance Documents**
- Schedule 16 — Equity Documents**
- Schedule 17 — Ownership**
- Schedule 18 — Permitted Share Capital Dealing**
- Schedule 19 — [Not used]**
- Schedule 20 — FF&E**
- Schedule 21 — Transportable Units**
- Schedule 22 — Additional Use**
- Schedule 23 — Schedule of Accommodation**
- Schedule 24 — Development Phase Plans and Reports**
- Schedule 25 — Expert Determination Agreement**
- Schedule 26 — Design Brief**
- Schedule 27 — Services Specifications**
- Schedule 28 — Operating Phase Licence**
- Annexures**
  - Annexure A — Initial Design Deliverables**
  - Annexure B — Initial Services Deliverables**
  - Annexure C — Initial Development Phase Plans**
  - Annexure D — Initial Development Phase Program**
  - Annexure E — Initial Operating Phase Management Plans**
  - Annexure F — Financial Close Adjustment Protocol**



## PROJECT DEED

This Deed is made on

2015

between

The State of Western Australia

and

the Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902* (WA) (**Minister for Works**)

and

the Minister for Education, a body corporate constituted under section 214 of the *Schools Education Act 1999* (WA) (**Minister for Education**)

and

EduWest Project Co Pty Ltd ACN 608 027 434 in its personal capacity and in its capacity as trustee for the EduWest Project Trust (**Project Co**)

## Background

- A. The State has invited proposals to undertake the Project.
- B. The State has selected Project Co to undertake the Project.
- C. This Deed sets out the terms on which:
  - (a) Project Co agrees to deliver the Project;
  - (b) Finance Co has agreed to provide financing to the Project by, amongst other things, entry into the Facility Agreement and the Receivables Purchase Deed;
  - (c) the State agrees to pay the Quarterly Service Payment to Project Co; and
  - (d) the risks associated with the Project are allocated as between the State and Project Co.

## Operative Provisions

### 1 DEFINITIONS

In this Deed, unless the context otherwise requires:

<b>Term</b>	<b>Meaning</b>
<b><i>Abatement</i></b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b><i>Abatement Amount</i></b>	means, in respect of a Quarter for the purposes of <b>Schedule 3 (Payment)</b> , the aggregate Availability Failure Abatements, Critical Functional Unit Abatements, Incident Failure Abatements, Reporting Failure Abatements and Whole School Unavailability Abatements for that Quarter.
<b><i>Abatement Regime</i></b>	means the arrangements for monitoring and the methods and calculations for abating the Quarterly Service Payment as set out in <b>Schedule 3 (Payment)</b> (and <b>Abate</b> means the act of applying the Abatement Regime).
<b><i>Academic Year</i></b>	means the period beginning on the first day of the first School Term in any calendar year and ending on the last day of the final School Term in that calendar year.
<b><i>Accounts and Records</i></b>	has the meaning given in <b>Clause 50.1(a)</b> .
<b><i>Actual Debt</i></b>	means the aggregate indebtedness of Group Members under the Finance Documents, excluding any indebtedness to Related Bodies Corporate that is in the nature of, or identified in the Financial Model as being equity funding.
<b><i>Additional Commercial Acceptance Tests</i></b>	has the meaning given in <b>Clause 20.3</b> .
<b><i>Additional Purchase Date</i></b>	has the meaning given in the Receivables Purchase Deed.
<b><i>Additional Receivables</i></b>	has the meaning given in the Receivables Purchase Deed.
<b><i>Additional Use</i></b>	means use of the School Facilities by a Principal or the State outside of Core Hours for School Use or School Third Party Use, excluding any use which is in connection with: <ol style="list-style-type: none"> <li>(a) State or Federal elections;</li> <li>(b) parents and citizens meetings;</li> <li>(c) staff meetings;</li> <li>(d) board meetings;</li> <li>(e) Dental Therapy Centre Facilities during Dental Therapy Centre Hours which are outside of Core Hours;</li> <li>(f) use of Dental Therapy Centre Facilities outside of Dental Therapy Centre Hours by Dental Therapy Centre Facility staff pursuant to their administrative or other general duties;</li> <li>(g) use of administrative areas or learning and teaching areas at a School Facility outside of Core Hours (whether during a School Term or not) by School Staff pursuant to their general administrative or academic duties;</li> <li>(h) use of car parks at a School Facility by any person; or</li> <li>(i) use of shared use change room and toilet facilities at Lakelands</li> </ol>

<b>Term</b>	<b>Meaning</b>
	Secondary School by any person.
<b><i>Additional Use Allowance</i></b>	means for each Operating Year: (a) [Not disclosed] for each 'Primary School' in <b>Schedule 1 (Contract Particulars)</b> ; and (b) [Not disclosed] for each 'Secondary School' in <b>Schedule 1 (Contract Particulars)</b> , or as increased pursuant to <b>Clause 26.5</b> .
<b><i>Additional Use Payment</i></b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b><i>Ad-Hoc Basis</i></b>	means on an ad-hoc or short term basis in a temporary capacity.
<b><i>Affected Site</i></b>	has the meaning given in <b>Clause 42.4(a)</b> .
<b><i>Agent</i></b>	means the Senior Agent defined in the Facility Agreement who is from time to time party to the Finance Direct Deed in that capacity.
<b><i>Agreed Amount</i></b>	has the meaning given in <b>Clause 54.1(b)(i)</b> .
<b><i>Annual Services Plan</i></b>	means in respect of each Stage, the plan for annual works forming part of the Operating Phase Management Plans.
<b><i>Approval</i></b>	means the State Obtained Authorisations, any licence, permit, authorisation, consent, assessment, approval, determination, certificate, accreditation, registration, clearance, permission or the like (as amended or substituted from time to time) which is required to be issued by or obtained from any Authority or any other person or in accordance with any Law, in connection with the Project.
<b><i>Artefacts</i></b>	means all artefacts, fossils, bones, coins, articles of value or antiquity, structures and other remains or things of scientific, geological, sociological, cultural, historical or archaeological interest, including all Aboriginal cultural material (as that term is defined in the <i>Aboriginal Heritage Act 1972 (WA)</i> ).
<b><i>As-Built Information</i></b>	means the For Construction Documentation and the For Fabrication Documentation as amended and updated to reflect the actual completed Works.
<b><i>Asset Condition Survey</i></b>	means each survey of the School Facilities undertaken in accordance with <b>Clause 28.2</b> .
<b><i>Authority</i></b>	means any government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality.
<b><i>Availability Failure</i></b>	has the meaning given in <b>Schedule 3 (Payment)</b> .
<b><i>Availability Failure Abatement</i></b>	has the meaning given in <b>Schedule 3 (Payment)</b> .
<b><i>Base Costs</i></b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b><i>Base Case Financial Model</i></b>	has the meaning given in <b>Clause 49.1</b> .
<b><i>BBSY Rate</i></b>	in a period means: (a) the rate (which is expressed as a yield per centum per annum to maturity) which is the buying rate for bank accepted Bills quoted at approximately 10.10am (Perth time) on page 'BBSY' of the Reuters Monitor System on that day, having a term of one Month; or (b) if that rate is no longer available or if, in the reasonable opinion of the



Term	Meaning
	State, that rate becomes an inappropriate rate to benchmark the Default Rate for the purposes of this Deed or becomes incapable of application, the Bank Bill Rate means the rate reasonably determined by the State to be the appropriate equivalent rate, having regard to prevailing market conditions.
<b><i>Beneficiaries</i></b>	has the meaning given in <b>Clause 51.9</b> .
<b><i>Best D&amp;C Practices</i></b>	<p>means design, construction and commissioning works and practices which are carried out:</p> <ul style="list-style-type: none"> <li>(a) with the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a professional, reputable and prudent contractor carrying out such works and practices similar to the Development Phase Activities under conditions comparable to those applicable to the Project;</li> <li>(b) in accordance with all Laws and Quality Standards;</li> <li>(c) with due expedition and without unreasonable or unnecessary delay;</li> <li>(d) in a manner safe to workers, the general public and the Environment; and</li> <li>(e) using new and high quality fixtures, fittings, finishes and materials and workmanship which are free from Defects and which are Fit For Purpose.</li> </ul>
<b><i>Best Industry Practices</i></b>	means Best D&C Practices and Best Operating Practices (or any one or more of these as the context requires).
<b><i>Best Operating Practices</i></b>	<p>means maintenance, refurbishment and repair practices, and practices in the delivery of the Services, which are carried out:</p> <ul style="list-style-type: none"> <li>(a) with the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a professional, reputable and prudent contractor undertaking practices and services similar to the Services under conditions comparable to those applicable to the Project;</li> <li>(b) in accordance with all Laws and Quality Standards;</li> <li>(c) to ensure the School Facilities and Verge Infrastructure are functioning to achieve the Services Requirements;</li> <li>(d) in a manner which does not impede or otherwise adversely impact the undertaking of the School Activities, and using reliable long-term efficient and safe practices, including: <ul style="list-style-type: none"> <li>(i) proper equipment, tools and procedures;</li> <li>(ii) workmanship and materials which are Fit For Purpose; and</li> <li>(iii) replacement parts that are new;</li> </ul> </li> <li>(e) to ensure a sufficient number of personnel are available and are adequately qualified, experienced and trained to ensure compliance with the requirements of this Deed;</li> <li>(f) to ensure suitable materials, resources, Project Co FF&amp;E, Consumables and supplies are available to ensure compliance with the requirements of this Deed;</li> <li>(g) with a commitment to continually meet advancements in technology and practices, and improve the standards and quality of the operation, maintenance, refurbishment and repair of, and the delivery of Services to the School Facilities and Verge Infrastructure and the</li> </ul>

Term	Meaning
	<p>manner in which they are carried out; and</p> <p>(h) to ensure regular and proper maintenance (both routine and non-routine) and prompt repairs to the School Facilities and Verge Infrastructure are undertaken by suitably qualified, experienced and trained personnel in accordance with manufacturers' recommendations and guidelines.</p>
<b>Bill</b>	has the same meaning as "bill of exchange" in the <i>Bills of Exchange Act 1909</i> (Cth) (but does not include a cheque or payment order) and a reference to the drawing or acceptance of, or other dealing with, a Bill is to be interpreted in accordance with that Act.
<b>Business Day</b>	<p>means any day other than:</p> <p>(a) a Saturday or a Sunday; or</p> <p>(b) a gazetted holiday in Perth, Western Australia under the <i>Public and Bank Holidays Act 1972</i> (WA).</p>
<b>Business Hours</b>	means between 9:00 am and 5:00 pm on a Business Day.
<b>Caretaker</b>	means, for a School Facility, the person employed by Project Co or the Services Subcontractor as the person primarily responsible for managing the provision of Caretaker Services at a School Facility and closely liaising with the Principal of that School Facility.
<b>Caretaker Service Standards</b>	means the service standards required to be met by the Caretaker as set out in Section 18 of <b>Schedule 27 (Services Specifications)</b> .
<b>Caretaker Services</b>	means the Services described as such in Part C of <b>Schedule 27 (Services Specifications)</b> .
<b>Change Compensation Event</b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b>Change in Control</b>	means where, at any time, any Entity, alone or together with any associate or associates (as that term is used in the Corporations Act), ceases to or commences to, directly or indirectly have Control of an Entity.
<b>Change in Law</b>	<p>means any one or more of the following that occurs after the date of this Deed:</p> <p>(a) a change in, or repeal of, an existing Law;</p> <p>(b) the enactment or judicial determination of a new Law; or</p> <p>(c) a change in the way a Law is applied or interpreted as a result of a decision of a court of competent jurisdiction,</p> <p>but does not include:</p> <p>(d) a change in the way a Law is applied or interpreted due to:</p> <p>(i) the failure of Project Co or any Project Co Associates to comply with a Law or Quality Standards; or</p> <p>(ii) a Project Co Act or Omission;</p> <p>(e) a Change in Quality Standards;</p> <p>(f) any new Approval or change in an Approval;</p> <p>(g) a change in Law arising from the New OHS Regulations;</p> <p>(h) any new Law or change in existing Law relating to Taxes including the <i>Income Tax Assessment Act 1936</i> (Cth), the <i>Income Tax Assessment Act 1997</i> (Cth), the <i>Duties Act 2008</i> (WA) and the GST Law;</p>

Term	Meaning
	<ul style="list-style-type: none"> <li>(i) any new Law or change in any existing Law which was not in force at the date of this Deed but which:               <ul style="list-style-type: none"> <li>(i) had been published in the Commonwealth Government Gazette or the Western Australia Government Gazette, as the case may be, by way of bill, draft bill or draft statutory instrument or otherwise specifically referred to prior to the date of this Deed;</li> <li>(ii) is contained or referred to in the Output Specifications, Project Information or any Project Document;</li> <li>(iii) a party exercising Best Industry Practices would have reasonably foreseen or anticipated prior to the date of this Deed; or</li> <li>(iv) is substantially the same as a Law in force prior to the date of this Deed;</li> </ul> </li> <li>(j) a change in any, or the enactment of a new, Law relating to employment or industrial relations;</li> <li>(k) a declaration made under section 26 of the <i>Terrorism (Community Protection) Act 2003</i> (Cth) in connection with the Project; or</li> <li>(l) any new Law or change in existing Law relating to the <i>Civil Liability Act 2002</i> (WA) or its application which limits or eliminates the impact of that Act or any legal risk allocation under this Deed, whether or not it has any application.</li> </ul>
<b>Change in Management</b>	<p>means a change in:</p> <ul style="list-style-type: none"> <li>(a) the Entity which provides management functions to Project Co;</li> <li>(b) the senior employees of an Entity which provides management functions to a Project Entity; or</li> <li>(c) the senior management of each Project Entity,</li> </ul> <p>as applicable.</p>
<b>Change in Mandatory Requirements</b>	<p>has the meaning given in <b>Clause 36.7</b>.</p>
<b>Change in Quality Standards</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) any withdrawal, revocation, suspension, invalidation or replacement of all or any part of a State Obtained Authorisation after the later of, the date of this Deed and the date the State Obtained Authorisation is provided to Project Co by the State; and</li> <li>(b) any one or more of the following that occurs after the date of this Deed:               <ul style="list-style-type: none"> <li>(i) the introduction of a new Quality Standard;</li> <li>(ii) a material change in a Quality Standard;</li> <li>(iii) any changes to or new conditions attaching to any State Obtained Authorisation after the date of this Deed (or, in respect of a State Obtained Authorisation set out in Part C of <b>Schedule 8 (Site Matters)</b>, the date the State Obtained Authorisation was finally issued by the relevant Authority); or</li> <li>(iv) in respect of a State Obtained Authorisation set out in Part C of <b>Schedule 8 (Site Matters)</b>, a requirement or</li> </ul> </li> </ul>

Term	Meaning
	<p>condition of that State Obtained Authorisation differing substantively from a requirement or condition that a party experienced and competent in the implementation of works similar to the Works or the provision of services similar to the Services would have reasonably foreseen or anticipated. For the avoidance of doubt, a requirement or condition of another State Obtained Authorisation is considered to be reasonably foreseeable;</p> <p>but does not include:</p> <ul style="list-style-type: none"> <li>(c) a Change in Law;</li> <li>(d) any of the events referred to in <b>paragraphs (b)(i) to (b)(iii)</b> to enable more efficient usage of the School Facilities;</li> <li>(e) a new Quality Standard or change to a Quality Standard, (other than to the extent that <b>paragraph (b)(iv)</b> applies), that was not in force at the date of this Deed but which: <ul style="list-style-type: none"> <li>(i) had been communicated to Project Co at or prior to the date of this Deed;</li> <li>(ii) was contained or referred to in the Design Requirements, any Information Documents provided to Project Co prior to the date of this Deed or any Project Document;</li> <li>(iii) a party experienced and competent in the implementation of works similar to the Works or the provision of services similar to the Services would have, reasonably foreseen or anticipated;</li> <li>(iv) as at the date of this Deed, was within the public knowledge; or</li> <li>(v) is substantially the same as a Quality Standard in force prior to the date of this Deed;</li> </ul> </li> <li>(f) a change in any Quality Standards in respect of health and safety which does not result in either: <ul style="list-style-type: none"> <li>(i) a change to the requirements in the Output Specifications;</li> <li>(ii) unavoidable increased costs to meet the requirements in the Output Specifications; or</li> <li>(iii) capital expenditure in respect of the School Facilities or Verge Infrastructure;</li> </ul> </li> <li>(g) a new Quality Standard or a change in a Quality Standard in response to: <ul style="list-style-type: none"> <li>(i) the failure of Project Co or a Project Co Associate to comply with a Quality Standard, Law or Approval; or</li> <li>(ii) a Project Co Act or Omission;</li> </ul> </li> <li>(h) during the Development Phase for a Stage, a change in an Australian or New Zealand standard; or</li> <li>(i) during the Development Phase for a Stage, a change in the Disability (Access to Premises – Buildings) Standards (2010).</li> </ul>
<b>Change Notice</b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b>Change Notice Request</b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .

<b>Term</b>	<b>Meaning</b>
<b><i>Change Response</i></b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b><i>Child Related Work</i></b>	has the meaning given in the <i>Working with Children (Criminal Record Checking) Act 2004</i> (WA).
<b><i>Claim</i></b>	means any claim, action, demand, suit or proceeding (including by way of contribution or indemnity) made: <ul style="list-style-type: none"> <li>(a) in connection with the Project Documents, the Relevant Infrastructure, a Site, a Verge Works Site or the Project; or</li> <li>(b) at Law or for specific performance, restitution, payment of money (including damages) or any other form of relief.</li> </ul>
<b><i>Collateral Warranty</i></b>	means the collateral warranty given by the Harrisdale Stage 1 Contractor in favour of Project Co.
<b><i>Commercial Acceptance</i></b>	means: <ul style="list-style-type: none"> <li>(a) in respect of Verge Infrastructure for a Stage, when all the Commercial Acceptance Criteria of that Verge Infrastructure have been satisfied to the satisfaction of the State (acting reasonably);</li> <li>(b) in respect of a Stage (other than Harrisdale Stage 1 Works): <ul style="list-style-type: none"> <li>(i) when all of the Commercial Acceptance Criteria of that Stage have been satisfied to the satisfaction of the State (acting reasonably); or</li> <li>(ii) when the State issues a certificate of Commercial Acceptance under <b>Clause 20.7(g)</b>; and</li> </ul> </li> <li>(c) in respect of Harrisdale Stage 1 Works, when all the Commercial Acceptance Criteria which apply to the Project Co FF&amp;E for Harrisdale Stage 1 have been satisfied to the satisfaction of the State (acting reasonably).</li> </ul>
<b><i>Commercial Acceptance Criteria</i></b>	means: <ul style="list-style-type: none"> <li>(a) in respect of Verge Infrastructure for a Stage, those criteria that are required to be satisfied to achieve Commercial Acceptance of those Verge Infrastructure, as set out in <b>Clause 18.2</b>;</li> <li>(b) in respect of a Stage, (other than Harrisdale Stage 1 Works) those criteria that are required to be satisfied to achieve Commercial Acceptance of that Stage, as set out in <b>Schedule 11 (Commercial Acceptance Criteria)</b>; and</li> <li>(c) in respect of Harrisdale Stage 1 Works, those criteria that apply to the Project Co FF&amp;E for Harrisdale Stage 1 Works that are required to be satisfied to achieve Commercial Acceptance of Harrisdale Stage 1 Works, as set out in <b>Schedule 11 (Commercial Acceptance Criteria)</b>.</li> </ul>
<b><i>Commercial Acceptance Outstanding Item</i></b>	means: <ul style="list-style-type: none"> <li>(a) in respect of Verge Infrastructure for a Stage or a Stage other than in relation to which the State issues a certificate of Commercial Acceptance under <b>Clause 20.7(g)</b>, any act, matter, state of affairs or thing, including a minor Defect, that is required in accordance with this Deed to have been performed, achieved, undertaken, provided or completed by Project Co as at Commercial Acceptance which has not been so performed, achieved, undertaken, provided or completed by Project Co, unless the State has determined (acting reasonably), such act, matter, state of affairs or thing, including a minor Defect, (or the cumulative impact of multiple acts, matters, state of affairs or things) is likely to prevent a Stage, or the Verge Infrastructure for that</li> </ul>

Term	Meaning
	<p>Stage from complying with the FFP Warranty;</p> <p>(b) in respect of a Stage in relation to which the State issues a certificate of Commercial Acceptance under <b>Clause 20.7(g)</b>:</p> <p>(i) Major Outstanding Items; and</p> <p>(ii) any other thing which Project Co is required to perform, provide, achieve, undertake, complete or obtain to satisfy the Commercial Acceptance Criteria which has not been performed, achieved, undertaken, completed, provided or obtained.</p>
<b>Commercial Acceptance Plan</b>	means the Development Phase Plan of that name.
<b>Commercial Acceptance Report</b>	means the report required to be submitted by Project Co in accordance with <b>Schedule 11 (Commercial Acceptance Criteria)</b> , as amended and updated under this Deed.
<b>Commercial Acceptance Tests</b>	means all tests required to be carried out under this Deed to assist in determining whether Commercial Acceptance has been achieved including those tests set out in <b>Schedule 11 (Commercial Acceptance Criteria)</b> .
<b>Compensable Extension Event</b>	<p>means each of the following events:</p> <p>(a) breach by the State of any State Project Document;</p> <p>(b) any act or omission of:</p> <p>(i) the State in its capacity as counterparty to the State Project Documents; or</p> <p>(ii) any State Associate acting in connection with the Project, other than any such act or omission which:</p> <p>(iii) is authorised or permitted under a State Project Document; or</p> <p>(iv) is contemplated by <b>Clause 8.1</b> where the Authority is acting in accordance with its statutory powers;</p> <p>(c) cessation or suspension of any part of the Development Phase Activities (or a material change in the way the Development Phase Activities are carried out) because of:</p> <p>(i) a State government direction;</p> <p>(ii) an order of a court or tribunal of competent jurisdiction; or</p> <p>(iii) a requirement of Law,</p> <p>in connection with a Heritage Claim, to the extent that:</p> <p>(iv) the cumulative cessation or suspension; or</p> <p>(v) change in the way the Development Phase Activities are carried out,</p> <p>endures for more than 10 Business Days;</p> <p>(d) an event described in <b>Clause 12.5(h)</b>; or</p> <p>(e) <i>[Not disclosed]</i>.</p>
<b>Compensable Intervening Event</b>	<p>means each of the following events:</p> <p>(a) breach by the State of any State Project Document;</p> <p>(b) a reckless, unlawful or malicious act or omission of the State or a</p>

<b>Term</b>	<b>Meaning</b>
	State Associate acting in connection with the Project; or
	(c) cessation or suspension of any part of the Services (or a material change in the way the Services are performed) because of: <ul style="list-style-type: none"> <li>(i) a State government direction;</li> <li>(ii) an order of a court or tribunal of competent jurisdiction; or</li> <li>(iii) a requirement of Law, in relation to a Heritage Claim.</li> </ul>
<b>Compensation Date</b>	has the meaning given in <b>Schedule 7 (Termination Payments)</b> .
<b>Conditions Precedent</b>	means the conditions precedent set out in <b>Schedule 2 (Conditions Precedent)</b> .
<b>Condition Precedent Deadline</b>	means, in connection with a Condition Precedent, the date specified in item 11 of <b>Schedule 1 (Contract Particulars)</b> .
<b>Condition Review Date</b>	has the meaning given in <b>Clause 33.4(a)</b> .
<b>Confidential Information</b>	means: <ul style="list-style-type: none"> <li>(a) Project Documents;</li> <li>(b) Project Information;</li> <li>(c) information provided by: <ul style="list-style-type: none"> <li>(i) the State or any State Associates to Project Co or any Project Co Associates; or</li> <li>(ii) Project Co or any Project Co Associates to the State or any State Associates,</li> </ul> under this Deed whether prior to or after the date of this Deed; </li> <li>(d) Project Co Material;</li> <li>(e) Personal Information;</li> <li>(f) other information in connection with the Project which Project Co is required to keep confidential in complying with any applicable Law; and</li> <li>(g) any other information designated by the State to be confidential information.</li> </ul>
<b>Consortium</b>	means: <ul style="list-style-type: none"> <li>(a) each Project Entity;</li> <li>(b) the D&amp;C Subcontractor up to the date which is two years after the final occurring Date of Commercial Acceptance;</li> <li>(c) the Services Subcontractor;</li> <li>(d) the Parent Guarantor of the D&amp;C Subcontractor for the period until the date which is two years after the final occurring Date of Commercial Acceptance; and</li> <li>(e) the Parent Guarantor of the Services Subcontractor,</li> </ul> and <b>Consortium Member</b> means any of them.
<b>Construction Contracts Act</b>	means the <i>Construction Contracts Act 2004</i> (WA).

<b>Term</b>	<b>Meaning</b>
<b><i>Construction Payment</i></b>	means the payment to be made in accordance with clause 22A.1 by the State to Project Co of an amount equal to the corresponding Receivables Purchase Payment payable by Finance Co to the State under the Receivables Purchase Deed.
<b><i>Construction Payment Date</i></b>	means with respect to the Construction Payment, the date that the corresponding Receivables Purchase Payment payable by Finance Co to the State is required to be made under the Receivables Purchase Deed.
<b><i>Consumables</i></b>	means materials and goods required by Project Co to perform the Services which are used up or worn out by use rather than fair wear and tear.
<b><i>Consumer Price Index or CPI</i></b>	means the Perth All Groups Consumer Price Index published quarterly by the Australian Bureau of Statistics or, if section 2.2 of <b>Schedule 4 (Indexes)</b> applies, the Index determined in accordance with that section.
<b><i>Contaminated</i></b>	has the meaning given to that term in the <i>Contaminated Sites Act 2003</i> (WA).
<b><i>Contamination</i></b>	means any substance which causes land, water or a site to be Contaminated.
<b><i>Contamination Modification Event</i></b>	<p>means where Project Co is required to Remediate Contamination:</p> <p>(a) that is on, in, over, under or emanating from a Site, to the extent to which such Contamination has been caused or contributed to by the State or a State Associate after the date of this Deed;</p> <p>(b) that is on, in, over, under or emanating from a Verge Works Site, to the extent to which such Contamination has been caused or contributed to by a person other than the State, a State Associate, Project Co or a Project Co Associate;</p> <p>(c) that migrates onto a Site or Verge Works Site from land which is not a Site or Verge Works Site after the date of this Deed;</p> <p>(d) that is on, in, over or under land which is not a Site or Verge Works Site and is the source or potential source of Contamination migrating, or which may migrate, onto a Site or Verge Works Site, by a State direction given under <b>Clause 6.1(e)</b>; or</p> <p>(e) where Project Co can demonstrate to the State (acting reasonably) that Contamination has been placed on a Site by a party other than Project Co, a Project Co Associate, the State or a State Associate after the date of this Deed and prior to the relevant Site Access Date, provided that Project Co has given the State notice of the existence of any such Contamination:</p> <p style="padding-left: 40px;">(i) immediately upon becoming aware of its existence; and</p> <p style="padding-left: 40px;">(ii) in any event, prior to the relevant Site Access Date,</p> <p>other than the extent to which such Contamination:</p> <p>(f) was reasonably foreseeable as at the date of this Deed;</p> <p>(g) has been caused or contributed to or disturbed by a Project Co Act or Omission; or</p> <p>(h) would have been prevented or minimised by a prudent, experienced and competent contractor in the same circumstances using Best Industry Practices.</p>
<b><i>Contingency Transportable Unit Response</i></b>	has the meaning given to that term in <b>Clause 19.2(h)</b> .
<b><i>Contingency Transportable</i></b>	means the transportable buildings which are required to be sourced, located, transported, delivered, installed and commissioned to or at a School Facility



<b>Term</b>	<b>Meaning</b>
<b>Units</b>	under <b>Clause 19.2(h)</b> .
<b>Contract Management Team</b>	means the group referred to in <b>Clause 8.9(a)</b> .
<b>Control</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) control or influence of, or having the capacity to control or influence the composition of the board or partnership committee (or if the Entity is a trust, the appointment of a trustee of that trust), or decision making, directly or indirectly;</li> <li>(b) being in a position to cast, or control the casting of, more than 20% of the maximum number of votes that may be cast at a general meeting or similar (or if the Entity is a trust, a meeting of unit holders); or</li> <li>(c) having a relevant interest (as defined in section 608 of the Corporations Act, but as if a reference in that section to "securities" were a reference to Securities as defined in this Deed) in more than 20% of the Securities,</li> </ul> <p>of an Entity (whether alone or together with any associate). For the purposes of this definition, 'associate' or 'associates' has the meaning given in the Corporations Act and includes a person deemed to be an associate of a designated body (within the meaning of section 12 of the Corporations Act). <b>Controlled</b> has a corresponding meaning.</p>
<b>Controlling Entity</b>	means, in relation to a Change in Control of a Consortium Member, the Entity to whom Control will pass.
<b>Controlling Unit Holder</b>	<p>means, in respect of any trust or managed investment scheme, any Entity which:</p> <ul style="list-style-type: none"> <li>(a) Controls (within the meaning of section 50AA of the Corporations Act) the trust or managed investment scheme (either directly or through one or more intermediary Entities);</li> <li>(b) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a meeting of unit holders of the trust or managed investment scheme (either directly or through one or more intermediary Entities); or</li> <li>(c) holds more than one half of the units in the trust or managed investment scheme.</li> </ul>
<b>Core Hours</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) between 7:00 am and 5:00 pm for each School Facility on each Business Day during a School Term (or, for a specified School Facility and Academic Year, such other consecutive ten hour period on such a day as requested by the State upon giving Project Co at least 20 Business Days' notice prior to the commencement of the relevant Academic Year) on each day on which the relevant School Facility is required by the State for the delivery of School Activities (which includes, for the avoidance of doubt, each day on which teachers are required to be at the relevant School Facility, even if that day is a student free day); and</li> <li>(b) for a School Facility which includes out of hours school care the following hours on a Business Day, in respect of that part of the School Facility used to provide out of hours school care: <ul style="list-style-type: none"> <li>(i) during the School Term, from 7:00 am until the School Facility instructional hours (which will be determined by</li> </ul> </li> </ul>

<b>Term</b>	<b>Meaning</b>
	each Principal) commence;
	(ii) during the School Term, after the School Facility instructional hours (which will be determined by each Principal) finish, until 6:00 pm; and
	(iii) during school holidays between the hours of 8:00 am and 6:00 pm.
<b>Corporations Act</b>	means the <i>Corporations Act 2001</i> (Cth).
<b>Counterparty Details</b>	means, in connection with each person (other than the State and the Financiers) who is a party to a State Project Document: <ul style="list-style-type: none"> <li>(a) a certified copy of its constitution (or other constituent documents);</li> <li>(b) in the case of a trustee who enters into the State Project Documents on behalf of a trust, a certified copy of the relevant trust deed;</li> <li>(c) a certified copy of any powers of attorney under which the person executed each State Project Document; and</li> <li>(d) a certified copy of the extract of minutes evidencing the resolutions of its board of directors, authorising the entry into, delivery and observance of obligations in accordance with each State Project Document to which it is a party.</li> </ul>
<b>CPI Adjustment Date</b>	means 1 January 2016 and each subsequent anniversary until the Expiry Date.
<b>CPI Multiplier Annual</b>	has the meaning given to that term in <b>Schedule 4 (Indexes)</b> .
<b>Criminal Record Check</b>	means a criminal record issued by the Western Australian Police, or such other organisation from time to time authorised to issue such record checks, containing details of a person's criminal history.
<b>Critical Functional Unit</b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b>Critical Functional Unit Abatement</b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b>Critical Period</b>	has the meaning given in <b>Schedule 3 (Payment)</b> .
<b>D&amp;C Consent Deed</b>	means the document entitled "WA Schools PPP Project D&C Consent Deed" between the D&C Subcontractor, the Parent Guarantor of the D&C Subcontractor, Project Co, the Security Trustee and others.
<b>D&amp;C Direct Deed</b>	means the document entitled "WA Schools PPP Project D&C Direct Deed" between the State, Project Co, the D&C Subcontractor and the Parent Guarantor of the D&C Subcontractor.
<b>D&amp;C Subcontract</b>	means any agreement between Project Co and the D&C Subcontractor to carry out any Development Phase Activities and any other contract approved by the State between Project Co and a Subcontractor to carry out any Development Phase Activities.
<b>D&amp;C Subcontract Price</b>	means the contract price for the delivery of the Works identified as such in the D&C Subcontract.
<b>D&amp;C Subcontractor</b>	means, as at the date of this Deed, each of the parties listed as such in <b>Schedule 1 (Contract Particulars)</b> and any person who in addition or substitution is engaged by Project Co to carry out all, or substantially all, of the Development Phase Activities.
<b>Date for Commercial</b>	means, in respect of a Stage, the date specified as such for that Stage in

<b>Term</b>	<b>Meaning</b>
<b>Acceptance</b>	<b>Schedule 1 (Contract Particulars)</b> as adjusted (if at all) under this Deed.
<b>Date of Commercial Acceptance</b>	means, in respect of a Stage, the date determined under <b>Clause 20.9</b> .
<b>Date for Harrisdale Stage 1 Practical Completion</b>	has the meaning given to the term 'Date for Practical Completion' in the Harrisdale Stage 1 Contract.
<b>Date of Harrisdale Stage 1 Practical Completion</b>	means the date of practical completion of Harrisdale Stage 1, as certified by the Superintendent in the Harrisdale Stage 1 Certificate of Practical Completion provided to the State and Project Co pursuant to <b>Clause 12.3(c)</b> .
<b>Day 1 Uninsurable Risk</b>	means any: <ul style="list-style-type: none"> <li>(a) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military usurped power, military insurrection, military commotion, act of sabotage for military advantage or other like hostilities;</li> <li>(b) chemical, nuclear or biological Contamination;</li> <li>(c) ionising radiation or Contamination by radioactivity; and</li> <li>(d) any act of terrorism, except to the extent a declaration is made under the <i>Terrorism Insurance Act 2003</i> (Cth).</li> </ul>
<b>Deed</b>	means this Project deed and includes all schedules, exhibits, attachments and annexures to it.
<b>Default</b>	means: <ul style="list-style-type: none"> <li>(a) any failure by Project Co to comply with, any obligation (other than a Major Default or Default Termination Event) of Project Co under any State Project Document; or</li> <li>(b) any Service Failure which the State considers is not a minor Service Failure in accordance with <b>Clause 40.2(c)</b> or minor Service Failure which becomes a Default in accordance with <b>Clause 40.2(b)</b>.</li> </ul>
<b>Default Notice</b>	has the meaning given in <b>Clause 40.2(c)</b> .
<b>Default Rate</b>	means a rate equivalent to 2% per annum above the BBSY Rate.
<b>Default Termination Event</b>	means the occurrence of any of the following events: <ul style="list-style-type: none"> <li>(a) <b>(abandonment)</b>: Project Co wholly or substantially abandons the Works, Development Phase Activities or the Services in respect of a Stage;</li> <li>(b) <b>(Project Entity Insolvency Event)</b>: an Insolvency Event occurs in relation to a Project Entity;</li> <li>(c) <b>(Insolvency Event of Subcontractor)</b>: an Insolvency Event occurs in relation to: <ul style="list-style-type: none"> <li>(i) both of the parties listed as D&amp;C Subcontractor in <b>Schedule 1 (Contract Particulars)</b>;</li> <li>(ii) both of the Parent Guarantors listed in section 10, items 1 and 4 of <b>Schedule 1 (Contract Particulars)</b>;</li> <li>(iii) the Services Subcontractor; or</li> <li>(iv) the Services Subcontractor's Parent Guarantor,</li> </ul> <p>whether or not Project Co is then in breach of a State Project Document and those parties or that party as set out in <b>paragraphs</b></p> </li> </ul>

Term	Meaning
	<p>(i) to (iv) above are or is, not replaced within 90 days by a party or parties approved by the State taking into account the considerations listed in <b>Clause 48.5</b>.</p> <p>(d) <b>(assignment, transfer or disposal)</b>: a Project Entity assigns, transfers or otherwise disposes of any of its right, title and interest in or under any Project Document, the whole or any part of any Site, any Verge Works Site or the Relevant Infrastructure in breach of this Deed;</p> <p>(e) <b>(Share Capital Dealing)</b>: a Share Capital Dealing (which is not a Permitted Share Capital Dealing) occurs in respect of a Project Entity without the consent of the State in accordance with <b>Clause 48.4</b>;</p> <p>(f) <b>(unremedied Major Default)</b>: a Major Default is capable of remedy and Project Co fails to remedy the Major Default within the period set out in the Major Default Notice (as extended, if at all, in accordance with <b>Clause 40.5(b)</b>);</p> <p>(g) <b>(Major Default not capable of remedy)</b>: a Major Default is not capable of remedy and Project Co fails to diligently comply with any reasonable requirements of the State to overcome the consequences of the Major Default within the time stated in the Major Default Notice (as extended, if at all, under <b>Clause 40.5(b)</b>);</p> <p>(h) <b>(Service Failure)</b>: following [Not disclosed] Major Default Service Failures in any rolling [Not disclosed] period (whether or not they have been cured by Project Co) the point at which a further Major Default Notice is issued during that period in respect of a Major Default Service Failure;</p> <p>(i) <b>(Probity Event)</b>: Project Co fails to comply with <b>Clause 55.4(b)</b>, in relation to a Probity Event or <b>Clause 55.5(b)</b> in relation to an Unsuitable Third Party; or</p> <p>(j) <b>(deemed Default Termination Event)</b>: any other event which is deemed to be a Default Termination Event under this Deed.</p>
<b>Defect</b>	<p>means:</p> <p>(a) any component of the Works, School Facilities or Verge Infrastructure which does not comply with the requirements of this Deed;</p> <p>(b) without limiting <b>paragraph (a)</b>, any component of the Works, School Facilities or Verge Infrastructure which is not Fit For Purpose; or</p> <p>(c) any defect, shrinkage, expansion, cracking, fault or omission in the Works, School Facilities or Verge Infrastructure (excluding any normal shrinkage or expansion of materials unless that shrinkage or expansion would have been accommodated in accordance with Best Industry Practices).</p>
<b>Dental Therapy Centre Facility</b>	<p>means for a School Facility, the dental therapy centre facility located at, and forming part of, that School Facility at which dental services, health promotion activities and oral health information are provided.</p>
<b>Dental Therapy Centre Hours</b>	<p>means between 8:15 am and 4:30 pm on each Business Day (or such other equivalent period as requested by the State upon giving Project Co at least one Month's notice prior to the commencement of any Academic Year for a School Facility).</p>
<b>Department</b>	<p>means the Department of Education of Western Australia.</p>
<b>Design</b>	<p>means all deliverables listed under the relevant Design Phase Design Deliverables Tables in <b>Schedule 9 (Design Development)</b> in respect of the</p>

<b>Term</b>	<b>Meaning</b>
<b><i>Deliverables</i></b>	design of each of the Stages (including all draft and final design standards, design reports, durability reports, drawings, specifications, manuals, designs, models, samples, patterns and calculations) in computer readable (native format) and written forms, or stored by any other means that Project Co or any Project Co Associates creates, or are required to, or must necessarily, create and submit to the State during the relevant Design Phase in accordance with the terms of this Deed, or otherwise proposed by Project Co to be provided as Design Deliverables for the relevant Design Phase, as approved by the State.
<b><i>Design Deliverables Tables</i></b>	has the meaning given to that term in <b>Schedule 9 (Design Development)</b> .
<b><i>Design Departure</i></b>	means any element of the design of each of the Stages or the Design Deliverables which deviates from, or does not meet or satisfy the Design Requirements, as approved by the State during the Development Phase in accordance with <b>Clause 13.3</b> .
<b><i>Design Manager</i></b>	means the person identified as such in <b>Schedule 1 (Contract Particulars)</b> subject to replacement, termination or delegation in accordance with <b>Clause 8.5</b> .
<b><i>Design Development Process</i></b>	means the process for the development of the design of each of the Stages to be implemented in accordance with the <b>Schedule 9 (Design Development)</b> .
<b><i>Design Phase</i></b>	has the meaning given to that term in <b>Schedule 9 (Design Development)</b> .
<b><i>Design Requirements</i></b>	means, subject to <b>Clause 2.2</b> , requirements for the design of the School Facilities and Verge Infrastructure set out in: <ul style="list-style-type: none"> <li>(a) <b>Schedule 26 (Design Brief)</b>;</li> <li>(b) the Initial Design Deliverables; and</li> <li>(c) the remainder of this Deed.</li> </ul>
<b><i>Designated Investor</i></b>	means an investor described as such in <b>Schedule 1 (Contract Particulars)</b> .
<b><i>Developed IP</i></b>	means any or all Project Co Material created, developed or produced (whether before, on or after the date of this Deed) by or on behalf of Project Co or any Project Co Associates in the course of carrying out the Project Activities, including: <ul style="list-style-type: none"> <li>(a) developments, modifications, improvements or additions to or adaptations, customisations or enhancements of or deletions or derivatives from Project Co Background IP, that are developed as part of the Project Activities, or for the purposes of the Project Activities or the Project (regardless of whether developed prior to the date of this Deed); and</li> <li>(b) all research conducted by Project Co and any Project Co Associate in relation to the Project or any part of it.</li> </ul>
<b><i>Development Phase</i></b>	in respect of a Stage, means the period beginning on the date of this Deed and ending on the Date of Commercial Acceptance for that Stage.
<b><i>Development Phase Activities</i></b>	means: <ul style="list-style-type: none"> <li>(a) all tasks and activities which Project Co is, or may be, required to carry out or do in connection with the Works; and</li> <li>(b) all other tasks and activities that Project Co is required to do in accordance with the State Project Documents,</li> </ul> during each Development Phase.

<b>Term</b>	<b>Meaning</b>
<b><i>Development Phase Insurances</i></b>	means the Insurances referred to in Part A of <b>Schedule 13 (Insurance)</b> .
<b><i>Development Phase Licence</i></b>	means the licence granted under <b>Clause 16.1</b> .
<b><i>Development Phase Plans</i></b>	means each of the plans to be prepared and updated by Project Co during the Development Phases as described in <b>Schedule 24 (Development Phase Plans and Reports)</b> .
<b><i>Development Phase Program</i></b>	means the program of the Development Phase Activities containing the details required by <b>Schedule 10 (Programming Requirements)</b> as prepared and updated in accordance with <b>Clause 11.2</b> .
<b><i>Development Phase Reports</i></b>	means each of the reports to be prepared by Project Co during the Development Phase as described in <b>Schedule 24 (Development Phase Plans and Reports)</b> .
<b><i>Director General</i></b>	means the Director General, or if no Director General is appointed, the Acting Director General, to the Department.
<b><i>Direct Deed</i></b>	means: <ul style="list-style-type: none"> <li>(a) the D&amp;C Direct Deed;</li> <li>(b) the Services Subcontractor Direct Deed; and</li> <li>(c) any other Subcontractor direct deed required by the State under this Deed.</li> </ul>
<b><i>Discharge</i></b>	means any discharge of matter (whether liquid, solid, gaseous or radioactive) or any emission of noise, odour or electromagnetic radiation onto or from a Site or Verge Works Site whether arising before or after the date of this Deed.
<b><i>Disciplinary Event</i></b>	means misconduct or a breach of discipline by a Relevant Person before, on or after the date of this Deed, including unlawful behaviour, and including any of the following behaviour at or in the vicinity of a Site or School Facility: <ul style="list-style-type: none"> <li>(a) behaviour causing or likely to cause disruption to School Activities;</li> <li>(b) using threatening or insulting language;</li> <li>(c) using threatening or violent behaviour;</li> <li>(d) behaviour adversely affecting the safety and welfare of persons;</li> <li>(e) causing damage to or defacing the School Facility;</li> <li>(f) causing damage to any property that is located at the School Facility;</li> <li>(g) smoking;</li> <li>(h) lighting fires or having explosives;</li> <li>(i) having animals;</li> <li>(j) having intoxicating liquor;</li> <li>(k) driving vehicles off roadways and parking areas, other than as necessary for the purposes of carrying out any of the Project Activities; and</li> <li>(l) exceeding speed limits, disobeying traffic signs, or otherwise driving in a dangerous or inconsiderate manner.</li> </ul>
<b><i>Dispute</i></b>	has the meaning given in <b>Clause 43</b> .
<b><i>Distribution</i></b>	means any: <ul style="list-style-type: none"> <li>(a) dividend, return of capital, or other distribution or payment (in cash or in kind) in connection with the share capital or units of a Group</li> </ul>

Term	Meaning
	<p>Member or shareholder loans (or other loans in the nature of equity funding) to, or for the benefit of, a Group Member;</p> <p>(b) release by a Group Member of any actual or contingent Liability of Project Co or any Equity Investor (or any Related Body Corporate or Related Trust Entity of an Equity Investor); or</p> <p>(c) payment, loan or transfer of any assets or provision of any other benefit by a Group Member to any Equity Investor (or any Related Body Corporate or Related Trust Entity of any Equity Investor) which is not on arm's length commercial terms.</p>
<b>Easements</b>	means those easements, restrictions on use, covenants, agreements, or other similar arrangements together with any leases, sub-leases, licences, rights or privileges.
<b>Education Policy</b>	<p>means any policy, guideline, standard, practice or procedure of the Department, the State or a Principal in connection with the construction, operation, management and maintenance of educational facilities (including those which are listed in <b>Schedule 26 (Design Brief)</b>) which are publicly available or available to Project Co or its Subcontractors or which are notified to Project Co and which directly or indirectly affects the performance and observance by Project Co of its obligations under this Deed, which:</p> <p>(a) is in force as at the date of this Deed; or</p> <p>(b) comes into force at any time after the date of this Deed,</p> <p>unless the State gives notice to Project Co directing that the relevant matter does not constitute an education policy for the purpose of this Deed.</p>
<b>Engineering Services</b>	has the meaning given to that term in Part H (Glossary) of <b>Schedule 26 (Design Brief)</b> .
<b>Entity</b>	has the meaning given in section 64A of the Corporations Act, but is also deemed to include a joint venture within the meaning of Australian Accounting Standard 131.
<b>Environment</b>	has the same meaning as under the <i>Environmental Protection Act 1986</i> (WA).
<b>Environmental Event</b>	means any event occurring before or after the date of this Deed arising in connection with the occupation, use or operation of, or activities conducted on, a Site or Verge Works Site which has resulted or results in any actual or potential adverse impact on the Environment.
<b>Environmental Laws</b>	means all Laws concerning Environmental Matters including the <i>Environmental Protection Act 1986</i> (WA), the <i>Rights in Water and Irrigation Act 1914</i> (WA), the <i>Contaminated Sites Act 2003</i> (WA), the <i>Dangerous Goods Safety Act 2004</i> (WA) and the <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth).
<b>Environmental Management Plan</b>	means the Development Phase Plan of that name.
<b>Environmental Matter</b>	means any Contamination, Discharge or Environmental Event, any matter which concerns or impacts on the Environment, the protection of the Environment, the prevention and control of any Contamination, Discharge or Environmental Event and the regulation of any matter which concerns or impacts on the Environment.
<b>Environmental Notice</b>	means a notice, order or direction given, or purporting to have been given, under any Environmental Law or Environmental Requirement in respect of a Site or a Verge Works Site, activities conducted at a Site or a Verge Works Site or any Environmental Matter concerning a Site or a Verge Works Site.
<b>Environmental</b>	means all:

<b>Term</b>	<b>Meaning</b>
<b>Requirements</b>	<p>(a) conditions and requirements of any Approval; and</p> <p>(b) requirements in the Design Requirements and Services Requirements,</p> <p>relating to the environmental impacts of the Project Activities.</p>
<b>Equity</b>	means the equity capital to be or which has been contributed to Project Co by way of subscription for units in EduWest Project Trust as set out in the Financial Model.
<b>Equity Documents</b>	means each of the documents listed in <b>Schedule 16 (Equity Documents)</b> .
<b>Equity Investor</b>	<p>means:</p> <p>(a) a person identified in <b>Schedule 17 (Ownership)</b> (subject to any replacement in accordance with <b>Clause 48</b>);</p> <p>(b) each other person who has provided or has agreed to provide:</p> <p>(i) equity funding at the times and in the amounts set out in the Financial Model (whether by way of subscription for units or shares or provision of unitholder or shareholder loans); and</p> <p>(ii) any other equity, financial arrangement, security or option issued by or provided to a Group Member which does not constitute a Refinancing; or</p> <p>(c) any person who replaces or is added, in accordance with <b>Clause 48</b>, to the persons referred to in <b>paragraph (a) or (b)</b> of this definition.</p>
<b>Equity IRR</b>	means the nominal pre-tax blended internal rate of return to Equity expressed as a percentage as set out in the Financial Close Financial Model or in the Financial Model (as the case may be).
<b>Estate Services Plan</b>	means the Operating Phase Lifecycle Maintenance Plan, the Annual Services Plan and the Monthly Services Plan.
<b>Excluded Student</b>	means any student of a School Facility who has been permanently or temporarily excluded or suspended from a School Facility in accordance with the <i>School Education Act 1999 (WA)</i> .
<b>Expiry Date</b>	has the meaning given in <b>Clause 4.2</b> .
<b>Explanation</b>	has the meaning given in <b>Clause 19.2(d)(i)</b> .
<b>Extension Event</b>	<p>means, in respect of a Stage, any of the following events occurring between Financial Close and Commercial Acceptance of that Stage:</p> <p>(a) a Compensable Extension Event;</p> <p>(b) a Force Majeure Event; or</p> <p>(c) the State is required by Law to discharge a statutory power or statutory duty in emergency circumstances and the exercise of such power requires the State to take control of all or substantially all of the Works.</p>
<b>Facility Agreement</b>	means the document entitled "Syndicated Facility Agreement – WA Schools PPP" dated on or about the date of this Deed between, amongst others, Project Co, Finance Co, the Agent and the Security Trustee.
<b>FF&amp;E</b>	<p>means Project Co FF&amp;E and State FF&amp;E:</p> <p>(a) as amended in accordance with this Deed; or</p> <p>(b) required to ensure that each School Facility will meet the FFP</p>



Term	Meaning
	<p>Warranty,</p> <p>and includes any other equipment procured as a FF&amp;E Modification, but excludes all Plant and Temporary Equipment.</p>
<b>FF&amp;E Modification</b>	<p>in the case of a Transportable Unit, means procurement of Project Co FF&amp;E for that Transportable Unit, and otherwise means:</p> <ul style="list-style-type: none"> <li>(a) a change in the quantity of, specification of, or a change to, an item of FF&amp;E;</li> <li>(b) the addition of a new item of FF&amp;E; or</li> <li>(c) the deletion of an item of FF&amp;E,</li> </ul> <p>from that specified in or inferred from <b>Schedule 20 (FF&amp;E)</b> (as directed by the State or otherwise in accordance with <b>Clause 15.3</b>), save where:</p> <ul style="list-style-type: none"> <li>(d) the changed FF&amp;E has an equivalent Whole of Life Cost to the relevant item of FF&amp;E specified in <b>Schedule 20 (FF&amp;E)</b>;</li> <li>(e) the change is required to ensure the design of a School Facility is consistent with the Design Requirements;</li> <li>(f) the change is a consequence of a Project Specific Change in Law, a General Change in Law or a Change in Quality Standard;</li> <li>(g) for the purposes of <b>Clause 15</b> only, a Minor Modification;</li> <li>(h) the procurement of Project Co FF&amp;E: <ul style="list-style-type: none"> <li>(i) during the Operating Phase in accordance with <b>Clause 27</b>; or</li> <li>(ii) as part of a Modification;</li> </ul> </li> <li>(i) any change to <b>Schedule 20 (FF&amp;E)</b> made: <ul style="list-style-type: none"> <li>(i) to address any comments provided by the State or the Independent Certifier with respect to the Project Co FF&amp;E made in accordance with <b>Schedule 12 (Review Procedures)</b>; or</li> <li>(ii) in order for Project Co to satisfy the FFP Warranty; or</li> </ul> </li> <li>(j) a direction to Project Co from the State to move items of FF&amp;E within School Facilities.</li> </ul>
<b>FF&amp;E Modification Notice</b>	means a notice given in respect of a FF&E Modification under <b>Clause 15.3</b> .
<b>FF&amp;E Selection Notice</b>	<p>means a notice which:</p> <ul style="list-style-type: none"> <li>(a) reflects the outcome of any consultation or tender process for an item (or group of items) of Project Co FF&amp;E conducted by Project Co in accordance with <b>Clause 15</b>; and</li> <li>(b) contains the information required under <b>Clause 15</b> in respect of the relevant item (or group of items) of Project Co FF&amp;E.</li> </ul>
<b>FF&amp;E Specification</b>	<p>means, for an item of FF&amp;E:</p> <ul style="list-style-type: none"> <li>(a) the make, model, reference number and, if required, the manufacturer of the item;</li> <li>(b) the relevant technical specifications for the item;</li> <li>(c) details of the functionality of the item;</li> <li>(d) the quantity of the item;</li> </ul>

<b>Term</b>	<b>Meaning</b>
	<p>(e) details of the proposed location of the item within the relevant School Facility including, if applicable, an elevation drawing (at a scale of 1:100) of the item in its proposed location within the relevant School Facility;</p> <p>(f) if the item requires Consumables, details of such Consumables and the estimated costs associated with such Consumables; and</p> <p>(g) if applicable, the details of any required interconnectivity with:</p> <p style="padding-left: 40px;">(i) the relevant Stage; and</p> <p style="padding-left: 40px;">(ii) other systems or items of equipment.</p>
<b><i>FFP Warranty</i></b>	means the Fit For Purpose warranty given by Project Co in <b>Clause 5.4</b> .
<b><i>Final Expiry Date</i></b>	means 31 December 2047.
<b><i>Final Refurbishment Works</i></b>	has the meaning given in <b>Clause 33.4(b)(i)</b> .
<b><i>Finance Co</i></b>	means EduWest Finance Company Pty Ltd ACN 608 038 320.
<b><i>Finance Direct Deed</i></b>	means the document entitled "WA Schools PPP Project Finance Direct Deed" between the State, Project Co, the Agent and the Security Trustee on behalf of the Financiers.
<b><i>Finance Documents</i></b>	means: <p>(a) each of the documents listed in <b>Schedule 15 (Finance Documents)</b>;</p> <p>(b) any document entered into in relation to a Refinancing of the Actual Debt approved by the State under <b>Clause 37</b>; and</p> <p>(c) any other document which the parties agree is a Finance Document for the purposes of this Deed.</p>
<b><i>Finance HoldCo</i></b>	means EduWest Finance Holding Company Pty Ltd ACN 608 037 930.
<b><i>Financial Close</i></b>	means when the last Condition Precedent to be satisfied (or waived in accordance with <b>Clause 3.3</b> ) has been satisfied (or waived in accordance with <b>Clause 3.3</b> ) as set out in a notice given by the State to Project Co in accordance with <b>Clause 3.2(d)</b> .
<b><i>Financial Close Adjustment Protocol</i></b>	means the protocol to be applied at Financial Close to update the Base Case Financial Model and make amendments to the Project Documents as set out in <b>Annexure F (Financial Close Adjustment Protocol)</b> .
<b><i>Financial Close Financial Model</i></b>	means the Base Case Financial Model as updated and audited in accordance with the Financial Close Adjustment Protocol.
<b><i>Financial Indebtedness</i></b>	means any indebtedness, present or future, actual or contingent, in connection with moneys borrowed or raised, or any financial accommodation whatsoever, including under the Finance Documents, or in connection with any bill, acceptance, guarantee, discounting arrangement, redeemable share or stock, finance or capital lease, hire purchase arrangement, the deferred purchase cost of any asset or service, or any obligation to deliver goods or provide services paid for in advance by any financier or in connection with any financing transaction.
<b><i>Financial Model</i></b>	means the Financial Close Financial Model updated from time to time in accordance with <b>Clause 49</b> .
<b><i>Financial Year</i></b>	means each 12 Month period commencing on 1 July and ending on the next 30 June.
<b><i>Financiers</i></b>	means the providers of any financing facilities, financial arrangements or

Term	Meaning
<i>Financing Delay Costs</i>	accommodation to a Group Member under the Finance Documents from time to time and may, where the context permits, include any agent or trustee of such Financiers.
<i>Fit For Purpose</i>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
	means:
	(a) for a Stage, the Stage (other than Group 2 FF&E for that Stage) and all Verge Infrastructure for that Stage at all times at and from the Date of Commercial Acceptance for that Stage;
	(b) for the Group 2 FF&E for a Stage, the Group 2 FF&E for that Stage as at the Date of Commercial Acceptance only; and
	(c) for Harrisdale Stage 1, that Harrisdale Stage 1 at all times at and from the Date of Harrisdale Stage 1 Practical Completion,
	is:
	(d) fit for its intended purposes, objectives, functions, uses and requirements as specified in, or reasonably inferred from the Design Requirements and the Services Requirements;
	(e) fit for the purpose of enabling Project Co to provide the Services in accordance with the Services Requirements;
	(f) constructed and maintained so that it allows the School Activities to be performed, without impacting, impairing or adversely affecting the performance of the School Activities in a safe, efficient and effective manner; and
	(g) in accordance with all Laws and Quality Standards.
<i>Fixed Force Majeure Costs</i>	means the sum of those fixed costs:
	(a) incurred by the Services Subcontractor in respect of its Key People;
	(b) incurred by the Services Subcontractor excluding Consumables, equipment, and labour capable of being demobilised or used at a different site, third party accounting, audit and legal costs, overheads and margins; and
	(c) incurred by Project Co with respect to Insurance premiums, and which are:
	(d) incurred directly by the Services Subcontractor or Project Co during the Term in meeting its obligations under this Deed and directly attributable to the Project which are not reasonably capable of being deferred or avoided by the Services Subcontractor or Project Co; and
	(e) notified to the State.
<i>Force Majeure Event</i>	means, in respect of a Stage, each of the following events:
	(a) earthquake, tropical cyclone, natural disaster, landslide, seismic activity, tsunami or mudslide;
	(b) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military usurped power, military insurrection, military commotion, act of sabotage for military advantage or other like hostilities;
	(c) chemical, nuclear or biological Contamination;
	(d) ionising radiation or Contamination by radioactivity;

Term	Meaning
	(e) any act of terrorism, except to the extent a declaration is made under the <i>Terrorism Insurance Act 2003 (Cth)</i>
	(f) fire, flood or explosion caused by events referred to in <b>paragraph (a)</b> or <b>(b)</b> ;
	(g) epidemics or pandemics to the extent that Project Co cannot, in compliance with Law: <ul style="list-style-type: none"> <li>(i) construct a School Facility or any Verge Infrastructure during the Development Phase for that Stage; or</li> <li>(ii) perform the Services for a Stage during the Operating Phase for that Stage; or</li> </ul>
	(h) during the Operating Phase for a Stage, a Utility Interruption that occurs upstream of the point of connection of a Utility for the Site of that Stage to the Utility provider's network, which: <ul style="list-style-type: none"> <li>(i) save in respect of <b>paragraph (h)</b>, occurs at or directly in the vicinity of the Site or Verge Works Site of that Stage;</li> <li>(j) prevents Project Co from carrying out all or a material part of the Project Activities with respect to the Stage; and</li> <li>(k) could not have been prevented, avoided, remedied or overcome by Project Co or a Project Co Associate taking those steps which a prudent, experienced and competent designer, constructor, or operator of facilities similar to the School Facilities providing services similar to the Services would have taken using Best Industry Practices (including the expenditure of reasonable sums of money).</li> </ul>
<b><i>Force Majeure Termination Event</i></b>	for a Stage means a Force Majeure Event which prevents either party from carrying out all or substantially all of the Project Activities for that Stage for a continuous period exceeding six Months or any other event expressly deemed to be a Force Majeure Termination Event in this Deed.
<b><i>For Construction Documentation</i></b>	has the meaning given in <b>Schedule 9 (Design Documentation)</b> .
<b><i>For Fabrication Documentation</i></b>	has the meaning given in <b>Schedule 9 (Design Documentation)</b> .
<b><i>Functional Unit</i></b>	has the meaning given to that term in Part H (Glossary) of <b>Schedule 26 (Design Brief)</b> .
<b><i>General Change in Law</i></b>	means a Change in Law that is not a Project Specific Change in Law.
<b><i>Group</i></b>	means each Project Entity, the Project Trust, each Holding Entity and any wholly owned subsidiary of any of them, and <b>Group Member</b> means any of them.
<b><i>Group 1 FF&amp;E</i></b>	means any furniture, fittings or equipment identified as 'Group 1 FF&E' in <b>Schedule 20 (FF&amp;E)</b> , being furniture, fittings or equipment (including Group 1 FF&E in respect of Harrisdale Stage 1) which is to be provided and installed or located (as applicable, depending on whether the relevant FF&E is loose or fixed) by Project Co in accordance with the obligations of this Deed and described in the Design Requirements and to be maintained by Project Co for the duration of the Operating Phase in accordance with this Deed.
<b><i>Group 2 FF&amp;E</i></b>	means any furniture, fittings or equipment identified as 'Group 2 FF&E' in <b>Schedule 20 (FF&amp;E)</b> , being furniture, fittings or equipment (including Group 2 FF&E in respect of Harrisdale Stage 1) which is to be provided and installed or located (as applicable, depending on whether the relevant FF&E is loose or

Term	Meaning
<b>Group 3 FF&amp;E</b>	<p>fixed) by Project Co in accordance with the obligations of this Deed and described in the Design Requirements and to be maintained by the State from the Date of Commercial Acceptance.</p> <p>means any furniture, fittings or equipment identified as 'Group 3 FF&amp;E' in <b>Schedule 20 (FF&amp;E)</b>, being furniture, fittings or equipment which is to be provided by the State and described in the Design Requirements, which is to be installed or located (as applicable, depending on whether the relevant FF&amp;E is loose or fixed) by the State (as set out in the Design Requirements) and maintained by the State.</p>
<b>GST</b>	has the meaning given in the GST Act and where appropriate includes Notional GST.
<b>GST Act</b>	means the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
<b>GST Law</b>	has the meaning given in the GST Act.
<b>Handover</b>	means the stage when Project Co has done everything that this Deed requires to enable Project Co to handover the Relevant Infrastructure for a Stage in the Handover Condition.
<b>Handover Bond</b>	means a Performance Bond provided by Project Co in favour of the State in accordance with <b>Clause 33.7(b)(ii)</b> .
<b>Handover Condition</b>	<p>means, if Handover of the Relevant Infrastructure for a Stage is to occur:</p> <ul style="list-style-type: none"> <li data-bbox="469 954 1398 1104">(a) prior to Commercial Acceptance of that Stage, the condition that the Works and the Sites should be in if Project Co had complied with all of its obligations in connection with the Works and the Sites under this Deed having regard to the time and circumstances of the termination;</li> <li data-bbox="469 1122 1398 1272">(b) between the Date of Commercial Acceptance for that Stage and the date which is four years before the Final Expiry Date the condition that the Stage should be in if Project Co had complied with all of its obligations in connection with this Deed up to the time of termination having regard to the circumstances of the termination; or</li> <li data-bbox="469 1290 1398 2038">(c) any time after the date that is four years prior to the Final Expiry Date, the condition the Stage would be in: <ul style="list-style-type: none"> <li data-bbox="584 1368 1398 1518">(i) had all the scheduled and unscheduled maintenance (other than Lifecycle Works scheduled to occur after the relevant time) of the Relevant Infrastructure for that Stage been completed as at the Expiry Date in accordance with this Deed;</li> <li data-bbox="584 1536 1398 1776">(ii) such that when operated and maintained in accordance with comparable requirements to those in this Deed, the relevant components of the Relevant Infrastructure for that Stage as specified in Appendix I4 (Design Life) of <b>Schedule 26 (Design Brief)</b> can reasonably be expected to continue to meet their design lives as specified in Appendix I4 (Design Life) of <b>Schedule 26 (Design Brief)</b>; and</li> <li data-bbox="584 1794 1398 2038">(iii) such that, when operated and maintained in accordance with comparable requirements to those in this Deed, the relevant components of the Relevant Infrastructure for that Stage to which no design life is allocated in Appendix I4 (Design Life) of <b>Schedule 26 (Design Brief)</b>, can reasonably be expected to continue to meet the Services Requirements for five years after the Expiry Date (or, in relation to FF&amp;E, such lesser period consistent with</li> </ul> </li> </ul>

Term	Meaning
	remaining life specified in the Operating Phase Lifecycle Maintenance Plan) without any major maintenance or refurbishment works, other than routine maintenance that Project Co would have had to carry out under this Deed if the expiry of this Deed was in fact five years later than the Expiry Date.
<i><b>Handover Escrow Account</b></i>	has the meaning given in <b>Clause 33.7(b)(i)</b> .
<i><b>Handover Package</b></i>	means the package so named in <b>Schedule 27 (Services Specifications)</b> .
<i><b>Handover Reviewer</b></i>	means a person with suitable expertise and experience appointed as the independent reviewer for Handover in accordance with <b>Clause 33.3</b> .
<i><b>Harrisdale Stage 1</b></i>	means the first Stage of the Harrisdale Secondary School to be designed, constructed, completed and handed over in accordance with the Harrisdale Stage 1 Contract.
<i><b>Harrisdale Stage 1 Certificate of Practical Completion</b></i>	means the certificate of practical completion issued by the Superintendent to the State and the Harrisdale Stage 1 Contractor in accordance with the Harrisdale Stage 1 Contract.
<i><b>Harrisdale Stage 1 Contract</b></i>	means the contract between the State and the Harrisdale Stage 1 Contractor dated 1 July 2015, an unpriced version of which is contained in <b>Schedule 6 (Information Documents)</b> .
<i><b>Harrisdale Stage 1 Contractor</b></i>	means, as at the date of this Deed, the party listed as such in <b>Schedule 1 (Contract Particulars)</b> and any person who in addition or substitution is engaged by the State to carry out all, or substantially all, of the Harrisdale Stage 1 Works.
<i><b>Harrisdale Stage 1 Defect</b></i>	has the meaning given to the term 'Defect' in the Harrisdale Stage 1 Contract, which was caused or contributed to by the Harrisdale Stage 1 Contractor.
<i><b>Harrisdale Stage 1 Works</b></i>	means all works which the Harrisdale Stage 1 Contractor must construct, complete and hand over to the State under the Harrisdale Stage 1 Contract and all FF&E in respect of Harrisdale Stage 1.
<i><b>Harrisdale Stage 1 Works Variation</b></i>	has the meaning given to the term 'variation' in the Harrisdale Stage 1 Contract.
<i><b>Health and Safety Management Plan</b></i>	means the Development Phase Plan of that name.
<i><b>Heritage Claim</b></i>	means a Claim made in accordance with any Law in respect of native title or for the protection, preservation or removal of any Artefact.
<i><b>Holding Entity</b></i>	means: <ul style="list-style-type: none"> <li>(a) in the case of Project Co and Project Trust – Project HoldCo and Project Holding Trust (and, following a Share Capital Dealing, any company, trust or other Entity which directly holds any issued S18 Securities in Project Co or Project Trust); and</li> <li>(b) in the case of Finance Co – Finance HoldCo (and following a Share Capital Dealing, any company, trust or other Entity which directly holds any issued S18 Securities in Finance Co).</li> </ul>
<i><b>Incident Failure</b></i>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<i><b>Incident Failure Abatements</b></i>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<i><b>Increased State Risk Allocation</b></i>	means any increase in the risks for the State in relation to the Project as a result of entry into the Securitised Licence Structure.

<b>Term</b>	<b>Meaning</b>
<b><i>Independent Certifier</i></b>	means the entity appointed as the Independent Certifier under the Independent Certifier Deed of Appointment, as replaced (if at all) under <b>Clause 8.12(a)</b> .
<b><i>Independent Certifier Deed of Appointment</i></b>	means the document entitled "WA Schools PPP Project Independent Certifier Deed of Appointment" between the State, Project Co and the Independent Certifier.
<b><i>Index</i></b>	means each index set out in <b>Schedule 4 (Indexes)</b> .
<b><i>Indexed</i></b>	means the relevant amount is to be indexed in accordance with <b>Schedule 4 (Indexes)</b> .
<b><i>Indirect or Consequential Loss</i></b>	<p>means any of the following:</p> <ul style="list-style-type: none"> <li>(a) direct expenditure of time by managers and employees consequential upon any Liability;</li> <li>(b) loss of opportunity;</li> <li>(c) loss of anticipated savings;</li> <li>(d) loss of profit, revenue or business;</li> <li>(e) damage to reputation; and</li> <li>(f) the cost of capital or other financing costs,</li> </ul> <p>but excludes any Liability arising from, or in connection with:</p> <ul style="list-style-type: none"> <li>(g) any statutory fine arising from any breach of Law by the other party;</li> <li>(h) any loss or damage to third party property or personal injury to, sickness, disease or death of a person caused or contributed to by a party;</li> <li>(i) fraud, wilful misconduct, illegal or unlawful acts or omissions of a party;</li> <li>(j) the abandonment of the Project Activities by Project Co;</li> <li>(k) matters that cannot be excluded at Law;</li> <li>(l) a loss, cost or other amount which is recovered by Project Co or any Project Co Associate under any Insurance policy or would have recovered if Project Co or any Project Co Associate had complied with the terms of the relevant Insurance policy, this Deed and the relevant Project Document (as the case may be) and had taken all reasonable steps to pursue such recovery: <ul style="list-style-type: none"> <li>(i) under an Insurance policy; or</li> <li>(ii) pursuant to an indemnity under any Project Document.</li> </ul> </li> <li>(m) payment of any excess or deductible under any Insurance;</li> <li>(n) any Day 1 Uninsurable Risk or any Uninsurable Risk for which the State indemnifies Project Co in accordance with <b>Clause 39.13</b>;</li> <li>(o) any reduction to any Quarterly Service Payment under and in accordance with <b>Schedule 3 (Payment Schedule)</b>;</li> <li>(p) any Non-Usage Rebate or Abatement Amount as set out in <b>Schedule 3 (Payment Schedule)</b>;</li> <li>(q) a breach of confidentiality by Project Co; or</li> <li>(r) an infringement of any Intellectual Property Rights by Project Co.</li> </ul>
<b><i>Information</i></b>	means the documents contained in <b>Schedule 6 (Information Documents)</b> .

<b>Term</b>	<b>Meaning</b>
<b>Documents</b>	
<b>Initial Design Deliverables</b>	means the Design Deliverables set out in <b>Annexure A</b> .
<b>Initial Development Phase Plans</b>	means those plans for the Development Phase for each Stage, which are contained in <b>Annexure C</b> .
<b>Initial Development Phase Program</b>	means the program for the Development Phase Activities prepared by Project Co, which is contained in <b>Annexure D</b> .
<b>Initial Operating Phase Management Plans</b>	means those plans for the Operating Phase, which are contained in <b>Annexure E</b> .
<b>Initial Services Deliverables</b>	means Project Co's proposal for delivery of the Services as set out in <b>Annexure B</b> .
<b>Input Tax Credit</b>	has the meaning given by the GST Law.
<b>Insolvency Event</b>	means: <ul style="list-style-type: none"> <li>(a) in relation to a corporation, the occurrence of any of the following events: <ul style="list-style-type: none"> <li>(i) <b>(informs creditors)</b>: that corporation informs its creditors generally that it is insolvent;</li> <li>(ii) <b>(receiver)</b>: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in connection with any of the assets of that corporation;</li> <li>(iii) <b>(execution)</b>: a distress, attachment or other execution is levied or enforced upon or against any assets of that corporation and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within ten Business Days;</li> <li>(iv) <b>(application)</b>: an application is made for the administration, dissolution or winding up of that corporation which application is not stayed within ten Business Days of being made;</li> <li>(v) <b>(winding up)</b>: an order is made for the administration, dissolution or winding up of that corporation;</li> <li>(vi) <b>(resolution)</b>: a resolution is passed for the administration or winding up of that corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;</li> <li>(vii) <b>(arrangement or composition)</b>: that corporation enters, or resolves to enter into or has a meeting of its creditors called to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;</li> <li>(viii) <b>(statutory demand)</b>: <ul style="list-style-type: none"> <li>(A) that corporation fails to comply with, or apply to have set aside, a statutory demand within ten Business Days of the time for compliance; or</li> <li>(B) if that corporation applies to have the statutory demand set aside within ten Business Days of the</li> </ul> </li> </ul> </li> </ul>



Term	Meaning
	<p>time for compliance, the application to set aside the statutory demand is unsuccessful and that corporation fails to comply with the statutory demand within five Business Days of the order of the court dismissing the application;</p> <p>(ix) <b>(execution levied against it)</b>: that corporation has an execution levied against it by creditors, debenture holders or trustees or under a floating charge which is not satisfied, withdrawn or dismissed within ten Business Days; or</p> <p>(x) <b>(insolvency)</b>: that corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts in accordance with any applicable Law.</p> <p>(b) in relation to a trust:</p> <p>(i) <b>(application to court)</b>: an application or order is sought or made (and is not stayed or dismissed within 20 Business Days after being sought or made) in any court for the property of the trust to be brought into court or administered by the court or brought under its control; or</p> <p>(ii) <b>(assets insufficient)</b>: the assets of the trust are not sufficient to satisfy the trustee's debts as and when they become due and payable in respect of which it has a right to be indemnified out of the assets of the trust.</p>
<b>Insurance Proceeds Account</b>	means the account established and maintained in accordance with <b>Clause 39.11</b> .
<b>Insurances</b>	means the insurances required to be effected and maintained by Project Co or Project Co Associates in accordance with this Deed.
<b>Insured</b>	means any person entitled to coverage under any of the Insurances as referred to in <b>Schedule 13 (Insurance)</b> .
<b>Intellectual Property Rights</b>	<p>means all intellectual and industrial property rights existing in Australia or throughout the world, including registered and unregistered trade marks, copyright (including future copyright), inventions, patents, designs, circuits and other eligible layouts and database rights, and includes:</p> <p>(a) any application or right to apply for registration of any of these rights; and</p> <p>(b) any renewals and extensions of these rights.</p>
<b>Interface Deed</b>	means any agreement entered into by any of the Subcontractors with each other (other than any Subcontract) to manage the interfaces between these parties in connection with the Project.
<b>Intervening Event</b>	<p>means, in respect of a Stage, each of the following events occurring during the Operating Phase for that Stage:</p> <p>(a) a Compensable Intervening Event;</p> <p>(b) a Force Majeure Event;</p> <p>(c) an act or omission by the State in its capacity as a contracting party to the relevant State Project Documents or a State Associate which prevents, hinders or disrupts Project Co in the performance of the Services in accordance with the State Project Documents, excluding an act or omission by the State or a State Associate:</p> <p>(i) in undertaking the School Activities;</p> <p>(ii) which is authorised or permitted under any State Project</p>

Term	Meaning
	<p>Document; or</p> <p>(iii) which is a reasonably foreseeable consequence of undertaking the School Activities or the acts or omissions permitted under the State Project Documents.</p> <p>(d) services (in the form of the Services) performed by the State or a State Associate after such Services are omitted, under <b>Clauses 32.9(c)</b> and <b>36.5</b>, from the scope of Services to be performed by Project Co;</p> <p>(e) fire, flood or explosion which commences off a Site or Verge Works Site and transgresses onto a Site or Verge Works Site (which is not a Force Majeure Event) where Project Co can demonstrate that all reasonable preventative measures were taken in the circumstances to minimise the cause of the fire, flood or explosion and its effect on the performance of its obligations under this Deed;</p> <p>(f) [Not disclosed].</p>
<b>Key People</b>	means the people specified as Key People in <b>Schedule 1 (Contract Particulars)</b> as replaced (if at all) in accordance with <b>Clause 9.1(b)</b> and <b>(c)</b> .
<b>Key Subcontract</b>	means: <p>(a) the D&amp;C Subcontract; and</p> <p>(b) the Services Subcontract,</p> <p>as replaced in accordance with <b>Clause 9.3</b>.</p>
<b>Key Subcontractors</b>	mean: <p>(a) the D&amp;C Subcontractor; and</p> <p>(b) the Services Subcontractor,</p> <p>as replaced in accordance with <b>Clause 9.3</b>.</p>
<b>Law</b>	means: <p>(a) Commonwealth, Western Australian and local government legislation, including statutes, ordinances, instruments, codes (but excluding any building codes or Quality Standards), regulations, by-laws and other subordinate legislation;</p> <p>(b) common law; and</p> <p>(c) principles of equity.</p>
<b>Liability</b>	means any debt, obligation, Claim, action, cost, (including legal costs, deductibles or increased premiums) expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), whether it is: <p>(a) actual, prospective or contingent; or</p> <p>(b) currently ascertainable or not,</p> <p>and whether under this Deed, any other Project Documents or arising under or for breach of contract, in tort (including negligence), restitution, pursuant to statute or otherwise at Law.</p>
<b>Licence Payment</b>	means in relation to an Operating Phase Licence, a licence payment payable by Project Co to the State in accordance with paragraph (c) of the relevant Operating Phase Licence.
<b>Lifecycle Works</b>	means the periodic refurbishment or replacement of specified elements

Term	Meaning
	<p>comprising a Stage in accordance with the Operating Phase Lifecycle Maintenance Plan for the relevant Stage or otherwise as necessary to ensure that the relevant Stage:</p> <ul style="list-style-type: none"> <li>(a) is Fit For Purpose;</li> <li>(b) meets the requirements set out in <b>Schedule 27 (Services Specifications)</b>; and</li> <li>(c) complies with all applicable Laws and Quality Standards.</li> </ul>
<b>Lock in Period</b>	has the meaning given in <b>Clause 48.9(a)</b> .
<b>Main Contractor</b>	has the meaning given in the New OHS Regulations.
<b>Major Default</b>	<p>means any of the following events:</p> <ul style="list-style-type: none"> <li>(a) <b>(late Commercial Acceptance)</b>: Project Co fails to achieve Commercial Acceptance of a Stage by the Date for Commercial Acceptance for that Stage;</li> <li>(b) <b>(Independent Certifier review of progress)</b>: <ul style="list-style-type: none"> <li>(i) Project Co fails to provide an Explanation in accordance with <b>Clause 19.2(d)(i)</b>;</li> <li>(ii) Project Co fails to provide a Remedy Implementation Plan in accordance with <b>Clause 19.2(d)(ii)</b> or <b>Clause 19.2(f)(ii)</b>;</li> <li>(iii) if Project Co must comply with a Remedy Implementation Plan under <b>Clause 19.2(g)</b>, any material non-compliance with that Remedy Implementation Plan; or</li> <li>(iv) a Remedy Implementation Plan fails to satisfactorily address the Independent Certifier's concerns, as notified by the Independent Certifier to the State and Project Co pursuant to <b>Clause 19.2(g)(ii)</b>;</li> </ul> </li> <li>(c) <b>(Finance and Equity Documents)</b>: any event that would restrict or cancel a Project Entity's ability to obtain or to have available finance in accordance with the Finance Documents or Equity Documents;</li> <li>(d) <b>(fraud)</b>: any Project Co Associate engages in fraud, collusion, misleading, deceptive or dishonest conduct in performing their obligations under the Project Documents;</li> <li>(e) <b>(representations and warranties)</b>: a representation or warranty given by a Project Entity under a State Project Document is found to be materially incorrect or misleading or a financial audit report discloses fraudulent, false, misleading or negligent reporting by a Project Entity in respect of any financial statements or invoices or other books or records of a Project Entity;</li> <li>(f) <b>(subcontracting and Key People)</b>: Project Co breaches an obligation in <b>Clause 9.1, 9.3, 9.4 or 9.5</b>;</li> <li>(g) <b>(Change in Management)</b>: as a result of a Change in Management, a Project Entity no longer has the same or better management skills available to it as prior to the Change in Management, except where the Change in Management occurs due to illness, death or resignation of any person and that person is replaced by the Project Entity within a reasonable time with another person who has the same or better management skills;</li> <li>(h) <b>(Share Capital Dealing)</b>: a Share Capital Dealing (which is not a Permitted Share Capital Dealing) occurs in respect of any Consortium Member other than Project Co without the consent of the</li> </ul>

Term	Meaning
	State in accordance with <b>Clause 48.4</b> ;
(i)	<p><b>(Probity Event)</b>: Project Co fails to remedy:</p> <ul style="list-style-type: none"> <li>(i) a Probity Event; or</li> <li>(ii) a Disciplinary Event,</li> </ul> <p>in accordance with <b>Clause 55</b>;</p>
(j)	<b>(Insurances)</b> : a breach by Project Co of its obligations under <b>Clauses 39.1, 39.2, 39.12 or 39.14</b> ;
(k)	<b>(Refinancing)</b> : a failure by Project Co to inform or obtain the prior consent of the State (as the case may be) of a Refinancing or to distribute the State Share of Refinancing Gain in accordance with <b>Clause 37</b> ;
(l)	<b>(Handover)</b> : Project Co fails to provide a Handover Bond in accordance with <b>Clause 33.7(b)(ii)</b> ;
(m)	<b>(breach of State Project Document)</b> : any breach of any State Project Document by a Project Entity (other than Service Failures) which has not been cured within 20 Business Days of the Project Entity receiving a Default Notice (other than a breach set out in <b>paragraphs (a) to (l)</b> of this definition or any of the events described in the definition of Default Termination Event, or if the relevant breach is the subject of a Dispute, under the relevant State Project Document);
(n)	<p><b>(breach of Project Document)</b>: without limiting paragraph <b>(m)</b>, a Project Entity:</p> <ul style="list-style-type: none"> <li>(i) breaches any of its obligations under any Project Document other than Service Failures or any breach that constitutes another Major Default;</li> <li>(ii) the breach has or will have a material adverse effect on Project Co's ability to deliver the Project; and</li> <li>(iii) the breach is not in the process of being remedied by the Project Entity in accordance with the regime set out in the relevant Project Document;</li> </ul>
(o)	<b>(Caretaker Services)</b> : Project Co fails to comply with <b>Clause 25.3(h)</b> ;
(p)	<p><b>(Service Failure)</b>: under the Abatement Regime Project Co has accumulated Service Failure Abatements:</p> <ul style="list-style-type: none"> <li>(i) of greater than [<i>Not disclosed</i>]% of the Quarterly Service Payment for [<i>Not disclosed</i>];</li> <li>(ii) greater than [<i>Not disclosed</i>]% but less than or equal to [<i>Not disclosed</i>]% of the aggregate Quarterly Service Payment over any [<i>Not disclosed</i>]; or</li> <li>(iii) greater than [<i>Not disclosed</i>]% but less than or equal to [<i>Not disclosed</i>]% of the aggregate Quarterly Service Payment over any [<i>Not disclosed</i>],</li> </ul> <p>(whether or not the Quarterly Service Payment has actually been adjusted for these abatements or incidents), provided that, if any Major Default occurs under this <b>paragraph (p)</b>, for the purposes of this <b>paragraph (p)</b> only, Project Co's accumulated Incident Failure Abatements and Availability Failure Abatements will be deemed to reset to zero from the date of the relevant Major Default Notice</p>

Term	Meaning
	<p>(Major Default Service Failure);</p> <p>(q) (Insolvency Event of D&amp;C Subcontractor or D&amp;C Subcontractor Parent Guarantor): an Insolvency Event occurs in relation to:</p> <p>(i) one (but not both) of the parties listed as D&amp;C Subcontractor in <b>Schedule 1 (Contract Particulars)</b>; or</p> <p>(ii) one (but not both) of the Parent Guarantors listed in section 10, items 1 and 4 of <b>Schedule 1 (Contract Particulars)</b>.</p>
<b>Major Default Notice</b>	has the meaning given in <b>Clause 40.3(b)</b> .
<b>Major Default Service Failure</b>	has the meaning given in <b>paragraph (p)</b> of the definition of Major Default.
<b>Major Outstanding Item</b>	<p>means any act, matter, state of affairs or thing, that is required in accordance with this Deed to have been performed, achieved, undertaken, provided or completed by Project Co to satisfy the Commercial Acceptance Criteria for a Stage and the State:</p> <p>(a) determines (acting reasonably) such act, matter, state of affairs or thing, (or the cumulative impact of multiple acts, matters, state of affairs or things) is likely to prevent a Stage, or the Verge Infrastructure for that Stage from complying with the FFP Warranty; and</p> <p>(b) permits such act, matter, state of affairs or thing to be treated as Major Outstanding Items in accordance with <b>Clause 20A.1</b>.</p>
<b>Major Outstanding Item Completion Date</b>	means with respect to all Major Outstanding Items, the date on which the State determines that Project Co has completed or rectified the Major Outstanding Items under <b>Clause 20.8(e)(ii)</b> .
<b>Make Safe Time</b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b>Margin</b>	has the meaning given to that term in <b>Schedule 5 (Change Compensation Principles)</b> .
<b>Material</b>	means tangible and intangible information, documents (including any document within the meaning of the <i>Acts Interpretation Act 1984</i> (WA)), reports, software (including source and object code), inventions, discoveries, designs, innovations, technology, processes, methods, techniques, know-how, data and other materials in any media whatsoever.
<b>Minister</b>	means a minister acting for and on behalf of the Crown in right of the State of Western Australia.
<b>Minor Modification</b>	<p>means a Modification during the Development Phase either proposed by Project Co or the State in accordance with <b>Clause 14.2</b>:</p> <p>(a) the estimated Base Cost of which does not exceed the Minor Modification Threshold;</p> <p>(b) for which Project Co will not be entitled to an extension of time to the Date for Commercial Acceptance for a Stage; and</p> <p>(c) which is implemented in accordance with <b>Clause 14</b>.</p>
<b>Minor Modification Running Schedule</b>	has the meaning given to it in <b>Clause 14.3</b> .
<b>Minor Modification Threshold</b>	means for each Minor Modification, an amount of \$[ <i>Not disclosed</i> ] per Primary School and \$[ <i>Not disclosed</i> ] per Secondary School (as Indexed on each CPI Adjustment Date).

<b>Term</b>	<b>Meaning</b>
<b>Minor Works</b>	<p>means any:</p> <ul style="list-style-type: none"> <li>(a) change to the Services, School Facilities or Verge Infrastructure required by the State during the Operating Phase for a Stage which has a total Minor Works Price less than \$[<i>Not disclosed</i>] per Primary School per annum and \$[<i>Not disclosed</i>] per Secondary School per annum (excluding GST) (Indexed) in connection with each Minor Works Notice; and</li> <li>(b) any other works agreed by the parties to be Minor Works,</li> </ul> <p>but does not include:</p> <ul style="list-style-type: none"> <li>(c) a Modification, a FF&amp;E Modification or a Minor Modification;</li> <li>(d) development and refinement of the Design Deliverables in accordance with the Design Development Process;</li> <li>(e) Design Departures accepted by the State in accordance with <b>Clause 13.3</b>;</li> <li>(f) any change of the type referred to in <b>paragraphs (a) and (b)</b> which: <ul style="list-style-type: none"> <li>(i) does not increase the capital costs of the Relevant Infrastructure, cause delay to Commercial Acceptance of the Stage or increase the cost of undertaking the Services; or</li> <li>(ii) is required to ensure that the Relevant Infrastructure or the Services are otherwise in accordance with this Deed.</li> </ul> </li> </ul>
<b>Minor Works Cost</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) the direct cost actually and properly incurred by Project Co in carrying out the Minor Works excluding the labour or provision of services where this could reasonably have been expected to be provided by the Services Subcontractor as part of the Services being undertaken at the relevant time; and</li> <li>(b) the expected future maintenance or Lifecycle Works cost of performance of any future services as a direct result of the Minor Works calculated in accordance with <b>Schedule 5 (Change Compensation Principles)</b>.</li> </ul>
<b>Minor Works Limit</b>	<p>means, for each Operating Year, an amount of:</p> <ul style="list-style-type: none"> <li>(a) \$[<i>Not disclosed</i>] for each Primary School; and</li> <li>(b) \$[<i>Not disclosed</i>] for each Secondary School,</li> </ul> <p>Indexed in accordance with <b>Schedule 4 (Indexes)</b> and increased pursuant to <b>Clause 35.6</b>.</p>
<b>Minor Works Notice</b>	has the meaning given to it in <b>Clause 35.1(a)</b> .
<b>Minor Works Price</b>	means the price for the Minor Works set out in the Minor Works Quote and adjusted in accordance with <b>Clause 35.6</b> .
<b>Minor Works Quote</b>	has the meaning given to it in <b>Clause 35.1(b)</b> .
<b>Model Output Schedule</b>	means the work sheets in the Financial Close Financial Model identified as the 'Model Output Schedule', a printout of which is signed or initialled by the State and Project Co (amongst others) at Financial Close.
<b>Model Variation Event</b>	has the meaning given in <b>Clause 49.3</b> .

<b>Term</b>	<b>Meaning</b>
<b><i>Modification</i></b>	<p>means, in respect of a Stage:</p> <ul style="list-style-type: none"> <li>(a) in the period prior to the Operational Commencement Date for that Stage any change to the Design Requirements including any decrease, omission, deletion, demolition or removal to or from the Works for that Stage which results from a change to the Design Requirements;</li> <li>(b) after Commercial Acceptance of that Stage a change to the Stage or Verge Infrastructure of a Stage including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Stage or Verge Infrastructure for a Stage;</li> <li>(c) any Other Off-Site Infrastructure required at any time during the Term; and</li> <li>(d) after the date of this Deed, in respect of the Services, a change to the Services Requirements or the Services,</li> </ul> <p>but excluding:</p> <ul style="list-style-type: none"> <li>(e) development and refinement of the Design Deliverables in accordance with the Design Development Process;</li> <li>(f) Design Departures accepted by the State in accordance with <b>Clause 13.3</b>;</li> <li>(g) a FF&amp;E Modification;</li> <li>(h) a Minor Modification;</li> <li>(i) Minor Works; and</li> <li>(j) any change of the type referred to in <b>paragraphs (a) to (d)</b> which: <ul style="list-style-type: none"> <li>(i) does not increase the capital costs of the Relevant Infrastructure, cause delay to Commercial Acceptance of the Stage or increase the cost of undertaking the Services; or</li> <li>(ii) is required to ensure that the Relevant Infrastructure or the Services are otherwise in accordance with this Deed.</li> </ul> </li> </ul>
<b><i>Modification Order</i></b>	has the meaning given in <b>Clause 36.4</b> .
<b><i>Modification Request</i></b>	has the meaning given in <b>Clause 36.1</b> .
<b><i>Month</i></b>	means a calendar month.
<b><i>Monthly Performance Report</i></b>	means the Operating Phase Report so named, to be prepared and submitted by Project Co in accordance with the relevant requirements of <b>Schedule 27 (Services Specifications)</b> .
<b><i>Monthly Services Plan</i></b>	means the plan of that name forming part of the Operating Phase Management Plans.
<b><i>Monthly Works Report</i></b>	means the Development Phase Report so named, to be prepared and submitted by Project Co in accordance with the relevant requirements of <b>Schedule 24 (Development Phase Plans and Reports)</b> .
<b><i>Moral Rights</i></b>	has the meaning given in the <i>Copyright Act 1968</i> (Cth) and any corresponding or similar rights granted under any other laws anywhere in the world.
<b><i>National Police History Check</i></b>	means a criminal history record check undertaken through the Department's screening unit.
<b><i>Net Income</i></b>	means all income received by Project Co in connection with Project Co Third Party Use less Project Co's aggregate direct costs incurred by Project Co at

Term	Meaning
	the rates specified in <b>Schedule 22 (Additional Use)</b> .
<b><i>New OHS Regulations</i></b>	means any work health and safety regulations replacing or amending the <i>Occupational Safety and Health Regulations 1996</i> (WA) in line with the model Work Health and Safety Regulations as endorsed by the Workplace Relations Ministerial Council (Cth) in December 2009.
<b><i>Notional GST</i></b>	means, where, in relation to the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations and the <i>State Entities (Payments) Act 1999</i> (WA) or a direction given under section 3 of that Act, the supplier is obliged to make voluntary or notional GST payments, in which case Notional GST means those voluntary or notional payments. For the avoidance of doubt, Notional GST amounts will be calculated as if the GST Act applies to the relevant supplies.
<b><i>Number of Days Early</i></b>	has the meaning given in <b>Clause 19.12(a)(i)</b> .
<b><i>Number of EOT Days</i></b>	has the meaning given in <b>Clause 19.12(a)(ii)</b> .
<b><i>Off-Site Infrastructure</i></b>	means the Verge Infrastructure and the Other Off-Site Infrastructure.
<b><i>OHS Laws</i></b>	<p>means all occupational health and safety related:</p> <ul style="list-style-type: none"> <li>(a) Laws that are in, or come into, force during the Term in the State of Western Australia and the Commonwealth in connection with: <ul style="list-style-type: none"> <li>(i) occupational health and safety;</li> <li>(ii) amendment or replacement of all or part of the <i>Occupational Safety and Health Act 1984</i> (WA), the <i>Occupational Safety and Health Regulations 1996</i> (WA); and</li> <li>(iii) to the extent relevant, any occupational health and safety accreditation scheme established under the <i>Fair Work (Building Industry) Act 2012</i> (Cth) or the <i>Fair Work (Building Industry – Accreditation Scheme) Regulations 2005</i> (Cth);</li> </ul> </li> <li>(b) standards, codes and guides of Standards Australia;</li> <li>(c) codes of practice and guidance materials issued by an Authority;</li> <li>(d) directions on safety or notices issued by any relevant Authority (including any commissioners and inspectors appointed or employed in respect of a relevant Authority) in accordance with any OHS Laws; and</li> <li>(e) directions, instructions, requests or requirements from an Authority or the State relevant to or associated with or necessary for compliance by Project Co, any Project Co Associate or the State with any of the instruments identified in <b>paragraphs (a) to (d)</b> and including any such matters of which Project Co has been informed by the State orally or in writing,</li> </ul> <p>in respect of the location where any part of the Development Phase Activities or Services are being performed.</p>
<b><i>Open Book Basis</i></b>	<p>means the provision of any pricing, costing and other information on an open book basis to enable an assessment of actual costs and profit margins, including a breakdown of all relevant:</p> <ul style="list-style-type: none"> <li>(a) preliminaries;</li> <li>(b) Insurances;</li> </ul>



<b>Term</b>	<b>Meaning</b>
	(c) labour;
	(d) equipment;
	(e) materials;
	(f) subcontract costs;
	(g) indexation adjustments for inflation;
	(h) currency components;
	(i) margins; and
	(j) discount rates used to calculate net present values.
<b><i>Operating Phase</i></b>	in respect of a Stage, means the period beginning on the Operational Commencement Date for that Stage and ending on the Expiry Date.
<b><i>Operating Phase Insurances</i></b>	means the Insurances referred to in Part B of <b>Schedule 13 (Insurance)</b> .
<b><i>Operating Phase Licence</i></b>	means the licence granted by the State to Project Co substantially in the form of <b>Schedule 28 (Operating Phase Licence)</b> , with respect to a licence of a Site.
<b><i>Operating Phase Lifecycle Maintenance Plan</i></b>	means the plan relating to management of the assets comprising the School Facilities forming part of the Operating Phase Management Plans.
<b><i>Operating Phase Management Plans</i></b>	means each of the plans to be prepared and updated by Project Co during the Operating Phases as described in <b>Schedule 27 (Services Specifications)</b> .
<b><i>Operating Phase Reports</i></b>	means the reports prepared during the Operating Phase in accordance with the relevant requirements of <b>Schedule 27 (Services Specifications)</b> .
<b><i>Operating Year</i></b>	means each calendar year during the Operating Phase with the: <ul style="list-style-type: none"> <li>(a) first Operating Year commencing on the first occurring Operational Commencement Date and ending on the last day of that calendar year; and</li> <li>(b) final Operating Year commencing on the first day of the year in which the Expiry Date falls and ending on the Expiry Date.</li> </ul>
<b><i>Operational Commencement Date</i></b>	means, in respect of a Stage (other than Harrisdale Stage 1), the day after the Date of Commercial Acceptance for that Stage and, in respect of Harrisdale Stage 1, the later of the Date of Harrisdale Stage 1 Practical Completion as certified under the Harrisdale Stage 1 Contract and 9 December 2016.
<b><i>Original Date for Commercial Acceptance</i></b>	means, in respect of a Stage, the Date for Commercial Acceptance for that Stage set out in <b>Schedule 1 (Contract Particulars)</b> .
<b><i>Original Reviewable Services Schedule</i></b>	has the meaning given in <b>Clause 32.1(b)</b> .
<b><i>Other Off-Site Infrastructure</i></b>	means in respect of a Stage, any Surrounding Works which the State directs Project Co to design, construct and commission as a Modification or a Minor Modification, but excluding Verge Works.
<b><i>Output Specifications</i></b>	means <b>Schedule 26 (Design Brief)</b> and <b>Schedule 27 (Services Specifications)</b> .
<b><i>Outstanding Matters Report</i></b>	has the meaning given in <b>Clause 33.4(b)</b> .
<b><i>Parent Guarantee</i></b>	means the guarantee:

<b>Term</b>	<b>Meaning</b>
	<p>(a) given by the Parent Guarantor of any D&amp;C Subcontractor to Project Co in connection with the obligations of the relevant D&amp;C Subcontractor to Project Co under a D&amp;C Subcontract; and</p> <p>(b) given by the Parent Guarantor of the Services Subcontractor to Project Co in connection with the obligations of the Services Subcontractor to Project Co under the Services Subcontract.</p>
<b>Parent Guarantor</b>	means each person giving a Parent Guarantee, which as at the date of this Deed means the parties listed as such in <b>Schedule 1 (Contract Particulars)</b> .
<b>Partial Termination</b>	means in respect of a Site, a Verge Works Site, School Facility or Stage, the removal of that Site, Verge Works Site, School Facility or Stage from this Deed in accordance with <b>Clause 42</b> .
<b>Partial Termination Payment</b>	has the meaning given to that term in <b>Schedule 7 (Termination Payments)</b> .
<b>Payment Claim</b>	means a payment claim submitted by Project Co in accordance with <b>Clause 34.4(b)</b> in the form reasonably required by the State.
<b>Payment Directions Deed</b>	means the document entitled "Payment Directions Deed" dated on or about the date of this Deed between amongst others, the State, Project Co, Finance Co and the Agent.
<b>Payment Statement</b>	has the meaning given in <b>Clause 34.4(c)</b> .
<b>Performance Bond</b>	means a bond or bank guarantee which: <ul style="list-style-type: none"> <li>(a) is unconditional, irrevocable and payable on demand;</li> <li>(b) is issued by a financial institution that is the holder of a current licence issued by the Australian Prudential Regulation Authority and has the Required Rating; and</li> <li>(c) specifies a location within Perth where demand is to be given and payment made, without further confirmation from the issuer, on any Business Day.</li> </ul>
<b>Permitted Share Capital Dealing</b>	means a Share Capital Dealing specified in <b>Schedule 18 (Permitted Share Capital Dealing Schedule)</b> .
<b>Personal Information</b>	means personal information, within the meaning given in the <i>Privacy Act 1988</i> (Cth), about current or former: <ul style="list-style-type: none"> <li>(a) School Staff;</li> <li>(b) School Invitees; or</li> <li>(c) Project Co Staff.</li> </ul>
<b>Plant</b>	means all plant and machinery and other items which: <ul style="list-style-type: none"> <li>(a) are necessary to ensure that each Stage meets the FFP Warranty;</li> <li>(b) are referred to in the Design Requirements; or</li> <li>(c) without limiting <b>paragraphs (a) or (b)</b>, Project Co or any of its Subcontractors or any other person acting on their behalf installs, constructs or places on any Site and which is, or becomes part of one or more School Facilities,</li> </ul> <p>but excludes any FF&amp;E and Temporary Equipment.</p>
<b>PPS Law</b>	means: <ul style="list-style-type: none"> <li>(a) the PPSA; and</li> <li>(b) any amendment made at any time to the Corporations Act or any</li> </ul>

Term	Meaning
	other legislation as a consequence of the PPSA.
<b>PPSA</b>	means the <i>Personal Properties Securities Act 2009</i> (Cth).
<b>Post Commercial Acceptance Tests</b>	means, in respect of the Works, those tests referred to in <b>Schedule 11 (Commercial Acceptance Criteria)</b> which, by their nature, are unable to be successfully completed until such time as the elements of the Stages to be delivered are operational.
<b>Primary School</b>	means each School Facility identified as a primary school in <b>Schedule 1 (Contract Particulars)</b> .
<b>Principal</b>	means, in respect of each School Facility, the person appointed in accordance with <b>Clause 8.6(a)</b> or such other person as may be appointed, in accordance with <b>Clause 8.6(b)</b> .
<b>Principal's Representative</b>	means those persons appointed from time to time to represent the Principal and, unless notified in writing to Project Co by the State otherwise, means the business manager of the relevant School Facility from time to time.
<b>Probity Event</b>	<p>includes any event or thing which occurs before, on or after the date of this Deed which:</p> <ul style="list-style-type: none"> <li>(a) has a material adverse effect on, or on the perception of, the character, integrity or honesty of a Relevant Person;</li> <li>(b) means that a Relevant Person is not a fit and proper person for the purposes of carrying out any of the Project Activities, including where the Relevant Person: <ul style="list-style-type: none"> <li>(i) is or becomes incapable of efficiently performing his or her duties;</li> <li>(ii) has, or becomes likely to have, a criminal history; or</li> <li>(iii) is not, or becomes a person who is not, suitable to be involved in providing any of the Project Activities;</li> </ul> </li> <li>(c) relates to a Relevant Person and has or may have a material adverse effect on the public interest, or public confidence, in the Project; or</li> <li>(d) without limiting <b>paragraphs (a) to (c)</b>, involves a material failure of a Consortium Member (and for the purposes of <b>Clause 55</b> only, any Subcontractor who is not a Consortium Member) to achieve or maintain: <ul style="list-style-type: none"> <li>(i) reasonable standards of ethical behaviour;</li> <li>(ii) the avoidance of conflicts of interest which will have a material adverse effect on the ability of the Consortium Member or Subcontractor or a Relevant Person to carry out and observe its obligations in connection with the Project; or</li> <li>(iii) other standards of conduct that would otherwise be expected of a party involved in a State government project,</li> </ul> </li> </ul> <p>regardless of whether the event or thing may also involve a Disciplinary Event.</p>
<b>Probity Investigation</b>	<p>means any probity or criminal investigations to report on the suitability of a person or Entity to be involved in any way with the Project, including:</p> <ul style="list-style-type: none"> <li>(a) investigations of any suspected Probity Event;</li> <li>(b) investigations of any suspected Disciplinary Event;</li> <li>(c) investigations into commercial structure, business and credit history</li> </ul>

<b>Term</b>	<b>Meaning</b>
	and prior contract compliance;
	(d) investigations into any criminal records, including any spent convictions in accordance with the <i>Spent Convictions Act 1988</i> (WA) and charges of an offence; and
	(e) interviews of any person or research into any activity that is or may reasonably be expected to be the subject of criminal or other regulatory investigation.
<b><i>Project</i></b>	means: <ul style="list-style-type: none"> <li>(a) the financing and undertaking of the Development Phase Activities;</li> <li>(b) the performance of the Services; and</li> <li>(c) the Handover of the Relevant Infrastructure to the State,</li> </ul> and the performance of all other obligations in accordance with or as contemplated by any Project Document or incidental to any Project Document.
<b><i>Project Activities</i></b>	means all things that Project Co is, or may be, required to do to comply with its obligations in connection with the State Project Documents, including the Development Phase Activities and the Services.
<b><i>Project Co Act or Omission</i></b>	means an act or omission of Project Co or a Project Co Associate other than an act or omission undertaken in accordance with the Project Documents.
<b><i>Project Co Associate</i></b>	means: <ul style="list-style-type: none"> <li>(a) the Project Co Representative;</li> <li>(b) any Group Member or Consortium Member (other than Project Co) and their respective officers, agents, advisers, consultants, contractors and employees; and</li> <li>(c) the Equity Investors, any Subcontractors (that are not Consortium Members) and their respective officers, agents, advisers, consultants, contractors and employees,</li> </ul> but does not include the State, any State Associates, the Independent Certifier or any Handover Reviewer.
<b><i>Project Co Background IP</i></b>	means any and all Material other than Developed IP, which is developed outside of the Project by Project Co or any Project Co Associate and brought to the Project by Project Co or any Project Co Associate.
<b><i>Project Co FF&amp;E</i></b>	means Group 1 FF&E and Group 2 FF&E.
<b><i>Project Co Material</i></b>	means: <ul style="list-style-type: none"> <li>(a) the Design Deliverables;</li> <li>(b) the Development Phase Plans and the Development Phase Reports;</li> <li>(c) the Operating Phase Management Plans and the Operating Phase Reports;</li> <li>(d) the Developed IP; and</li> <li>(e) all other Material which Project Co, a Project Co Associate or the Equity Investors prepare, use or provide to the State or any State Associate in the course of carrying out the Project Activities or otherwise in connection with the Project.</li> </ul>
<b><i>Project Co Proposal</i></b>	means the full proposal submitted by Project Co in response to the Request for Proposal.
<b><i>Project Co</i></b>	means the person identified in <b>Schedule 1 (Contract Particulars)</b> subject to

<b>Term</b>	<b>Meaning</b>
<b><i>Representative</i></b>	replacement, termination or delegation in accordance with <b>Clause 8.4</b> .
<b><i>Project Co Staff</i></b>	means those people engaged by Project Co or any Project Co Associates to perform any Services at a Site or Verge Works Site.
<b><i>Project Co Third Party Use</i></b>	means use of a School Facility (or any part of it) introduced by Project Co (whether or not commercial use).
<b><i>Project Co Utility Infrastructure Connection Point</i></b>	means, with respect to a Site, the Utility Infrastructure connections in relation to all Utilities other than electricity and communications, which are identified in the Utility Infrastructure Connection Plan for that Site by coloured triangles and coordinates.
<b><i>Project Debt</i></b>	means at any time the lesser of: <ul style="list-style-type: none"> <li>(a) the Actual Debt at that time; and</li> <li>(b) the amount forecast in the Financial Model to be owing to the Financiers at that time.</li> </ul>
<b><i>Project Documents</i></b>	means: <ul style="list-style-type: none"> <li>(a) this Deed;</li> <li>(b) the Finance Direct Deed;</li> <li>(c) the State Security;</li> <li>(d) the D&amp;C Subcontract;</li> <li>(e) the Services Subcontract;</li> <li>(f) the Interface Deed;</li> <li>(g) the D&amp;C Direct Deed;</li> <li>(h) the Services Subcontractor Direct Deed;</li> <li>(i) the D&amp;C Consent Deed;</li> <li>(j) the Services Subcontractor Consent Deed;</li> <li>(k) the Parent Guarantees;</li> <li>(l) the Equity Documents;</li> <li>(m) the Finance Documents;</li> <li>(n) the Independent Certifier Deed of Appointment;</li> <li>(o) the Collateral Warranty;</li> <li>(p) the Payment Directions Deed;</li> <li>(q) the Receivables Purchase Deed; and</li> <li>(r) any other document the parties agree is a Project Document.</li> </ul>
<b><i>Project Entity</i></b>	means: <ul style="list-style-type: none"> <li>(a) Project Co; and</li> <li>(b) Finance Co,</li> </ul> <p>or if the context requires, the relevant one of them.</p>
<b><i>Project HoldCo</i></b>	means EduWest Project Holding Company Pty Ltd ACN 608 027 596.
<b><i>Project Holding Trust</i></b>	means the trust constituted pursuant to the Project Holding Trust Deed.
<b><i>Project Holding Trust Deed</i></b>	means the trust deed entitled "EduWest Project Holding Trust Unit Trust Deed" dated on or about the date of this Deed.

<b>Term</b>	<b>Meaning</b>
<b><i>Project Information</i></b>	means: <ul style="list-style-type: none"> <li>(a) the Information Documents; and</li> <li>(b) all Material provided by the State and any State Associate to Project Co or a Project Co Associate in connection with the Project: <ul style="list-style-type: none"> <li>(i) prior to the date of this Deed, which are not incorporated into this Deed; and</li> <li>(ii) after the date of this Deed which the State is not required by this Deed to provide to Project Co or a Project Co Associate.</li> </ul> </li> </ul>
<b><i>Project Management Plan</i></b>	means the Development Phase Plan of that name.
<b><i>Project Specific Change in Law</i></b>	means a Change in Law which expressly and exclusively applies to: <ul style="list-style-type: none"> <li>(a) the Project Activities or one or more Stages, Sites or Verge Works Sites;</li> <li>(b) Project Co, but only in its capacity as the Entity contracting with the State to implement the Project; or</li> <li>(c) Project Co and other Entities which are undertaking projects under the Public Private Partnerships Western Australia framework, or any replacement or substitute policies relating to public private partnership arrangements for the provision of public infrastructure in the State of Western Australia, in each case only as it applies to them in that capacity.</li> </ul>
<b><i>Project Trust</i></b>	means the trust constituted pursuant to the Project Trust Deed.
<b><i>Project Trust Deed</i></b>	means the trust deed entitled “EduWest Project Trust Unit Trust Deed” dated on or about the date of this Deed.
<b><i>Prolongation Costs</i></b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b><i>Public Disclosure Obligations</i></b>	has the meaning given in <b>Clause 52.1(a)</b> .
<b><i>Quality Standards</i></b>	means all standards, codes, specifications, guidelines, policies and other requirements including: <ul style="list-style-type: none"> <li>(a) the standards, codes, specifications, guidelines, policies, instructions and other requirements set out in, or otherwise expressly referred to in the Output Specifications;</li> <li>(b) all Approvals (including any requirements under them) and any requirements of Authorities having jurisdiction over, the Project Activities, the School Facilities and the Verge Works and Verge Infrastructure (or any of them);</li> <li>(c) the National Construction Code;</li> <li>(d) the Disability (Access to Premises – Buildings) Standards (2010) under the <i>Disability Discrimination Act 1992</i> (Cth);</li> <li>(e) all relevant national and State policies;</li> <li>(f) all relevant standards, codes and guides of Standards Australia and Standards New Zealand (with the year of the standards, codes, and guides to be as referenced by the National Construction Code, unless noted otherwise in the Output Specifications or otherwise approved by the State), and, where an Australian standard or a New Zealand standard does not exist, the relevant British standard or</li> </ul>

<b>Term</b>	<b>Meaning</b>
	international standard;
	(g) all relevant standards, codes, and guides published by WorkCover Corporation of Western Australia and WorkSafe WA;
	(h) to the extent they do not conflict with the standards, codes or guides published by WorkSafe WA, the standards, codes and guides published by the National Occupational Health and Safety Commission and Safe Work Australia;
	(i) National Environment Protection (Assessment of Site Contamination) Measure 1999 (Cth);
	(j) all Education Policies; and
	(k) all other standards, codes, specifications, guidelines, policies and requirements relevant to the Works, the Services, the School Facilities and the Verge Infrastructure (or any of them),
	as amended, updated or replaced from time to time.
<b>Quarter</b>	means each three Month period commencing on a Quarterly Date, save that: <ul style="list-style-type: none"> <li>(a) the first Quarter of an Operating Phase will be the period from the relevant Date of Commercial Acceptance for a Stage until the day before the first Quarterly Date during the Operating Phase; and</li> <li>(b) the last Quarter of an Operating Phase will be the period from the last Quarterly Date during the Operating Phase to the Expiry Date.</li> </ul>
<b>Quarterly Availability Payment</b>	has the meaning given in <b>Schedule 3 (Payment)</b> .
<b>Quarterly Date</b>	means every 1 January, 1 April, 1 July and 1 October during the Operating Phase.
<b>Quarterly Performance Report</b>	means the Operating Phase Report so named, to be prepared and submitted by Project Co in accordance with the relevant requirements of <b>Schedule 27 (Services Specifications)</b> .
<b>Quarterly Service Payment</b>	means a quarterly service payment payable to Project Co calculated in accordance with <b>Schedule 3 (Payment)</b> .
<b>Rates</b>	means all municipal rates, water rates, sewerage rates, drainage rates and other rates payable to any Authority in connection with each of the Sites, but does not include any portion of such rates as relates to the connection of each of the Sites to Utilities or rates or charges for the usage of Utilities.
<b>Receivables Purchase Deed</b>	means the deed so titled dated on or about the date of this Deed between the State, Project Co and Finance Co under which Finance Co will purchase the Licence Payments from the State.
<b>Receivables Purchase Payment</b>	has the meaning given in the Receivables Purchase Deed.
<b>Receivables Refund Payment</b>	has the meaning given in the Receivables Purchase Deed.
<b>Recipient</b>	has, for the purposes of <b>Clause 54.1</b> the meaning given in <b>Clause 54.1(b)(ii)</b> .
<b>Refinancing</b>	means: <ul style="list-style-type: none"> <li>(a) any amendment, novation, supplement or replacement of any Finance Document;</li> <li>(b) the exercise of any right, or the grant of any waiver or consent, in</li> </ul>

Term	Meaning
	<p>accordance with any Finance Document;</p> <p>(c) the disposition of any rights or interests in, or the creation of any rights of participation in connection with the Finance Documents or the creation or granting of any other form of benefit or interest in either the Finance Documents or the contracts, revenues or assets of the Group whether by way of security or otherwise;</p> <p>(d) any new financing arrangements entered into by a Group Member which has the effect of restructuring the then current financing arrangements; or</p> <p>(e) any other step or arrangement that has an effect which is similar to any of the actions referred to in <b>paragraphs (a) to (d)</b>,</p> <p>which is likely to:</p> <p>(f) give rise to a Refinancing Gain;</p> <p>(g) change the type, amount, pricing, tenor, terms for payment or repayment, hedging or financial covenants of any financial accommodation connected with the Project; or</p> <p>(h) adversely affect any of the State's rights, obligations or Liabilities in accordance with the State Project Documents,</p> <p>but does not include:</p> <p>(i) entering into derivative transactions contemplated by the Finance Documents to be entered into on or before Financial Close;</p> <p>(j) the syndication or subscription of any debt in accordance with the Finance Documents that is contemplated at Financial Close; or</p> <p>(k) the change in control or sell down of any bonds in an arm's length transaction at market value.</p>
<b>Refinancing Event</b>	means an event set out in <b>paragraphs (a) to (e)</b> of the definition of Refinancing, but expressly excludes an event set out in <b>paragraphs (i) to (k)</b> of the definition of Refinancing.
<b>Refinancing Gain</b>	has the meaning given in <b>Clause 37.4(a)</b> .
<b>Related Body Corporate</b>	has the meaning given in the Corporations Act.
<b>Related Trust Entity</b>	<p>means with respect to an Entity which is a trustee, manager or Responsible Entity of a trust or a managed investment scheme:</p> <p>(a) any Related Body Corporate of the trustee, manager or Responsible Entity;</p> <p>(b) any other trustee, manager or Responsible Entity of the trust or managed investment scheme (or Related Body Corporate) of such Entity; or</p> <p>(c) any Controlling Unit Holder of the trust or managed investment scheme (or Related Body Corporate) of such an Entity.</p>
<b>Relevant Infrastructure</b>	<p>means:</p> <p>(a) during the Development Phase for a Stage – the Works for that Stage; and</p> <p>(b) during the Operating Phase for a Stage – the School Facilities and Verge Infrastructure for that Stage.</p>
<b>Relevant Person</b>	means:



<b>Term</b>	<b>Meaning</b>
	<ul style="list-style-type: none"> <li>(a) a director or secretary of a Consortium Member;</li> <li>(b) any officer, employee, consultant, contractor or agent of a Consortium Member who: <ul style="list-style-type: none"> <li>(i) has the ability to exercise influence or Control in relation to the Consortium Member or Subcontractor (as applicable), or in matters relating to the Project;</li> <li>(ii) works in any role in connection with the Project Activities, including undertaking any task for the purpose of this Deed; or</li> <li>(iii) has access to Confidential Information or Personal Information; and</li> </ul> </li> <li>(c) any officer, employee, consultant, contractor or agent of a Subcontractor who works in any role in connection with the Project Activities.</li> </ul>
<b><i>Relief Event</i></b>	<p>means any Change Compensation Event or other event which entitles Project Co to:</p> <ul style="list-style-type: none"> <li>(a) an extension of time;</li> <li>(b) relief from performance; or</li> <li>(c) bring any other Claim against the State,</li> </ul> <p>in connection with the Project.</p>
<b><i>Remediate</i></b>	<p>means to remove, destroy, dispose of, neutralise, treat, test or monitor or take other action to minimise Contamination (as applicable).</p>
<b><i>Remedy Implementation Plan</i></b>	<p>has the meaning given in <b>Clause 19.2(d)(ii)</b>.</p>
<b><i>Remedy Plan</i></b>	<p>means the plan prepared by Project Co and approved by the State which is contained in <b>Schedule 24 (Development Phase Plans and Reports)</b>.</p>
<b><i>Reporting Failure</i></b>	<p>has the meaning given to that term in <b>Schedule 3 (Payment)</b>.</p>
<b><i>Reporting Failure Abatements</i></b>	<p>has the meaning given to that term in <b>Schedule 3 (Payment)</b>.</p>
<b><i>Reputable Insurer</i></b>	<p>means an insurance company having the Required Rating.</p>
<b><i>Request for Proposal</i></b>	<p>means the request for proposal for the Project issued by the State on 18 December 2014.</p>
<b><i>Required Rating</i></b>	<p>means a credit rating of at least A- by Standard and Poor's (Australia) Pty Limited or A3 by Moody's Investors Service, Inc.</p>
<b><i>Responsible Entity</i></b>	<p>has the meaning given in the Corporations Act.</p>
<b><i>Revenue</i></b>	<p>for the purposes of <b>Clause 54</b>, has the meaning given in <b>Clause 54.1(e)</b>.</p>
<b><i>Review Period</i></b>	<p>has the meaning given in <b>Schedule 12 (Review Procedures)</b>.</p>
<b><i>Reviewable Services</i></b>	<p>means each of the following Services:</p> <ul style="list-style-type: none"> <li>(a) waste management services;</li> <li>(b) cleaning services;</li> <li>(c) security services;</li> <li>(d) grounds and garden services; and</li> <li>(e) pest control services,</li> </ul>

<b>Term</b>	<b>Meaning</b>
	in each case as described in Part C of <b>Schedule 27 (Services Specifications)</b> .
<b>Reviewable Services Date</b>	means the date that is: <ul style="list-style-type: none"> <li>(a) the second anniversary of the last occurring Date of Commercial Acceptance; and</li> <li>(b) thereafter every five years until the date that is five years prior to the Expiry Date.</li> </ul>
<b>Reviewable Services Schedule</b>	means the component so named of the Model Output Schedule, which contains the information required under <b>Clause 32.1(b)</b> , as updated under <b>Clause 32</b> .
<b>Reviewable Services Tender Expiry Date</b>	means one Month after the expiry of the then current Reviewable Services Term for a Stage.
<b>Reviewable Services Term</b>	means, in respect of a Stage, the period of: <ul style="list-style-type: none"> <li>(a) two years commencing on the last occurring Date of Commercial Acceptance; and</li> <li>(b) every five years thereafter,</li> </ul> and ending on the Expiry Date, unless otherwise changed by agreement between the parties and in each case subject to Partial Termination of a Stage.
<b>S18 Securities Savings</b>	has the meaning given in <b>Schedule 18 (Permitted Share Capital Dealing)</b> .
<b>Scheduled Lifecycle Component</b>	has the meaning given in <b>Schedule 5 (Change Compensation Principles)</b> .
<b>Scheduled Lifecycle Component</b>	means for each Stage the Quarterly Lifecycle Payment for Quarter <sub>(q)</sub> as calculated in accordance with the formula in Section 2.3 of <b>Schedule 3 (Payment)</b> as applicable to that Stage.
<b>School Activities</b>	means: <ul style="list-style-type: none"> <li>(a) the provision of all curriculum, teaching and pastoral support, career guidance, extra curricular, remedial, training, vocational, scholastic, health and dental health activities (including the activities provided by the Dental Therapy Centre Facilities) and educational activities provided for the benefit of Students, and related parent, guardian and community liaison and administrative support functions to be undertaken at each School Facility, including out of school hours care, all activities and services that would reasonably be expected, as at the date of this Deed, to be undertaken in connection with or which are incidental or ancillary to such functions and activities, but excluding the Services; and</li> <li>(b) prior to the Operational Commencement Date for a Stage, includes all operational commencement readiness activities which are undertaken on the Site or in respect of the School Facility in preparation for conducting the activities set out in paragraph (a) of this definition.</li> </ul>
<b>School Facility</b>	means each of the schools described in <b>Schedule 1 (Contract Particulars)</b> and <b>Schedule 26 (Design Brief)</b> and its associated facilities including: <ul style="list-style-type: none"> <li>(a) the entire physical infrastructure required to be provided as part of the Works (other than the Verge Works), including all structures and Engineering Services, hard and soft landscaping and other improvements on the relevant Site;</li> <li>(b) any Contingency Transportable Units at a Site;</li> </ul>

<b>Term</b>	<b>Meaning</b>
	(c) any Transportable Units at a Site; and (d) Harrisdale Stage 1 Works, as applicable.
<b>School Facility Management Committee</b>	has the meaning given in <b>Clause 26.1(a)</b> .
<b>School Facility Name</b>	means a name given to a School Facility by the State pursuant to <b>Clause 26.9</b> .
<b>School Invitee</b>	means any Student being taught at a School Facility (or in the case of an Excluded Student, who would have been taught but for the exclusion) or visitor to a School Facility in connection with the School Activities. The expression does not include the State, State Associate, Project Co or any Project Co Associate.
<b>School Staff</b>	means employees, agents, contractors, subcontractors, consultants, licensees and authorised officers of the State or a Principal involved in the provision of any part of the School Activities.
<b>School Term</b>	means each term, published from time to time by the Department on the 'Term Dates' page of the Department's website which, as at the date of this Deed, can be found at <a href="http://www.det.wa.edu.au/termdates/detcms/portal/">http://www.det.wa.edu.au/termdates/detcms/portal/</a> , for teachers for each Academic Year.
<b>School Third Party Use</b>	means use of a School Facility (or any part of it) introduced by the State or a Principal (whether or not commercial use) but excluding School Use.
<b>School Use</b>	means use of a School Facility (or any part of it) by Users for the provision or receipt of School Activities.
<b>Secondary School</b>	means each School Facility identified as a secondary school in <b>Schedule 1 (Contract Particulars)</b> .
<b>Securities</b>	means shares, units, interests in a partnership, and any other interests which would constitute "securities" as defined under the Corporations Act.
<b>Securitised Licence Structure</b>	means the Receivables Purchase Deed, the Payment Directions Deed and Clause 22.A (other than Clause 22A.3 and paragraph (c) of <b>Schedule 28 (Operating Phase Licence)</b> ).
<b>Securitised Modification Payment</b>	means an amount equal to the corresponding Receivables Purchase Price in respect of the Additional Receivables purchased by Finance Co from the State under the Receivables Purchase Deed resulting from a Change Compensation Event.
<b>Security Interest</b>	has the meaning given to it in section 12 of the PPSA.
<b>Security Trust Deed</b>	means the document entitled 'Security Trust and Intercreditor Deed – WA Schools PPP' dated on or about the date of this Deed between, amongst others, Finance Co, the Agent and the Security Trustee.
<b>Security Trustee</b>	means at the date of this Deed, the party named as such in <b>Schedule 1 (Contract Particulars)</b> as replaced in accordance with the Security Trust Deed and who is from time to time party to the Finance Direct Deed in that capacity.
<b>Service Failure</b>	means any Availability Failure, Incident Failure, Reporting Failure or Whole School Unavailability Event.
<b>Service Failure Notice</b>	has the meaning given in <b>Clause 40.2(a)</b> .
<b>Services</b>	means:

<b>Term</b>	<b>Meaning</b>
	<p>(a) the services to be performed by Project Co (as described in <b>Schedule 27 (Services Specifications)</b>);</p> <p>(b) all other things Project Co is required to provide or undertake during the Operating Phase as set out in <b>Schedule 27 (Services Specifications)</b>; and</p> <p>(c) all other obligations Project Co is required to perform under this Deed during the Operating Phase,</p> <p>in each case as modified in accordance with this Deed.</p>
<b>Services Margin</b>	has the meaning given to that term in <b>Schedule 5 (Change Compensation Principles)</b> .
<b>Services Requirements</b>	means, subject to <b>Clause 2.2</b> , the requirements for the provision of the Services set out in: <p>(a) <b>Schedule 27 (Services Specifications)</b>;</p> <p>(b) the Initial Services Deliverables; and</p> <p>(c) the remainder of this Deed.</p>
<b>Services Subcontract</b>	means the agreement approved by the State between Project Co and the Services Subcontractor to perform the Services.
<b>Services Subcontractor</b>	means at the date of this Deed the party listed as such in <b>Schedule 1 (Contract Particulars)</b> and any person who in addition or substitution is engaged by Project Co to carry out any of the Services.
<b>Services Subcontractor Consent Deed</b>	means the agreement between Project Co, the Services Subcontractor, the Parent Guarantor of the Services Subcontractor and the Security Trustee and others.
<b>Services Subcontractor Direct Deed</b>	means the deed between the State, Project Co, the Services Subcontractor and the Parent Guarantor of the Services Subcontractor.
<b>Share Capital Dealing</b>	has the meaning given in <b>Clause 48.4</b> .
<b>Site</b>	means, with respect to a Stage, the land for the relevant School Facility as shown in the applicable plan set out in Part A of <b>Schedule 8 (Site Matters)</b> .
<b>Site Access and Interface Protocols</b>	means the Development Phase Plan of that name.
<b>Site Access Date</b>	means, in respect of a Stage, the relevant date set out in Part A of <b>Schedule 8 (Site Matters)</b> .
<b>Site Conditions</b>	means any physical conditions on, under, or over the surface, or in the vicinity of one or more of the Sites or Verge Works Sites, including: <p>(a) <b>(water and gas)</b>: ground gases, ground water, ground water hydrology, surface water, water quality, salinity, the existence of any wells and the effects of any de-watering;</p> <p>(b) <b>(physical structures)</b>: physical and structural conditions above, upon and below the ground including any infrastructure (including Utilities and transport infrastructure), partially completed structures, Artefacts or in ground works;</p> <p>(c) <b>(vegetation and fauna)</b>: pastures, grasses or other vegetation and fauna;</p> <p>(d) <b>(topography)</b>: topography, ground surface and sub-surface conditions and geology including rock or other materials;</p>

<b>Term</b>	<b>Meaning</b>
	<p>(e) <b>(climate)</b>: climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand seasons, mud and other effects of climatic and weather conditions;</p> <p>(f) <b>(Contamination)</b>: any Contamination;</p> <p>(g) <b>(acid sulphate soils)</b>: any soils and sediments that contain iron sulphides; and</p> <p>(h) <b>(Easements)</b>: all Easements over or in connection with each of the Sites and Verge Works Sites,</p> <p>whether or not they were in existence or known to Project Co before the date of this Deed.</p>
<b><i>Solvent</i></b>	has the meaning given in the Corporations Act.
<b><i>Stage</i></b>	<p>means:</p> <p>(a) for a School Facility with only one stage, that School Facility; and</p> <p>(b) for a School Facility with two stages, each separate stage of that School Facility,</p> <p>as specified in item 11 of <b>Schedule 1 (Contract Particulars)</b>.</p>
<b><i>State</i></b>	<p>means:</p> <p>(a) during the Development Phase for a Stage, the Minister for Works and the State of Western Australia; and</p> <p>(b) during the Operating Phase for a Stage, the Minister for Education and the State of Western Australia.</p>
<b><i>State Associate</i></b>	<p>means State Entities (including the Department and the Minister for Works):</p> <p>(a) to the extent that they are carrying out activities, works or performing services related to the Project;</p> <p>(b) in the Development Phase only, to the extent that they are carrying out activities, works or performing services related to the Development Phase Activities; and</p> <p>(c) during the Operating Phase only, to the extent that they are carrying out activities, works or performing services on the Site or Verge Works Site related to the Services for the Project.</p>
<b><i>State Background IP</i></b>	means any and all Material other than Developed IP which is developed outside of the Project by the State or any State Associate and brought to the Project by the State or any State Associate.
<b><i>State Cure Notice</i></b>	has the meaning given in the D&C Direct Deed or the Services Subcontractor Direct Deed (as the case may be).
<b><i>State Entities</i></b>	means the State of Western Australia, including any department and any Entity, agency or instrumentality of the State of Western Australia and any Minister (including the Minister for Works and the Minister for Education), whether body corporate or otherwise and their respective officers, employees, agents, advisors, contractors and consultants (but does not include the, Project Co, any Project Co Associate, the Independent Certifier, the Harrisdale Stage 1 Contractor and any provider of any Information Documents in that capacity), and the term 'State Entity' means any one of them.
<b><i>State FF&amp;E</i></b>	means Group 3 FF&E.
<b><i>State Obtained Authorisations</i></b>	means the Approvals which have been or will be obtained by the State as set out in <b>Schedule 1 (Contract Particulars)</b> .

<b>Term</b>	<b>Meaning</b>
<b><i>State Project Documents</i></b>	means those Project Documents to which the State is a party.
<b><i>State Representative</i></b>	means the person identified as such in <b>Schedule 1 (Contract Particulars)</b> subject to replacement, termination or delegation in accordance with <b>Clause 8.2</b> .
<b><i>State Security</i></b>	means the document entitled "WA Schools PPP Project State Security" between the State and Project Co.
<b><i>State Share of Refinancing Gain</i></b>	has the meaning given in <b>Clause 37.4(b)</b> .
<b><i>State Utility Infrastructure Connection Point</i></b>	means, with respect to a Site, the State proposed Utility Infrastructure connections in relation to electricity and communications Utilities only, which are identified in the Utility Infrastructure Connection Plan for that Site by coloured triangles and coordinates.
<b><i>Student</i></b>	has the meaning given in the <i>School Education Act 1999</i> (WA), and includes any Excluded Student at a School Facility.
<b><i>Subcontract</i></b>	means an agreement which: <ul style="list-style-type: none"> <li>(a) Project Co enters into with a Subcontractor; or</li> <li>(b) a Subcontractor enters into with another Subcontractor,</li> </ul> in connection with the Project Activities.
<b><i>Subcontractor</i></b>	means: <ul style="list-style-type: none"> <li>(a) any person who enters into a contract in connection with the Project Activities with Project Co or a Key Subcontractor; or</li> <li>(b) for the purposes of <b>Clause 55</b> and the definition of Relevant Person in this <b>Clause 1</b> only, any person whose subcontract is in connection with the Project Activities and is in a chain of contracts where the ultimate contract is with Project Co or a Key Subcontractor.</li> </ul>
<b><i>Superintendent</i></b>	means the Superintendent under the Harrisdale Stage 1 Contract.
<b><i>Surrounding Works</i></b>	means in respect of a Stage, works to be undertaken by the State or other third parties for that Stage as described in Part A10.1 of <b>Schedule 26 (Design Brief)</b> .
<b><i>Suspension Notice</i></b>	has the meaning given in <b>Clause 42.4(d)</b> .
<b><i>Tax or Taxes</i></b>	means any present or future tax, levy, impost, duty, rate, charge, fee, deduction or withholding of any nature, imposed or levied by an Authority, together with any interest, penalty, charge, fee or other amount imposed or made on, or in connection with, any of the foregoing, but excluding any Rates.
<b><i>Taxable Supply</i></b>	has the meaning given in the GST Law, excluding section 84-5 of the GST Act.
<b><i>Tax Invoice</i></b>	has the meaning given in the GST Law.
<b><i>Temporary Equipment</i></b>	means all Plant, machinery and equipment and other items used by Project Co or its Subcontractors solely for the purpose of enabling or facilitating delivery of the Works which: <ul style="list-style-type: none"> <li>(a) does not and will not become part of the School Facilities; and</li> <li>(b) will not be used by Project Co for performing the Services.</li> </ul>
<b><i>Term</i></b>	means the term of this Deed: <ul style="list-style-type: none"> <li>(a) commencing in accordance with <b>Clause 4.1</b>; and</li> <li>(b) ending on the Expiry Date.</li> </ul>

<b>Term</b>	<b>Meaning</b>
<b><i>Termination Payment</i></b>	has the meaning given to that term in <b>Schedule 7 (Termination Payments)</b> .
<b><i>Termination Payment Date</i></b>	<p>means 20 Business Days after the later of:</p> <p>(a) the Expiry Date;</p> <p>(b) the date on which the amount of the relevant Termination Payment is agreed by the State and Project Co or, failing agreement, is determined by an Independent Expert (as that term is defined in <b>Schedule 7 (Termination Payments)</b>) in accordance with <b>Schedule 7 (Termination Payments)</b> or <b>Clause 41</b>; and</p> <p>(c) in the case of a Default Termination Payment, the Compensation Date,</p> <p>or such other date as may be specified in <b>Schedule 7 (Termination Payments)</b> for payment of a Termination Payment.</p>
<b><i>Threshold Amount</i></b>	has the meaning given in <b>Clause 33.7(a)</b> .
<b><i>Transportable Units</i></b>	means the transportable buildings described in <b>Schedule 21 (Transportable Units)</b> which are procured, installed, maintained and removed in accordance with <b>Clause 29</b> . For the avoidance of doubt, Transportable Units do not include the Contingency Transportable Units.
<b><i>Transportable Unit Zone</i></b>	has the meaning given in Part H of <b>Schedule 26 (Design Brief)</b> .
<b><i>Trust Beneficiaries</i></b>	the beneficiaries of the Project Trust.
<b><i>Trust Property</i></b>	all the present and future rights, undertaking and property comprising the trust fund of the Project Trust.
<b><i>Unavailability</i></b>	has the meaning given in <b>Schedule 3 (Payment)</b> .
<b><i>Uncleared Personnel</i></b>	has the meaning given in <b>Clause 55.4(e)</b> .
<b><i>Uninsurable Risk</i></b>	<p>means a risk that is required to be insured under this Deed and is insurable at the date of this Deed but during the Term:</p> <p>(a) Insurance becomes unavailable in the recognised international insurance market in connection with that risk by Reputable Insurers; or</p> <p>(b) the Insurance premium payable for insuring that risk with a Reputable Insurer or the terms and conditions of the relevant Insurance are such that the risk is no longer generally being insured against by private sector providers of infrastructure or services similar to the Relevant Infrastructure or Services in Australia or in the United Kingdom,</p> <p>provided that the uninsurability referred to in <b>paragraphs (a) and (b)</b> is not caused by any Project Co Act or Omission.</p>
<b><i>Unsuitable Third Party</i></b>	<p>means any person:</p> <p>(a) that is a Relevant Person who is issued a negative notice or an interim negative notice under the <i>Working with Children (Criminal Record Checking) Act 2004</i> (WA);</p> <p>(b) that is suspected, charged and not yet acquitted, or convicted, in relation to a child-related offence or other serious criminal offence;</p> <p>(c) whose activities pose or could pose a threat to any child;</p> <p>(d) whose activities or continued presence on or in the vicinity of a Site</p>

<b>Term</b>	<b>Meaning</b>
	<p>or Verge Works Site constitute or could constitute a risk to the safety or welfare of any child; or</p> <p>(e) whose activities pose or could pose a threat to national, State or School Facility security.</p>
<b>Use</b>	means, in relation to any Material, the accessing, possessing, using, storing, reproducing, communicating to the public, copying, translating, adapting, modifying, customising, and enhancing of that Material, and includes the incorporation of that Material with other Material and the creation of new versions of or derivations from that Material.
<b>Users</b>	<p>means:</p> <p>(a) School Invitees;</p> <p>(b) School Staff (excluding Project Co or Project Co Associates);</p> <p>(c) the State or any State Associate; and</p> <p>(d) any person who has dealings with a Principal, the Department or the State in relation to a School Facility (excluding Project Co or Project Co Associates), including:</p> <p>(i) users of out of school care;</p> <p>(ii) users of any Dental Therapy Centre Facilities; and</p> <p>(iii) any party who has entered into a separate agreement with the Principal, the Department or the State in relation to a School Facility and any parties that are contemplated by such agreements.</p>
<b>Utility</b>	means any utility service, including water, electricity, gas, drainage, sewerage, stormwater, communications and data services (including telephone, facsimile and internet access).
<b>Utility Infrastructure</b>	means any part of the supply, distribution or reticulation network owned, operated or controlled by a Utility provider, including poles, pipes, pipeline, cables, wires, conduits, tunnels, aqueduct, electrical installation, telecommunications plant, water channel and electronic communications systems, but not including communications systems as generally described in <b>Schedule 26 (Design Brief)</b> (which form part of the School Facilities).
<b>Utility Infrastructure Connection Plan</b>	means, with respect to a Site, the plan for that Site set out in Part B of <b>Schedule 8 (Site Matters)</b> .
<b>Utility Interruption</b>	means any one or more Utilities not being available for use at one or more Sites (at all, or in the necessary quantity or to the necessary specification).
<b>Verge Infrastructure</b>	means, during the Operating Phase for a Stage, all works which are required to be completed as part of the Verge Works for that Stage, including all hard and soft landscaping and other improvements on the Verge Works Site.
<b>Verge Works</b>	means in respect of a Stage, all physical things and works which are external to and in the vicinity of the Site for that Stage which Project Co must design, supply, construct, install, produce, commission or complete in accordance with the requirements set out in Part C2.3 of <b>Schedule 26 (Design Brief)</b> , including all Modifications, Minor Modifications and rectification of Defects in respect of those physical things and works.
<b>Verge Works Site</b>	<p>means, with respect to each Site, the land adjacent to or adjoining that Site on which the Verge Infrastructure for that Site are to be completed and maintained, limited to:</p> <p>(a) the embayments required to be completed under this Deed; and</p>



<b>Term</b>	<b>Meaning</b>
	(b) the area between the boundary of the relevant Site and the back of the kerb adjoining the Site.
<b>Whole of Life Cost</b>	means the anticipated total capital and operating costs to be incurred by Project Co in connection with an item of Project Co FF&E during the Term, assuming usage as intended by the Design Requirements and consisting of costs associated with: <ul style="list-style-type: none"> <li>(a) design, re-design, purchase, Insurance, transportation, storage, removal, replacement, dismantling, installation, associated Utility Infrastructure and commissioning (including any fees, margins and preliminaries); and</li> <li>(b) lifecycle replacement, maintenance, Insurance and the need for additional security to be lodged (including any fees, margins and preliminaries).</li> </ul>
<b>Whole School Unavailability Abatements</b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b>Whole School Unavailability Event</b>	has the meaning given to that term in <b>Schedule 3 (Payment)</b> .
<b>Works</b>	means all physical works, infrastructure and other things (whether permanent or temporary) which Project Co must design, supply, install, locate, construct, commission or complete under this Deed in respect of each Stage, and the Verge Works in respect of each Stage, including: <ul style="list-style-type: none"> <li>(a) Project Co FF&amp;E;</li> <li>(b) Modifications;</li> <li>(c) Minor Modifications;</li> <li>(d) FF&amp;E Modifications; and</li> <li>(e) any rectification of Defects.</li> </ul>

## **2 GENERAL RULES OF INTERPRETATION**

### **2.1 Interpretation**

In this Deed:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;
- (c) **(Deed, schedule and clause references)**: a reference to:
- (i) a party, Clause, Schedule, exhibit, or Annexure is a reference to a party, clause, schedule, exhibit or annexure of or to this Deed;
  - (ii) a section is a reference to a section of a schedule; and
  - (iii) a paragraph is a reference to a paragraph in the clause in which the reference appears;
- (d) **(Deed as amended)**: a reference to this Deed or to any other deed, agreement, or instrument includes a reference to this Deed or such other deed, agreement, or instrument as amended, novated, supplemented, varied or replaced from time to time;

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- (e) **(party)**: a reference to a 'party' is to a party to this Deed;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an Authority, a body politic, an association or a joint venture (whether incorporated or unincorporated), a partnership, a trustee and a trust;
- (g) **(other persons)**: a reference to any party or person includes each of their legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (h) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (i) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";
- (k) **("or")**: the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) **(information)**: a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (m) **("\$")**: a reference to "\$", AUD or dollar is to Australian currency;
- (n) **(time)**: a reference to time is a reference to time in Perth, Australia;
- (o) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes communication by email;
- (p) **(rights)**: a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (q) **(obligations and Liabilities)**: a reference to an obligation or a Liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (r) **("may")**: unless the State, State Representative or Principal (as applicable) is expressly required under this Deed to act reasonably in exercising any power, right or remedy, the term "may", when used in the context of a power, right or remedy exercisable by the State, State Representative or Principal, as applicable, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;
- (s) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
- (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another Entity, this Deed is deemed to refer to that other Entity;
  - (ii) ceases to exist, this Deed is deemed to refer to that new Entity which serves substantially the same purpose or object as the former Entity;
- (t) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision;
- (u) **(no double counting)**: if this Deed requires calculation of an amount payable to a party there must be no double counting in calculating that amount, which, for the avoidance of doubt includes amounts calculated in accordance with the schedules to this Deed; and

- (v) **(Business Day)**: if the day on or by which any thing is to be done in accordance with this Deed is not a Business Day, that thing must be done on the next Business Day.

## 2.2 Composition of Deed and order of precedence

- (a) **(Deed composition)**: This Deed comprises:
- (i) **Clauses 1 to 58**;
  - (ii) **Schedule 1 (Contract Particulars) to Schedule 28 (Operating Phase Licence)**; and
  - (iii) Annexures:
    - (A) **A: Initial Design Deliverables**;
    - (B) **B: Initial Services Deliverables**;
    - (C) **C: Initial Development Phase Plans**;
    - (D) **D: Initial Development Phase Program**;
    - (E) **E: Initial Operating Phase Management Plans**; and
    - (F) **F: Financial Close Adjustment Protocol**.
- (b) **(Annexures)**: Project Co agrees that to the extent that an annexure seeks to impose any obligations on the State, Project Co will not be entitled to make any Claim against the State in respect of that obligation (unless that same obligation is expressly imposed on the State in a clause or schedule).
- (c) **(Order of precedence)**: the following order of precedence applies in the event of any inconsistency, ambiguity or discrepancy between the various documents comprising this Deed:
- (i) **Clauses 1 to 58 and Schedules 1 (Contract Particulars), 3 (Payment), 4 (Indexes), 5 (Change Compensation Principles), 7 (Termination Payments), 11 (Commercial Acceptance Criteria) and 13 (Insurance)**;
  - (ii) the Output Specifications and **Schedules 8 (Site Plans), 9 (Design Development), 10 (Programming Requirements), 12 (Review Procedures), 20 (FF&E) and 21 (Transportable Units)**;
  - (iii) the annexures listed in **Clause 2.2(a)(iii)**; and
  - (iv) the remaining Schedules,
- except to the extent that any part of the various documents listed above impose a greater or higher requirement, standard, quality, level of service, staffing level, quantum or scope than any other part of the documents listed above, in which case, that greater or higher requirement, standard, quality, level of service, staffing level, quantum or scope prevails.

## 2.3 Inconsistency within Deed

- (a) **(Notification of ambiguity)**: If either party identifies any inconsistency, ambiguity or discrepancy within or between any of the documents that comprise this Deed, then that party must notify the other party of the inconsistency, ambiguity or discrepancy as soon as possible and, in any case, no later than five Business Days after becoming aware of the inconsistency, ambiguity or discrepancy.
- (b) **(Resolution of ambiguity)**: Within the Review Period, the State will direct Project Co as to how to resolve the ambiguity, discrepancy or inconsistency which is the subject of the notice in accordance with **Clause 2.3(a)** as follows:
- (i) in accordance with the order of precedence in **Clause 2.2(c)**;
  - (ii) if the relevant inconsistency, ambiguity or discrepancy is within a document referred to in **Clause 2.2(c)** or cannot be resolved in accordance with **Clause 2.2(c)**, in accordance with any process for

resolving such inconsistencies, ambiguities and discrepancies contained in the relevant document; or

- (iii) if the relevant inconsistency, ambiguity or discrepancy cannot be resolved in accordance with **Clause 2.3(b)(ii)** the State will direct Project Co to adopt the option the State requires Project Co to proceed with (which may be the greater or higher requirement or standard or level of service).

## **2.4 Inconsistency between State Project Documents**

Where there is an ambiguity, discrepancy, inconsistency or conflict of obligations between this Deed and any of the other State Project Documents, or between any of the State Project Documents, then the following order of precedence applies:

- (a) the Finance Direct Deed;
- (b) this Deed; and
- (c) the remaining State Project Documents.

## **2.5 Savings from resolution of inconsistency**

If resolution of an ambiguity, discrepancy, inconsistency or conflict of obligations under **Clause 2.4** results in a Saving to Project Co, the Saving will be a debt due and payable by Project Co to the State.

## **2.6 Plans, reports and procedures**

A reference to any Development Phase Plan and Development Phase Report, or Operating Phase Management Plan and Operating Phase Report, is a reference to that Development Phase Plan or Development Phase Report, or Operating Phase Management Plan or Operating Phase Report, as amended or updated from time to time under this Deed.

## **2.7 Version of documents Project Co must comply with**

Where Project Co is required to comply with a document and that document or any update of that document is required to be submitted for review in accordance with **Schedule 12 (Review Procedures)**, Project Co must comply with the version of the document that has been submitted, reviewed, amended and approved (if applicable) in accordance with **Schedule 12 (Review Procedures)**.

## **2.8 Approvals, directions and notices in writing**

Unless otherwise expressly provided in this Deed or agreed between the parties, all approvals, consents, directions, requirements, requests, Claims, notices, agreements and demands must be given in writing.

## **2.9 Prior approval or consent**

Where Project Co is required by this Deed to obtain the State's consent or approval to an action, document or thing, unless otherwise expressly stated, that consent or approval must be obtained in writing prior to the action, document or thing occurring or coming into effect.

## **2.10 Action without delay**

Unless there is a provision in this Deed which specifies a period of time in which something must be done by the parties all things must be done without undue delay.

## **2.11 Provisions limiting or excluding Liability, rights or obligations**

- (a) A right or an obligation of a party under this Deed will not limit or exclude any other right or obligation of that party under this Deed unless expressly stated.
- (b) Any provision of this Deed which seeks, either expressly or by implication, to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.

## 2.12 Relationship of the parties

Nothing in this Deed or any other Project Document:

- (a) **(no additional relationship)**: creates a partnership, joint venture, fiduciary, employment or agency relationship between the State and Project Co; or
- (b) **(no duty of good faith)**: imposes any duty of good faith on the State (unless otherwise expressly provided).

## 2.13 State's executive rights duties and functions

- (a) **(State's own interests)**: Unless otherwise expressly provided in the State Project Documents, nothing in the State Project Documents gives rise to any duty on the part of the State to consider interests other than its own interests when exercising any of its rights or carrying out any of its obligations in accordance with the State Project Documents.
- (b) **(State's rights)**: Notwithstanding anything expressly provided or implied in the State Project Documents to the contrary, the parties agree that the State:
  - (i) is not obliged to exercise any executive or statutory right or duty, or to influence, over-ride, interfere with or direct any other government party in the proper exercise and performance of any of its executive or statutory rights or duties; and
  - (ii) nothing expressly provided or implied in the State Project Documents has the effect of constraining the State or placing any fetter on the State's discretion to exercise or not to exercise any of its executive or statutory rights or duties.
- (c) **(No Claim)**: Subject to **Clause 2.13(d)**, Project Co will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (d) **(Liability for breach)**: **Clauses 2.13(a) to 2.13(c)** do not limit any Liability which the State would have had to Project Co under any State Project Document as a result of a breach by the State of a term of any State Project Document but for these clauses.

## 2.14 Reasonable endeavours of State

Any statement in a State Project Document providing that the State, the Principal, the Principal's Representative or any officer or agent of the State, will use or exercise "reasonable endeavours" or "act reasonably" in relation to an outcome, means that the State, the Principal, the Principal's Representative or any officer or agent of the State:

- (a) **(relevant steps)**: will take steps to bring about the relevant outcome so far as it is reasonably able to do so, having regard to its resources and other responsibilities;
- (b) **(no guarantee)**: cannot guarantee the relevant outcome; and
- (c) **(no obligation)**: is not required to:
  - (i) exercise a right of any government party, or to influence, over-ride, interfere with or direct any other government party in the proper exercise and performance of its legal, statutory or executive duties and functions;
  - (ii) exercise a power or discretion in a manner that the State regards as not in the public interest;
  - (iii) develop or implement new policy;
  - (iv) procure legislation; or
  - (v) act in any way that the State regards as not in the public interest.

## 2.15 Reduction in State Liability for Relief Events

- (a) Project Co will not be entitled to make any Claim in respect of a Relief Event where the Relief Event is caused by a Project Co Act or Omission.
- (b) Without limiting **Clause 2.15(a)**, the State's Liability and Project Co's entitlements in connection with any Relief Event will be reduced:
  - (i) **(caused by Project Co)**: to the extent that the Relief Event or the consequences of the Relief Event are contributed to by:
    - (A) any breach of any Project Document by Project Co or any Project Co Associate who is a counterparty to the Project Document; or
    - (B) a Project Co Act or Omission; or
  - (ii) **(failure to mitigate)**: to the extent Project Co, or any Project Co Associate, fails to:
    - (A) use all reasonable endeavours to mitigate, minimise or avoid the effects, consequences or duration of any Relief Event (including by putting in place temporary measures reasonably required by the State); or
    - (B) take all reasonable steps which a prudent, competent and experienced contractor in the circumstances of Project Co or the relevant Project Co Associate would have taken to mitigate, minimise or avoid the effects, consequences or duration of the Relief Event; and
  - (iii) **(Insurance proceeds)**: by any Insurance proceeds:
    - (A) payable to Project Co, or a Project Co Associate, in respect of any Insurances; or
    - (B) which would have been payable to Project Co or a Project Co Associate in accordance with any Insurances but for a failure by Project Co to comply with this Deed or a failure by Project Co or any Project Co Associate, to comply with the terms of those Insurances.

## 2.16 No State Liability for review

- (a) **(No obligation)**: The State does not owe any duty of care to Project Co to:
  - (i) review the Project Co Material submitted by Project Co (even where required to be submitted in accordance with **Schedule 12 (Review Procedures)**); or
  - (ii) inspect or review the Project Activities or the Relevant Infrastructure, for Defects, other errors or omissions or for compliance with the State Project Documents, any Approvals or any Laws.
- (b) **(No relief)**: No:
  - (i) review of, comments upon, acceptance, approval or certification of any Project Co Material by the State or a State Associate;
  - (ii) inspection or review of the Project Activities or the Relevant Infrastructure by the State or a State Associate; or
  - (iii) failure by (or on behalf of) the State or a State Associate, to detect any non-compliance by Project Co with its obligations in accordance with the State Project Documents, any Approvals, applicable Laws or Quality Standards;

will:

- (iv) relieve Project Co from, or alter or affect, its Liabilities, obligations or responsibilities whether in accordance with the State Project Documents or otherwise according to Law;
- (v) prejudice the State's rights against Project Co whether under the State Project Documents or otherwise according to Law; or
- (vi) constitute an approval by the State of Project Co's performance of its obligations in accordance with the State Project Documents.

## 2.17 Indexation

- (a) **(Indexed amounts):** All amounts required to be adjusted under this Deed by an Index will be Indexed in accordance with **Schedule 4 (Indexes)**.
- (b) **(Changes to Indexes):** Any changes to an Index will be calculated in accordance with **Schedule 4 (Indexes)**.

## 2.18 Cost of carrying out obligations

Each party must carry out its obligations under this Deed at its own cost, unless expressly provided otherwise.

## 2.19 Project Co and Project Co Associates

Any obligation of Project Co under a State Project Document is deemed to include an obligation on Project Co to ensure that each Project Co Associate assumes and complies with the corresponding obligation to the extent that the obligation is applicable to that Project Co Associate under a Project Document to which that Project Co Associate is a party, which results in, or might reasonably be expected to result in, a breach of the Project Deed.

## 2.20 Cooperation during the Term

Project Co must ensure that, at all times during the Term, Project Co, or any Project Co Associate:

- (a) ensures the ongoing cooperation with the State in the implementation and delivery of the Project;
- (b) cooperates and works collaboratively with the State (including the State Representative), Principal (or Principal's Representative) or any other person that may have been appointed by the State to assist with the implementation and delivery of the Project;
- (c) provides safe and sufficient access to any part of the Site during the Development Phase or Verge Works Site to:
  - (i) the State (including the State Representative);
  - (ii) any State Associate;
  - (iii) the Independent Certifier;
  - (iv) any Utility provider; or
  - (v) any other person that may have been granted access to the Site or Verge Works Site by the State or a State Associate;
 in accordance with the Site Access and Interface Protocols; and
- (d) subject to **Clause 2.12**, does all things reasonably necessary to ensure the State derives the full benefit of the Deed.

## 2.21 Final and binding

Where a determination, decision, opinion or direction is said in this Deed to be "final and binding", that decision, opinion or direction is not capable of forming the subject matter of a Dispute which can be resolved under this Deed.

## 2.22 Transparent provision of information

- (a) Without limiting any other clause of this Deed, the State has the right to request that Project Co make available to the State any information, records, Project Co Material and other documentation in whatever form which relate to this Deed, the Works, the Services or the Project on a fully transparent basis.
- (b) For the purposes of this **Clause 2.22**, 'fully transparent basis' includes Project Co providing to the State any requested information, records, Project Co Material or other documentation in a timely, clear and transparent manner which allows the State to properly understand the information, records, Project Co Material and other documentation and making available appropriately qualified personnel to explain the information, records, Project Co Material and other documentation or answer any questions the State may have in respect of the information, records, Project Co Material and other documentation.
- (c) The parties acknowledge and agree that, notwithstanding any provision of this Deed to the contrary:
  - (i) the powers and responsibilities of the Auditor General for the State of Western Australia under the *Financial Management Act 2006 (WA)* and the *Auditor General Act 2006 (WA)* (or any substituted legislation) are not limited or affected by the terms of this Deed and each party submits to those powers and responsibilities; and
  - (ii) Project Co may be the subject of an audit by the Auditor General pursuant to the *Auditor General Act 2006 (WA)* or the *Financial Management Act 2006 (WA)*.
- (d) Project Co covenants with the State that it will cooperate and comply expeditiously with any directions of the Auditor General given to the State or any other party in relation to any audit referred to in **Clause 2.22(c)(ii)**.
- (e) Project Co covenants with the State that it will cooperate and comply with any requests for information from the State that the State requires for the Department's reporting purposes.
- (f) All information provided by Project Co concerning costs, returns, Margins or other financial matters must be provided on an Open Book Basis.

## 2.23 Records

- (a) Notwithstanding any other provision of this Deed (other than **Clause 2.23(b)** and **Clause 37.2(c)**), Project Co is not required to provide the State with:
  - (i) employment contracts and employment files (unless specific waivers have been obtained from the relevant employees except to the extent these records are required in connection with a Probity Event or a Probity Investigation);
  - (ii) any communication subject to legal professional privilege, including any internal information regarding any Dispute or any Claim against the State under this Deed; or
  - (iii) documents relating to the Key Subcontractor's internal costs structures and treatment of non-Project related overheads, but only to the extent that those cost structures are not related to Project Co's obligations or the Project.
- (b) Nothing in **Clause 2.23(a)** prevents:
  - (i) the Auditor General from having access to the records described in **Clause 2.23(a)** which they are entitled to have at Law or for the purpose of satisfying the powers and responsibilities of the Auditor General referred to in **Clause 2.22(c)**; or



- (ii) the State from having access to the information contained in the Materials described in **Clauses 2.23(a)(i)** and **2.23(a)(iii)** to the extent that information is required by the State under **Clause 2.22(c)**, **Clause 50.3(a)** or **Clause 50.3(b)** and provided that the State cannot obtain the relevant information from other documents that it has been provided with.

### 3 CONDITIONS PRECEDENT

#### 3.1 Commencement

This Deed will not commence until each of the Conditions Precedent has been satisfied (or waived in accordance with **Clause 3.3**), except for the provisions contained in:

- (a) **Clause 1** (Definitions);
- (b) **Clause 2.12** (Relationship of the parties);
- (c) this **Clause 3** (Conditions Precedent);
- (d) **Clause 4** (Term);
- (e) **Clause 5.3** (All risks);
- (f) **Clauses 8.2** and **8.4** (Parties' representatives);
- (g) **Clause 38.8** (Indemnity for Project Co breach);
- (h) **Clause 38.9** (General indemnity);
- (i) **Clause 39** (Insurance);
- (j) **Clause 43** (Dispute resolution);
- (k) **Clause 44** (Representations and warranties);
- (l) **Clause 47** (Restrictions on Project Co);
- (m) **Clause 48** (Assignment and change in ownership);
- (n) **Clause 49.1** (Provision of the Base Case Financial Model);
- (o) **Clause 52** (Confidential Information and disclosure);
- (p) **Clause 55** (Probity Events and Disciplinary Events);
- (q) **Clause 56** (Notices and bar to Claims); and
- (r) **Clause 57** (Miscellaneous),

which will commence on the date of this Deed.

#### 3.2 Satisfaction of Conditions Precedent

- (a) **(Conditions Precedent Schedule): Schedule 2 (Conditions Precedent)** sets out which party is to satisfy each of the Conditions Precedent.
- (b) **(State to use reasonable endeavours):** The State must satisfy each Condition Precedent it is obliged to satisfy in accordance with **Schedule 2 (Conditions Precedent)** by the Condition Precedent Deadline and must notify Project Co as each such Conditions Precedent is satisfied.
- (c) **(Project Co to satisfy):** Project Co must satisfy each Condition Precedent it is obliged to satisfy in accordance with **Schedule 2 (Conditions Precedent)** by the relevant Condition Precedent Deadline and must notify the State in writing as each such Conditions Precedent is satisfied.
- (d) **(Notice at Financial Close):** When the last of the Conditions Precedent to be satisfied has been satisfied or waived, the State must confirm by written notice to Project Co:
  - (i) that all of the Conditions Precedent have been satisfied or waived; and

- (ii) the date upon which the last of the Conditions Precedent was satisfied or waived.

### 3.3 Waiver of Conditions Precedent

- (a) **(Conditions Precedent Schedule): Schedule 2 (Conditions Precedent)** sets out which party benefits from the satisfaction of each Condition Precedent.
- (b) **(Waiver):** A Condition Precedent is only waived if:
  - (i) where the Condition Precedent is included for the benefit of a particular party as set out in **Schedule 2 (Conditions Precedent)**, that party gives written notice of the waiver of the Condition Precedent to the other party; and
  - (ii) where the Condition Precedent is included for the benefit of both parties, both parties agree in writing to waive the Condition Precedent.

### 3.4 Failure to satisfy Condition Precedent Deadline

If the Conditions Precedent are not satisfied (or waived in accordance with **Clause 3.3**) by the relevant Condition Precedent Deadline, then:

- (a) **(State option to terminate):** the State may, at its option, terminate this Deed upon the State giving not less than five Business Days' notice to Project Co;
- (b) **(State Project Documents terminated):** if the State terminates this Deed in accordance with **Clause 3.4(a)**, each of the State Project Documents will be taken to have been terminated at the time this Deed is terminated and will be of no further force or effect; and
- (c) **(Right to Compensation):** if termination of this Deed is due to a failure by Project Co to satisfy the Conditions Precedent for which it is responsible, the State may seek compensation for that failure from Project Co.

### 3.5 Model Output Schedule

- (a) The parties acknowledge that the Financial Close Financial Model will contain the Model Output Schedule.
- (b) As soon as practicable after Financial Close, the parties will prepare conformed copies of the Project Documents incorporating relevant data derived from the Model Output Schedule, and the Project Documents, including this Deed, will be deemed to be amended accordingly with effect on and from Financial Close.

## 4 TERM

### 4.1 Commencement date

Subject to **Clause 3.1**, this Deed commences on the date of Financial Close.

### 4.2 Expiry Date

This Deed will terminate on the Final Expiry Date unless terminated earlier, in which case this Deed will expire on the date of such earlier termination (in each case the **Expiry Date**).

## 5 OVERARCHING OBLIGATIONS

### 5.1 Project Co's primary obligations

- (a) **(Deliver the Project):** Project Co must carry out the Project Activities in accordance with:
  - (i) the State Project Documents;
  - (ii) all applicable Laws;
  - (iii) all Approvals;
  - (iv) Best Industry Practices; and

- (v) all applicable Quality Standards.
- (b) **(Comply with directions):** Project Co must comply with:
  - (i) all directions given by the State to comply with the terms of the State Project Documents;
  - (ii) all agreements made by the parties in accordance with this Deed;
  - (iii) all Modification Orders and Change Responses issued by the State in accordance with this Deed; and
  - (iv) all directions or determinations given by the State or the Independent Certifier in accordance with State Project Documents.

## 5.2 Disputed Directions

- (a) Subject to **Clause 35**, where Project Co disputes that any direction given or determination made has been given or made in accordance with **Clause 5.1(b)**, Project Co must comply with the direction or determination but at the same time may refer the Dispute for determination in accordance with **Clause 43**.
- (b) An expert or court with power to determine a Dispute under this Deed will have the power to open up and review the direction purported to be given or determination purported to be made under this Deed.

## 5.3 All risks

- (a) **(All risks and no claim):** Except as otherwise expressly provided in the State Project Documents, as between the State and Project Co:
  - (i) Project Co accepts all risks (and the cost of such risks) in connection with the Sites, Verge Works Sites, Site Conditions, Stages, School Facilities, Verge Infrastructure, Project Activities and the Project; and
  - (ii) Project Co is not entitled to make any Claim against the State or the State Associates in connection with the Sites, Verge Works Sites, Site Conditions, Stages, School Facilities, Verge Infrastructure, the Project or the Project Documents (including any Claim for breach of contract, misrepresentation or negligence).
- (b) **(Third party Liability):** **Clause 5.3(a)** does not exclude or limit any Liability the State or the State Associates may have to Project Co or Project Co Associates under this Deed or at Law in respect of the Liability of Project Co or Project Co Associates to a third party in respect of death, personal injury or damage to property to the extent that the Liability of Project Co or Project Co Associate is a consequence of a negligent act or omission of the State or a State Associate.

## 5.4 Fit For Purpose warranty

Project Co warrants that at all times on and from the Date of Commercial Acceptance for the Stage until the end of the Term each Stage and the Verge Infrastructure relevant to that Stage will:

- (a) be Fit For Purpose by reference to the standards required at the Date of Commercial Acceptance for the Stage; and
- (b) comply with:
  - (i) all applicable Laws;
  - (ii) all Approvals; and
  - (iii) all applicable Quality Standards.

## 5.5 State Obtained Authorisations

- (a) Project Co must:
  - (i) satisfy any requirements of and comply with;

- (ii) ensure that the Project Co Associates comply with; and
- (iii) ensure that all elements of the Project satisfy any requirements of and complies with,

all State Obtained Authorisations including all conditions of such State Obtained Authorisations, except any such condition or requirement of a relevant Authority to carry out works external to both the relevant Site and related Verge Works Site, to deal with traffic conditions, which condition or requirement results from a traffic impact assessment (other than in circumstances where such condition or requirement is imposed to address Project Co's design of the School Facilities or Verge Infrastructure or work in respect of embayments), which works will be undertaken by the State as Surrounding Works.

- (b) Project Co must provide all information and assistance reasonably required by the State in order for the State to obtain any State Obtained Authorisation or discharge any obligation it has in accordance with any Law or Approval in connection with the Project.
- (c) Where a change to a State Obtained Authorisation, or to the conditions attaching to that State Obtained Authorisation, occurs the State must provide a notice to Project Co within five Business Days of the State becoming aware of the relevant change.
- (d) Subject to **Clause 5.5(b)**, the State will procure each of the State Obtained Authorisations for a Site set out in Part C of **Schedule 8 (Site Matters)** if required for the Site by:
  - (i) in respect of the State Obtained Authorisations for the Landsdale East Primary School Site set out in Part C of **Schedule 8 (Site Matters)**, 1 January 2016; and
  - (ii) in respect of the State Obtained Authorisations for all other Sites set out in Part C of **Schedule 8 (Site Matters)**, no later than the Site Access Date for the Stage located at that Site.

## 5.6 Other Approvals

Subject to **Clause 5.5**, Project Co must:

- (a) with the exception of State Obtained Authorisations, obtain, maintain and comply with;
- (b) ensure that the Project Co Associates comply with; and
- (c) ensure that all elements of the Project complies with,

all Approvals necessary for the Project, including all conditions of such Approvals.

## 5.7 Conditional Approvals

Without limiting **Clause 36.7** in respect of any State Obtained Authorisations, where any Approval is issued on conditions which would or could have a material adverse effect on the ability of Project Co to carry out the Project Activities under this Deed or otherwise affect Project Co's ability to meet its obligations under this Deed, Project Co must:

- (a) notify the State that those conditions would or could have such an effect; and
- (b) provide a copy of the relevant conditional Approvals, together with Project Co's detailed proposal for satisfying those conditional Approvals in a manner that would not have such an effect, to the State for review in accordance with **Schedule 12 (Review Procedures)**.

## 5.8 Surrounding Works

- (a) Project Co agrees that the Site for each School Facility is adjacent or proximate to the Surrounding Works.

- (b) Project Co agrees that it will, at its cost, comply with any reasonable request by the State to amend the Project Management Plan having regard to the requirements in **Clauses 5.8(d)** and **5.8(e)**.
- (c) Project Co must not access or enter any areas on which Surrounding Works are being undertaken without the prior consent of and on terms agreed with the State.
- (d) Except to the extent expressly permitted in accordance with this Deed, Project Co must not compromise, hinder, disrupt or otherwise adversely affect the Surrounding Works.
- (e) Project Co agrees that access to the Sites and the Verge Works Sites may be required for the purpose of undertaking the Surrounding Works and it must provide safe and sufficient access to any part of a Site to any person that may have been granted access by the State to perform the Surrounding Works.
- (f) Subject to **Clause 5.8(e)** the State will procure that the Surrounding Works specified in paragraphs (b)(iii) and (b)(iv) of Part A10.1 of **Schedule 26 (Design Brief)** for a Site will be completed (subject to minor outstanding items and defects) by no later than 12 weeks prior to the Date for Commercial Acceptance of the Stage (or if there are two, the first Stage) located at that Site.
- (g) Subject to **Clause 5.8(e)**, the State will procure that the Surrounding Works specified in paragraph (b)(i) of Part A10.1 of **Schedule 26 (Design Brief)** are completed in accordance with the requirements set out in paragraph (c) of Part A10.2 of **Schedule 26 (Design Brief)**, by no later than:
  - (i) in respect of Primary Schools, 16 weeks; and
  - (ii) in respect of Secondary Schools, 20 weeks,
 prior to the Date for Commercial Acceptance of the relevant Stage (or if there are two, the first Stage).
- (h) Project Co must arrange with the relevant owner of the Utility Infrastructure and relevant Utility provider to connect to each State Utility Infrastructure Connection Point and each Project Co Utility Infrastructure Connection Point, once it has been installed.
- (i) Without limiting Project Co's rights arising from **Clause 5.8(g)** or in respect of an Intervening Event, Project Co releases, and will procure that each Project Co Associate releases, the State and each State Associate from any Claim or Liability in connection with the quality, amount, capacity or other characteristics of any Utility Infrastructure or the location of a State Utility Infrastructure Connection Point or a Project Co Utility Infrastructure Connection Point.

## 6 SITE CONDITIONS

### 6.1 Environmental issues

Project Co must:

- (a) **(use of Site and Verge Works Site)**: during any period where Project Co is entitled to use or occupy a Site or Verge Works Site, not use or allow it to be used (other than in respect of School Activities), such that any substance is handled, disposed of, disturbed, discharged, released, deposited to or caused to emanate from the Site or Verge Works Site such that land, water or a site is Contaminated;
- (b) **(environmental responsibility)**: notwithstanding any other provision of this Deed, at all times carry out the Project Activities in accordance with, and ensure that the Works, the School Facilities and the Verge Infrastructure comply with:
  - (i) all Environmental Laws;
  - (ii) the Environmental Requirements;
  - (iii) the Environmental Management Plan; and

- (iv) any other requirement of any Authority in respect of any Environmental Matter, including any Environmental Notice,  
and take all reasonable and practicable measures to prevent or minimise adverse impacts on the Environment;
- (c) **(notification)**: immediately notify the State of any past, present or reasonably anticipated Discharge, Environmental Event or other act or incident that has caused, is alleged to have caused or is likely to cause a breach of, or non-compliance with, any Environmental Law, any Environmental Requirement or the Environmental Management Plan;
- (d) **(Environmental Notice)**: promptly provide the State with a copy of any Environmental Notice served on it, and all related correspondence between Project Co or a Project Co Associate and the relevant Authority which precedes or follows the issuing of the Environmental Notice;
- (e) **(comply with directions)**: comply with any direction from the State to:
  - (i) investigate any actual, alleged or potential Contamination;
  - (ii) carry out Remediation;
  - (iii) investigate or deal with any Discharge or Environmental Event; or
  - (iv) do any other thing which the State reasonably considers necessary to:
    - (A) avoid any alleged or potential Contamination, Discharge or Environmental Event; or
    - (B) manage or Remediate any Contamination, Discharge or Environmental Events; and
- (f) **(manage waste disposal)**: manage, remove and dispose of all waste, rubbish, debris, redundant materials and spoil produced by the Project Activities in accordance with Best Industry Practices, all relevant Approvals and this Deed.

## 6.2 Contamination

- (a) **(Monitoring and testing)**: Project Co must conduct any monitoring, testing or investigations required to be undertaken of any Contamination in, on, over or under any Site or Verge Works Site, or which has emanated or is emanating from any Site or Verge Works Site, in accordance with:
  - (i) the Environmental Requirements;
  - (ii) any Environmental Notice; or
  - (iii) Best Industry Practices,
 and must assist the State to comply with its obligations under all Environmental Requirements, Environmental Laws and the requirements of any Authority in respect of any Environmental Matter.
- (b) **(Notification)**: If Project Co discovers any Contamination in, on, over, under or emanating from any Site or Verge Works Site (whether or not Project Co has caused or contributed to that Contamination), it must notify the State as soon as practicable, but nevertheless within five Business Days after the discovery of the Contamination.
- (c) **(Notification Requirements)**: Project Co's notice under **Clause 6.2(b)** must contain all relevant details in relation to the Contamination, including:
  - (i) the type of Contamination;
  - (ii) the location of the Contamination;
  - (iii) the nature and extent of the Contamination; and
  - (iv) whether it considers the Contamination will give rise to a Contamination Modification Event,

to the extent such details are known at the time the notification is provided.

- (d) **(Remediation):** Project Co must:
- (i) Remediate:
    - (A) any Contamination in, on, over or under any Site or Verge Works Site; or
    - (B) any Contamination which has emanated or is emanating from any Site or Verge Works Site,
 where such Remediation is necessary, and to the extent required, to:
    - (C) comply with all Environmental Laws and any Environmental Notice;
    - (D) render the relevant Site or Verge Works Site suitable for the Project; or
    - (E) prevent the migration of Contamination from the relevant Site or Verge Works Site; and
  - (ii) comply with all requirements of any Authority in connection with any Contamination referred to in **Clause 6.2(d)(i)** or the Remediation of such Contamination.
- (e) **(Disputing an Environmental Notice):** Nothing in this **Clause 6.2** prevents Project Co from disputing the issue of an Environmental Notice or taking an action against a third party with respect to the Contamination.
- (f) **(Parties not to cause service of an Environmental Notice):** Subject to their respective obligations at Law or under any Approval, neither party will do anything with the intent, directly or indirectly, of causing or being likely to cause the issue or service of an Environmental Notice on Project Co or any Project Co Associate.
- (g) **(Indemnity):** To the extent that any such Contamination does not constitute a Contamination Modification Event, Project Co must indemnify the State against any Claim arising in connection with any Contamination existing on, in, over, under, or migrating or emanating from any Site or Verge Works Site.

### 6.3 Project Co's entitlement to compensation for Remediation

- (a) If the Contamination Project Co is required to Remediate is a Contamination Modification Event then Project Co may issue a Change Notice and will be entitled to compensation in accordance with **Schedule 5 (Change Compensation Principles)**.
- (b) Except as provided for in **Clause 6.3(a)** Project Co bears the full risk of all occurrences of Contamination, including for Remediating Contamination and will not be entitled to make any Claim against the State in connection with Contamination (including for Remediating Contamination).

### 6.4 Delay caused by Contamination Modification Event

If, for a Stage:

- (a) there is a Contamination Modification Event during the Development Phase which will:
  - (i) delay Project Co in achieving Commercial Acceptance of that Stage; and
  - (ii) cause activities on the critical path contained and shown in the then current Development Phase Program to be delayed;
- (b) Project Co includes in the Change Notice it submits for the relevant Contamination Modification Event a Claim for an extension of time in accordance with **Schedule 5 (Change Compensation Principles)**; and

- (c) Project Co is, at the time it submits the Change Notice for the relevant Contamination Modification Event, fully complying with its obligations in connection with the Development Phase Program in accordance with **Clause 11.2**,

Project Co will be entitled to an extension of time to the relevant Date for Commercial Acceptance for a Stage and its Prolongation Costs and Financing Delay Costs for the period of any such extension, calculated in accordance with **Schedule 5 (Change Compensation Principles)**.

## 6.5 Native Title Claims and Heritage Claims

- (a) **(Native Title)**: As between the State and Project Co, the State is responsible for:
- (i) dealing with any Native Title Claim in connection with any part of a Site, and taking any action required in accordance with the *Native Title (State Provisions) Act 1999* (WA) in connection with the Project;
  - (ii) the payment of any compensation or other moneys required to be paid to the native title holders of any part of a Site as a consequence of a successful Native Title Claim; and
  - (iii) the payment of any compensation or other moneys required to be paid under the *Native Title (State Provisions) Act 1999* (WA) in connection with the Project.
- (b) **(Artefacts)**: If an Artefact is discovered on or under the surface of a Site or Verge Works Site:
- (i) it will be the absolute property of the State; and
  - (ii) Project Co must:
    - (A) immediately notify the State of the discovery;
    - (B) permit the State to watch or examine any excavation on the Site or Verge Works Site; and
    - (C) take every reasonable precaution in carrying out the Project Activities so as to prevent Artefacts being damaged or removed until appropriate arrangements for dealing with, or removing, the Artefacts have been made.
- (c) **(Project Co must continue to carry out)**: If there is a:
- (i) Native Title Claim or Heritage Claim in connection with; or
  - (ii) discovery of Artefacts in,
- any part of a Site or Verge Works Site, Project Co must:
- (iii) continue to carry out its obligations under this Deed, except to the extent otherwise:
    - (A) directed by the State;
    - (B) ordered by a court or tribunal of competent jurisdiction; or
    - (C) required by Law; and
  - (iv) provide all reasonable assistance to the State in connection with dealing with the Native Title Claim, Heritage Claim or Artefact discovery.
- (d) **(Aboriginal cultural heritage)**: Project Co must:
- (i) comply with all reasonable directions of the State concerning Artefacts and the protection of Aboriginal cultural material and Aboriginal sites under the *Aboriginal Heritage Act 1972* (WA); and
  - (ii) undertake the Project Activities, and deliver the Project, in accordance with the *Aboriginal Heritage Act 1972* (WA).



## 7 UTILITIES

### 7.1 Project Co's obligations

Project Co must:

- (a) **(enquiries)**: make enquiries as to the location of existing Utility Infrastructure and liaise with the owner of that Utility Infrastructure and the relevant Utility provider as to the need for any potential relocation, protection or decommissioning of the Utility Infrastructure (as applicable);
- (b) **(risk)**: subject to **Clause 5.8(g)** assume the risk of the existence, location, condition and availability and required capacity of Utility Infrastructure in connection with the Project Activities and School Use;
- (c) **(Utility works)**: undertake, or procure that a Utility provider undertakes all necessary work in connection with Utility Infrastructure within each Site required to deliver the Works and ensure continuous supply of Utilities to each School Facility;
- (d) **(notice)**: notify the State at least 14 days before any planned connection, disconnection or interference with existing Utility Infrastructure and liaise with the State as to how best to manage the disconnection or interference taking into account the nature and requirements of the relevant Site;
- (e) **(agreements during the Development Phase)**: enter into all agreements for the supply of Utilities to each Site for a Stage throughout the Development Phase of that Stage;
- (f) **(approvals)**: Project Co must use its best endeavours to pursue all necessary approvals from Western Power and other relevant Authorities in relation to the connection of the photovoltaic system for each Site as specified in Section G6.1.24 of **Schedule 26 (Design Brief)** back into the relevant Utilities Infrastructure grid. The State may, at any time notify Project Co that it will seek the relevant approvals from Western Power itself or by using third parties;
- (g) **(access)**: give all Utility providers reasonable access to any part of each Site and not interfere with any Utility provider's access to any Verge Works Site to undertake any work or provide any service in respect of the Utilities;
- (h) **(payment)**: arrange and pay for all Utilities (other than communications and data services (including telephone, facsimile and internet access)) consumed or used at each Site or Verge Works Site throughout the Development Phase in accordance with the agreements entered into with the Utility providers;
- (i) **(indemnity)**: indemnify the State against any Claim or Liability arising in connection with:
  - (i) any disruption to any Utility Infrastructure or disruption to the supply of Utilities;
  - (ii) any damage to any Utility Infrastructure; or
  - (iii) the removal, relocation or carrying out of works to Utility Infrastructure, caused or to the extent contributed to by Project Co or any Project Co Associate; and
- (j) **(efficiency)**: use the Utilities provided to the State:
  - (i) efficiently; and
  - (ii) solely for the provision of the Services, subject to any agreement by the State to use Utilities for Project Co Third Party Use under **Clause 26.6**.

### 7.2 Utilities procurement throughout the Operating Phase

- (a) Project Co must throughout the Operating Phase for a Stage ensure the continuous supply of all Utilities for that Stage in accordance with **Schedule 27 (Services Specifications)**.

- (b) During the Operating Phase for each Stage, the State will enter into all agreements with Utility providers for the supply of Utilities to the School Facilities.
- (c) Project Co must do everything reasonably directed by the State from time to time to enable the State to enter into agreements with Utility providers for the supply of Utilities to the School Facilities. Subject to **Clause 26.6**, the cost of Utilities reasonably consumed by Project Co in the performance of the Services will be borne by the State.

## 8 PARTIES, PERSONNEL AND COMMUNITY

### 8.1 Authorities

Project Co acknowledges and agrees that:

- (a) there are Authorities with jurisdiction over aspects of the Project Activities, the Sites and the Verge Works Sites;
- (b) such Authorities may, from time to time and at any time, exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Project Activities;
- (c) it will co-operate with and co-ordinate its Project Activities with such Authorities as is required by them; and
- (d) except as otherwise expressly provided in this Deed, Project Co bears the full risk of all occurrences of the kind referred to in this **Clause 8.1** and will not be entitled to make any Claim against the State in connection with such occurrences.

### 8.2 State Representative

- (a) **(Natural person)**: The State will ensure that at all times throughout the Term there is a natural person appointed by it as the State Representative for the Project.
- (b) **(Identity)**: As at the date of this Deed the State Representative is the party nominated as such in **Schedule 1 (Contract Particulars)**.
- (c) **(Agent of the State)**: The State Representative may administer this Deed as the State's delegate and:
  - (i) give directions and notices to be given by the State;
  - (ii) receive all notices and documents to be received by the State; and
  - (iii) may exercise all rights and powers, authority and functions of the State, in connection with this Deed as agent of the State.
- (d) **(Oral directions)**: The State Representative may give a direction orally but will as soon as practicable confirm that direction in writing.
- (e) **(Directions from other people)**: Project Co must not accept or act upon directions in connection with the Development Phase Activities or Services from an employee or agent of the State other than the State Representative or a delegate of the State Representative appointed in accordance with **Clause 8.3** acting in accordance with this Deed and, in the case of a delegate appointed under **Clause 8.3**, acting within the scope of the delegation notified under **Clause 8.3**.
- (f) **(Vary or terminate delegation)**: The State may vary or terminate any delegated power or authority of the State Representative but must promptly notify Project Co of any such variation or termination.
- (g) **(Replacement)**: The State may at any time replace the State Representative, in which event the State will appoint another person as the State Representative and notify Project Co of that appointment.
- (h) **(Delegation)**: The State Representative may at any time delegate the exercise of any of his or her powers or authorities to another person and may terminate or vary that delegation. In connection with any such delegation, the State Representative

will promptly notify Project Co of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and of any termination or variation to that delegation. Any direction or notice given by or act of a State Representative delegate in accordance with the powers and authorities delegated to it under this **Clause 8.2(h)** will be deemed to be a direction, notice or act of the State Representative.

### 8.3 Delegations

- (a) **(Delegations)**: The State may at any time further delegate the exercise of any power or authority of the State under this Deed to a person other than the State Representative and may terminate or vary that delegation.
- (b) **(Notice)**: The State will promptly notify Project Co of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and of any termination or variation to that delegation.
- (c) **(Deemed direction of State)**: Any direction given by a State delegate in accordance with its delegation in accordance with this **Clause 8.3** will be deemed to be a direction of the State Representative.

### 8.4 Project Co Representative

- (a) **(Natural person)**: Project Co will ensure that at all times throughout the Term there is a natural person appointed by it as the Project Co Representative in respect of the Project.
- (b) **(Employee)**: The Project Co Representative must be an officer or employee of Project Co or a Related Body Corporate of Project Co.
- (c) **(Replacement)**: The Project Co Representative is one of the Key People and can accordingly only be replaced in accordance with **Clause 9.1**.
- (d) **(Contact)**: The Project Co Representative must act as the principal point of contact between Project Co and the State in respect of the administration of this Deed and be available to the State as and when required.
- (e) **(Presence)**: Project Co must ensure that the relevant delegate of the Project Co Representative is present at the Sites at such times as are necessary to ensure that Project Co is complying with its obligations under this Deed and upon reasonable request by the State.
- (f) **(Directions)**: A direction is given to Project Co if it is given to the Project Co Representative.
- (g) **(Authority and skills)**: Project Co will ensure that at all times during his or her appointment, the Project Co Representative has:
  - (i) the authority to perform its role and duties and discharge its obligations under this Deed; and
  - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Project Co Representative.
- (h) **(Duties during the Term)**: The Project Co Representative must perform the duties of the Project Co Representative under this Deed, including to:
  - (i) **(spokesperson)**: act as the spokesperson for Project Co;
  - (ii) **(partnership)**: ensure the ongoing implementation of a partnership with the State;
  - (iii) **(liaison)**: liaise and generally deal with stakeholders;
  - (iv) **(manage)**: represent the views of Project Co and manage and co-ordinate issues with any Project Co Associate prior to presentation to the State;

- (v) **(presence)**: ensure a strong presence and consistent project management role for Project Co in the implementation of the Project; and
- (vi) **(cooperation)**: ensure the ongoing cooperation with the State in the implementation of the Project.
- (i) **(Delegation)**: Project Co may at any time delegate any power or authority of the Project Co Representative to a person other than the then appointed Project Co Representative provided that the proposed delegate and the extent of the proposed delegation has been approved by the State (which approval will not be unreasonably withheld).

## 8.5 Design Manager

- (a) **(Natural person)**: Project Co will ensure that at all times throughout the Development Phase there is a natural person appointed by it as the Design Manager in respect of the Project.
- (b) **(No other role)**: The Design Manager must not be engaged to perform any other role on the Project.
- (c) **(Employee)**: The Design Manager must be an officer or employee of Project Co or a Related Body Corporate of Project Co.
- (d) **(Replacement)**: The Design Manager is one of the Key People and can accordingly only be replaced in accordance with **Clause 9.1**.
- (e) **(Contact)**: The Design Manager must be available to the State as and when required.
- (f) **(Presence)**: Project Co must ensure that the Design Manager is present at the Sites at such times as are necessary to ensure that Project Co is complying with its obligations under this Deed and upon reasonable request by the State.
- (g) **(Reporting)**: The Design Manager must report directly to the Project Co Representative.
- (h) **(Authority and skills)**: Project Co will ensure that at all times during his or her appointment, the Design Manager has:
  - (i) the authority to perform its role and duties and discharge its obligations in accordance with **Clause 8.5(i)** and elsewhere in this Deed; and
  - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Design Manager.
- (i) **(Role of Design Manager)**: The role of the Design Manager includes the following functions:
  - (i) **(manage design process)**: manage and be heavily engaged in the Design Development Process in accordance with **Schedule 9 (Design Development)**;
  - (ii) **(co-ordinate Subcontractors)**: co-ordinate and liaise with the Subcontractors and oversee compliance by the D&C Subcontractor and other Subcontractors of their Subcontracts during the Development Phase;
  - (iii) **(co-ordinate Design Deliverables)**: co-ordinate all Design Deliverables and all information within them, and all communications with the State in connection with the Design Deliverables;
  - (iv) **(quality)**: examine the Design Deliverables prior to submission to the State in accordance with **Schedule 12 (Review Procedures)**, for errors, omissions, inconsistencies and discrepancies and take all steps to ensure they are rectified;
  - (v) **(certification)**: certify in respect of all Design Deliverables prior to submission to the State that it has complied with its obligations under

**Clause 8.5(i)(iv)** and is not aware of any non-compliance with the relevant requirements of this Deed including the Design Requirements;

- (vi) **(meetings with State)**: convene and attend regular co-ordination meetings with the State;
  - (vii) **(liaison)**: attend on and liaise with the persons performing the testing (including the Commercial Acceptance Tests) and commissioning of the Works; and
  - (viii) **(co-ordinate Works)**: co-ordinate the execution of the Works in order to facilitate achievement of Commercial Acceptance for a Stage by the Date for Commercial Acceptance for that Stage.
- (j) **(Delegation)**: Subject to **Clause 9.1**, Project Co may at any time delegate any power or authority of the Design Manager to a person other than the then appointed Design Manager provided that the extent of the proposed delegation has been approved by the State (which approval will not be unreasonably withheld).

## 8.6 Principal

- (a) **(Principal)**: The Principal of a School Facility will be the person (as notified to Project Co) appointed by the State in accordance with the *School Education Act 1999* (WA) and, until such time as the Principal has been appointed, will be the State.
- (b) **(Replacing Principals)**: The State may at any time and from time to time change, in accordance with the *School Education Act 1999* (WA), the Principal of a School Facility.
- (c) **(Benefit of Deed)**: The State holds the benefit of each right in this Deed for itself and on trust for each Principal to the extent that such right is expressly stated to be for the benefit of a Principal.

## 8.7 Powers of a Principal

- (a) A Principal may:
  - (i) exercise the powers and authority that are conferred upon the Principal by this Deed;
  - (ii) exercise such other power or authority of the State under any State Project Document, delegated by the State to the Principal and notified to Project Co (including any conditions applying to the delegated power);
  - (iii) bind the State under this Deed or other State Project Documents, only to the extent described in **Clauses 8.7(a)(i)** and **8.7(a)(ii)** or to the extent of compliance with the conditions of any lawfully delegated power to do so, notified to Project Co; and
  - (iv) exercise such powers and authorities as agent for the State (and not as an independent reviewer, assessor or valuer) but not in relation to Commercial Acceptance or the Commercial Acceptance Criteria.
- (b) The State may exercise any power or authority delegated to the Principal, and may vary or terminate any such delegation but must promptly notify Project Co of any such variation or termination of delegated power or authority.

## 8.8 Delegation by Principal

- (a) The Principal may delegate the exercise of any power or authority of the Principal under this Deed to the Principal's Representative and may vary or terminate that delegation from time to time.
- (b) The Principal may at any time delegate the exercise of any power or authority of the Principal under this Deed to any person other than the Principal's Representative and may vary or terminate that delegation from time to time.

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- (c) The Principal must promptly notify Project Co of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and any termination or variation of that delegation.

## 8.9 Contract Management Team

- (a) **(Establishment):** The parties will establish a group consisting of the following members (together the **Contract Management Team**):
- (i) the State Representative;
  - (ii) two or more other representatives of the State notified by the State to Project Co from time to time;
  - (iii) the Project Co Representative;
  - (iv) two other representatives of Project Co notified by Project Co to the State from time to time; and
  - (v) any other person the parties may agree is appropriate from time to time.
- (b) **(Functions):** The functions of the Contract Management Team will be to:
- (i) monitor the overall progress of the Project Activities and compliance with this Deed;
  - (ii) assist in the resolution of any matters referred to the Contract Management Team by a party including Disputes in accordance with **Clause 43**;
  - (iii) review all reports and plans provided by Project Co, its Subcontractors and the Independent Certifier during the Term; and
  - (iv) discuss and address such other matters as the members of the Contract Management Team may agree from time to time in connection with the Project.
- (c) **(Meetings):** The Contract Management Team must:
- (i) meet:
    - (A) monthly during the Term, not later than 15 Business Days after the end of each Month (or as otherwise agreed by the State and the Project Co Representative); or
    - (B) when otherwise called to meet on ten Business Days' notice by the State or the Project Co Representative (or on such earlier notice as otherwise agreed by them); and
  - (ii) conduct its meetings in the manner agreed from time to time between the State and the Project Co Representative.
- (d) **(Reports):** Project Co must, no later than five Business Days before each meeting of the Contract Management Team convened in accordance with **Clause 8.9(c)**, give each member of the Contract Management Team and the Independent Certifier (for the duration only of the Independent Certifier's term in accordance with the Independent Certifier Deed of Appointment):
- (i) prior to the final Operational Commencement Date, the Monthly Works Report for the previous Month; and
  - (ii) thereafter, the Quarterly Performance Report.
- (e) **(Meeting agendas):** The State will determine the agenda for each meeting of the Contract Management Team and in determining each agenda:
- (i) will seek input from the Project Co Representative; and
  - (ii) include any items notified to it by any other member received no later than ten Business Days prior to the date of the meeting.

- (f) **(Quorum)**: A quorum for a Contract Management Team meeting is at least the Project Co Representative and the State Representative.
- (g) **(Chair of meetings)**: The State Representative will chair Contract Management Team meetings.
- (h) **(Minutes)**: The State will take minutes of each Contract Management Team meeting and distribute such minutes at least five Business Days prior to the next relevant meeting.
- (i) **(Continuity of membership)**: The parties acknowledge the importance of the Contract Management Team having a continuity of membership in order to successfully carry out its functions.
- (j) **(Changes to membership)**: The people who are required to attend the Contract Management Team meetings under this Deed may, where strictly necessary, be changed by the party they are representing from time to time on notice to the other parties together with details of the reason for the change.
- (k) **(Other attendees)**: The State may require that:
- (i) the Independent Certifier attend any meeting of the Contract Management Team; and
  - (ii) Project Co procure the attendance of senior representatives of any of Project Co, the Key Subcontractors, a Financier or any Project Co Associate at any meeting of the Contract Management Team and Project Co must comply with any such requirement.
- (l) **(Liability of Contract Management Team)**: The Contract Management Team:
- (i) is advisory only and its decisions or recommendations are not binding on the parties; and
  - (ii) does not have any legal responsibilities, Liability or power to require any of the parties to act or refrain from acting in any way.
- (m) **(No limitation)**: The parties' involvement in the Contract Management Team does not affect their respective rights and obligations under this Deed.
- (n) **(Further information)**: The State may require Project Co to provide information on matters discussed at any Contract Management Team meeting and Project Co must provide that information in a timely manner.
- (o) **(No reliance or Claim)**: Neither the State nor Project Co will be entitled to:
- (i) rely on any statement, opinion, advice, representation, warranty, promise or undertaking made or given by or on behalf of or any member of the Contract Management Team (in its capacity as a member); or
  - (ii) make any Claim against any such group or committee or any member of the Contract Management Team (in its capacity as a member),
- arising in connection with anything which any such member does or fails to do in its capacity as a member of the Contract Management Team.
- (p) **(Conduct at meetings)**: The parties must to the greatest extent possible, freely and openly discuss the Project Activities at all Contract Management Team meetings, and Project Co must procure that all Project Co Associates fully respond to any questions which the State may ask Project Co at any Contract Management Team meetings within five Business Days.

## 8.10 Appointment of Independent Certifier

- (a) **(Project Co nominates three firms)**: Following initial consultation with the State in relation to the number and identity of appropriate firms from which to seek tenders, Project Co must, no later than 15 Business Days prior to Financial Close, nominate at least three firms that have submitted tenders to Project Co from which the State will select the Independent Certifier, each of which must:

- (i) have appropriate qualifications and experience;
  - (ii) have no interest or duty which may conflict with the role of the Independent Certifier under this Deed;
  - (iii) indicate its willingness to execute the Independent Certifier Deed of Appointment without substantial amendment;
  - (iv) have professional indemnity insurance in accordance with the requirements of the Independent Certifier Deed of Appointment; and
  - (v) provide such information in relation to fees and other matters as the State reasonably requires.
- (b) **(State's rights):** The State may request additional information from Project Co in respect of the shortlisted firms and may conduct interviews, jointly with Project Co, with any of the firms nominated by Project Co.
- (c) **(Appointment):** The State may nominate one of the firm's selected by Project Co as the Independent Certifier and the State and Project Co must then jointly engage that firm to act as the Independent Certifier under this Deed.
- (d) **(Not agent):** The Independent Certifier is appointed jointly by the parties and will act independently and not as agent of either party.
- (e) **(State refusal):** If the State, acting reasonably, refuses to select one of the three firms nominated by Project Co within ten Business Days of Project Co's nomination, Project Co must, within five Business Days of receiving notice from the State of that refusal, nominate three other firms in accordance with **Clause 8.10(a)** and the process in **Clauses 8.10(a) to 8.10(c)** will apply again.
- (f) **(Costs):** Where the Independent Certifier acts as an expert in relation to a Dispute in accordance with **Clause 43**, the parties will share equally the cost of the Independent Certifier.
- (g) **(Role):** The role, functions, rights and Liabilities of the Independent Certifier and the parties' rights and obligations in connection with the Independent Certifier are set out in the Independent Certifier Deed of Appointment.
- (h) **(Period of Appointment):** The Independent Certifier will be appointed until 12 Months after the final occurring Date of Commercial Acceptance.
- (i) **(No dual role):** Neither party may engage the Independent Certifier in respect of any Finance Document, the Key Subcontracts or any other role in connection with the Project without the prior consent of the other party.

### 8.11 Determinations of Independent Certifier

Determinations of the Independent Certifier will be final and binding on the State and Project Co except:

- (a) in the case of manifest error;
- (b) if there is an express provision in this Deed to the contrary; or
- (c) where the Independent Certifier is acting as an expert under **Clause 43**, in which case the parties' rights in respect of the determination of the Independent Certifier will be as set out in that **Clause 43**.

### 8.12 Replacement of Independent Certifier

- (a) If:
  - (i) the Independent Certifier Deed of Appointment is terminated in accordance with its terms; or
  - (ii) the Independent Certifier is, for any reason, not appointed or ceases to act as the Independent Certifier in accordance with the State Project Documents,



the State and Project Co must jointly engage another person to act as Independent Certifier on substantially the same terms as the Independent Certifier Deed of Appointment in accordance with the process set out in **Clauses 8.10(a) to 8.10(e)**.

- (b) The new Independent Certifier appointed in accordance with **Clause 8.12(a)** is bound by the exercise of any functions exercised or decisions made by the State and Project Co where such functions were exercised or decisions were made under this Deed or the Independent Certifier Deed of Appointment.

### 8.13 Power of attorney

Project Co irrevocably:

- (a) appoints the State, and the State's nominees from time to time, jointly and severally, as its attorney with full power and authority:
- (i) with effect from the Expiry Date, to execute any agreement or novation contemplated by **Clauses 33.1 and 41.8**; and
  - (ii) to undertake Project Co's obligations in accordance with **Clause 41.8**; and
- (b) agrees to ratify and confirm whatever action is taken by the attorney appointed by Project Co under **Clause 8.10(a)**.

### 8.14 Media and public relations

- (a) **(Community liaison)**: Project Co must manage and participate in all community relations programs and activities as:
- (i) required by the Output Specifications;
  - (ii) contained in the Project Management Plan which relate to media and public relations; and
  - (iii) reasonably requested by the State from time to time.
- (b) **(Communications approach)**: Without limiting the generality of **Clause 8.14(a)**, Project Co must not, and must procure that any Project Co Associates do not, communicate with the media or communicate any information publicly with regard to the Project without the prior consent of the State.
- (c) Project Co must, subject to **Clause 8.14(b)**, attend and participate in any meetings or activities requested by the State during the Term.

### 8.15 Conflicts of Interest

Project Co must avoid any conflicts of interest that might arise in relation to the exercise or performance by Project Co or any Project Co Associates of any power, duty or function conferred or imposed by or under this Deed or any other Law.

## 9 KEY PEOPLE AND SUBCONTRACTING

### 9.1 Key People

Project Co must:

- (a) ensure that the Key People are employed or engaged in the roles specified in **Schedule 1 (Contract Particulars)**;
- (b) subject to **Clause 9.1(c)**, not replace the Key People or delegate the functions of the Key People (where they are entitled to do so under this Deed) without the State's prior approval; and
- (c) if any of the Key People die, become seriously ill or resign from the employment of Project Co or any Subcontractor or receive a promotion: replace the relevant Key People with persons approved by the State (not to be unreasonably withheld) of at least equivalent qualification, experience, ability and expertise.

## 9.2 Subcontracting

Project Co:

- (a) is not relieved from any or all of its obligations or Liabilities in accordance with the State Project Documents as a result of subcontracting any of those obligations or Liabilities;
- (b) will be responsible for the acts and omissions of any Subcontractor and their respective associates in carrying out the Project Activities as if such acts or omissions were the acts or omissions of Project Co;
- (c) for the purposes of Part 1F (Proportionate liability) of the *Civil Liability Act 2002* (WA) is entirely responsible for any failure to take reasonable care on the part of any Subcontractor or their associates; and
- (d) must, if the State requires, give the State access to (or copies of, upon request) any proposed or executed Subcontract (regardless of whether Project Co is a party to that Subcontract) and all plans, specifications and drawings relating to that Subcontract.

## 9.3 Key Subcontracts

- (a) Project Co must not, and must ensure none of the Project Co Associates:
  - (i) amend or agree to amend or waive any rights under a Key Subcontract in a way that would have a material adverse effect on:
    - (A) the ability of an Entity to perform and observe its obligations under any Project Document; or
    - (B) the rights of the State under any Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document;
  - (ii) amend or agree to amend, grant an indulgence or waive or accept any waiver of any rights under a Key Subcontract in a way that would have a material adverse effect on:
    - (A) the ability of an Entity to perform and observe its obligations under any Project Document; or
    - (B) the rights of the State under any Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document;
  - (iii) terminate, rescind, novate or assign or agree to any termination rescission, novation or assignment of any Key Subcontract; or
  - (iv) replace a Key Subcontractor,  
without the prior consent of the State, which will not be unreasonably withheld.
- (b) Project Co must procure from each Key Subcontractor an executed Direct Deed:
  - (i) in respect of the D&C Subcontractor, in the form of the D&C Direct Deed; and
  - (ii) in respect of the Services Subcontractor, in the form of the Services Subcontractor Direct Deed.
- (c) It will be reasonable for the State to withhold its consent of any proposal to replace a Key Subcontractor if:
  - (i) Project Co has not given the State all of the following information:
    - (A) the identity of the replacement Subcontractor;
    - (B) terms upon which the replacement Subcontractor is to be appointed; and

- (C) the scope of the Works or the Services that Project Co intends the replacement Subcontractor to perform or provide;
- (ii) Project Co has not procured from any replacement Subcontractor:
  - (A) a Direct Deed on substantially the same terms as the Direct Deed entered into by the Key Subcontractor which the replacement Subcontractor is replacing; and
  - (B) the written consent to a Probity Investigation from each person in respect of whom the State advises Project Co it requires a Probity Investigation; or
- (iii) the State, acting reasonably, is of the opinion that the proposed replacement Subcontractor:
  - (A) is not capable of performing Project Co's obligations in respect of any part or the whole of the Works or the Services which are the subject of the proposed Subcontract between Project Co and that Subcontractor;
  - (B) has not demonstrated recent experience and good performance in delivery of that part of the Works or the Services (which are the subject of the replacement Subcontract) at a facility similar to the School Facilities;
  - (C) is not reputable; or
  - (D) does not have sufficient financial capacity to implement that part of the Works or the Services which are the subject of the replacement Subcontract; or
- (iv) a Relevant Person in relation to proposed Subcontractor does not satisfy the State's Probity Investigations in accordance with **Clause 55**.
- (d) If the State approves the replacement Subcontractor, Project Co must provide to the State a copy of the replacement Subcontract (certified as true and complete by an officer of Project Co) not less than 15 Business Days prior to Project Co entering into the Subcontract for review in accordance with the **Schedule 12 (Review Procedures)**.
- (e) If the State rejects the replacement Subcontractor, or the terms of the replacement Subcontract, the State must provide reasons for such rejection and Project Co must not enter into the replacement Subcontract until the reasons for the State's rejection have been addressed to the satisfaction of the State.

#### 9.4 Requirements for subcontracting

- (a) Without limiting **Clause 9.3**, Project Co must not engage any Subcontractor or allow any Project Co Associate to engage any Subcontractor, unless:
  - (i) the State's probity requirements as described in **Clause 55** are satisfied;
  - (ii) the proposed Subcontractor is a reputable and competent party which has the financial capacity, experience and capability to perform the obligations of Project Co to be subcontracted to at least the standards required by this Deed; and
  - (iii) any Subcontract to be entered into by Project Co or the Subcontractor contains further provisions expressly recognising and permitting the exercise by the State of its rights under, and contains all relevant provisions prescribed by (if applicable), **Clauses 9.1, 9.2, 9.7(a), 13.2, 17.1, 21, 24.3, 40, 40.8, 48, 52, 53 and 55**.
- (b) If the State:
  - (i) either:

- (A) is aware or suspects that a Probity Event has occurred in respect of a Subcontractor or a Relevant Person engaged by that Subcontractor; or
  - (B) is aware or suspects that a Disciplinary Event has occurred in respect of a Relevant Person engaged by that Subcontractor; and
  - (ii) is of the opinion that it is consequently not desirable for that Relevant Person to take part in the management or performance of the Subcontract or for Project Co to engage the relevant Subcontractor in respect of the Project,
- the State may:
- (iii) direct Project Co not to engage the relevant Subcontractor in respect of the Project; or
  - (iv) approve the Subcontract on condition that the Relevant Person or persons:
    - (A) not take part in the management or performance of the Subcontract;
    - (B) not be allowed to access any Site; and
    - (C) not be given Personal Information,
 or on such other conditions as the State considers necessary to quarantine that Relevant Person from the Project and on condition that the Subcontractor provides its written undertaking to the State to comply with such conditions.
  - (c) Project Co must:
    - (i) monitor and ensure compliance by each Subcontractor with its Subcontract and any related Direct Deed; and
    - (ii) comply with its obligations under all Subcontracts except to the extent necessary to comply with its obligations under this Deed.

## 9.5 Payment of amounts owed to Subcontractors

Project Co must ensure that Subcontractors are paid in accordance with the terms of their Subcontracts.

## 9.6 Construction Contracts Act

- (a) This **Clause 9.6** will apply only to the extent that the Construction Contracts Act applies to any Subcontract.
- (b) Expressions defined or used in the Construction Contracts Act have the same meaning for the purposes of this **Clause 9.6** (unless the context otherwise requires).
- (c) If the Construction Contracts Act applies to any Subcontract, Project Co must:
  - (i) within two Business Days of receiving any application or notice in accordance with the Construction Contracts Act (excluding any payment claim or payment schedule), give a copy of that application or notice to the State; and
  - (ii) within one Business Day of receiving any notice of a Subcontractor's intention to suspend work under a Subcontract in accordance with the Construction Contracts Act, give a copy of that notice to the State.
- (d) If:
  - (i) a Subcontractor is entitled to suspend work under a Subcontract in accordance with the Construction Contracts Act; or

- (ii) Project Co informs the State, or the State becomes aware that Project Co has failed to pay an amount that is certified or determined under the relevant Subcontract as being due and payable to a Subcontractor,

the State may then make that payment directly to the Subcontractor, provided that the State has given sufficient notice to Project Co of its intention to pay an amount to the Subcontractor to enable Project Co to provide reasons (accompanied by contemporaneous Records) as to why the payment should not be made.

- (e) If the State makes a payment directly to the Subcontractor under **Clause 9.6(d)**, such amount will be a debt due and payable by Project Co to the State.

## 9.7 Subcontractor payments, Claims and Dispute

- (a) The State may, at any time, request information from any Subcontractor in relation to whether payments are being made to that Subcontractor in accordance with the terms of their Subcontract with Project Co or a Key Subcontract (as applicable).
- (b) Project Co must notify the State of the existence of any Claims or Disputes that have arisen under any Subcontract (regardless of whether Project Co is a party to that subcontract), where the Claims process or dispute resolution process under that Subcontract has been activated by any party to it.

## 9.8 Obligations as to Claims made on pass-through basis

Project Co must, in circumstances where it makes any Claim against the State as a consequence of a Claim that has been made by a Subcontractor against Project Co, take reasonable steps to ensure that any such Claim made by the Subcontractor is bona fide, prior to making any related Claim against the State and must notify the State of the steps it has taken prior to or at the same time it makes the Claim against the State.

## 9.9 Industrial relations issues

Project Co:

- (a) has sole responsibility for and must manage all aspects of industrial relations in connection with the Project Activities; and
- (b) must keep the State fully and immediately informed of industrial relations issues or action which affect or are likely to affect the carrying out of the Project Activities and what action or measures (including settlements) Project Co has taken or proposes to take to overcome the effects of such industrial relations issues or action.

## 10 HEALTH AND SAFETY

### 10.1 Project Co's general OHS obligations

During the Term, Project Co:

- (a) **(health, safety and welfare)**: must ensure the health, safety and welfare of all persons present on or entering the Site or the Verge Works Site (as applicable), consistent with its obligations under the OHS Laws;
- (b) **(comply with OHS Laws)**: must:
  - (i) comply with, and ensure that all Subcontractors comply with, all OHS Laws, including OHS Laws applicable or relevant to the Project Activities, the Works, or access to the Site by Project Co or any other person accessing the Site;
  - (ii) upon the request of the State, demonstrate compliance with OHS Laws; and
  - (iii) ensure suitably qualified and experienced personnel are present at the Site or the Verge Works Site (as applicable) to ensure Project Co discharges its duties under this **Clause 10.1** including providing Key People qualified to:

- (A) monitor and manage the health, safety and welfare impacts of all activities on the Site or Verge Works Site;
  - (B) conduct regular audits of the Site or Verge Works Site; and
  - (C) arrange a minimum of one external audit of compliance with OHS Laws per Quarter during the Development Phase and as required by the State during the Operating Phase. All audit reports are to be provided to the State with details of any corrective action required. For the avoidance of doubt, any cost associated with the audits referred to in this **Clause 10.1(b)(iii)(C)** must be borne by Project Co;
- (c) **(cooperation and notice):** must:
- (i) consult, cooperate and coordinate with any other contractors or other persons engaged in or associated with the business of the State or the Project (or both) in order to:
    - (A) maintain uniform health and safety practices; and
    - (B) ensure health and safety at the Site or Verge Works Site;
  - (ii) cooperate with the State to enable the State to comply with its obligations in accordance with all relevant OHS Laws;
  - (iii) comply with any of the State's policies and procedures that relate to work health and safety applicable to the Project Activities, the Works, the Site or the Verge Works Site;
  - (iv) perform all relevant functions and fulfil all relevant duties of an employer, occupier and all other obligations as a duty holder under the OHS Laws;
  - (v) participate in any on-site committee in connection with health and safety, including attending any meetings as requested by the State;
  - (vi) immediately advise the State in writing of any act, omission, fact or circumstance associated with the activities of Project Co or any other person relevant to the ability of Project Co to deliver the Project and access the Site or the Verge Works Site in a manner that is safe and without risks to health;
  - (vii) supply or arrange to be supplied all Plant and equipment necessary to ensure the delivery of the Project Activities or the Works is carried out and the Site and Verge Works Site is maintained, in a manner that is safe and without risks to health; and
  - (viii) ensure that all Plant and equipment supplied or arranged to be supplied by it or any Subcontractor is and will be maintained in a condition that is safe and without risks to any person;
- (d) **(OHS records):** must retain up to date health and safety records and make these available to the State as requested by the State from time to time; and
- (e) **(ultimately responsible):** subject to **Clause 10.3** accepts that it is ultimately responsible for:
- (i) the control and management of the Site during the Development Phase for the purposes of delivering the Project Activities and the Works and discharging the duties imposed by the OHS Laws;
  - (ii) the control and management of the Site during the Operating Phase for the purposes of delivering the Project Activities and discharging the duties imposed by the OHS Laws; and
  - (iii) all health and safety at the Site and the Verge Works Site, including the provision of appropriate equipment and facilities,

and that it cannot delegate or assign this responsibility. Whilst the State does not prevent Project Co delegating its obligations in respect of health and safety as may be permitted by any Law, a delegation or assignment of any responsibility for health and safety by the Project Co under OHS Laws does not derogate from Project Co's overall responsibility as set out in this Deed.

## 10.2 NOT USED

## 10.3 New OHS Regulations

If the New OHS Regulations are enacted in Western Australia and supersede the *Occupational Safety and Health Regulations 1996 (WA)* and the State determines that it is necessary to appoint a Main Contractor for any of the School Facilities, the Sites, the Verge Works Sites or the Development Phase Activities in accordance with the New OHS Regulations, then:

- (a) **(appointment under New OHS Regulations):** the State will appoint:
  - (i) the D&C Subcontractor to perform the role of Main Contractor for the Development Phase Activities and the Works; and
  - (ii) the relevant Services Subcontractor to perform the role of Main Contractor for all works undertaken and activities undertaken during the Operating Phase in connection with the School Facilities or the Services; and
- (b) **(Project Co to procure):** Project Co must procure that the D&C Subcontractor and the relevant Services Subcontractor accept appointment to the role of Main Contractor for the purposes of **Clauses 10.3(a)(i)** and **10.3(a)(ii)** under the New OHS Regulations on such terms as are prescribed in the New OHS Regulations for a Main Contractor and so as to ensure that the D&C Subcontractor and the relevant Services Subcontractor (as the case may be):
  - (i) complies with the obligations of a Main Contractor under the New OHS Regulations; and
  - (ii) is able to discharge the obligations required of a Main Contractor.

## 10.4 Occupational health and safety incident reports

- (a) Project Co must:
  - (i) in connection with incidents that occur during the course of the Project, the Works, the rectification of Defects by or on behalf of Project Co at the Site or the Verge Works Site, comply with all relevant OHS Laws requiring an employer, a person with management or control of the Site or otherwise applicable to the role of Project Co under this Deed, to provide notification of an incident;
  - (ii) notify the State immediately (and, in any case, within 24 hours) of any accident or incident which is notifiable under OHS Laws, injury or property damage which:
    - (A) occurs during the performance of the Project Activities, the Works, or the rectification of Defects;
    - (B) is associated with the Project Activities or the Works; or
    - (C) occurs at the Site or Verge Works Site; and
  - (iii) if the State requests,
    - (A) provide a written report to the State giving complete details of the incident, including the results of investigations into its cause and any recommendations or strategies for preventing a recurrence, including the implementation of suitable control measures and remedial action as required; or

- (B) prepare and provide the State with a written report detailing the ways in which Project Co complies with applicable OHS Laws and which contains such other work health and safety information in relation to the Project Activities, the Works, the rectification of Defects by or on behalf of Project Co, or the Site or Verge Works Site as the State may reasonably require.
- (b) The State may, at any time and from time to time, perform an audit of Project Co and inspect the Site or the Verge Works Site to identify whether Project Co has breached **Clause 10.1** or this **Clause 10.4**.

## 10.5 Breach of OHS Laws

- (a) Without limiting any of the State's rights at Law, any breach by Project Co, or any Project Co Associate, of OHS Laws or the requirements of **Clauses 10.1** to **Clause 10.4** which:
- (i) gives rise to circumstances which present actual or potential risk to life or serious injury; or
  - (ii) is otherwise required to be notified under an OHS Laws,
- entitles the State to suspend the whole or part of the Project Activities or the Works, and Project Co must bear any cost it incurs as a result of the suspension.
- (b) When the State is satisfied that Project Co has adequately rectified the situation that gave rise to the breach it will promptly give notice to Project Co to resume the Project Activities or the Works.
- (c) Project Co (to the greatest extent permitted by Law) will indemnify the State against all Liability which the State may suffer or incur arising out of or in connection with a breach by Project Co of, or an act or omission of a Project Co Associate that causes Project Co to breach any of its obligations under this **Clause 10**.
- (d) Project Co's Liability to indemnify the State under **Clause 10.5(c)** will be reduced to the extent that the Liability was directly caused by a negligent act or omission of the State.

## 10.6 State may act if Project Co fails to comply

To the extent that Project Co fails to comply with any obligation under this **Clause 10**, the State may, in addition to any other remedies under this Deed or at Law, on reasonable prior notice to Project Co, do all things necessary to rectify the failure and the reasonable costs of doing so will be a debt due and payable by Project Co to the State.

## 11 DEVELOPMENT PHASE PLANS, REPORTS AND DEVELOPMENT PHASE PROGRAM

### 11.1 Development Phase Plans and Development Phase Reports

- (a) **(Initial Development Phase Plan not in final form)**: The parties acknowledge that the Development Phase Plans in **Annexure C (Initial Development Phase Plans)** are not in final form.
- (b) **(Submission)**: Project Co must update the Initial Development Phase Plans in accordance with **Schedule 24 (Development Phase Plans and Reports)** and submit the updated Initial Development Phase Plans to the State (and, where applicable, in accordance with **Schedule 24 (Development Phase Plans and Reports)**, the Independent Certifier) for review in accordance with **Schedule 12 (Review Procedures)**.
- (c) **(Resubmission)**: The Initial Development Phase Plans submitted and amended in accordance with **Schedule 12 (Review Procedures)** in accordance with **Clause 11.1(b)** will become the Development Phase Plans.



- (d) **(Submission of written communications)**: During the Development Phase and subject to **Clause 56.1**, all written communications, including the submission or resubmission of any Development Phase Plans, submitted to the State or the Independent Certifier by Project Co in accordance with this Deed must be submitted through the project information, management and collaboration system. The State will, at a time mutually agreed between the parties, procure that reasonable training in the use of the system is provided to those Project Co Associates who are required to use the system in connection with the Works.
- (e) **(Delivery)**: Unless otherwise agreed by the State, Project Co must carry out the Development Phase Activities in accordance with the Development Phase Plans.
- (f) **(Authority approval)**: If a Development Phase Plan is required to be approved by an Authority, Project Co must ensure that it has obtained that approval prior to submitting the relevant Development Phase Plan to the State for review.
- (g) **(Development Phase Reports)**: Project Co must prepare and submit the Development Phase Reports to the State in accordance with **Schedule 24 (Development Phase Plans and Reports)**.
- (h) **(Certification by Independent Certifier)**: The Commercial Acceptance Plan and the plans described in **Schedule 24 (Development Phase Plans)** (and any revisions) must be certified by the Independent Certifier:
- (i) as being appropriate for the Project;
  - (ii) as being sufficient to demonstrate that the Commercial Acceptance Criteria will be met; and
  - (iii) as otherwise meeting the requirements of this Deed, including **Schedule 26 (Design Brief)**.
- (i) **(Updating)**: If the Independent Certifier has identified any issues with or made any comments in respect of the plans listed in **Clause 11.1(h)**, or any revisions of those Development Phase Plans, in submitting the documents to the State, Project Co must provide a description as to how Project Co has addressed those issues or comments and include confirmation from the Independent Certifier that the Independent Certifier is satisfied with how those issues or comments have been addressed.
- (j) **(Additional information)**: Project Co must provide to the State and, where applicable, the Independent Certifier, any additional information in connection with the Development Phase Plans and the Development Phase Reports reasonably requested by the State or, where applicable, by the Independent Certifier.

## 11.2 Development Phase Program

- (a) **(Initial Development Phase Program not in final form)**: The parties acknowledge that the Initial Development Phase Program that was included in the Project Co Proposal (as may have been amended prior to the date of this Deed) is not in final form.
- (b) **(Submission)**: Project Co must update the Initial Development Phase Program to ensure it complies with **Schedule 10 (Programming Requirements)** and submit the updated Initial Development Phase Program to the State and the Independent Certifier for review in accordance with **Schedule 12 (Review Procedures)**.
- (c) **(Resubmission)**: The Initial Development Phase Program submitted and amended in accordance with **Schedule 12 (Review Procedures)** in accordance with **Clause 11.2(b)** will become the Development Phase Program.
- (d) **(Departure)**: Subject to complying with **Clause 11.2(e)**, Project Co may depart from the Development Phase Program if it is necessary to do so to comply with this Deed save that any such departure will not relieve Project Co from its obligations to meet Commercial Acceptance for each Stage by the relevant Date for Commercial Acceptance under this Deed.

- (e) **(Notice of departure):** Project Co must give notice to the State and the Independent Certifier before making any material change (including any change to the critical path) to the Development Phase Program, together with the reasons why it is necessary to do so to comply with this Deed.
- (f) **(Updated Development Phase Program):** A notice under **Clause 11.2(e)** must include a Development Phase Program updated to reflect the departure in accordance with **Schedule 10 (Programming Requirements)** for review by the State and the Independent Certifier in accordance with **Schedule 12 (Review Procedures)**.
- (g) **(Assessing Claims):** Neither the State nor the Independent Certifier is required to use the Development Phase Program for any purpose, including for the purpose of assessing any Claim made by Project Co, but may do so in their sole and absolute discretion.

## 12 INTERACTION WITH HARRISDALE STAGE 1 CONTRACTOR

### 12.1 Warranty regarding Harrisdale Stage 1 Works

- (a) Project Co warrants that:
  - (i) it has reviewed and carefully considered the design documentation for the Harrisdale Stage 1;
  - (ii) it has reviewed and carefully considered the Harrisdale Stage 1 Contract;
  - (iii) it has inspected the Harrisdale Stage 1 Works; and
  - (iv) at all times on and from the Date of Harrisdale Stage 1 Practical Completion until the end of the Term, Harrisdale Stage 1 will comply with the requirements of the Harrisdale Stage 1 Contract and will be fit for the performance of the Services in accordance with this Deed.
- (b) The State will waive any Abatement that would otherwise be incurred by Project Co to the extent Project Co was unable to provide a Service due to a defect in the design of the Harrisdale Stage 1 Works except Abatements in relation to failing to Make Safe by the Make Safe Times, provided that:
  - (i) Project Co has taken all reasonable measures to mitigate the impact of a design defect in the Harrisdale Stage 1 Works (including implementing a Temporary Repair);
  - (ii) the design defect in the Harrisdale Stage 1 Works has a material impact on the provision of the Services;
  - (iii) the design defect in the Harrisdale Stage 1 Works could not have been discovered if Project Co and the Project Co Associates had carefully reviewed and considered the design of the Harrisdale Stage 1 Works (including all design documentation) as at the date of this Deed in accordance with Best Industry Practices; and
  - (iv) immediately upon Project Co or a Project Co Associate becoming aware of the design defect in the Harrisdale Stage 1 Works, Project Co notified the State identifying the design defect in the Harrisdale Stage 1 Works and the impact on the provision of the Services.
- (c) Project Co will not be entitled to make any Claim against the State arising out of or in connection the Harrisdale Stage 1 Contract or the Harrisdale Stage 1 Works or the design of the Harrisdale Stage 1 Works.
- (d) Except as set out in **Clause 12.1(b)**, Project Co is not entitled to relief from, and the State may enforce its rights against Project Co in respect of, the performance of the Services or Project Co's other obligations under this Deed whether or not the design of the Harrisdale Stage 1 Works is adequate or includes design defects.

## 12.2 Not Used

## 12.3 Completion of Harrisdale Stage 1 Works

- (a) The State will give Project Co notice of the estimated Date of Harrisdale Stage 1 Practical Completion as soon as reasonably practicable after the State receives such notice from the Harrisdale Stage 1 Contractor.
- (b) The Superintendent will be responsible for certifying that completion of the Harrisdale Stage 1 Works has been achieved in accordance with the Harrisdale Stage 1 Contract.
- (c) The State will procure that the Superintendent must promptly provide to Project Co and the State a copy of the Harrisdale Stage 1 Certificate of Practical Completion issued pursuant to the Harrisdale Stage 1 Contract.
- (d) Project Co acknowledges and agrees that:
  - (i) the Superintendent's determination under **Clause 12.3(b)** will be final and binding on the State and Project Co, except in the case of manifest error; and
  - (ii) Project Co will not be entitled to make any Claim against the State in connection with the Superintendent's determination.
- (e) Project Co must commence performing the Services in relation to Harrisdale Stage 1 on and from the Operational Commencement Date for Harrisdale Stage 1.
- (f) The State will provide Project Co with copies of operation manuals and other documents applicable to operation and maintenance of Harrisdale Stage 1 which are provided to the State by the Harrisdale Stage 1 Contractor.

## 12.4 State initiated Harrisdale Stage 1 Works Variation

- (a) The State may, at any time, notify Project Co of a proposed Harrisdale Stage 1 Works Variation and must provide Project Co with relevant information available to the State to enable Project Co to carry out a review for the purposes of **Clause 12.4(b)**.
- (b) Project Co must, within ten Business Days (or such longer period as the State reasonably agrees, having regard to the size and complexity of the proposed Harrisdale Stage 1 Works Variation) provide a notice to the State which must:
  - (i) subject to **Clause 12.4(b)(ii)**, confirm that the Harrisdale Stage 1 Works will remain capable of enabling Project Co to comply with its obligations under this Deed if the Harrisdale Stage 1 Works Variation is implemented; and
  - (ii) set out Project Co's estimate of the effect (if any) the proposed Harrisdale Stage 1 Works Variation will have on lifecycle costs or Project Co's costs or Project Co's ability to perform the Services in relation to Harrisdale Stage 1 in accordance with this Deed.
- (c) Project Co's confirmation under **Clause 12.4(b)(i)** can only be withheld if the proposed Harrisdale Stage 1 Works Variation is reasonably expected to prevent Project Co from complying with its obligations under this Deed.
- (d) If Project Co declines to give the confirmation pursuant to **Clause 12.4(b)(i)**:
  - (i) Project Co must provide:
    - (A) detailed reasons explaining why the proposed Harrisdale Stage 1 Works Variation will prevent Project Co from complying with its obligations under this Deed; and
    - (B) details of any change it requires to the proposed Harrisdale Stage 1 Works Variation in order to give the confirmation; and

- (ii) the State may either:
  - (A) refer the determination of whether the proposed Harrisdale Stage 1 Works Variation will prevent Project Co from complying with its obligations under this Deed to be decided in accordance with **Clause 43**;
  - (B) notify Project Co of any changes to the proposed Harrisdale Stage 1 Works Variation, in which case this **Clause 12.4** will reapply;
  - (C) withdraw the proposed Harrisdale Stage 1 Works Variation; or
  - (D) notify Project Co that it agrees that the proposed Harrisdale Stage 1 Works Variation will prevent Project Co from complying with its obligations under this Deed.
- (e) If it is determined under **Clause 43** or the parties agree that:
  - (i) the proposed Harrisdale Stage 1 Works Variation will prevent Project Co from complying with its obligations under this Deed, the State may:
    - (A) withdraw the proposed Harrisdale Stage 1 Works Variation;
    - (B) modify the proposed Harrisdale Stage 1 Works Variation, in which case this **Clause 12.4** will reapply; or
    - (C) proceed with the proposed Harrisdale Stage 1 Works Variation on the basis that Project Co's warranty in **Clause 12.1(a)(iv)** will not apply to the extent to which Project Co is prevented from complying with that warranty by the Harrisdale Stage 1 Works Variation to the extent determined under **Clause 43** or agreed by the parties and the State will,
 

issue a Modification Request to Project Co to implement a Modification, if required, to accommodate the Harrisdale Stage 1 Works Variation; or
  - (ii) the proposed Harrisdale Stage 1 Works Variation will not prevent Project Co from complying with its obligations under this Deed, Project Co will be deemed to agree that **Clauses 12.1(a)** and **12.1(b)** will continue to apply with respect to the modified Harrisdale Stage 1 Works Variation if the Harrisdale Stage 1 Works Variation is implemented.
- (f) The State must reimburse Project Co for all costs reasonably incurred by Project Co in assessing each Harrisdale Stage 1 Works Variation pursuant to this **Clause 12.4**.

## 12.5 Defects in Harrisdale Stage 1 Works

- (a) Project Co must:
  - (i) promptly give notice to the State upon becoming aware of any matter it considers to be a Harrisdale Stage 1 Defect; and
  - (ii) if Project Co gives such a notice, also set out in that notice Project Co's estimate of the effect (if any) the proposed Harrisdale Stage 1 Defect will have on lifecycle costs or Project Co's costs of performing the Services in relation to Harrisdale Stage 1 in accordance with this Deed or Project Co's ability to comply with this Deed.
- (b) If:
  - (i) Project Co notifies the State of a Harrisdale Stage 1 Defect prior to the Date of Harrisdale Stage 1 Practical Completion;
  - (ii) the Harrisdale Stage 1 Defect is not rectified;
  - (iii) Project Co has also notified the State in accordance with **Clause 12.5(a)** of Project Co's estimate of the effect (if any) the proposed Harrisdale

Stage 1 Defect will have on lifecycle costs or Project Co's costs of performing the Services in relation to Harrisdale Stage 1 or Project Co's ability to comply with this Deed; and

(iv) there is such an impact,

then the State will issue a Modification Request to Project Co to implement a Modification to address that impact of the Harrisdale Stage 1 Defect on lifecycle costs or Project Co's costs of performing the Services in relation to Harrisdale Stage 1 or Project Co's ability to comply with this Deed.

- (c) Project Co acknowledges and agrees that after the Date of Harrisdale Stage 1 Practical Completion, it will be responsible for rectifying all Defects in Harrisdale Stage 1 in accordance with the requirements of this Deed.
- (d) If the State and Project Co disagree as to whether a Defect is a Harrisdale Stage 1 Defect or what impact a Harrisdale Stage 1 Defect has on lifecycle costs or Project Co's costs of performing the Services in relation to Harrisdale Stage 1 or Project Co's ability to comply with this Deed, either party may refer the matter to the Dispute resolution procedure under **Clause 43** for resolution.
- (e) *[Not disclosed]*.
- (f) *[Not disclosed]*.
- (g) *[Not disclosed]*.
- (h) If the Harrisdale Stage 1 Works do not reach practical completion by the Site Access Date for the Harrisdale Secondary School – Stage 2 Site and such delay causes a delay to the Works in respect of Harrisdale Secondary School – Stage 2, to the extent that Project Co is not compensated for the impact of the relevant delay under the Collateral Warranty, this will comprise a Compensable Extension Event.

## 13 DESIGN

### 13.1 Design warranties

Project Co must design each Stage and the Verge Infrastructure for each Stage in accordance with the Design Requirements and so that each Stage and the Verge Infrastructure for that Stage, when constructed, satisfies the FFP Warranty.

### 13.2 Purpose of Design Development Process

- (a) **(Project Co agrees):** Project Co agrees that:
- (i) Project Co must comply with the Design Development Process in developing the Design Deliverables;
- (ii) the purpose of the Design Development Process is to:
- (A) optimise the design of each Stage; and
- (B) develop, refine and finalise the Design Deliverables through to For Construction Documentation in accordance with **Schedule 9 (Design Development)** and this Deed; and
- (iii) the Design Development Process itself does not constitute a Modification or otherwise enable Project Co to make any Claim against the State or the State Associates for any Liabilities incurred by Project Co in connection with the conduct of the Design Development Process.
- (b) **(Design Development Process):** Project Co must conduct and manage all aspects of the Design Development Process in accordance with **Clause 5.1(a), Schedule 9 (Design Development)** and as otherwise required under this Deed.
- (c) **(Submission):** Project Co must submit the Design Deliverables to the State and the Independent Certifier in accordance with **Schedule 9 (Design Development)** and **Schedule 12 (Review Procedures)**.

- (d) **(State review):** The State will review the Design Deliverables submitted or resubmitted by Project Co in accordance with **Schedule 12 (Review Procedures)**.

### 13.3 Design Departures

- (a) With any Design Deliverable submitted for review under this Deed, Project Co must clearly identify any proposed Design Departures, with full details of the proposed departures including:
- (i) designs and detailed explanations of all consequential changes to the School Facilities, Verge Infrastructure and Services Requirements and Project Co's obligations and warranties under this Deed;
  - (ii) any changes in quality of the Design Deliverables that result from the proposed departure; and
  - (iii) any Saving as a consequence of the Design Departure.
- (b) The State may accept or reject any proposed Design Departures.
- (c) If the State accepts a proposed Design Departure and the Design Departure results in a Saving, Project Co must pay the Saving (calculated in accordance with **Schedule 5 (Change Compensation Principles)**) to the State.
- (d) If the State rejects the proposed Design Departure, Project Co:
- (i) must amend the relevant Design Deliverable to comply with the relevant Design Requirements; and
  - (ii) must not vary the Design Deliverables to reflect the Design Departure until that Design Departure is accepted by the State.
- (e) To the extent that the State accepts a proposed Design Departure in accordance with this **Clause 13.3**, the Design Requirements and the Design Deliverables will be varied to reflect the Design Departure so that Project Co's obligations and warranties under this Deed will not be breached by implementation of that Design Departure.

## 14 MINOR MODIFICATIONS

### 14.1 Purpose and timing

- (a) This **Clause 14** only applies to a Stage from Financial Close until the Date of Commercial Acceptance for that Stage.
- (b) The parties agree that the purpose of this **Clause 14** is to:
- (i) better facilitate and more efficiently give effect to Minor Modifications; and
  - (ii) ease the administrative burden on Project Co and the State in the implementation of Minor Modifications.
- (c) Project Co must seek to give effect to the purpose stated in **Clause 14.1(b)** in complying with its obligations under this **Clause 14**.

### 14.2 Minor Modifications during Development Phase

- (a) At any time during the Development Phase, Project Co may propose a Modification which is a Minor Modification by issuing a Change Notice in accordance with **Schedule 5 (Change Compensation Principles)** by way of a Change Notice entitled "Minor Modification Proposal".
- (b) At any time during the Development Phase, the State may propose a Modification which is a Minor Modification in accordance with **Schedule 5 (Change Compensation Principles)** by way of a Change Notice Request entitled "Minor Modification", provided that, without limiting the State's rights under **Clause 36** to treat what otherwise would have been a 'Minor Modification' as a Modification, the State may not direct a Minor Modification less than [*Not disclosed*] months prior to the Date for Commercial Acceptance of the relevant Stage if Project Co can

demonstrate to the State (acting reasonably) that the proposed Minor Modification may reasonably be expected to cause delay to the achievement of Commercial Acceptance by the Date for Commercial Acceptance.

- (c) Nothing in this **Clause 14** will prevent either party from exercising their rights under **Clause 36** as if the Minor Modification were in fact a Modification.

### 14.3 Minor Modification Running Schedule

- (a) Project Co must prepare and continually update a running schedule of all proposed and approved Minor Modifications (**Minor Modification Running Schedule**).
- (b) The Minor Modification Running Schedule must be in a form approved by the State and, at a minimum, contain the following information with respect to each proposed Minor Modification:
- (i) a unique code, number or identifier (which must not be changed or removed from the Minor Modification Running Schedule regardless of whether a proposed Minor Modification has been rejected or otherwise);
  - (ii) reasons why Project Co considers that the proposed change, item of work, activity or component constitutes a Minor Modification;
  - (iii) the impact of the proposed Minor Modification on the Output Specifications, the performance by Project Co of the Services, the provision of the Services and Project Co's ability to satisfy the FFP Warranty and, if the impact disadvantages Project Co, any amendments that are required to this Deed to address that impact;
  - (iv) to the extent applicable, the name of the State Associate or the relevant person or Entity that has requested the proposed Minor Modification (or to which the proposed Minor Modification relates) and the reason for the proposed Minor Modification;
  - (v) the proposed amount payable by the State to Project Co or by Project Co to the State for the proposed Minor Modification calculated in accordance with **Schedule 5 (Change Compensation Principles)** and having regard to the requirements of **Clause 14.6**; and
  - (vi) details of the total amount payable to Project Co or the State for all Minor Modifications which have been previously approved by the State in accordance with **Clause 14.4(b)(ii)**.

### 14.4 Minor Modifications meeting

- (a) (**Meeting**): The State or Project Co may convene a meeting concerning the Minor Modification Running Schedule by giving two Business Days' notice and the parties must attend such meeting.
- (b) (**State's election**): To the extent that the Minor Modification Running Schedule contains the information required by **Clause 14.3** for each of the proposed Minor Modifications, the State must:
- (i) dispute Project Co's reasoning that a proposed change, item of work, activity or component constitutes a Minor Modification;
  - (ii) approve one or more of the proposed Minor Modifications identified in the Minor Modification Running Schedule;
  - (iii) elect to further consider a proposed Minor Modification;
  - (iv) reject any proposed Minor Modification identified in the Minor Modification Running Schedule; or
  - (v) otherwise request Project Co to provide additional information concerning a proposed Minor Modification.
- (c) (**Rejected**): Subject to Project Co's right to refer the matter for resolution in accordance with **Clause 43**, if the State:

- (i) disputes Project Co's reasoning that a proposed change, item of work, activity or component constitutes a Minor Modification; or
- (ii) rejects any proposed Minor Modification identified in the Minor Modification Running Schedule,

Project Co must mark the relevant item 'rejected' and, if applicable and directed by the State, proceed to carry out the work that had been the subject of the alleged Minor Modification.

- (d) **(Project Co to implement):** If the State approves a proposed Minor Modification identified in the Minor Modification Running Schedule (and only if there is an approval by the State):
  - (i) Project Co must implement the Minor Modification; and
  - (ii) the State must pay to Project Co or Project Co must pay to the State (as applicable) that proposed amount for the approved Minor Modification in accordance with **Schedule 5 (Change Compensation Principles)** subject to:
    - (A) the proposed amount payable by the State to Project Co or by Project Co to the State for the proposed Minor Modification identified in the Minor Modification Running Schedule being correctly calculated in accordance with **Schedule 5 (Change Compensation Principles)**; and
    - (B) the payor first receiving a Tax Invoice for the relevant amount.
- (e) **(Further Information):** If the State elects to consider a proposed Minor Modification further, Project Co must provide any further information requested by the State and otherwise retain the proposed Minor Modification on the Minor Modification Running Schedule until the Minor Modification is accepted or rejected in accordance with **Clause 14.4(b)**.

## 14.5 Value management

Project Co must:

- (a) regularly arrange and conduct detailed value management workshops with the State, the Key Subcontractors and any other parties notified by the State for the purpose of identifying proposed changes to the scope of the Works (including omissions to the scope of the Works) which will result in costs savings to the State and otherwise minimise the State's Liability to Project Co for approved Minor Modifications;
- (b) otherwise work collaboratively with the State to identify potential costs savings which will eliminate or minimise the State's Liability to Project Co for approved Minor Modifications; and
- (c) any changes and savings referred to in this **Clause 14.5** must take into account any potential "whole of life" impact on the performance of the Services.

## 14.6 Payment and other entitlements

- (a) Subject to **Clause 14.6(d)**, the amount payable to either party in connection with Minor Modifications will be calculated in accordance with **Schedule 5 (Change Compensation Principles)**.
- (b) Project Co will not be entitled to any extension to any Date for Commercial Acceptance for a Stage or the payment of any Prolongation Costs or Financing Delay Costs in connection with a Minor Modification. If the State approves the Minor Modification being carried out in accordance with this **Clause 14**, or it is otherwise determined that the change is a Minor Modification, this Deed will be amended in the manner set out in, and to reflect, the Minor Modification Running Schedule.



- (c) Project Co must not implement a proposed Minor Modification, and will not be entitled to make any Claim against the State or any State Associate in connection with a Minor Modification, unless it has been approved by the State or otherwise determined to be a Minor Modification in accordance with this **Clause 14**.
- (d) To the extent that Project Co is entitled to payment for carrying out a Minor Modification, Project Co:
  - (i) will only be entitled to be paid Base Costs in connection with that Minor Modification; and
  - (ii) will not be entitled to be paid any margin.

#### 14.7 Changes to Minor Modification process

If the State considers that the Minor Modification process is not meeting the purposes set out in **Clause 14.1**, the State may direct Project Co to no longer use the Minor Modification process set out in this **Clause 14**, in which case, all Minor Modifications will be managed in accordance with the process set out in **Clause 36** and this **Clause 14** will be deemed not to operate.

### 15 FF&E DURING DEVELOPMENT PHASE, HARRISDALE STAGE 1 AND FOR TRANSPORTABLE UNITS

#### 15.1 FF&E

- (a) **(Selection and purchase)**: Project Co must select and purchase items of Project Co FF&E:
  - (i) as set out in or as required by **Schedule 20 (FF&E)** or which have at least the equivalent standard, quantity, quality and functionality of the corresponding items of FF&E set out in or required by **Schedule 20 (FF&E)**;
  - (ii) in accordance with the Design Requirements; and
  - (iii) otherwise where **Clauses 15.1(a)(i)** and **15.1(a)(ii)** are not applicable, in such quantities and of such standard, quality and functionality to meet Best Operating Practices and as is necessary for Project Co to deliver each School Facility so that it meets the FFP Warranty.
- (b) **(Consultation)**: Unless the State agrees otherwise, Project Co must consult with the State and the Principal in accordance with the process set out in **Schedule 9 (Design Development)**, if any, and **Clause 15.3** prior to selecting for purchase any items of Project Co FF&E.
- (c) **(Installation)**: Project Co must connect, install or locate (as applicable depending on whether the item of FF&E is loose or fixed) and commission all items of Project Co FF&E in each Stage:
  - (i) in accordance with the Commercial Acceptance Criteria;
  - (ii) other than for Harrisdale Stage 1 Works and Transportable Units, in the locations designated in the For Construction Documentation or, if not designated in the For Construction Documentation, as otherwise required by Project Co so that each Stage meets the FFP Warranty;
  - (iii) in the case of Harrisdale Stage 1 Works;
    - (A) as required by Project Co so that Harrisdale Stage 1 Works are fit for the School Activities and for the performance of the Services and the relevant Project Co FF&E meets the FFP Warranty; and
    - (B) subject to **Clause 15.1(d)**, in sufficient time to permit the provision of the Services and the School Activities for Harrisdale Stage 1 from the start of the 2017 Academic Year;

- (iv) without limiting Project Co's rights under **Clause 29**, in the case of a Transportable Unit:
  - (A) as required by Project Co so that each School Facility at which the Transportable Unit is located meets the requirements of this Deed in relation to Transportable Units and the relevant Project Co FF&E meets the FFP Warranty; and
  - (B) in sufficient time to permit the provision of the Services and the School Activities in respect of the Transportable Unit at all relevant times from the date determined under **Clause 29(h)(i)** for that Transportable Unit; and
- (v) as otherwise required under this Deed.
- (d) **(Delayed Installation of Harrisdale FF&E) If:**
  - (i) there is not at least 15 Business Days from (but excluding) the Date of Harrisdale Stage 1 Practical Completion to and including the start of the 2017 Academic Year;
  - (ii) Project Co has used its best endeavours to connect, install, locate and commission, as applicable, all items of Project Co FF&E for Harrisdale Stage 1 as quickly as reasonably practicable; and
  - (iii) Project Co has otherwise complied with its obligations under this Deed as they relate to the Project Co FF&E for Harrisdale Stage 1,

then:

  - (iv) Project Co will:
    - (A) not be taken to have breached this Deed; and
    - (B) not incur Abatements,

to the extent that Project Co is unable to provide the Services, and the School Activities are unable to be provided, in respect of Harrisdale Stage 1 in the 15 Business Days from (but excluding) the Date of Harrisdale Stage 1 Practical Completion because Project Co has not had sufficient time to be able to connect, install, locate or commission one or more items of the Project Co FF&E for Harrisdale Stage 1; and
  - (v) Project Co will be entitled to be paid for the provision of Services for Harrisdale Stage 1 from the start of the later of the Date of Harrisdale Stage 1 Practical Completion and the 2017 Academic Year until the end of the period of 15 Business Days from (but excluding) the Date of Harrisdale Stage 1 Practical Completion notwithstanding that Project Co has not been able to achieve Commercial Acceptance with respect to Harrisdale Stage 1 Works.

## 15.2 Status of Schedule 20 (FF&E)

The parties acknowledge and agree that:

- (a) **Schedule 20 (FF&E)** has been prepared by the State prior to the completion of the design of the Stages and significantly in advance of when Project Co and the State (as the case may be) are required to select and procure the Project Co FF&E in accordance with this **Clause 15**;
- (b) changes may be made by Project Co or the State to **Schedule 20 (FF&E)** (including changes to either the type, specification or quantities of such Project Co FF&E);
- (c) except as otherwise expressly provided under this Deed, changes of the nature referred to in **Clause 15.2(b)** will not, in any way derogate from, limit or affect

Project Co's obligations or Liabilities under this Deed, including the FFP Warranty; and

- (d) Project Co will not be entitled to make any Claim against the State arising out of or in connection with any changes of the nature referred to in **Clause 15.2(b)** save where such changes are an FF&E Modification or give rise to a Modification Order.

### 15.3 Consultation with State

- (a) Prior to purchasing any item (or group of items) of Project Co FF&E, Project Co must submit to the State (and, if requested by the State, the relevant Principal for that School Facility) for review in accordance with the process set out in **Schedule 9 (Design Development)** and **Schedule 12 (Review Procedures)**, if any, an FF&E Selection Notice which must include:
- (i) details of the proposed supplier;
  - (ii) the FF&E Specification;
  - (iii) if requested by the State;
    - (A) arrangements in respect of a sample or demonstration of the selected item (to the extent possible); and
    - (B) if applicable, a summary of the reasons for Project Co's selection of the relevant Project Co FF&E;
  - (iv) whether Project Co considers that if it proceeds with the purchase of that item of Project Co FF&E that it may constitute a FF&E Modification and, if so, provide details of the cost or savings associated with any such FF&E Modification in accordance with **Schedule 5 (Change Compensation Principles)**; and
  - (v) any other particulars reasonably required by the State.
- (b) If Project Co fails to notify the State (and, where required, the relevant School Principal) in accordance with **Clause 15.3(a)(iv)**, Project Co will not be entitled to claim any FF&E Modification or make any other Claim against the State in respect of that Project Co FF&E.
- (c) The State must, within the Review Period, notify Project Co whether it agrees or disagrees with Project Co's selection or quantity of Project Co FF&E. The State may disagree with Project Co's selection or quantity of any Project Co FF&E which in the State's reasonable opinion does not comply with the requirements of this Deed. The State must give reasons for its disagreement. If the State fails to respond to Project Co within the Review Period, Project Co must issue a further notice to the State within five Business Days of the expiry of the initial Review Period (**Further Notice**). The State will be deemed to have accepted Project Co's selection or quantity of such Project Co FF&E if it fails to respond to the Further Notice within 15 Business Days of the date of that Further Notice.
- (d) If the State disagrees with Project Co's selection or quantity of such FF&E the parties must consult to resolve any dispute. If the parties are unable to reach agreement within 20 Business Days from the end of the Review Period referred to in **Clause 15.3(c)**, the State will determine the item and quantity of Project Co FF&E to be selected, and will notify Project Co of that determination. Project Co must procure the Project Co FF&E in accordance with the State's determination.
- (e) Project Co must notify the State, within ten Business Days after a determination under **Clause 15.3(d)** is made on the selection of an item of Project Co FF&E, whether it considers the selection or quantity to be a FF&E Modification or whether it reasonably considers that the item of or quantity of Project Co FF&E does not comply with the requirements of this Deed.
- (f) If Project Co fails to notify the State in accordance with **Clause 15.3(e)**, Project Co will not be entitled to claim any FF&E Modification or make any other Claim against the State in respect of that Project Co FF&E.

- (g) Promptly on the reasonable request of Project Co or the State, a representative of Project Co and the State Representative will meet to review:
- (i) the current FF&E Modification Notices; and
  - (ii) any FF&E Modification made in accordance with this **Clause 15.3** where an FF&E Modification Notice was not issued but which the State reasonably believes resulted in savings to Project Co,
- to agree whether each of these is in fact a FF&E Modification.
- (h) If the State and Project Co are unable to agree on whether the selection or quantity of Project Co FF&E amounts to an FF&E Modification within five Business Days of any meeting under this **Clause 15.3**, the matter will be referred for determination in accordance with the Dispute resolution procedure under **Clause 43**.
- (i) If the expert determines that there has been a FF&E Modification or it is agreed that there has been a FF&E Modification, Project Co will issue a Change Notice and Project Co's entitlement in respect of such FF&E Modification will be calculated and payable in accordance with **Schedule 5 (Change Compensation Principles)**.

#### 15.4 Limitation of Liability in respect of FF&E Modifications

- (a) If any direction of the State other than a direction issued under **Clause 15.3** involves a FF&E Modification, Project Co must, if it wishes to make a Claim against the State arising out of or in connection with the FF&E Modification or direction within ten Business Days of receiving the direction and before commencing any work in respect of the direction give notice to the State that it considers the direction to involve a FF&E Modification and the reason for this.
- (b) Subject to **Clause 15.3**, Project Co will not be entitled to make any Claim against the State in respect of a FF&E Modification unless it complies with this **Clause 15.4**.
- (c) Subject to **Clause 15.2(d)**, Project Co will not be entitled to make any Claim against the State in respect of:
- (i) any change in the specification of an item of FF&E; or
  - (ii) any change in the quantity of an item of FF&E,
- unless such change is a FF&E Modification and has been made in accordance with the terms of this Deed.

#### 15.5 Disputes

Any Dispute between the parties as to the standard, selection, purchase, procurement, connection, installation or commissioning of Project Co FF&E may be referred by either party for expert determination in accordance with **Clause 43**.

### 16 CONSTRUCTION

#### 16.1 Development Phase Licence

- (a) **(Licence for Development Phase Activities)**: The State grants to Project Co and any Project Co Associates a non-exclusive licence to access and occupy the Site for a Stage to the extent necessary to carry out the Development Phase Activities:
- (i) commencing on the Site Access Date for the Stage as set out in **Schedule 8 (Site Matters)**; and
  - (ii) terminating on the Date of Commercial Acceptance of the Stage, or on earlier termination of this Deed or Partial Termination of this Deed in respect of that Site, School Facility or Stage.
- (b) **(Terms of Development Phase Licence)**: The Development Phase Licence granted under **Clause 16.1(a)**:

- (i) is a personal right in contract, does not create any estate or interest in any Site, does not confer exclusive possession on Project Co or any Project Co Associate and does not create the relationship of tenant and landlord between any of them and the State; and
  - (ii) is given subject to the rights of the State, any State Associates and any other person authorised by it (including the Independent Certifier), including their rights of access to and occupation of the Sites, under this Deed and any other State Project Document.
- (c) **(Other access):** Except as set out in **Clause 16.1(a)**, Project Co is solely responsible for obtaining access to and from the Sites and any land outside the Sites to which access is required to carry out the Development Phase Activities.
- (d) **(Ownership):** Once constructed on, installed at or delivered to the Site for a Stage, the State will own the Works, the School Facilities and all FF&E.

## 16.2 Construction

- (a) Project Co must construct each Stage on the relevant Site identified in **Schedule 8 (Site Matters)**.
- (b) Without limiting its obligations under **Clause 5.1(a)**, Project Co must construct each Stage in accordance with:
- (i) the For Construction Documentation;
  - (ii) any Modification directed by the State, through the issue of a Modification Order; and
  - (iii) the Development Phase Licence and the Site Access and Interface Protocols.
- (c) Project Co must not carry out any works or activities on that part of a Site on which a Stage is to be constructed, or permit the use of that part of the Site during the Development Phase for that Stage for any purpose, other than the Development Phase Activities within the boundaries identified in **Schedule 8 (Site Matters)** or as otherwise approved by the State.
- (d) Project Co must keep each Site:
- (i) safe, clean and tidy at all times; and
  - (ii) secure and free from all unauthorised access.

## 16.3 Access to Harrisdale Stage 1 Works

- (a) The State will procure, in accordance with and subject to, the Harrisdale Stage 1 Contract, that the Harrisdale Stage 1 Contractor provides Project Co with reasonable access to those parts of the Site on which the Harrisdale Stage 1 Works are being performed, on reasonable prior request by Project Co.
- (b) The State must provide Project Co with a minimum ten Business Days' notice of any scheduled testing of any part of the Harrisdale Stage 1 Works so that Project Co may inspect and observe those tests, to the extent reasonably required to enable Project Co to satisfy itself, acting reasonably, that the Harrisdale Stage 1 Works are being constructed in accordance with the Harrisdale Stage 1 Contract.
- (c) Project Co must not hinder or impede the performance of the Harrisdale Stage 1 Contractor when accessing any parts of the site on which Harrisdale Stage 1 is located and must comply with the site access protocols of the Harrisdale Stage 1 Contractor when accessing the relevant site.

## 17 STATE ACCESS DURING DEVELOPMENT PHASE

### 17.1 State's right to enter, inspect and test

- (a) **(Right of entry):** The State, any State Entities and any other person authorised by it (including the Independent Certifier) may, during the Development Phase for any Stage at a Site or Verge Works Site:
- (i) access the Site or Verge Works Site in accordance with the Site Access and Interface Protocols to exercise their rights, powers and functions and to perform their obligations, under any State Project Document;
  - (ii) inspect, observe or test any part of the Works or the Development Phase Activities (whether or not such inspections, observations or tests are otherwise required under any State Project Documents);
  - (iii) install, observe, test and commission any Group 3 FF&E within the Works at any time prior to, but no earlier than 20 Business Days before, the estimated Date of Commercial Acceptance for a Stage; or
  - (iv) examine and make copies of and retain all Project Co Material.
- (b) **(Project Co to assist):** If requested by the State, Project Co must assist the State to exercise its right to inspect and test the Development Phase Activities or the Works.

### 17.2 Site Access and Interface Protocols

- (a) Project Co must allow the State, any of the State's Entities and any other person authorised by the State (including the Independent Certifier) access to each Site or Verge Works Site during the Development Phase for that Site or Verge Works Site and the Project Co Material.
- (b) The State will, and will procure that the State Entities comply with the Site Access and Interface Protocols during the Development Phase for a Site or Verge Works Site when the State or the State Entities access a Site or Verge Works Site during the Development Phase for that Site or Verge Works Site.

### 17.3 Project Co to assist

If requested by the State, Project Co must assist the State in connection with any inspection or testing in accordance with **Clause 17.1**, including by:

- (a) providing access to such part of the Works and Project Co Materials as may be required by the State;
- (b) preparing samples of materials used in connection with the Works as required by the State;
- (c) forwarding the samples prepared in accordance with **Clause 17.3(b)** to the State or such other place or person notified by the State; and
- (d) if requested by the State, carrying out any tests (including tests not otherwise required by this Deed) and providing the results of those tests to the State.

### 17.4 Costs of inspection or testing

The State will bear the reasonable costs incurred by Project Co in connection with any inspection or test conducted in accordance with this **Clause 17**, unless:

- (a) the inspection or test reveals any Defect or failure to comply with this Deed or is in respect of any work undertaken to correct or overcome such Defect or failure;
- (b) the test is in connection with Works covered up or made inaccessible without the State's prior approval where such approval was required; or
- (c) the inspection or test:
  - (i) is a Commercial Acceptance Test or is an inspection or test required to be carried out in connection with a Commercial Acceptance Test; or

- (ii) was otherwise required by this Deed to be carried out by Project Co or should have been carried out by Project Co in accordance with Best D&C Practices,

in which case Project Co will be responsible for all reasonable costs incurred by the State which will be a debt due and payable by Project Co to the State.

## 18 VERGE WORKS

### 18.1 Access

- (a) **(Access for Verge Works):** Project Co must, in relation to the Verge Works for a Stage, procure a non-exclusive licence from the relevant Authority for Project Co and Project Co Associates to access the Verge Works Site for that Stage:
  - (i) on and from the Site Access Date in respect of a Stage, and until the Expiry Date; and
  - (ii) to the extent necessary to perform the relevant Verge Works and to provide the Services in respect of the Verge Infrastructure,**(Verge Works Licence).**
- (b) **(State to assist):** The State must provide all reasonable assistance to Project Co to procure access to the Verge Works Site for a Stage in accordance with **Clause 18.1(a)**.
- (c) **(Adequacy of Verge Works Licence):** Project Co accepts all risks in connection with the adequacy of access to the Verge Works Site to enable it to carry out the Verge Works.
- (d) **(Termination of Verge Works Licence):** Each Verge Works Licence terminates at the end of the Operating Phase for that Stage.
- (e) **(If Project Co cannot procure access):** In the event that Project Co is unable to procure access to any Verge Works Site in accordance with **Clause 18.1(a)**, Project Co must notify the State as soon as reasonably practicable, and in any event no later than five Business Days after receiving notice from the relevant Authority that it will not provide access to the relevant Verge Works Site.
- (f) **(State to elect):** If, within 20 Business Days of receipt by the State of a notice submitted by Project Co in accordance with **Clause 18.1(e)**, the State must either elect to:
  - (i) in relation to the Verge Works for a Stage, enter into negotiations with the relevant Authority so as to procure a non-exclusive licence from that Authority for Project Co and Project Co Associates to access the Verge Works Site for that Stage on terms equivalent to the licence described in **Clause 18.1(a)**; or
  - (ii) issue a Modification Request under **Clause 36.1** to delete those Verge Works and the related Services.
- (g) Project Co must provide all assistance and information required by the State for the purposes of the negotiations referred to in **Clause 18.1(f)(i)**.

### 18.2 Verge Works Commercial Acceptance

- (a) Project Co must consult with the owner of each Verge Works Site so as to ensure that Project Co identifies the usual requirements of the owners for the Verge Works for that Verge Works Site.
- (b) Commercial Acceptance is achieved in respect of each item of Verge Works when:
  - (i) the Verge Works have been completed in accordance with the State Project Documents subject only to Commercial Acceptance Outstanding Items;

- (ii) Project Co has issued a notice to the State, the Independent Certifier and the relevant owner of the Verge Works Site which:
  - (A) states that it considers that the Verge Works has been completed in accordance with the State Project Documents; and
  - (B) lists any Commercial Acceptance Outstanding Items;
- (iii) Project Co, the Independent Certifier and the owner of the Verge Works Site have jointly inspected the Verge Works at a time to be agreed (or in the absence of agreement determined by the Independent Certifier) which will be no more than five Business Days after receipt of Project Co's notice in accordance with **Clause 18.2(b)(ii)**; and
- (iv) following the joint inspection in accordance with **Clause 18.2(b)(iii)**, the Independent Certifier has issued to the State, the owner of the Verge Works Site and Project Co a notice confirming that the Verge Works have been completed subject only to Commercial Acceptance Outstanding Items.
- (c) Project Co must rectify any Commercial Acceptance Outstanding Items listed in the Independent Certifier's notice issued in accordance with **Clause 18.2(b)(iv)** within a reasonable period of time as determined by the Independent Certifier.
- (d) Project Co must submit to the State and the Independent Certifier for review, in accordance with **Schedule 12 (Review Procedures)**, a program for the completion of the Commercial Acceptance Outstanding Items within five Business Days after the issue of a notice from the Independent Certifier in accordance with **Clause 18.2(b)(iv)** which attaches a list of Commercial Acceptance Outstanding Items, which program must be consistent with the time period for rectification determined by the Independent Certifier in accordance with **Clause 18.2(c)**.
- (e) Project Co must complete any Commercial Acceptance Outstanding Items in accordance with the program as reviewed and amended in accordance with **Schedule 12 (Review Procedures)** to the reasonable satisfaction of the Independent Certifier.

### 18.3 Title to Verge Works

All rights, title and ownership in each part of the Verge Works for a Stage and all Verge Infrastructure, remains at all times with the relevant owner of the Verge Works Site for that Stage.

## 19 TIME

### 19.1 Primary obligation

- (a) **(Project Co obligations):** Project Co must:
  - (i) regularly, expeditiously and diligently carry out and progress the Development Phase Activities to achieve Commercial Acceptance for each Stage; and
  - (ii) achieve Commercial Acceptance for each Stage by the relevant Date for Commercial Acceptance.
- (b) **(School Opening):** Without limiting Project Co's obligations under this Deed, Project Co acknowledges and agrees that:
  - (i) a key priority of the State for this Project is achievement of Commercial Acceptance for each Stage by the relevant Original Date for Commercial Acceptance so as to enable commencement of School Activities for each Stage at the start of the first School Term following the Original Date for Commercial Acceptance for that Stage; and



- (ii) Project Co must plan and program the Development Phase Activities for each Stage so as to:
  - (A) achieve Commercial Acceptance for that Stage by the relevant Original Date for Commercial Acceptance; and
  - (B) ensure the sequencing of Development Phase Activities is such that, if Commercial Acceptance for that Stage may not be achieved by the relevant Original Date for Commercial Acceptance, the key priority in **Clause 19.1(b)(i)** is achieved by the implementation of remedies which include:
    - (1) the installation and commissioning of Contingency Transportable Units or Transportable Units (as applicable); and
    - (2) the use of such Contingency Transportable Units or Transportable Units (as applicable) and surrounding areas for School Activities.

## 19.2 Independent Certifier's review of progress

- (a) **(Review by Independent Certifier):** Project Co agrees that the Independent Certifier will (including where directed to by the State), on and from the date that is three Months prior to the Date for Commercial Acceptance of a Stage, continually review the construction of the Works in relation to that Stage to ensure that:
  - (i) the obligations of Project Co under the State Project Documents relating to the Works are being complied with;
  - (ii) Commercial Acceptance of a Stage will be achieved by the Date for Commercial Acceptance for that Stage; and
  - (iii) subject to **Clause 11.2(a)**, the Development Phase Program accurately reflects the actual progress of the Works.
- (b) **(Notice of non-compliance):** If the Independent Certifier forms the view that:
  - (i) the obligations of Project Co under the State Project Documents relating to the Development Phase Activities are not being complied with;
  - (ii) Commercial Acceptance of a Stage is unlikely to be achieved by the Date for Commercial Acceptance for that Stage; or
  - (iii) the Development Phase Program does not accurately reflect the actual progress of the Works,

the Independent Certifier must give notice to the State and Project Co of its opinion together with its reasons for forming that opinion.
- (c) **(Final and binding):** Any determination of the Independent Certifier under **Clause 19.2(b)** is final and binding on the parties.
- (d) **(Project Co's response):** Within ten Business Days of receipt of the Independent Certifier's notice in accordance with **Clause 19.2(b)**, Project Co must:
  - (i) notify the State and the Independent Certifier of any matters in connection with that notice with which it disagrees together with its reasons for doing so (**Explanation**); and
  - (ii) to the extent it does not disagree, provide to the State and the Independent Certifier an updated Remedy Plan and a program for the rectification of any non-compliance in accordance with this **Clause 19.2 (Remedy Implementation Plan)**.
- (e) **(Explanation):** Where Project Co provides the Independent Certifier with an Explanation under **Clause 19.2(d)**, the Independent Certifier will, within ten Business Days of receiving the Explanation, give notice to the State and Project Co

of its opinion as to whether or not the Explanation satisfactorily addresses its concerns together with its reasons for forming that opinion.

- (f) **(Satisfactory / Unsatisfactory Explanation):** If the Independent Certifier notifies Project Co and the State under **Clause 19.2(e)** that, in its opinion:
- (i) the Explanation is satisfactory and:
    - (A) the Development Phase Program accurately reflects the actual progress of the Works; and
    - (B) Commercial Acceptance of a Stage is likely to be achieved by the Date for Commercial Acceptance for that Stage,

no further action is required from Project Co in connection with the notice issued by the Independent Certifier under **Clause 19.2(b)**; or
  - (ii) the Explanation is not satisfactory or Commercial Acceptance of the Stage is unlikely to be achieved by the Date for Commercial Acceptance for that Stage, Project Co must, within five Business Days from the date it receives the Independent Certifier's notice, provide a Remedy Implementation Plan to the State and the Independent Certifier in accordance with **Clause 19.2(d)**.
- (g) **(Remedy Implementation Plan):** Where Project Co provides the Independent Certifier with a Remedy Implementation Plan under **Clause 19.2(d)(ii)** or **Clause 19.2(f)(ii)**, the Independent Certifier will, within five Business Days of receiving the Remedy Implementation Plan, give notice to the State and Project Co of its opinion as to whether the Remedy Implementation Plan:
- (i) satisfactorily addresses the Independent Certifier's concerns, in which case Project Co must comply with the Remedy Implementation Plan and must promptly notify the State and the Independent Certifier of any non-compliance with, or issues with the implementation of, the Remedy Implementation Plan; or
  - (ii) does not satisfactorily address the Independent Certifier's concerns, in which case **Clause 40.3** will apply.
- (h) **(Contingency Transportable Units):** If the State considers that Contingency Transportable Units will be necessary to ensure that School Activities for a Stage will commence at the start of the first School Term following the Original Date for Commercial Acceptance for that Stage, the State may give notice to Project Co either:
- (i) directing Project Co to source, locate, transport, deliver, install and commission a specified number and type of Contingency Transportable Units at the relevant Site prior to the Original Date for Commercial Acceptance for the Stage and, from commissioning, maintain such Contingency Transportable Units, and Project Co must comply with that direction; or
  - (ii) that the State will source, locate, transport, deliver, install and commission Contingency Transportable Units at the relevant Site,
- (Contingency Transportable Unit Response).**
- (i) **(Costs):** If a Contingency Transportable Unit Response has been implemented in accordance with **Clause 19.2(h)**:
- (A) and a Major Default referred to in Paragraph **(b)** of the definition of 'Major Default' has occurred and a notice of non-compliance has been issued under **Clause 19.2(b)(ii)** then Project Co must:
    - (1) if it has been directed to implement the Contingency Transportable Unit Response under **Clause 19.2(h)(i)**, comply with the direction at its own cost and will be responsible for the costs of removal in

- accordance with **Clause 19.2(n)** and making good the area from which the Contingency Transportable Units were removed in accordance with **Clause 19.2(m)(ii)**; or
- (2) if the State has implemented the Contingency Transportable Unit Response under **Clause 19.2(h)(ii)**, reimburse the State for all costs incurred in implementing the Contingency Transportable Unit Response and the costs of the subsequent removal of the Contingency Transportable Units; or
- (B) other than in circumstances set out in **Clause 19.2(i)(A)**, then the State will be responsible for all costs incurred in implementing the Contingency Transportable Unit Response, the subsequent removal of the Contingency Transportable Units and the costs of making good the area from which the Contingency Transportable Units were removed and will pay Project Co those costs in accordance with **Schedule 5 (Change Compensation Principles)**, provided that if there are any Major Outstanding Items, Project Co remedies and completes all Major Outstanding Items by the Date for Commercial Acceptance, otherwise Project Co will be responsible for the costs of removal of the Contingency Transportable Units and the costs of making good the area from which the Contingency Transportable Units were removed.
- (j) **(No Claim)**: Subject to **Clause 19.2(i)(B)**, Project Co will have no Claim against the State if the State has elected to implement a Contingency Transportable Unit Response in accordance with **Clause 19.2(h)**.
- (k) **(Cooperation and access)**: If the State elects to implement a Contingency Transportable Unit Response in accordance with **Clause 19.2(h)**, Project Co must fully cooperate with the State to facilitate the implementation of the Contingency Transportable Unit Response including by giving the State priority access to the Site.
- (l) **(Site security)**: If the State gives a notice under **Clause 19.2(h)**, Project Co must promptly ensure that the areas of the relevant Site where Development Phase Activities continue to be undertaken are fenced off from the remainder of the Site to permit the Contingency Transportable Units to be delivered to, and installed, commissioned and maintained on, the Site and School Activities to be provided safely and with minimal interference.
- (m) **(Services and make good)**: Without limiting Project Co's obligations under **Clause 20** and **25.1**, if Contingency Transportable Units are installed in accordance with this **Clause 19**, Project Co must:
- (i) if a certificate of Commercial Acceptance is issued under **Clause 20.7**, on and from the Operational Commencement Date, perform the Services for the School Facilities in accordance with the Output Specifications and the remainder of this Deed, as adapted to accommodate the Contingency Transportable Units being on Site; and
- (ii) following removal of the Contingency Transportable Units 'make good' the area from which the Contingency Transportable Units are removed.
- (n) **(Removal)**: As soon as the State is satisfied that, in relation to the relevant Stage, the provision of the School Activities at the School Facility has been transitioned from a Contingency Transportable Unit to the Functional Unit which contained or was affected by the Major Outstanding Items, the State will, if Project Co implemented the Contingency Transportable Unit Response, direct Project Co to remove the Contingency Transportable Units as soon as reasonably practicable after issue of the direction, and Project Co must comply with that direction.

- (o) **(Revised Development Phase Program):** Notwithstanding Project Co's obligations under **Clause 11.2** and without limiting the State's other rights under this Deed, if the State issues a notice under **Clause 19.2(h)**, the State may direct Project Co to:
- (i) amend the Development Phase Program in carrying out the remainder of the Development Phase Activities; and
  - (ii) take any other action which the State considers necessary (including directing Project Co to re-schedule or re-sequence the Works, increase the labour force, and/or equipment and expedite and adjust the Development Phase Activities),
- to ensure that on and from the first day of the School Term following the Original Date for Commercial Acceptance for the relevant Stage, the School Activities are able to be undertaken at the relevant School Facility (including in Contingency Transportable Units) to the satisfaction of the State.
- (p) **(Disputes):** Subject to **Clause 19.2(c)**:
- (i) any Dispute in relation to the determination of the Independent Certifier under this **Clause 19.2** may be referred by either party to expert determination in accordance with **Clause 43**; and
  - (ii) despite the existence of any Dispute which arises under this **Clause 19.2**, Project Co must continue to comply with any directions of the Independent Certifier under this **Clause 19**.

### 19.3 Delay to Commercial Acceptance

Without limitation to **Clause 19.2**, if Project Co reasonably forms the view that it will be delayed, or is likely to be delayed, in achieving a Date for Commercial Acceptance for a Stage, Project Co must give the State and the Independent Certifier notice of:

- (a) the matter and the delay it is likely to cause; and
- (b) the steps, if any, Project Co proposes to take to prevent or minimise the delay or disruption caused by the matter.

### 19.4 Delays entitling Claim

Subject to **Clause 2.15** and this **Clause 19**, if Project Co will be delayed by an Extension Event in a manner which will delay Project Co in achieving Commercial Acceptance of a Stage, Project Co will be entitled to an extension of time to the relevant Date for Commercial Acceptance for the period of the delay.

### 19.5 Modifications, Contamination and Change in Mandatory Requirements

If a delay in achieving Commercial Acceptance of a Stage is caused by a Modification, a FF&E Modification, a Contamination Modification Event or a Change in Mandatory Requirements, Project Co's entitlement to an extension of time and any compensation for any such extension of time will be determined in accordance with **Clauses 6.4, 15** and **36** and **Schedule 5 (Change Compensation Principles)** and not this **Clause 19**.

### 19.6 Change Notice

To claim an extension of time to the relevant Date for Commercial Acceptance for a Stage for an Extension Event, Project Co must submit a Change Notice in accordance with **Schedule 5 (Change Compensation Principles)**.

### 19.7 Conditions precedent to extension

Subject to **Clause 19.10**, it is a condition precedent to Project Co's entitlement to an extension of time for an Extension Event that:

- (a) Project Co submits to the State and the Independent Certifier:
  - (i) for the initial extension of time claimed, its Change Notice within ten Business Days of the date that it or one of both of the parties listed as

- D&C Subcontractor in **Schedule 1 (Contract Particulars)** became aware or ought reasonably to have become aware of the delay to Commercial Acceptance of a Stage caused by the Extension Event; and
- (ii) for any additional extension of time claimed, its updated Change Notice in accordance with **Schedule 5 (Change Compensation Principles)**;
- (b) the delay was beyond the reasonable control of Project Co and Project Co Associates;
  - (c) Project Co can demonstrate to the Independent Certifier 's satisfaction that:
    - (i) it has been or will be delayed in achieving Commercial Acceptance of a Stage by the Extension Event; and
    - (ii) the Extension Event has caused or will cause activities on the critical path contained and shown in the then current Development Phase Program to be delayed; and
  - (d) Project Co is, at the time it submits the relevant Change Notice and any updated Change Notice, fully complying with its obligations in connection with the Development Phase Program in accordance with **Clause 11.2**.

### 19.8 Extension of Time determined by Independent Certifier

- (a) **(State right to provide information)**: The State may provide any evidence to the Independent Certifier it considers relevant to the Independent Certifier's consideration of Project Co's Change Notice under **Clause 19.6**.
- (b) **(Extension of time)**: If the conditions precedent in **Clause 19.7** have been satisfied, the Independent Certifier will extend the relevant Date for Commercial Acceptance for a Stage by a reasonable period determined by the Independent Certifier and in doing so must take into account all relevant evidence presented by the parties but is not bound by the Development Phase Program.
- (c) **(Dispute)**: Any Dispute in relation to a determination by the Independent Certifier under this **Clause 19.8** may be referred by either party to expert determination in accordance with **Clause 43**.

### 19.9 Unilateral extensions

- (a) **(Unilateral extensions)**: Subject to **Clause 19.9(b)**, whether or not Project Co has made, or is entitled to make, a Claim for an extension of time in accordance with this **Clause 19**, the State may, at any time and from time to time, by notice to Project Co, unilaterally extend the relevant Date for Commercial Acceptance for a Stage.
- (b) **(Acknowledgements)**: The parties acknowledge that:
  - (i) the State is not required to exercise the State's discretion under **Clause 19.9(a)** for the benefit of Project Co; and
  - (ii) the exercise or failure to exercise the State's discretion under this **Clause 19.9** is not capable of being the subject of a dispute for the purposes of **Clause 43** or otherwise subject to review.
- (c) **(Compensation)**: The exercise by the State of its power under **Clause 19.9** will not operate to reduce any amount the State must otherwise pay Project Co in accordance with **Clause 19.11** in respect of a Compensable Extension Event.

### 19.10 Force Majeure Events

- (a) **(Obligations to be suspended)**: Where the Extension Event is a Force Majeure Event, in addition to their rights and obligations under this **Clause 19**, the obligations of each party under this Deed which are affected by the Force Majeure Event will be suspended, but only to the extent that, and for so long as, the Force Majeure Event prevents that party from meeting its obligations under this Deed.

- (b) **(Party not in breach):** A party's failure to perform its obligations under this Deed which are suspended under **Clause 19.10(a)** will not be a breach of this Deed, or constitute or contribute to a Major Default or a Default Termination Event during the period of suspension under **Clause 19.10(a)**.
- (c) **(Payment during a Force Majeure Event):** If the Force Majeure Event is an Uninsurable Risk (as agreed or determined in accordance with **Clause 39.12**) or a Day 1 Uninsurable Risk but does not give rise to loss or damage to the Relevant Infrastructure (if loss or damage is incurred, **Clause 39.13** would apply), Project Co will be entitled to payment of an amount calculated in accordance with **Schedule 5 (Change Compensation Principles)** for the period by which the Date for Commercial Acceptance for the relevant Stage is extended as a consequence of the Force Majeure Event.

### 19.11 Entitlement to Financing Delay Costs and Prolongation Costs

To the extent that Project Co is granted an extension of time under **Clauses 19.8** or **19.9** for a Compensable Extension Event, the State will pay Project Co the Financing Delay Costs and Prolongation Costs calculated in accordance with **Schedule 5 (Change Compensation Principles)**, except in the case that an extension of time is granted in relation to the Harrisdale Stage 1 Works, in which case Project Co will have no entitlement to, and the State will not pay Project Co, any Financing Delay Costs or Prolongation Costs.

### 19.12 Share of Savings

If Project Co achieves Commercial Acceptance of a Stage earlier than the Date for Commercial Acceptance for that Stage but after the Original Date for Commercial Acceptance for that Stage and Project Co has been granted or is entitled to an extension of time for a Compensable Extension Event, then:

- (a) within ten Business Days after the Date of Commercial Acceptance for that Stage, Project Co must provide the State with a report setting out:
- (i) the number of working days by which Commercial Acceptance of that Stage was achieved earlier than the Date for Commercial Acceptance for that Stage (**Number of Days Early**);
  - (ii) the number of working days granted or entitled to be granted as an extension of time under this **Clause 19** for a Compensable Extension Event (**Number of EOT Days**); and
  - (iii) the aggregate amount of any preliminary and supervision component of any Prolongation Costs to which Project Co is entitled under **Clause 19.11** for the Number of EOT Days divided by the Number of EOT Days (**Daily Average P&S**); and
- (b) an amount calculated using the following formula will be a debt due and payable from Project Co to the State as a debt due and owing:
- (Daily Average P&S) x (Number of Days Early up to a maximum of the Number of EOT Days) x 50%.***

### 19.13 Concurrent delays

Project Co is not entitled to claim an extension of time under **Clause 19.8** or Financing Delay Costs or Prolongation Costs under **Clause 19.11** in respect of a delay to Commercial Acceptance of a Stage caused by an Extension Event to the extent that any period of that delay is contemporaneous with a delay to Commercial Acceptance of that Stage caused by an event which is not an Extension Event.

### 19.14 Acceleration by Project Co

If Project Co chooses to compress the Development Phase Activities or otherwise accelerate progress other than in accordance with a direction of the State under **Clause 19.15**:

- (a) the State will not be obliged to take any action to assist or enable Project Co to achieve any particular sequencing or rate of progress of the Project Activities; and

- (b) the time for the carrying out of the State's obligations will not be affected.

### 19.15 Acceleration notice

Whether or not Project Co makes a Claim under **Clause 19.6**, if:

- (a) any part or the whole of the Development Phase Activities are delayed by an Extension Event and Project Co would have been entitled to an extension of time to a Date for Commercial Acceptance for a Stage for the cause of delay in accordance with this **Clause 19.15**; or
- (b) the State, in its discretion, requires that specific aspects of the Development Phase Activities be completed prior to the date specified in the Development Phase Program,

the State may direct Project Co to submit a Change Notice prepared in accordance with **Schedule 5 (Change Compensation Principles)** within ten Business Days of a direction from the State under this **Clause 19**, setting out the estimated time and cost consequences of accelerating any part or the whole of the Development Phase Activities to address the delay.

### 19.16 Reasonably achievable

- (a) In any Change Notice submitted by Project Co in response to an acceleration notice directed under **Clause 19.15**, Project Co must identify whether Project Co considers the acceleration is reasonably achievable in the circumstances and Project Co's reasons for this view.
- (b) Following receipt of Project Co's Change Notice, the State and Project Co must meet to agree the contents of the Change Notice, and:
- (i) if the parties agree that the acceleration is reasonably achievable, the State may, by issuing a Change Response, direct Project Co to accelerate the Development Phase Activities in accordance with Project Co's Change Notice and Project Co must comply with the State's direction; or
- (ii) if the parties agree that the acceleration is not reasonably achievable in the circumstances, then the State will not direct the acceleration.

### 19.17 Effect of acceleration on Extension Event

If the State gives Project Co a Change Response to accelerate and:

- (a) it only applies to part of the delay, any entitlement to an extension of time Project Co would have had but for the acceleration will only be reduced to the extent to which the instruction to accelerate requires Project Co to accelerate the relevant part or the whole of the Development Phase Activities to overcome the delay; or
- (b) it applies to the entire delay, then Project Co will not be entitled to an extension of time in relation to that delay or its cause.

### 19.18 Acceleration

If the State gives Project Co a Change Response to accelerate under **Clause 19.16(b)** in order to address delay to any part, or the whole of, the Development Phase Activities:

- (a) Project Co must accelerate the relevant part or the whole of the Development Phase Activities to overcome or minimise the extent and effect of some or all of the delay as instructed including, if required, in order to achieve Commercial Acceptance of a Stage by the relevant Date for Commercial Acceptance for that Stage;
- (b) if Project Co would, but for the instruction, have been entitled to an extension of time to the relevant Date for Commercial Acceptance for the cause of the delay, the State must pay Project Co the extra actual costs properly and reasonably incurred by Project Co and directly attributable to accelerating the relevant part or

- the whole of the Development Phase Activities calculated in accordance with **Schedule 5 (Change Compensation Principles)**; and
- (c) subject to **Clause 19.17**, Project Co will not be entitled to make any Claim against the State arising out of, or in any way in connection with, the cause of the delay and the direction or acceleration other than for the amount which is payable by the State under **Clause 19.18(b)**.

## 20 COMMERCIAL ACCEPTANCE

### 20.1 Notice before Commercial Acceptance

- (a) Project Co must give the State and the Independent Certifier separate notices for each Stage:
- (i) three Months;
  - (ii) 30 Business Days; and
  - (iii) 15 Business Days,
- prior to the date upon which it reasonably expects to achieve Commercial Acceptance of that Stage.
- (b) If, after Project Co gives the State and the Independent Certifier a notice in accordance with **Clause 20.1(a)** the expected Date of Commercial Acceptance for that Stage changes, Project Co must notify the State and the Independent Certifier promptly of the revised date.

### 20.2 Commercial Acceptance Tests

- (a) At the time that Project Co submits the Commercial Acceptance Plan to the State for review in accordance with **Schedule 12 (Review Procedures)**, Project Co must include Commercial Acceptance Tests necessary to demonstrate that the relevant Commercial Acceptance Criteria have been met.
- (b) Project Co must carry out all Commercial Acceptance Tests in accordance with and otherwise comply with the Commercial Acceptance Plan, **Schedule 11 (Commercial Acceptance Criteria)** and this **Clause 20**.
- (c) The State may waive the requirement for Project Co to carry out a Commercial Acceptance Test at any time or require a Commercial Acceptance Test to be conducted as a Post Commercial Acceptance Test.
- (d) Project Co must:
- (i) at the time it submits a notice in accordance with **Clauses 20.1(a)(i), 20.1(a)(ii) and 20.1(a)(iii)**, also notify the State and the Independent Certifier of the anticipated dates on which all Commercial Acceptance Tests in respect of the relevant Stage will be performed and promptly notify the State and the Independent Certifier if any of those dates change;
  - (ii) allow the Independent Certifier to take samples, make measurements and otherwise carry out whatever checks and investigations it may reasonably require in order to ensure that any Commercial Acceptance Test has been successfully carried out;
  - (iii) conduct the Commercial Acceptance Tests in respect of the relevant Stage to the reasonable satisfaction of the Independent Certifier and the State;
  - (iv) comply with all reasonable directions of the Independent Certifier and the State in relation to the conduct of any such Commercial Acceptance Tests; and



- (v) if a test fails, immediately inform the Independent Certifier and the State and carry out rectification works to enable retesting to occur as soon as possible.

### 20.3 Additional Commercial Acceptance Tests

- (a) At any time up to the date that is 30 Business Days before the anticipated Date of Commercial Acceptance for a Stage, the Independent Certifier or State may notify Project Co of additional tests that the Independent Certifier or the State considers reasonably necessary to demonstrate that the Stage satisfies the relevant Commercial Acceptance Criteria (**Additional Commercial Acceptance Tests**).
- (b) The Independent Certifier or the State must direct whether the Additional Commercial Acceptance Tests are required to be completed:
  - (i) prior to Commercial Acceptance of the Stage; or
  - (ii) as a Post Commercial Acceptance Test.
- (c) Project Co must carry out all such Additional Commercial Acceptance Tests in accordance with the Commercial Acceptance Plan, **Schedule 11 (Commercial Acceptance Criteria)** and otherwise in accordance with the requirements of the Independent Certifier and the reasonable requirements of the State.
- (d) Any Dispute in relation to an Additional Commercial Acceptance Test may be referred by either party to expert determination in accordance with **Clause 43**.

### 20.4 Initial Commercial Acceptance Report

- (a) Project Co must submit to the State and the Independent Certifier (for review in accordance with **Schedule 12 (Review Procedures)**) a draft Commercial Acceptance Report in connection with Commercial Acceptance for each Stage not earlier than 30 Business Days and not later than 20 Business Days prior to the date on which it expects to achieve Commercial Acceptance of that Stage.
- (b) Project Co must submit to the State and the Independent Certifier (for review in accordance with **Schedule 12 (Review Procedures)**) a further draft Commercial Acceptance Report in connection with Commercial Acceptance for each Stage no later than 10 Business Days prior to the date on which it expects to achieve Commercial Acceptance of that Stage, which must reflect all Commercial Acceptance Tests undertaken in connection with Commercial Acceptance of that Stage to the date of the further draft Commercial Acceptance Report.
- (c) Project Co must take into account and comply with any directions reasonably given by the State or the Independent Certifier in connection with preparing for Commercial Acceptance of each Stage.

### 20.5 Independent Certifier to notify State of completion of Tests

- (a) Within 5 Business Days of receipt of any draft Commercial Acceptance Report under **Clause 20.4(b)**, the Independent Certifier must:
  - (i) if satisfied that the Commercial Acceptance Tests and all other Commercial Acceptance Criteria that the Independent Certifier must certify for a Stage in accordance with **Schedule 11 (Commercial Acceptance Criteria)** have been successfully completed, notify the State and the Project Co Representative accordingly; or
  - (ii) if not satisfied that the Commercial Acceptance Tests and all other Commercial Acceptance Criteria that the Independent Certifier must certify for a Stage in accordance with **Schedule 11 (Commercial Acceptance Criteria)** have been successfully completed, notify the State and the Project Co Representative of the matters that are required to be addressed by Project Co to successfully complete the Commercial

Acceptance Criteria that is required to be certified by the Independent Certifier.

(each an **Independent Certifier Commercial Acceptance Notice**).

- (b) Without limiting the State's rights under **Clause 20.2(c)**, Project Co must comply with the requirements of the Independent Certifier Commercial Acceptance Notice referred to in **Clause 20.5(a)(ii)** necessary to successfully complete the Commercial Acceptance Tests for a Stage.

## 20.6 Notice of Commercial Acceptance

When Project Co is of the reasonable opinion that it has achieved Commercial Acceptance of a Stage, and, if applicable, has complied with the requirements of the Independent Certifier under **Clause 20.5**, Project Co must provide:

- (a) notice of its opinion that it has achieved Commercial Acceptance of that Stage; and
  - (b) the final Commercial Acceptance Report in respect of that Stage,
- to the State and the Independent Certifier.

## 20.7 Determination of Commercial Acceptance

- (a) Within 5 Business Days of receipt of a notice under **Clause 20.6**, if:
  - (i) the Independent Certifier has provided the State with an Independent Certifier Commercial Acceptance Notice provided under **Clause 20.5(a)(i)** that it is satisfied that all Commercial Acceptance Criteria for a Stage required, in accordance with **Schedule 11 (Commercial Acceptance Criteria)**, to be certified by the Independent Certifier have been satisfied; and
  - (ii) in the opinion of the State (acting reasonably and in accordance with the requirements of **Schedule 11 (Commercial Acceptance Criteria)** including any advice contained in the Independent Certifier Commercial Acceptance Notice provided under **Clause 20.5(a)(i)**), all other relevant Commercial Acceptance Criteria for that Stage have been achieved,

the State must issue to Project Co a certificate of Commercial Acceptance stating the date on which Project Co achieved Commercial Acceptance of that Stage.
- (b) If, in the opinion of the State (acting reasonably and in accordance with the requirements of **Schedule 11 (Commercial Acceptance Criteria)** including any advice contained in the Independent Certifier Commercial Acceptance Notice provided under **Clause 20.5(a)(ii)**), Commercial Acceptance has not been achieved, unless the State exercises its rights under **Clause 20.2(c)**, the State must issue to Project Co a notice containing details of the relevant outstanding Commercial Acceptance Criteria that must be satisfied by Project Co as a condition precedent to achieving Commercial Acceptance of that Stage, in which case the process outlined in **Clauses 20.2** to this **Clause 20.7** will apply again.
- (c) Subject to **Clause 20.7(d)**, the State may in its sole and absolute discretion issue a certificate of Commercial Acceptance of a Stage, if Commercial Acceptance of that Stage has been achieved, including in the certificate of Commercial Acceptance the Date of Commercial Acceptance for that Stage as determined in accordance with **Clause 20.9**, notwithstanding that Project Co has not issued a notice in accordance with **Clause 20.6**.
- (d) Notwithstanding any other provision of this Deed, the State:
  - (i) is under no obligation to certify Commercial Acceptance of a Stage prior to the Date for Commercial Acceptance for that Stage, regardless of whether Commercial Acceptance has been achieved prior to the Date for Commercial Acceptance; and

- (ii) must not certify Commercial Acceptance of a Stage prior to the Date for Commercial Acceptance (as at the date of this Deed) without the consent of Project Co (such consent not to be unreasonably withheld).
- (e) The issue of a certificate of Commercial Acceptance in accordance with this **Clause 20.7** does not constitute:
  - (i) evidence that the School Facilities or Verge Infrastructure meet the FFP Warranty;
  - (ii) an approval by the State of the completion or acceptance of the Works under this Deed; or
  - (iii) evidence that all or any other obligations under this Deed have been satisfied.
- (f) To the extent permitted by Law, a determination made by the Independent Certifier under **Clause 20.5** as to whether or not the Commercial Acceptance Criteria that the Independent Certifier is required to certify in accordance with **Schedule 11 (Commercial Acceptance Criteria)** have been satisfied is final and binding on the parties except in the case of manifest error.
- (g) If a Contingency Transportable Unit Response is implemented under **Clause 19.2(h)** and the State is reasonably satisfied that the School Activities can be undertaken on a basis acceptable to the State for that Stage (**School Activities Readiness**), the:
  - (i) Date of Commercial Acceptance for that Stage will be a day as certified by the State, which will be no later than the first day of the School Term following the date of School Activities Readiness; and
  - (ii) the State will issue a certificate of Commercial Acceptance for that Stage under **Clause 20.7(a)** which will include a list of Major Outstanding Items, in which case **Clauses 20.8** and **20A** will apply.

## 20.8 Commercial Acceptance Outstanding Items

- (a) The State may issue a certificate of Commercial Acceptance with a list of Commercial Acceptance Outstanding Items and the time within which they must be rectified.
- (b) If a certificate of Commercial Acceptance for a Stage includes Major Outstanding Items as part of the list of Commercial Acceptance Outstanding Items, once those Major Outstanding Items have been completed or remedied in accordance with **Clause 20.8(e)**, the State may issue a certificate of acceptance of Major Outstanding Items for that Stage with a list of Commercial Acceptance Outstanding Items under **paragraph (b)(ii)** of that definition, and the time within which they must be rectified, in which case the provisions of this **Clause 20.8** will apply to that further list of Commercial Acceptance Outstanding Items.
- (c) Where the State is required to determine the time within which a Commercial Acceptance Outstanding Item will be rectified, the State will act reasonably in doing so and will consult with the Independent Certifier in determining the period of time which may be required to rectify a Commercial Acceptance Outstanding Item which in accordance with **Schedule 11 (Commercial Acceptance Criteria)** are to be certified by the Independent Certifier to have been satisfied.
- (d) Project Co must submit to the State and the Independent Certifier (for review in accordance with **Schedule 12 (Review Procedures)**) a program for the completion of the Commercial Acceptance Outstanding Items that complies with the time periods determined in accordance with **Clause 20.8(c)**, within five Business Days after the issue of a certificate of Commercial Acceptance.
- (e) Project Co must complete or remedy any Commercial Acceptance Outstanding Items in the timeframe determined in accordance with **Clause 20.8(c)**:

- (i) to the satisfaction of the Independent Certifier, as certified by the Independent Certifier, where the Commercial Acceptance Outstanding Item is required to be certified by the Independent Certifier in accordance with the requirements of **Schedule 11 (Commercial Acceptance Criteria)**; and
  - (ii) where the Commercial Acceptance Outstanding Item is a Major Outstanding Item, following provision of any required certificate from the Independent Certifier under **Clause 20.8(e)(i)**, to the satisfaction of the State as certified by the State (acting reasonably and in accordance with the requirements of **Schedule 11 (Commercial Acceptance Criteria)** and any advice contained in a certification of the Independent Certifier provided under **Clause 20.8(e)(i)**); and
  - (iii) in circumstances other than those set out in paragraphs (i) and (ii) in this **clause 20.8(e)**, to the satisfaction of the State (acting reasonably).
- (f) If a Commercial Acceptance Outstanding Item is not completed or remedied within the timeframe determined in accordance with **Clause 20.8(c)**, the Commercial Acceptance Outstanding Item will be:
- (i) subject to an Abatement; and
  - (ii) a breach of this Deed.

## 20.9 Date of Commercial Acceptance

- (a) Subject to **Clause 20.9(b)**, the Date of Commercial Acceptance for a Stage will be the date on which Project Co achieves Commercial Acceptance of that Stage as certified by the State under **Clause 20.7**.
- (b) The State may declare in its certificate of Commercial Acceptance, the Date of Commercial Acceptance for a Stage to be:
  - (i) earlier than the applicable Date for Commercial Acceptance under **Clause 20.7(c)**; or
  - (ii) the first day of the next School Term if the date on which Project Co achieves Commercial Acceptance of that Stage as certified by the Independent Certifier is after:
    - (A) the Date for Commercial Acceptance for that Stage; and
    - (B) the start of the Academic Year immediately following the Date for Commercial Acceptance (as at the date of this Deed) for that Stage.

## 20.10 Post Commercial Acceptance

- (a) Project Co must conduct all Post Commercial Acceptance Tests in accordance with **Schedule 11 (Commercial Acceptance Criteria)** and the Commercial Acceptance Plan to the reasonable satisfaction of the Independent Certifier and the State.
- (b) Project Co must:
  - (i) prior to Commercial Acceptance of a Stage, give the State and the Independent Certifier a notice setting out the anticipated dates on which all Post Commercial Acceptance Tests will be performed and promptly notify the State and the Independent Certifier if any of those dates change;
  - (ii) allow the Independent Certifier and the State to attend, take samples, make measurements and otherwise carry out any checks and investigations they may reasonably require in order to ensure that any Post Commercial Acceptance Test has been successfully carried out;

- (iii) comply with all reasonable directions of the Independent Certifier and the State in relation to the conduct of any Post Commercial Acceptance Tests; and
  - (iv) if a test fails, immediately inform the Independent Certifier and the State and carry out rectification works to enable retesting to occur as soon as possible.
- (c) If a Post Commercial Acceptance Test is not completed or remedied within the timeframe determined by the State (acting reasonably), the failure to do so will be:
- (i) a Service Failure Abatement; and
  - (ii) a breach of this Deed.
- (d) After the Date of Commercial Acceptance for a Stage, Project Co must submit to the State a Post Commercial Acceptance Report for that Stage in accordance with **Schedule 11 (Commercial Acceptance Criteria)**.

## 20.11 Release after Commercial Acceptance

Without limiting **Clause 5.3(a)(ii)**, on and from the date which is three Months after the Date of Commercial Acceptance for a Stage, Project Co releases the State from any Claim in connection with any fact, matter or thing arising in connection with the carrying out of the Development Phase Activities in respect of that Stage which occurred prior to Commercial Acceptance of the Stage, except for any Claim in connection with which Project Co has, no later than three Months after the Date of Commercial Acceptance for that Stage, given the State the notices required by **Clause 56.3** and, if applicable, **Clause 56.4**.

## 20.12 Commercial Acceptance of Project Co FF&E for Harrisdale Stage 1 Works

**Clauses 20.1 to 20.11** apply to Commercial Acceptance for Project Co FF&E for Harrisdale Stage 1 Works subject to the following changes:

- (a) no notice is required to be given under **Clauses 20.1(a)(i)** and **(ii)**;
- (b) in **Clause 20.4(a)**, the reference to 20 Business Days will be deemed to be a reference to 10 Business Days;
- (c) in **Clause 20.4(b)**, the reference to 10 Business Days will be deemed to be a reference to 5 Business Days;
- (d) in **Clause 20.5(a)**, the reference to 5 Business Days will be deemed to be a reference to 3 Business Days; and
- (e) in **Clause 20.7(a)**, the reference to 5 Business Days will be deemed to be a reference to 2 Business Days.

## 20A MAJOR OUTSTANDING ITEMS

### 20A.1 Major Outstanding Items

- (a) The State:
  - (i) may permit Major Outstanding Items to be included in the list of Commercial Acceptance Outstanding Items in accordance with **Clause 20.8**; and
  - (ii) will, in the event that it issues a certificate of Commercial Acceptance under **Clause 20.7(g)**, permit Major Outstanding Items to be included in the list of Commercial Acceptance Outstanding Items.
- (b) If Major Outstanding Items are included on the list of Commercial Acceptance Outstanding Items for a Stage in accordance with **Clause 20A.1(a)**, then Project Co must comply with the obligations in **Clause 20.8** with respect to those Major Outstanding Items.

## 20A.2 Payment for Functional Units affected by Major Outstanding Items

- (a) Subject to **Clause 20A.3**, if a Functional Unit (or any part thereof) contains or is affected by a Major Outstanding Item during a Quarter the Quarterly Availability Payment component of the Quarterly Service Payment will be reduced for that Quarter by an amount calculated as follows for the relevant Functional Unit:

$$\left( A = QAP_q \times \left( \frac{A_{sqm}}{TA_{sqm}} \right) \times \frac{D_{AF}}{D_q} \right) \times 2$$

where:

- A = the adjustment in respect of the unavailability of a Functional Unit;
- QAP<sub>q</sub> = the Quarterly Availability Payment for the relevant Quarter calculated in accordance with **Schedule 3 (Payment)**;
- A<sub>sqm</sub> = the area of the Functional Unit in square metres which is affected by the Major Outstanding Item;
- TA<sub>sqm</sub> = the total area in square metres of all Stages which have reached Commercial Acceptance as at the last Business Day of the relevant Quarter;
- D<sub>q</sub> = the total number of days in the relevant Quarter; and
- D<sub>AF</sub> = the total number of days (or part days) in the Quarter that the Functional Unit at the relevant School Facility is affected by the Major Outstanding Item.
- (b) The formula in **Clause 20A.2(a)** will be applied more than once in a Quarter where more than one Functional Unit is affected by a Major Outstanding Item.
- (c) The reduction of the Quarterly Availability Payment effected in accordance with **Clause 20A.2(a)** will replace any Availability Failure Abatement which would otherwise apply to that Functional Unit while **Clause 20A.2(a)** applies to that Functional Unit (including pursuant to **Clause 20.8(e)(i)**).
- (d) The period for which a Functional Unit will be taken to contain or be affected by a particular Major Outstanding Item will commence on the Date of Commercial Acceptance of the relevant Stage and end on the day after the last Major Outstanding Item Completion Date in respect of the Major Outstanding Items affecting that Functional Unit.
- (e) The parties acknowledge that the regime in Section 3.8 (Alternative Accommodation) of **Schedule 3 (Payment)** does not apply to this **Clause 20A**.

## 20A.3 Date of Commercial Acceptance being prior to the Date for Commercial Acceptance

If the Date of Commercial Acceptance for a Stage is prior to the Date for Commercial Acceptance for that Stage, there will be no reduction in the Quarterly Availability Payment component of the Quarterly Service Payments under **Clause 20A.2** unless and until such time that the Date for Commercial Acceptance for that Stage has passed and Project Co has not completed or remedied all Major Outstanding Items in accordance with **Clause 20.8(e)(i)**. If Project Co has not completed or remedied all Major Outstanding Items in accordance with **Clause 20.8(e)(i)** by the Date for Commercial Acceptance for that Stage, then as and from the day after the Date for Commercial Acceptance for that Stage, the Quarterly Availability Payment component of the Quarterly Service Payments will be reduced in accordance with **Clause 20A.2**.

**20A.4 Indemnity**

Without limitation to **Clause 19.2**, if one or more Functional Units is affected by a Major Outstanding Item, and the Date for Commercial Acceptance for a Stage has passed, Project Co must indemnify the State for all reasonable out-of-pocket costs, losses and expenses suffered or incurred by the State directly arising from the State not being able to occupy or utilise, as applicable, the relevant Functional Unit/s, to the extent that the State has not been compensated for such losses or expenses under **Clause 20A.2**.

**21 STATE RIGHT TO REQUIRE PROJECT CO TO CALL ON PERFORMANCE BONDS**

- (a) Without limiting the State's rights under this Deed or at Law, the State may require Project Co to exercise any right it has to call on any Performance Bond that it holds and apply the proceeds to satisfy any debt due and payable by Project Co to the State under **Clause 41.7(a)(ii)** or which is referable to the Development Phase Activities (which has not been paid within 10 Business Days of receipt of a demand):
- (i) prior to the last occurring Date of Commercial Acceptance (or Major Outstanding Item Completion Date, if there are any Major Outstanding Items), up to an amount no greater than [*Not disclosed*]% of the D&C Subcontract Price; and
  - (ii) for the 12 Month period commencing on the last occurring Date of Commercial Acceptance, up to an amount no greater than [*Not disclosed*]% of the D&C Subcontract Price.
- (b) Project Co must enforce its rights to require the D&C Subcontractor to provide and maintain Performance Bonds for the Development Phase in accordance with the terms of the D&C Subcontract.

**22 DEFECTS****22.1 Correction of Defects in School Facilities**

- (a) Subject to **Clause 12.5(b)** Project Co must rectify all Defects in the School Facilities during the Term regardless of whether or not such Defects are the subject of a notice under this **Clause 22**.
- (b) **(Notice)**: If the State is of the opinion that there is a Defect in the School Facilities, then the State may give a notice to Project Co specifying the Defect, requiring Project Co to rectify the Defect and specifying a reasonable time within which this must occur.
- (c) **(Project Co to rectify)**: If a notice is given under **Clause 22.1(b)**, Project Co must rectify the Defect within the time specified in the State's notice.
- (d) **(State may rectify)**: If the Defect is not rectified by Project Co within the time specified in the State's notice, then the State is entitled to rectify the Defect itself or engage a third party to rectify the Defect and the cost of any such rectification work will be a debt due and payable by Project Co to the State.
- (e) **(Not affected)**: Neither the State's rights, nor Project Co's Liability, whether in accordance with this Deed or otherwise at Law in connection with Defects will be:
- (i) affected or limited by the rights conferred upon the State by this **Clause 22** or any other provision of this Deed; or
  - (ii) affected or limited by the failure of the State to exercise any such rights.
- (f) **(Costs)**: All Defects must be rectified by Project Co at Project Co's sole cost.
- (g) **(Service Failures)**: Nothing in this **Clause 22**, or any other clause of this Deed in connection with Defects, limits Project Co's obligations in respect of Service Failures under **Schedule 3 (Payment)** or **Schedule 27 (Services Specifications)**.

## 22.2 Correction of Defects in Verge Infrastructure

- (a) Project Co must correct all Defects in connection with the Verge Infrastructure of which Project Co becomes aware, or which are notified to Project Co.
- (b) Project Co must give notice to the State and the Independent Certifier that a Defect has been corrected promptly after the correction of that Defect.
- (c) Without limiting **Clause 22.2(a)**, if Project Co reasonably considers that the Defect the subject of any notice in accordance with **Clause 22.2(a)** was directly caused by any breach of any State Project Document by the State or a State Associate or a wrongful act or omission of the State or a State Associate then the costs reasonably incurred in correcting that Defect will be a debt due and payable by the State to Project Co, except to the extent that:
  - (i) the Defect was caused or contributed to by any Project Co Act or Omission; or
  - (ii) Insurance proceeds, damages or other compensation is received by Project Co or any Project Co Associate in connection with the Defect (or would have been received by Project Co or a Project Co Associate but for the act or omission of Project Co or Project Co Associates).
- (d) Except to the extent **Clause 22.2(c)** applies, Project Co indemnifies the State and any State Associate against any Claim made by a third party or Liability incurred to a third party (including another State Associate) in respect of a Defect in connection with the Verge Infrastructure.

## 22A.1 Construction Price

- (a) Subject to **Clause 22A.1(b)** and **54.1(h)(iv)**, in consideration for the execution of the Works, the State agrees to pay to, or at the direction of, Project Co each Construction Payment on each Construction Payment Date (the **Construction Price**).
- (b) The State has no obligation to pay a Construction Payment unless, and its obligation is limited to the extent that, it receives the corresponding Receivables Purchase Payment in accordance with the Receivables Purchase Deed. The parties acknowledge and agree that the amount of each Construction Payment and its corresponding Receivables Purchase Payment (including after adjustment) must always be equal.
- (c) The amount of a Construction Payment and the corresponding Receivables Purchase Payment may only be adjusted to reflect:
  - (i) a Change Compensation Event prior to Commercial Acceptance of the relevant Stage in respect of which finance has been provided under the Finance Documents (and such finance is to be applied in respect of amounts owing to the D&C Subcontractor) calculated in accordance with the Change Compensation Principles; and
  - (ii) otherwise by agreement between the parties prior to Commercial Acceptance of the relevant Stage, provided that no adjustment to a Construction Payment or the corresponding Receivables Purchase Payment will affect the limitation referred to in **Clause 22A.1(b)**.
- (d) If a Construction Payment and corresponding Receivables Purchase Payment are adjusted in accordance with **Clause 22A.1(c)**, the State and Project Co agree to adjust each relevant Licence Payment in accordance with section 2.3(d) of **Schedule 5 (Change Compensation Principles)**.
- (e) Notwithstanding any other clause of any Project Document, the State may not set off any amount due and payable by Project Co to the State under the Project Documents against any Construction Payment.



- (f) To the extent it has not already passed, all right, title and interest of Project Co in the Works to which a Construction Payment applies passes to the State on payment by the State under **Clause 22A.1(a)**.
- (g) Notwithstanding anything else in the Project Documents, the State acknowledges that, if a Receivables Purchase Payment is not received in full or at all under the Receivables Purchase Deed, the State's only right or remedy in respect of such non-payment is the relief from payment of the corresponding Construction Payment under **Clause 22A.1(b)**.

## 22A.2 Securitised Modification Payment

- (a) Subject to **Clause 22A.2(b)** and **54.1(h)(iv)**, if a Change Compensation Event occurs after the Date of Commercial Acceptance of the relevant Stage and the State requests that Project Co (either itself or via the Financiers) provide financing for that event, and Project Co or the Financiers agree to provide financing for that event under the Change Compensation Principles, the State must pay a Securitised Modification Payment to Project Co on the Additional Purchase Date.
- (b) The State has no obligation to pay a Securitised Modification Payment unless, and its obligation is limited to the extent that, it receives the corresponding Receivables Purchase Price for the relevant Additional Receivables from Finance Co under the Receivables Purchase Deed in relation to that Change Compensation Event.
- (c) Notwithstanding any other clause of any Project Document, the State may not set off any amount due and payable by Project Co or Finance Co to the State under the Project Documents against a Securitised Modification Payment.
- (d) To the extent it has not already passed, all right, title and interest of Project Co in the Works to which a Securitised Modification Payment applies passes to the State on payment by the State under **Clause 22A.2(a)**.
- (e) Notwithstanding anything else in the Project Documents, the State acknowledges that, if the additional Receivables Purchase Price for the relevant Additional Receivable is not received in full or at all under the Receivables Purchase Deed, the State's only right or remedy in respect of such non-payment is the relief from payment of the corresponding Securitised Modification Payment under **Clause 22A.2(b)**.
- (f) If the State agrees to pay a Securitised Modification Payment, each relevant Licence Payment will be increased in order to ensure that the relevant Receivables Purchase Price for the Additional Receivables is equal to that Securitised Modification Payment.

## 22A.3 No Change in Risk Allocation

- (a) The parties acknowledge and agree that the Securitised Licence Structure is not intended to result in an Increased State Risk Allocation.
- (b) If the State believes (on reasonable grounds supported by external advice) that the Securitised Licence Structure results or is likely to result in an Increased State Risk Allocation, then it may give Project Co a notice stating that the Securitised Licence Structure is to be amended to the extent necessary to ensure there is no Increased State Risk Allocation.
- (c) Project Co agrees to do anything reasonably requested by the State in a notice given by the State in accordance with **Clause 22A.3(b)** to modify the Securitised Licence Structure to ensure there is no Increased State Risk Allocation.
- (d) Project Co undertakes not to make any Claim inconsistent with the acknowledgement in **Clause 22A.3(a)**.
- (e) Project Co acknowledges and agrees that:
  - (i) damages may not be an adequate remedy for the State for any failure by Project Co to comply with the undertakings in this **Clause 22A.3**; and

- (ii) if there is a breach or purported breach by Project Co of its obligations in this **Clause 22A.3**, the State may seek and is entitled to injunctive or declaratory relief.

## 23 OPERATING PHASE MANAGEMENT PLANS AND OPERATING PHASE REPORTS

- (a) **(Acknowledgement)**: Project Co acknowledges that the Initial Operating Phase Management Plans in **Annexure E (Initial Operating Phase Management Plans)** are not in final form.
- (b) **(Submission and Update)**: Project Co must:
  - (i) prepare the Operating Phase Management Plans, the Operating Phase Reports, any statements, manuals and other information required to be submitted by Project Co during the Operating Phase:
    - (A) in accordance with the relevant requirements of **Schedule 27 (Services Specifications)**;
    - (B) in accordance with Best Industry Practice;
    - (C) to align with and be consistent with this Deed and the Development Phase Plans; and
    - (D) to ensure they contain complete and accurate information in respect of the Project, including providing a detailed description of how Project Co intends to carry out the Services;
  - (ii) update all Operating Phase Management Plans and Operating Phase Reports in accordance with the relevant requirements of **Schedule 27 (Services Specifications)**; and
  - (iii) submit to the State all Operating Phase Management Plans and Operating Phase Reports when prepared and updated for review in accordance with **Schedule 12 (Review Procedures)**.
- (c) **(Performance)**: Unless otherwise agreed by the State and without limitation to **Clause 25.1**, Project Co must perform the Services in accordance with the Operating Phase Management Plans.
- (d) **(Review)**: Project Co must review and, where required following that review, update the Operating Phase Management Plans:
  - (i) at the times set out in this Deed;
  - (ii) as necessary to reflect any changes to the nature, understanding or status of the Services; and
  - (iii) at any time if reasonably requested by the State to do so.
- (e) **(Authority Approval)**: If an Operating Phase Management Plan is required to be approved by an Authority, Project Co must ensure that it has obtained that Approval prior to submitting the relevant Operating Phase Management Plan to the State for review. Project Co must comply with all requirements of an Authority in respect of regular updates of an Operating Phase Management Plan.
- (f) **(Compliance)**: Project Co must comply with the then current version of each Operating Phase Management Plan (but only to the extent such Operating Phase Management Plan is not inconsistent with **Schedule 27 (Services Specifications)**).
- (g) **(Operating Phase Reports)**: Project Co must prepare and submit the Operating Phase Reports to the State in accordance with the relevant requirements of **Schedule 27 (Services Specifications)**.

- (h) **(Additional information):** Project Co must provide to the State any additional information in connection with the Operating Phase Management Plans and Operating Phase Reports requested by the State.
- (i) **(Complete):** Project Co warrants that each Operating Phase Management Plan and each Operating Phase Report is complete and correct, and not false or misleading in any material particular at the time it is provided to the State.

## 24 OPERATING PHASE SITE ACCESS

### 24.1 Operating Phase Licences

- (a) **(Operating Phase Licences):** Subject to **Clause 24.1(b)**, with effect from the Operational Commencement Date for a Stage, the State will grant to Project Co a non-exclusive licence substantially in the form of **Schedule 28 (Operating Phase Licence)** to enter upon, occupy and access (as applicable) the Site for that Stage to the extent necessary to carry out the Services terminating on termination of this Deed or Partial Termination of the Site, School Facility or Stage.
- (b) **(Terms of Operating Phase Licence):** Each Operating Phase Licence is subject to payment by Project Co of each Licence Payment payable quarterly (or at any other intervals agreed between the parties) and otherwise on the terms and conditions of the Operating Phase Licence.
- (c) **(Other access):** Except as set out in **Clause 24.1(a)**, Project Co is solely responsible for obtaining access to and from the Site as required to carry out the Services.
- (d) **(Ownership):** Once constructed on, installed at or delivered to the Site for a Stage, the State will own the Works, the School Facilities and all FF&E.

### 24.2 Permitted use

During the Operating Phase, Project Co must not use and will procure that no Project Co Associate uses any Site or Verge Works Site for any purpose other than the delivery of the Services and the performance of the Project Activities during the Operating Phase, subject to Project Co Third Party Use in accordance with **Clause 26.6**.

### 24.3 State access to the School Facilities and records

- (a) At all times during the Operating Phase, the State, any State Entities and any persons authorised by the State will have free and unfettered access:
  - (i) to the School Facilities and the Verge Infrastructure for any purpose, including:
    - (A) to review, inspect, test and monitor the provision of the Services;
    - (B) to attend any test or investigation that is being carried out at a School Facility; and
    - (C) to undertake any Asset Condition Survey in accordance with **Clause 28.2**; and
  - (ii) to all Project Co Material.
- (b) Project Co must procure that the State, any State Associate and any persons authorised by the State shall have, at all reasonable times during the Operating Phase, the right to visit any property, site or workshop outside of the School Facilities:
  - (i) where materials, Plant or FF&E are being manufactured, prepared or stored for use in the School Facilities for the purposes of general inspection and testing; or
  - (ii) used by Project Co for the provision of any Services.

- (c) Each party will bear its own costs in respect of any rights of access exercised under this **Clause 24.3**, except:
- (i) where a Defect is revealed, when Project Co must pay as any debt due and payable by Project Co to the State the costs and expenses of any inspection, testing or investigation which revealed that Defect; and
  - (ii) the costs of the State in respect of any Asset Condition Survey, when **Clause 28** will apply.

#### **24.4 Access by Harrisdale Stage 1 Contractor**

- (a) Without limiting **Clause 24.3**, Project Co must provide the Harrisdale Stage 1 Contractor (and any person authorised by the Harrisdale Stage 1 Contractor) with such access to those parts of the Site on which Harrisdale Stage 1 is located as may be required by the Harrisdale Stage 1 Contractor in order to meet its obligations under the Harrisdale Stage 1 Contract.
- (b) The State will use reasonable endeavours to procure that the Harrisdale Stage 1 Contractor complies with Project Co's reasonable requirements in relation to site safety, security and coordination in accessing those parts of the Site on which Harrisdale Stage 1 is located.

### **25 OPERATING PHASE GENERAL OBLIGATIONS**

#### **25.1 Delivery of the Services**

Without limiting Project Co's obligations under **Clause 5.1(a)**, Project Co must perform the Services for each Stage during the Operating Phase of the applicable Stage in accordance with:

- (a) the Services Requirements;
- (b) any Minor Works;
- (c) the Operating Phase Management Plans; and
- (d) any Modification directed by the State, through the issue of a Modification Order.

#### **25.2 Coordination of Services with School Activities**

- (a) Except as expressly provided to the contrary in this Deed, the use and occupation of a School Facility by the State, a Principal or other Users and the carrying out of the School Activities as contemplated under this Deed will not limit or affect Project Co's rights and obligations to provide the Services in accordance with and to the standards specified in the Services Requirements.
- (b) Project Co:
  - (i) warrants that it has made a full allowance in its Quarterly Service Payment to ensure the coordination of the provision of the Services with:
    - (A) the possession, occupation and use of the School Facilities by the State and the Principal and Users as contemplated by this Deed; and
    - (B) the carrying out of the School Activities;
  - (ii) must:
    - (A) perform the Services in accordance with and to the standards specified in the Services Requirements so as to minimise disruption to the normal functioning of each School Facility and the provision of the School Activities; and
    - (B) take any steps which are necessary or otherwise reasonably required by the State or a Principal to minimise disruption or inconvenience to the State, a Principal, the Users and to the School Activities; and

- (iii) will not, unless otherwise expressly permitted in this Deed:
  - (A) be relieved of its obligations under this Deed, including to perform the Services in accordance with and to the standards specified in the Services Requirements by; or
  - (B) be entitled to make any Claim against the State in respect of, any fact, matter or thing arising out of or in connection with the use and occupation of a School Facility by the State, a Principal and the Users or the carrying out of the School Activities as contemplated by this Deed.

### 25.3 Caretaker Services

- (a) **(Natural Person)**: Subject to this **Clause 25.3**, Project Co must ensure that a natural person or persons is appointed to the position of Caretaker for each School Facility at all times.
- (b) **(Appointment)**: Project Co must advise the State of the identity of:
  - (i) the person or persons appointed to the position of Caretaker for each School Facility at least 20 Business Days prior to the Operational Commencement Date for that School Facility; and
  - (ii) any replacement person or persons at least 20 Business Days prior to the commencement of that person or persons as the Caretaker at a School Facility.
- (c) **(Employee)**: The Caretaker must be an officer or employee of Project Co or the Services Subcontractor.
- (d) **(Replacement)**: Subject to **Clause 25.3(e)**, if at any time during the Operating Phase for a Stage, the Caretaker position for a School Facility is vacant, Project Co must appoint a replacement person or persons to the Caretaker position within 20 Business Days of the position becoming vacant and must notify the State of that replacement person or persons in accordance with **Clause 25.3(b)(ii)**.
- (e) **(Temporary Caretaker)**: Project Co may appoint a temporary person or persons to fulfil a vacant Caretaker position provided that any such appointment is for no longer than three Months.
- (f) **(Qualifications)**: All persons nominated by Project Co to undertake the Caretaker Services in accordance with **Clauses 25.3(b) - 25.3(e)** must have appropriate qualifications to carry out the position of Caretaker in accordance with the Caretaker Service Standards.
- (g) **(Poor performance)**: Without limiting **Clause 55**, if the State, acting reasonably, forms the view that a Caretaker is not delivering the Caretaker Services in accordance with Best Operating Practices or in accordance with the Caretaker Service Standards, the State, the Principal of the relevant School Facility and Project Co will, within five Business Days of the State's request, meet to discuss the issue and agree an action plan to resolve the issue. Such action plan may include:
  - (i) ensuring additional training for the Caretaker is undertaken; and
  - (ii) active monitoring of the Caretaker's performance over a nominated period.
- (h) **(Removal)**: Without limiting **Clause 55**, if:
  - (i) following the completion of an action plan agreed in accordance with **Clause 25.3(g)**, the State, acting reasonably, is still of the view that the Caretaker is not delivering the Caretaker Services in accordance with Best Operating Practices or in accordance with the Caretaker Service Standards; or

- (ii) Project Co fails to comply with or fails to procure that the Caretaker complies with the action plan agreed in accordance with **Clause 25.3(g)**, the State may request that the Caretaker is no longer involved in the delivery of the Services, in which case Project Co must remove that Caretaker from the Project and appoint a replacement person or persons to the Caretaker position in accordance with the process outlined in this **Clause 25.3**.

## 26 USE OF SCHOOL FACILITIES

### 26.1 School Facility Management Committees

- (a) **(Establishment)**: The parties must procure the establishment of a committee for each School Facility (each a **School Facility Management Committee**) consisting of the following members:
- (i) the Principal for the relevant School Facility;
  - (ii) the Caretaker for the relevant School Facility; and
  - (iii) such other members as the parties agree.
- (b) **(Functions)**: The primary functions of each School Facility Management Committee will be to ensure sufficient consultation by Project Co and its Services Subcontractor with the Principal for each School Facility in relation to matters specific to that School Facility, including:
- (i) the upcoming Project Activities and School Activities;
  - (ii) the forecast School Third Party Use and Project Co Third Party Use for the upcoming Academic Year for that School Facility and which parts of a School Facility are likely to be required for each such use;
  - (iii) improvement to the manner in which the Services may be provided and which may better support the provision of the School Activities; and
  - (iv) to discuss and address such other matters as the members of the School Facility Management Committee may agree from time to time in connection with the Project.
- (c) **(Meetings)**: The School Facility Management Committee must meet monthly during the Operating Phase for a Stage, unless the members otherwise agree.
- (d) **(State involvement)**: The State Representative may, but is not required to, attend any meeting of a School Facility Management Committee as a member.
- (e) **(Continuity of membership)**: The parties acknowledge the importance of the School Facility Management Committee having a continuity of membership in order to successfully carry out its functions.
- (f) **(Changes to membership)**: A member of the School Facility Management Committee may, where strictly necessary, be substituted by the party they are representing from time to time on notice to the other parties together with details of the reason for the change.
- (g) **(Liability of School Facility Management Committee)**: The School Facility Management Committee:
- (i) is advisory only and its decisions or recommendations are not binding on the parties; and
  - (ii) does not have any legal responsibilities, Liability or power to require any of the parties to act or refrain from acting in any way.

### 26.2 School Terms and Academic Years

- (a) Project Co must inform itself of each of the School Terms and Academic Years that will occur between the period between the date of this Deed and the Expiry Date.

- (b) No later than 30 November in each Operating Year for a Stage, and at least one Month prior to the anticipated Date of Commercial Acceptance for a Stage, the State must notify Project Co of the dates for any Critical Periods for the upcoming Operating Year and provide details of Critical Functional Units. Critical Periods for each Operating Year for each Stage will not exceed 40 days.

### 26.3 Use of a School Facility during Core Hours

- (a) Each School Facility must be made available by Project Co for School Use and School Third Party Use during Core Hours.
- (b) Project Co must make Dental Therapy Centre Facilities available during the Dental Therapy Centre Hours.
- (c) Project Co is not entitled to any payment in respect of the uses referred to in **Clauses 26.3(a) or 26.3(b)** other than the Quarterly Service Payment.

### 26.4 Use of a School Facility outside of Core Hours

- (a) A Principal (or a person nominated by a Principal) may require a School Facility or part of a School Facility to be made available at any time during the Operating Phase outside of Core Hours for Additional Use subject to any Project Co Third Party Use previously approved by the Principal in accordance with **Clause 26.6** and **Clause 26.8**.
- (b) A Principal must notify Project Co no later than two Business Days prior to the occurrence of any period of Additional Use, such notice to include the relevant details of the Additional Use (**State Notice**).
- (c) Subject to **Clause 26.4(e)**, Project Co must make the School Facility or part of the School Facility available for Additional Use as notified by the Principal.
- (d) Upon receipt of a State Notice under **Clause 26.4(b)** and if the Principal has given Project Co less than ten Business Days prior notice of an Additional Use, Project Co may notify the Principal if it reasonably considers that the Additional Use is likely to interfere with the provision of the Services and provide an explanation as to how those Services may be affected by the Additional Use (**Project Co Notice**).
- (e) Upon receipt of a Project Co Notice under **Clause 26.4(d)**, the Principal may either withdraw its request for the Additional Use, or elect to proceed with the Additional Use.
- (f) If the Principal elects to proceed with the Additional Use and the Additional Use directly causes a Service Failure, Project Co will be granted a reasonable period of time in which to rectify the Service Failure prior to any Abatement taking into account the circumstances at the time and assuming that any resulting deferred maintenance (including deferred maintenance which would rectify the Service Failure) can be carried out for the original cost planned.
- (g) Project Co must notify the State, as soon as possible following receipt of the State Notice, if the proposed Additional Use will cause or has caused the Additional Use Allowance to be exceeded.
- (h) Subject to **Clauses 26.4(i) and 26.4(j)**, Project Co will be entitled to charge the State an Additional Use Payment for any Additional Use outside of Core Hours at the rates specified in **Schedule 22 (Additional Use)** where that Additional Use will cause the Additional Use Allowance to be exceeded.
- (i) Project Co is not entitled to any Additional Use Payment in respect of any Additional Use, other than the payments set out in this **Clause 26.4** and the Quarterly Service Payment.
- (j) All amounts to be paid by the State to Project Co in accordance with this **Clause 26.4** will be paid by way of an adjustment to the Quarterly Service Payment.

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- (k) The State, or the Principal on the State's behalf, is entitled to retain all income received by, or on behalf of, the State in connection with School Third Party Use. Project Co has no entitlement to any such income or any other fees or income in respect of such School Third Party Use.

## 26.5 Increase of Additional Use Allowance

- (a) If at the end of any Operating Year the Additional Use Allowance has not been fully utilised an amount equivalent to the unused amount of the Additional Use Allowance will be added to the Additional Use Allowance for the next Operating Year.
- (b) There is no limit to the amount that can be rolled forward in each Operating Year.
- (c) The State may at the end of each Operating Year where the Additional Use Allowance has not been fully utilised, notify Project Co that, instead of increasing the Additional Use Allowance for the next Operating Year by the surplus amount, Project Co must adjust the Quarterly Service Payment for an amount equal to the surplus. If, at the Expiry Date, the Additional Use Allowance has not been fully utilised, the amount of the surplus will be a debt due and payable by Project Co to the State which will be calculated in accordance with **Schedule 22 (Additional Use)**.

## 26.6 Project Co Third Party Use

- (a) Subject to the prior approval of the Principal, Project Co may request the use of a School Facility or any part of a School Facility for Project Co Third Party Use provided that such Project Co Third Party Use is not during Core Hours or periods during which the School Facility is being used for School Use or School Third Party Use outside of Core Hours notified by a Principal to Project Co.
- (b) Without limiting other conditions that may be imposed on approval, the Principal may require, as a condition of its approval, the proposed third party user to enter into a release and indemnity in favour of the State and the Principal in a form satisfactory to the State in respect of losses that may be suffered by, or Claims made against, the State or the Principal as a result of or in connection with the proposed Project Co Third Party Use.
- (c) No later than 15 Business Days prior to the proposed Project Co Third Party Use, Project Co must notify the Principal of:
- (i) the type of Project Co Third Party Use proposed;
  - (ii) the dates, times and frequency of the proposed Project Co Third Party Use;
  - (iii) the areas of the School Facility required for the Project Co Third Party Use;
  - (iv) the estimated usage or consumption of Utilities which will be required for the Project Co Third Party Use together with a breakdown of such usage or consumption and an allocated cost for the same. If requested by Project Co, the Principal or the State will provide to Project Co the applicable rates for the usage or consumption of Utilities; and
  - (v) any other information reasonably requested by the State or the Principal.
- (d) The Principal must notify Project Co no later than ten Business Days prior to the Project Co Third Party Use whether it accepts or rejects Project Co's proposal under **Clause 26.6(c)**.
- (e) If the Principal accepts the proposed Project Co Third Party Use, Project Co may proceed to use the relevant School Facility for the approved use. Project Co must notify the Principal of the termination or suspension of any Project Co Third Party Use arrangements.



- (f) If the Principal rejects the proposed Project Co Third Party Use, Project Co may approach the State who will consider the proposed Project Co Third Party Use based on the information provided to the Principal under **Clause 26.6(c)**. The State's determination will be final and binding. If the State accepts the proposed Project Co Third Party Use, then **Clause 26.6(e)** applies.
- (g) Project Co must share with the State [*Not disclosed*]% of the Net Income received by Project Co for Project Co Third Party Use and make payment to the State of the estimated cost for the usage and consumption of Utilities in respect of the Project Co Third Party Use as approved by the State, and any such amounts will be a debt due and payable by Project Co to the State.
- (h) Any dispute between the parties as to the amount of Net Income to be paid to the State by Project Co will be referred to the Dispute resolution procedure under **Clause 43** for resolution.

## 26.7 Limitations on Project Co Third Party Use

A School Facility must not be used for Project Co Third Party Use if in the State's determination, that use:

- (a) interferes with the normal operations of the School Facility;
- (b) adversely affects the safety or welfare of persons at the School Facility;
- (c) causes damage to property that comprises, or is located at, the School Facility;
- (d) conflicts with the ethos and values of the School Facility or otherwise adversely affects the School Facility's reputation;
- (e) involves any purpose which is inconsistent with or constitutes a breach of an Approval or applicable Law;
- (f) impairs, or can reasonably be expected to impair, the ability of the State or a Principal to provide the School Activities or to limit or hinder School Use;
- (g) is not in accordance with relevant Education Policies;
- (h) may cause the State or a Principal loss or embarrassment; or
- (i) is incompatible with the use of a School Facility or conflicts with School Use.

## 26.8 Using the School Facilities for Elections

The parties acknowledge and agree that any proposed use of a School Facility or School Facilities for the purposes of State or Federal elections will take preference over any School Use, School Third Party Use or Project Co Third Party Use outside of Core Hours.

## 26.9 Naming rights

- (a) Unless otherwise agreed, the State may:
  - (i) determine the name of and rename the School Facilities or a School Facility;
  - (ii) vary any School Facility Name from time to time; and
  - (iii) grant naming rights for any parts of a School Facility, and any activity, prize, scholarship or award in connection with the School Activities, to any person, including Project Co, in accordance with the *School Education Regulations 2000 (WA)*.
- (b) During the Term, Project Co must confirm the name of the Project and the School Facility Name with the State and display the:
  - (i) School Facility Name:
    - (A) on any signage it is required to provide in or on the relevant School Facility, Works or Site or any part of the relevant School Facility, Works or Site; and

- (B) for any other purpose involving the School Facility where reference to the name of a particular School Facility is required or appropriate.
- (ii) name of the Project:
  - (A) in its advertising and promotional Material (if appropriate);
  - (B) on the uniforms of its employees and the Services Subcontractor's employees; and
  - (C) for any other purpose involving more than one School Facility where reference to the name of the Project is required or appropriate.
- (c) During the Term, Project Co must not:
  - (i) do anything that diminishes the value of a School Facility Name or the name of any School Facility or the name of any part of a School Facility; or
  - (ii) use any name (other than the School Facility Name) to describe or refer to a School Facility or use any name other than the name of the part of a School Facility to describe or refer to that part of the School Facility.
- (d) Project Co must include in any contract with a third party for the occupation of, or access to, any part of a School Facility:
  - (i) an acknowledgement by the third party of the State's rights under this **Clause 26.9**; and
  - (ii) an undertaking on the part of the third party:
    - (A) to do everything necessary to facilitate the State's exercise of its rights and the performance of Project Co's obligations under this **Clause 26.9**; and
    - (B) not to do anything that precludes or prevents the State exercising those rights or Project Co performing those obligations or which may diminish the value of the School Facility Name or the name of any part of a School Facility.
- (e) The State will bear Project Co's and the Services Subcontractor's reasonable direct costs associated with complying with this **Clause 26.9** if a School Facility Name is changed after the initial naming by the State.

## 27 FF&E

- (a) **(Ownership):** The State will own all FF&E, during the Term.
- (b) **(Transfer of title):** To the extent not already owned by the State, Project Co must transfer to the State title, free from encumbrances, to all Project Co FF&E:
  - (i) procured during the Development Phase for a Stage, at Commercial Acceptance of the Stage (other than in respect of Harrisdale Stage 1 Works);
  - (ii) procured during the Operating Phase for a Stage, at the time of procurement; and
  - (iii) procured in respect of Harrisdale Stage 1 Works, at the time of procurement.
- (c) **(Obligations):** Project Co must maintain, replace and repair all items of Group 1 FF&E until the end of the Operating Phase in accordance with the Operating Phase Lifecycle Maintenance Plan, the Services Requirements and its other obligations under this Deed.

- (d) **(Quality of FF&E):** Subject to **Clause 27(e)**, where Project Co is required to replace FF&E, it must do so using equipment that:
- (i) has the same standard relative to the market for that FF&E at the time of replacement as the replaced FF&E had relative to the market at the time that FF&E was purchased;
  - (ii) has the same or higher levels of quality and are as technically up to date as that which would be used in accordance with Best Operating Practices;
  - (iii) has a design life equal to or greater than the terms of FF&E being replaced;
  - (iv) does not materially increase the operating or maintenance costs to the State, the cost of any Reviewable Services or any other amount payable by the State; and
  - (v) does not materially increase operating or maintenance costs to the Principal, or any other costs payable by the State (in relation to equipment where alternative equipment on comparable terms is readily available and would not have had such an effect).
- (e) **(New FF&E):** If at the time Project Co is replacing any FF&E a new item of FF&E exists which has:
- (i) better functionality;
  - (ii) a better standard relative to the market;
  - (iii) a higher level of quality; or
  - (iv) is more technically or technologically advanced,
- than the item of FF&E it is replacing, and that new item, at the time of replacement, has a Whole of Life Cost less than or equal to [Not disclosed]% of the Indexed Whole of Life Cost of the item it is replacing, Project Co must use that new item to replace the relevant item of FF&E.
- (f) **(Fit For Purpose):** Nothing in this **Clause 27** affects Project Co's obligations to maintain the School Facilities (including the FF&E, but excluding Group 2 FF&E and Group 3 FF&E) so that each School Facility meets the FFP Warranty.

## 28 ASSET CONDITION

### 28.1 Condition of School Facilities

- (a) Project Co must maintain each Stage and the relevant Verge Infrastructure for that Stage so that each Stage and the Verge Infrastructure for that Stage:
- (i) meets the FFP Warranty; and
  - (ii) meets the relevant Handover Condition,
- for the duration of the Operating Phase for that Stage.
- (b) Project Co must maintain each Stage and the relevant Verge Infrastructure for that Stage in accordance with:
- (i) the Operating Phase Lifecycle Maintenance Plan;
  - (ii) the Annual Services Plan;
  - (iii) Best Industry Practices; and
  - (iv) its other obligations under this Deed,
- for the duration of the Operating Phase for that Stage.

**28.2 Asset Condition Survey**

Subject to **Clause 28.7(b)**, no more than once every two years, during the Operating Phase for a Stage, the State may undertake (or engage a State Associate to undertake) an Asset Condition Survey to assess whether:

- (a) Project Co is maintaining that Stage in accordance with the requirements of **Clause 28.1(a)**; and
- (b) the Estate Services Plan and Project Co's processes for reviewing the quality of the assets comprising that Stage reflect Best Industry Practices.

**28.3 Notification**

The State will consult with and then notify Project Co a minimum of 30 Business Days in advance of the date it wishes to carry out or procure the carrying out of each Asset Condition Survey.

**28.4 Parties' obligations**

- (a) Where the State carries out or procures the carrying out of an Asset Condition Survey, the State will use reasonable endeavours to minimise any disruption caused to the provision of the Services by Project Co.
- (b) If all Stages of a School Facility have achieved Commercial Acceptance, the State will carry out the Asset Condition Survey for the entire School Facility at one time rather than carrying out separate Asset Condition Surveys for each Stage.
- (c) Project Co must provide the State or any person carrying out the Asset Condition Survey all information and other reasonable assistance required by the State during the carrying out of the Asset Condition Survey.

**28.5 Results of Asset Condition Survey**

- (a) The State will provide Project Co with a copy of the Asset Condition Survey report.
- (b) The Contract Management Team must discuss the contents of the Asset Condition Survey report provided in accordance with **Clause 28.5(a)** and seek to agree:
  - (i) any action Project Co must undertake to ensure that it meets the requirements set out in **Clause 28.1**; and
  - (ii) the time in which any such action must be undertaken, within 20 Business Days of Project Co being provided with the Asset Condition Survey report.
- (c) To the extent that the parties are unable to reach an agreement in accordance with **Clause 28.5(b)**, the State may (acting reasonably and in accordance with the findings of the Asset Condition Survey) direct Project Co as to:
  - (i) any action Project Co must undertake to meet the requirements referred to in **Clause 28.1**; and
  - (ii) the time in which any such action must be undertaken by Project Co.

**28.6 Failure to carry out work**

If Project Co fails to undertake any action agreed or determined in accordance with **Clause 28.5**, the State shall be entitled to undertake, or to procure the undertaking of, such action and to recover all costs incurred by it (including administration costs) in doing so from Project Co as a debt due and payable by Project Co to the State.

**28.7 Costs of Asset Condition Surveys**

- (a) Subject to **Clause 28.7(b)**, the State shall pay its own costs of carrying out any Asset Condition Survey.
- (b) If any Asset Condition Survey shows significant non-compliance by Project Co, the State may conduct subsequent Asset Condition Surveys annually until such time

as the State is satisfied (acting reasonably) that Project Co has rectified that non-compliance and the State's costs of conducting those additional surveys shall be paid by Project Co as a debt due and payable by Project Co to the State.

## 28.8 Operating Phase Lifecycle Maintenance Plan

- (a) In reviewing and updating the Estate Services Plan in accordance with **Clause 23**, Project Co may, subject to **Clauses 28.8(c), 28.8(e), 28.8(f)** and **28.8(g)** defer Lifecycle Works scheduled in previously approved plans where those works are not required to:
- (i) enable the relevant Stage to meet the requirements of **Schedule 27 (Services Specifications)**;
  - (ii) enable the relevant Stage to meet the FFP Warranty and, at the Expiry Date, the Handover Conditions; or
  - (iii) comply with all relevant Laws and Quality Standards.
- (b) In reviewing and updating the Estate Services Plan in accordance with **Clause 23**, Project Co must bring forward the timing of Lifecycle Works scheduled in previously approved plans where and to the extent necessary to:
- (i) enable a Stage to meet the requirements in **Schedule 27 (Services Specifications)**;
  - (ii) enable a Stage to meet the FFP Warranty and, at the Expiry Date, the Handover Conditions; or
  - (iii) comply with all relevant Laws and Quality Standards.
- (c) Each time Project Co reviews and updates the Estate Services Plan in respect of each Stage, Project Co will not be entitled to:
- (i) defer any Lifecycle Works scheduled in the previously approved plans by a period of more than one year; or
  - (ii) subject to **Clause 28.8(d)**, request the deferral of any Lifecycle Works prior to the Operating Year which immediately precedes the Operating Year in which the Lifecycle Works were scheduled to commence, without the approval of the State.
- (d) The deferral or advancement of any Lifecycle Works in accordance with **Clauses 28.8(a)** or **28.8(b)** will automatically defer or advance, by the same period, any scheduling of the same works to be conducted on later occasions during the Operating Phase.
- (e) The State may refuse to approve a revised Estate Services Plan in respect of a Stage:
- (i) in accordance with **Schedule 12 (Review Procedures)**; or
  - (ii) where the State is of the view, acting reasonably, that such plans will not enable Project Co to:
    - (A) meet **Schedule 27 (Services Specifications)**;
    - (B) ensure each Stage meets the FFP Warranty and, at the Expiry Date, the Handover Conditions; or
    - (C) comply with all relevant Law, Approvals, and Quality Standards.
- (f) The State may refuse to approve a revised Estate Services Plan in respect of a Stage if Project Co's proposed deferral of the performance of the first Lifecycle Works in respect of an element would, if approved, result in the Lifecycle Works being deferred from the Operating Year when the Lifecycle Works were initially scheduled to be undertaken in the relevant Estate Services Plan current as at the Date of Commercial Acceptance for a Stage, by a period (measured in Operating Years) equal to or greater than:

$0.3 \times P$

Where:

P = the Operating Year (expressed as a number) in which those Lifecycle Works were initially scheduled to be undertaken.

- (g) The State may refuse to approve a revised Estate Services Plan in respect of a Stage if Project Co's proposed deferral of the performance of any subsequent Lifecycle Works for an element would, if approved, result in the relevant Lifecycle Works being deferred from the Operating Year when the Lifecycle Works were initially scheduled to be undertaken in the Operating Phase Lifecycle Maintenance Plan current as at the Date of Commercial Acceptance for a Stage, by a period (measured in Operating Years) equal to or greater than:

$(0.3 \times P) + TD$

Where:

P = the number of Operating Years between the Operating Year in which the relevant Lifecycle Works were initially scheduled to be undertaken in the Operating Phase Lifecycle Maintenance Plan current as at the Date of Commercial Acceptance and the Operating Year in which the previous Lifecycle Works for that element were initially scheduled to be undertaken in the Operating Phase Lifecycle Maintenance Plan current as at Date of Commercial Acceptance for a Stage; and

TD = the total of the previously approved deferral periods in connection with the Lifecycle Works for that element (measured in Operating Years).

- (h) Project Co must undertake Lifecycle Works in accordance with the Estate Services Plan which has been finalised in accordance with **Schedule 12 (Review Procedures)**.

## 29 TRANSPORTABLE UNITS

- (a) At any time during the Operating Phase for a Stage, the State may notify Project Co that it requires Project Co to accommodate one or more Transportable Units at a School Facility and provide the Services to Transportable Units in accordance with the Services Requirements.
- (b) Where the State notifies Project Co that a School Facility requires Transportable Units, it must give Project Co notice specifying:
- (i) the number and category of Transportable Units required for the School Facility and the location of those Transportable Units; and
  - (ii) the date by which those Transportable Units will be functional, which must not be less than 45 Business Days from the date of the notice.
- (c) The State must deliver the Transportable Units to the relevant School Facility.
- (d) **Schedule 21 (Transportable Units)** sets out the standards applicable to newly constructed and previously unused Transportable Units.
- (e) On or before delivery of any Transportable Unit to a School Facility, the State and Project Co will agree the Functional Unit Availability Failure Abatement for each Transportable Unit in accordance with **Schedule 23 (Schedule of Accommodation)**.
- (f) Within five Business Days of delivery of the Transportable Units in accordance with **Clause 29(c)**, Project Co must (in the presence of the State who will be given full access to observe all inspections and tests carried out by Project Co) inspect and test each Transportable Unit for physical damage and any Defects or deficiencies which impact on, or are likely to impact on, the intended use or functionality of the Transportable Units or the provision of any Services required to be provided in connection with the Transportable Units and:

- 
- (i) if satisfied that the Transportable Units meet the applicable standards, issue to the State a notice to that effect; or
  - (ii) if not satisfied that the Transportable Units meet the applicable standards issue to the State a notice specifying any works Project Co reasonably considers are required to be done to repair any damage to, Defects or deficiencies in a Transportable Unit and set out any adverse impact on Project Co's ability to provide the Services in respect of the Transportable Unit.
- (g) Within five Business Days after receipt by the State of the notice referred to in **Clause 29(f)(ii)**, the State must:
- (i) issue a Modification Request in respect of any works required (by the notice issued under **Clause 29(f)(ii)**) to repair any damage to, Defects or deficiencies to a Transportable Unit or address any impact on the ability of Project Co to provide Services in respect of the Transportable Unit; or
  - (ii) install and commission the Transportable Units in accordance with **Clause 29(c)**, notwithstanding that the Transportable Units do not meet the applicable standards or as otherwise required by this Deed, and the State must, at its cost, arrange for any damage to, Defects or deficiencies in a Transportable Unit to be repaired.
- (h) Project Co:
- (i) must provide the Services to the Transportable Units in accordance with this Deed and the Services Requirements from the relevant date specified in **Clause 29(b)(ii)** provided that Project Co has been given at least 5 Business Days to inspect and test the Transportable Units under **Clause 29(f)** from the date of their delivery, failing which, provide those Services at the expiry of that 5 Business Day period; and
  - (ii) subject to **Clause 29(i)**, will be responsible for loss or destruction of, damage to or Defects or deficiencies in, each Transportable Unit (except for damage to or Defects or deficiencies in Transportable Units, accepted by the State under **Clause 29(g)(ii)** and Project Co will be relieved from any Abatement arising directly from the same).
- (i) If Project Co identifies a latent Defect in the Transportable Unit after installation and commissioning, it must, within two Business Days of discovery of the latent Defect, notify to the State, the existence of the latent Defect. Project Co must use reasonable endeavours to make the Transportable Unit safe and to mitigate the impact of the latent Defect on the ongoing delivery of the Services. Upon receipt of such a notice from Project Co, the provisions of **Clauses 29(f)** and **29(g)** will apply to the extent applicable.
- (j) After the repairs to a Transportable Unit have been carried out in accordance with the Modification Request, Project Co must comply with **Clause 29(h)**, except that in respect of **Clause 29(h)(i)**, the date by which the Transportable Units must be functional will be the date determined under the Modification Request.
- (k) Without limiting the other provisions of this Deed, Project Co acknowledges and agrees that:
- (i) each School Facility must be designed, constructed and operated so as to accommodate and incorporate Transportable Units as set out in the Output Specifications;
  - (ii) upon installation, each Transportable Unit in accordance with this **Clause 29** will become part of the relevant School Facility; and
  - (iii) Project Co will be responsible for the provision of all aspects of the Services as they relate to such Transportable Units in accordance with the Services Requirements.
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- (l) Subject to **Clauses 29(g), 29(m), 29(n)(i) and 29(r)**, Project Co releases the State and the State Associates from any Liability, duty or obligation to Project Co (or any person claiming through or on behalf of Project Co, including any Subcontractor) in respect of any Claim or loss connected with such Transportable Units.
- (m) Project Co will be paid for the provision of all Services to the Transportable Units in accordance with **Clause 29(o)**, and will not (except as expressly provided in this Deed) have any other Claim under **Clause 36** in respect of the performance of its obligations under this **Clause 29**.
- (n) If there is a change to the specification of a Transportable Unit required to be installed at a School Facility from the specifications for Transportable Units set out in **Schedule 27 (Services Specifications)** and the change to the specifications result in:
- (i) Project Co incurring additional costs in respect of the delivery of Services to the Transportable Units from the rates specified in Annexure C of **Schedule 3 (Payment)**, the State will issue a Modification Request to pay to Project Co the reasonable incremental costs that Project Co incurs in connection with the delivery of the Services to that Transportable Unit in accordance with **Schedule 5 (Change Compensation Principles)**; or
  - (ii) a net Saving, Project Co must pay that net Saving as and when it accrues to the State, such amounts will be a debt due and payable to the State.
- (o) Project Co must calculate the cost of providing the Services to the Transportable Units in accordance with the square metre rates specified in **Schedule 3 (Payment)**. The rates specified in Annexure C of **Schedule 3 (Payment)** are fixed rates unless the State issues a Modification Request pursuant to **Clause 29(g)(i)** or **Clause 29(n)(i)**, in which case the provisions in **Clauses 36.1 to 36.4** and **Schedule 5 (Change Compensation Principles)** will apply.
- (p) As soon as the State determines that any Transportable Units are no longer required at a School Facility, the State will issue a notice to Project Co setting out the date on which the Transportable Units will be removed by the State.
- (q) Following the removal by the State of the Transportable Units (**Removed Transportable Units**), Project Co must 'make good' the area where the Removed Transportable Units were removed to ensure that the area is restored to its previous use.
- (r) The State will pay Project Co the actual costs properly and reasonably incurred for restoration of the area where the Removed Transportable Units were removed from. This cost will be calculated in accordance with **Schedule 5 (Change Compensation Principles)**.
- (s) The Transportable Unit Services Payment which was paid to Project Co as part of the Quarterly Service Payment for the Services delivered to the Removed Transportable Units will no longer be payable to Project Co.
- (t) Project Co must procure, connect, install or locate (as applicable depending on whether the item of Project Co FF&E is loose or fixed) and commission all items of Project Co FF&E for each Transportable Unit in accordance with **Clause 15**. All Project Co FF&E procured in accordance with this **Clause 29(t)** will constitute an FF&E Modification under **Clause 15.3**.

### 30 NOT USED

### 31 INTERVENING EVENTS

#### 31.1 Intervening Events entitling Change Notice

- (a) If Project Co believes, or ought reasonably to have known that, an Intervening Event has occurred which has prevented, hindered or disrupted, or will prevent,



hinder or disrupt its performance of the Services or other obligations under this Deed during and applicable to an Operating Phase for a Stage, Project Co must without limiting its obligations under **Schedule 3 (Payment)**, promptly notify the State within 72 hours of the relevant Intervening Event and its then current effect.

- (b) Project Co may issue a Change Notice to the State for an Intervening Event within ten Business Days of the date on which Project Co became aware or ought reasonably to have become aware of the occurrence of an Intervening Event.

### 31.2 Obligations suspended and no breach

**(Obligations suspended):** To the extent that an Intervening Event prevents Project Co from performing the Services or otherwise meeting its obligations in accordance with this Deed during and applicable to an Operating Phase for a Stage then, provided Project Co has issued a Change Notice in accordance with **Schedule 5 (Change Compensation Principles)**:

- (a) the relevant obligation of Project Co will be suspended, but only until the earlier of the date the Intervening Event and the consequences of the Intervening Event cease to prevent performance of the relevant obligations or would have ceased to prevent performance had Project Co :
- (i) used all reasonable endeavours to mitigate, minimise or avoid the effects, consequences or duration of any Intervening Event (including by putting in place temporary measures reasonably required by the State); or
  - (ii) taken all reasonable steps which a prudent, competent and experienced contractor in the circumstances of Project Co or the relevant Project Co Associate would have taken to mitigate, minimise or avoid the effects, consequences or duration of the Intervening Event; and
- (b) the failure to perform such suspended obligations will not be a breach of this Deed by Project Co, a Project Co Act or Omission, a Major Default or a Default Termination Event.

### 31.3 Payment continues for Intervening Events other than Force Majeure Events

- (a) **(Continuation of Quarterly Service Payment):** Subject to **Clause 31.4**, notwithstanding that Project Co's obligations to perform the Services or other obligations affected by any Intervening Event are suspended:
- (i) the State will continue to pay Project Co the Quarterly Service Payment in connection with the Services or other obligations affected by the Intervening Event for the period of suspension;
  - (ii) the Quarterly Service Payment will not be subject to adjustment in accordance with the Abatement Regime due to the Intervening Event; and
  - (iii) the State will deduct from the Quarterly Service Payment the amounts of any recurrent and other costs of Project Co which are not being incurred by Project Co during the period because the obligation to carry out the relevant Services or other obligations have been suspended for the period of suspension under **Clause 31.2** or which are insured (or would have been insured if Project Co had of complied fully with **Clause 39**).
- (b) **(Compensation for costs):** If Project Co's obligations are suspended in accordance with **Clause 31.2** because of a Compensable Intervening Event then the State will, in addition to the amounts referred to in **Clause 31.3(a)**, pay Project Co an amount calculated in accordance with **Schedule 5 (Change Compensation Principles)**, other than the costs of repairing and rebuilding the Relevant Infrastructure which will be determined under **Clause 38**.

### 31.4 Intervening Event which is a Force Majeure Event

- (a) **(Adjustment of Quarterly Service Payment):** The Quarterly Service Payment will be abated and otherwise adjusted in accordance with the Abatement Regime to

the extent that the Intervening Event in respect of which Project Co is entitled to relief under this **Clause 31** is a Force Majeure Event that causes damage or destruction to the School Facilities, any Verge Infrastructure or otherwise affects Project Co's ability to perform the Services.

- (b) **(Adjustment not to constitute Major Default):** Any adjustment of the Quarterly Service Payment as a consequence of the application of the Abatement Regime in accordance with **Clause 31.4(a)** will not be included in the calculation of reductions for a Major Default under **paragraph (p)** of that definition or a Default Termination Event under **paragraph (h)** of that definition.
- (c) **(Repayment of Project Debt for Force Majeure Event):** Subject to **Clause 31.4(d)**, if any reduction of the Quarterly Service Payment referred to in **Clause 31.4(a)** results in the Quarterly Service Payment being less than the sum of:
- (i) a Project Entity's principal and interest in accordance with its Project Debt obligations;
  - (ii) [Not disclosed]% of the Fixed Force Majeure Costs; and
  - (iii) the amount of the Scheduled Lifecycle Component that otherwise would have been due and payable to Project Co by the State but for the suspension,

Project Co will be entitled to payment of an amount calculated in accordance with **Schedule 5 (Change Compensation Principles)**.

- (d) **(Exceptions):** If the Intervening Event is a Force Majeure Event that is also:
- (i) an Uninsurable Risk (as agreed or determined in accordance with **Clause 39.12**) which gives rise to loss or damage to the Relevant Infrastructure, **Clause 39.13** will apply;
  - (ii) a Day 1 Uninsurable Risk which gives rise to loss or damage to the Relevant Infrastructure, **Clause 39.13** will apply; and
  - (iii) a risk that is insured or insurable under this Deed, or would customarily be insured by operators of facilities similar to the School Facilities providing services similar to the Services using Best Industry Practices, Project Co will not be entitled to make any Claim for payment in accordance with **Schedule 5 (Change Compensation Principles)**.

### 31.5 Alternative arrangements

- (a) During the period of suspension of any Services for an Intervening Event, the State may:
- (i) make alternative arrangements for the performance of those Services at no cost to Project Co and without the State incurring any Liability to Project Co in respect of those alternative arrangements; or
  - (ii) direct Project Co to deliver those Services by an alternative method or "work around" from that contemplated in the then current Operating Phase Management Plans to the extent that it is reasonably possible for Project Co to do so.
- (b) If the State requires Project Co to perform those Services by an alternative method or "work around" in accordance with **Clause 31.5(a)**, the State must pay Project Co in accordance with **Schedule 5 (Change Compensation Principles)** in respect of such alternative method or "work around".

### 31.6 Cessation of Intervening Event

- (a) **(Notice):** Project Co must:
- (i) notify the State; and

- (ii) recommence carrying out all obligations suspended as a result of the Intervening Event,

immediately after it ceases to be prevented from carrying out any of its obligations under this Deed as a result of an Intervening Event or its consequences.

- (b) **(State rights):** Once Project Co recommences carrying out the obligations suspended as a result of an Intervening Event, the State may no longer exercise its rights in accordance with this **Clause 31** in connection with the relevant Intervening Event.

## 32 REPRICING REVIEWABLE SERVICES

### 32.1 Reviewable Services Schedule

- (a) **(Reviewable Services Schedule):** For the purposes of the Project Co Proposal and to assist in the repricing of the Reviewable Services, Project Co has prepared the Reviewable Services Schedule.
- (b) **(Status and content of Reviewable Services Schedule):** The Reviewable Services Schedule sets out the basis on which Project Co has priced the Reviewable Services for the first Reviewable Services Term, including:
  - (i) details of relevant margins;
  - (ii) details in respect of the allocation of responsibilities and risks between Project Co, the Services Subcontractor and any other Subcontractors in respect of the performance of the Reviewable Services; and
  - (iii) the staffing profiles and shift patterns in respect of the performance of the Reviewable Services, including details of the number of full time equivalent positions involved in performing the Services, including those involved in "Management and Administration", consistent with the Financial Model,

(the **Original Reviewable Services Schedule**).
- (c) **(Reviewable Services Schedule updated):** The Reviewable Services Schedule:
  - (i) will be updated at the commencement of each subsequent Reviewable Services Term to reflect the terms and prices agreed or determined for that subsequent Reviewable Services Term in accordance with this **Clause 32**; and
  - (ii) as updated will be used for the purposes of pricing the Reviewable Services for the following Reviewable Services Term.
- (d) **(Overarching principles for repricing Reviewable Services):** Unless otherwise agreed by the State, Project Co will price the provision of each Reviewable Service for the ensuing Reviewable Services Term in accordance with the following pricing principles and otherwise in accordance with this **Clause 32**:
  - (i) there must be no new margins and no increase to any margins, from those margins identified in the Original Reviewable Services Schedule;
  - (ii) there must be no net increase to the Quarterly Service Payment from the previous Reviewable Services Term as a result of any reallocation of poor performance risk as between Project Co, the Services Subcontractor and any other Subcontractors following the pricing of each Reviewable Service for an ensuing Reviewable Services Term in accordance with this **Clause 32**; and
  - (iii) unless otherwise agreed by the State (acting reasonably) there must be no increase in the aggregate number of full time equivalent positions involved in performing the relevant Reviewable Services, from the Original Reviewable Services Schedule including those involved in "Management and Administration" other than where necessary due to

any changes under **Clause 32.2(a)(i)** or as a consequence of any Modification implemented under this Deed.

### 32.2 Preparation for repricing

- (a) No later than 15 Months before each Reviewable Services Date, Project Co must meet with the State to discuss:
  - (i) changes to be made to the Services, Services Requirements or **Schedule 3 (Payment)** and any terms of this Deed for the Reviewable Services for the purposes of the next Reviewable Services Term;
  - (ii) a timetable for the repricing of the Reviewable Services;
  - (iii) any Reviewable Services which the State is excluding from review for the next Reviewable Services Term following the Reviewable Services Term which commences on that Reviewable Services Date; and
  - (iv) any bundling of the Reviewable Services for repricing.
- (b) If the State determines that any changes are required to **Schedule 3 (Payment)** or **Schedule 27 (Services Specifications)** in respect of one or more Reviewable Services for the next Reviewable Services Term, the State will provide those updated schedules to Project Co and those updated schedules will apply in respect of those Reviewable Services for the next Reviewable Services Term.

### 32.3 Request for offer to reprice

- (a) (**Request for offer**): The State may request Project Co to submit an offer for the provision of each Reviewable Service or a bundle of the Reviewable Services (as notified by the State under **Clause 32.2**) for the next Reviewable Services Term.
- (b) (**Project Co offer**): Whether or not the State has made a request in accordance with **Clause 32.3(a)**, no later than 11 Months before the Reviewable Services Date, Project Co may (and if the State has made a request in accordance with **Clause 32.3(a)**, Project Co must) submit an offer for the provision of the Reviewable Services for the next Reviewable Services Term on the terms notified by the State under **Clause 32.2**.
- (c) (**Offer detail**): Project Co's offer must:
  - (i) contain an overarching explanation and details of any proposed changes to the price of the Reviewable Services ;
  - (ii) be priced in accordance with the pricing principles set out in **Clause 32.1(d)**;
  - (iii) break down the price for each of the Reviewable Services for the next Reviewable Services Term;
  - (iv) include the staffing profiles and shift patterns in respect of the performance of the Reviewable Services for the next Reviewable Services Term, including the number of full time equivalent positions involved in "Management and Administration" compared with the then current Reviewable Services Schedule;
  - (v) detail all of the relevant factors and inputs into the proposed price including proposals in connection with labour and materials required to perform the Services;
  - (vi) clearly identify the allocation of responsibility for the performance of obligations where such obligations may be provided pursuant to two or more Services (including Services which do not constitute Reviewable Services); and
  - (vii) provide details of any changes that may have been made to their subcontracting arrangements for the Reviewable Services during the previous Reviewable Services Term.

- (d) **(Offer submitted):** If Project Co submits an offer in accordance with **Clauses 32.3(a) or 32.3(b)**, then:
- (i) for a period of four Months after the offer is submitted the State agrees to negotiate exclusively with Project Co for the provision of the relevant Reviewable Services during the next Reviewable Services Term; and
  - (ii) the State will, by a date no later than one Month after the expiration of that four Month period, advise Project Co whether:
    - (A) Project Co's final offer is acceptable to the State for the provision of each Reviewable Service; or
    - (B) the State requires a competitive tender to be conducted under **Clause 32.5** in respect of that Reviewable Service.
- (e) **(Offer remains open):** Notwithstanding that the State may require Project Co to conduct a competitive tender, Project Co's offer must remain open for subsequent acceptance by the State under **Clause 32.6(b)** until the Reviewable Services Tender Expiry Date.

#### **32.4 No offer made**

If Project Co does not submit an offer under **Clauses 32.3(a) or 32.3(b)**:

- (a) provision of those Reviewable Services will continue on the then current terms and pricing for the next Reviewable Services Term; or
- (b) the State may require a competitive tender to be conducted in accordance with **Clause 32.5**.

#### **32.5 Competitive tender**

- (a) **(No delegation):** Project Co may not subcontract or otherwise delegate any aspect of a competitive tender conducted under this **Clause 32.5** without the prior consent of the State.
- (b) **(Initial meeting):** Within one Month of the State's request under **Clause 32.3(d)(ii)** or **Clause 32.4(b)** for a competitive tender to be conducted under this **Clause 32.5**, Project Co must commence the competitive tender process by convening an initial meeting with the State.
- (c) **(Consultation):** At the initial meeting convened under **Clause 32.5(b)** (and any subsequent meetings agreed between them), Project Co and the State will seek to agree on:
  - (i) the appropriate timetable for conducting the tender for the relevant Reviewable Services, including the proposed date for releasing the tender to the market;
  - (ii) the appropriate manner of advertising the tender for the relevant Reviewable Services and the means of identifying prospective tenderers;
  - (iii) evaluation criteria, which will include those set out in **Clause 32.5(f)**; and
  - (iv) the draft tender documentation which must:
    - (A) provide such information concerning the Project, the relevant Reviewable Services and the Project Documents as the State reasonably requires to ensure the tenderers are fully informed of the opportunity tendered (including details of the evaluation criteria set out in **Clause 32.5(f)**);
    - (B) impose a duty of confidentiality on tenderers;
    - (C) require tenders to be conforming, and irrevocable until three Months after the relevant current Reviewable Services Term;
    - (D) require tenderers to comply with the subcontracting requirements set out in **Clause 9.4** including providing consents

- to the conduct of any Probity Investigations which may be required by the State;
- (E) attach a draft Subcontract:
- (1) substantially on the same terms (other than price and term and any amendments required in accordance with **Clause 32.2**) as the current Subcontract for the provision of those tendered Reviewable Services; and
  - (2) which provides for the review of those Reviewable Services in accordance with the terms of this **Clause 32**;
- (F) require tenderers to accept the terms of the draft Subcontract; and
- (G) enable Project Co to prepare a proposed updated Reviewable Services Schedule in accordance with the pricing principles set out in **Clause 32.1(d)**.
- (d) **(Review of request for tender)**: Not later than 30 Business Days prior to the proposed date for releasing the tender to the market, Project Co must provide to the State:
- (i) the final request for tender which Project Co proposes to issue to prospective tenderers and the list of proposed tenderers for each of the tendered Reviewable Services; and
  - (ii) a proposal regarding the way in which Project Co intends to undertake the procurement process for the tendered Reviewable Services,
- for review in accordance with **Schedule 12 (Review Procedures)**.
- (e) **(Offers)**: In response to the request for tender provided to the State under **Clause 32.5(d)**, Project Co must procure offers by competitive tender from at least 3 experienced and capable service providers for the relevant component of the tendered Reviewable Services which must not include (without the consent of the State) offers from:
- (i) Project Co or any Project Co Associate;
  - (ii) any more than one Related Body Corporate of any Project Co Associate; or
  - (iii) any service provider that has not received the prior approval of the State (which must not be unreasonably withheld).
- (f) **(Content of offers)**: Each offer obtained under **Clause 32.5(e)** must address the following criteria:
- (i) details of the contract price, which reflect a competitive pricing of those Reviewable Services in the then current market;
  - (ii) current capacity and capability to carry out the tendered Reviewable Services over the Reviewable Services Term, including current workload and resources plans, key people, subcontractors and consultants;
  - (iii) previous performance of services similar to the relevant Reviewable Services together with referees;
  - (iv) financial capacity to provide the tendered Reviewable Services;
  - (v) demonstration that Project Co will be able to continue to meet the performance standards in **Schedule 27 (Services Specifications)** relevant to the tendered Reviewable Services; and
  - (vi) value for money delivered to the State.

### 32.6 Outcome of competitive tender process

- (a) **(Third party offers):** Project Co will, within six Months of the notice from the State under **Clause 32.3(d)(ii)(B)** or **32.4(b)**, provide to the State:
- (i) copies of all conforming offers Project Co has procured in accordance with **Clauses 32.5(e)** and **32.5(f)**;
  - (ii) Project Co's evaluation report in connection with each offer;
  - (iii) Project Co's recommendation as to the preferred tenderer for each tendered Reviewable Service; and
  - (iv) such further details as the State reasonably requires in relation to the tender and the offers.
- (b) **(Project Co offer):** Subject to **Clause 32.3(e)**, in addition to the information submitted in accordance with **Clause 32.6(a)**, Project Co must (unless otherwise agreed by the State) submit an offer to the State to provide each tendered Reviewable Service for the next Reviewable Services Term in accordance with **Clause 32.6(c)**.
- (c) **(Form of Project Co offer):** Project Co's offer submitted under **Clause 32.6(b)** must include a proposed Reviewable Services Schedule which must be priced on the basis of:
- (i) the offers obtained from the preferred tenderer (as recommended by Project Co) for each tendered Reviewable Service; and
  - (ii) the pricing principles set out in **Clause 32.1(d)**.

### 32.7 Consultation

- (a) During the period of one Month following provision of the information under **Clause 32.6**, Project Co will consult with the State concerning the offers Project Co has procured in accordance with **Clauses 32.5(e)** and **32.5(f)**, to attempt to reach agreement on the appointment of one of the tenderers to provide each of the tendered Reviewable Services for the next Reviewable Services Term having regard to:
- (i) the experience and capability of each tenderer;
  - (ii) the extent to which each offer provides value for money to the State when compared with each of the other offers; and
  - (iii) the ability of Project Co to continue to meet the section of **Schedule 27 (Services Specifications)** specified by the State in its notice under **Clause 32.3(a)** and otherwise comply with this Deed on subcontracting the relevant Reviewable Service to any of the tenderers.
- (b) Project Co must not enter into any contract with any tenderer for the provision of the tendered Reviewable Services without the prior agreement of the State.
- (c) Project Co must ensure that each of the tenderers for the tendered Reviewable Services and any persons likely to be associated with the provision of the tendered Reviewable Services provide their written consent to the carrying out of any Probity Investigations required by the State.

### 32.8 Appointment

- (a) If an offer made by a tenderer is acceptable to the State, Project Co will (subject only to the conduct of Probity Investigations satisfactory to the State) subcontract the provision of the relevant Reviewable Services for the next Reviewable Services Term to the successful tenderer, pursuant to a Subcontract which complies with **Clause 32.5(c)(iv)(E)**.
- (b) A Subcontract entered into in accordance with this **Clause 32.8** will be deemed to be approved by the State for the purposes of **Clause 9.3**.

- (c) Subject to **Clause 32.9(c)**, the Quarterly Service Payment (and the Financial Model) must be adjusted for the balance of the Operating Phase to reflect the updated Reviewable Services Schedule:
- (i) accepted by the State in accordance with **Clause 32.1(c)**; or
  - (ii) amended as necessary to reflect the outcome of any Dispute referred to expert determination in accordance with **Clause 43**.

### 32.9 Failure to agree

If none of the offers made by the tenderers are acceptable to the State, the State may:

- (a) accept the offer (if any) made by Project Co under **Clause 32.3(b)**;
- (b) require Project Co to proceed to provide the Reviewable Services under the current terms and pricing in accordance with **Clause 32.10**; or
- (c) omit the tendered Reviewable Services from the Services by way of a Modification Order and carry out the tendered Reviewable Services itself or procure a third party to carry out the tendered Reviewable Services (in which case the Quarterly Service Payment will be adjusted in accordance with **Schedule 5 (Change Compensation Principles)** for the omission of those Reviewable Services).

### 32.10 Continued provision of Reviewable Services

- (a) Subject to **Clause 32.10(b)**, without limiting the State's rights under this Deed, if a Subcontractor is intended by the State to be appointed to carry out the tendered Reviewable Services in the next Reviewable Services Term but has not yet been appointed under **Clause 32.8** by the date of commencement of the next Reviewable Services Term, Project Co will continue to provide the relevant Reviewable Services on the terms and pricing for the immediately preceding Reviewable Services Term and in accordance with **Schedule 27 (Services Specifications)** and the Services Requirements, until such time as a Subcontractor is appointed under **Clause 32.8** and commences provision of those Reviewable Services.
- (b) If the period for provision of the tendered Reviewable Services by Project Co under **Clause 32.10(a)** extends beyond the Reviewable Services Tender Expiry Date, the State will pay the price offered by Project Co (if any) under **Clause 32.3(b)** for the continued provision of those Reviewable Services backdated to the Reviewable Services Tender Expiry Date.

### 32.11 Probity of process

The State may, at any time, appoint a probity officer to, or have the State, oversee the whole or any part of the process referred to in this **Clause 32** and Project Co must:

- (a) provide all assistance and information required by; and
- (b) comply with all directions of,

the probity officer or State, in connection with that process.

## 33 EXPIRY OBLIGATIONS

### 33.1 Assistance in securing continuity

- (a) Subject to **Clause 33.1(b)**, Project Co must, by the Expiry Date, (unless the obligation is set out in **Clauses 33.1(a)(i) to 33.1(a)(iii)** and **33.1(a)(viii)**, in which case, the period commencing two years prior to the Expiry Date) do all other things reasonably required by the State to ensure the smooth and orderly transfer of responsibility for delivering the Project to the State or its nominee, including:
  - (i) meeting with the State and such other persons notified by the State to discuss delivery of the Project on reasonable notice by the State;



- (ii) providing access to its operations for managers and supervisors of the State or its nominee for the purpose of familiarisation;
  - (iii) providing sufficient information to the State or its nominee to determine the status and condition of the Project, including the Final Refurbishment Works, at the time;
  - (iv) providing sufficient resources, including personnel, for the time required to facilitate the transfer of the Project to the State or its nominee;
  - (v) procuring the novation or, if such novation cannot be procured, the assignment to the State or its nominee of:
    - (A) such Subcontracts as the State may nominate; and
    - (B) any leases, subleases and licences requested by the State;
  - (vi) granting or procuring the grant to the State or its nominee of such Intellectual Property Rights as will enable the State or its nominee to deliver the Project to the standards specified in this Deed;
  - (vii) assisting in the transfer of any employees of Project Co or any Subcontractor who agree with the State to be employed by the State or its nominee after the Expiry Date (and Project Co or the relevant Subcontractor will make appropriate adjustments and payment to the State or its nominee in respect of all actual or contingent Liability for annual leave, accrued rostered days off, sick leave, long service leave and all other employee entitlements which are not to be paid out to the relevant transferring employees at the time of transfer of employment); and
  - (viii) doing all other acts and things reasonably required to enable the State (or its nominee) to be in a position to deliver the Project to the standards specified in this Deed, with minimum disruption.
- (b) Where the Expiry Date is prior to the Final Expiry Date, Project Co must meet the requirements under **Clause 33.1(a)** unless the State, acting reasonably, determines such requirements cannot be met within the required time due to the limited notice period Project Co has received of the Expiry Date, in which case, Project Co must meet such requirements as soon as practicable after the Expiry Date.

### 33.2 Handover

- (a) Subject to **Clause 33.2(b)**, by the Expiry Date, Project Co must have:
- (i) **(Handover of Relevant Infrastructure and Sites)**: handed over the Relevant Infrastructure and the Sites (including all Project Co's rights, title and interest in them, free of any encumbrances) to the State or its nominee and in the Handover Condition;
  - (ii) **(Handover Package)**: delivered to the State the Handover Package updated in accordance with the Output Specifications and this Deed;
  - (iii) **(transfer of rights)**: transferred to the State or its nominee all its rights, title and interest, free of any encumbrances, in Plant and equipment used by Project Co or Project Co Associates in the delivery of the Services, required by the State to allow the State or its nominee to operate, maintain and repair the Relevant Infrastructure to the standards required of Project Co under this Deed;
  - (iv) **(delivery of information)**: delivered to the State or its nominee, all Project Co Material not previously delivered to the State;
  - (v) **(payment of insurance proceeds)**: paid to the State or its nominee any insurance proceeds Project Co has received from any Insurances for the reinstatement or replacement of the Relevant Infrastructure to the extent not already reinstated or replaced, and assign to the State any rights

available to Project Co under the Insurances in respect of the reinstatement or replacement of the Relevant Infrastructure; and

- (vi) **(transfer of Approvals)**: done all acts and things necessary for Project Co to do to enable the State (or its nominee) to have transferred to it or to obtain all Approvals necessary to deliver the Project.
- (b) Where the Expiry Date is prior to the Final Expiry Date, Project Co must meet the requirements under **Clause 33.2(a)** unless the State, acting reasonably, determines such requirements cannot be met within the required time due to the limited notice period Project Co has received of the Expiry Date, in which case, Project Co must meet such requirements as soon as practicable after the Expiry Date.

### 33.3 Appointment of Handover Reviewer

- (a) **(Handover Reviewer)**: No later than 12 Months before the inspections to be undertaken in accordance with **Clause 33.4**, Project Co and the State must meet to determine the identity of a Handover Reviewer to be appointed jointly by Project Co and the State to perform the tasks identified in **Clause 33.4**.
- (b) **(State to appoint)**: If Project Co and the State are unable to agree on the appointment of the Handover Reviewer within three Months before the Condition Review Date, the Handover Reviewer will be appointed using the process set out in **Clause 8.10** for the appointment of the Independent Certifier.
- (c) **(Terms of engagement)**: The Handover Reviewer will be appointed on similar terms to the Independent Certifier Deed of Appointment, taking into account any changes required to reflect the different role and the effluxion of time since the engagement of the Independent Certifier.

### 33.4 Handover Reviewer Role

- (a) **(Joint inspection)**: Project Co, the State and the Handover Reviewer appointed under **Clause 33.3** must carry out joint inspections of the Relevant Infrastructure:
  - (i) at least:
    - (A) four years before the Final Expiry Date; and
    - (B) every six Months after that initial inspection until the Final Expiry Date; or
  - (ii) where this Deed is to be terminated by an Expiry Date determined in accordance with **Clause 41**, within such shorter period before the date of termination as is required by the State,
 

(each a **Condition Review Date**).
- (b) **(Program to achieve proper Handover)**: Following the first Condition Review Date in accordance with **Clause 33.4(a)**, the Handover Reviewer must give to the State and Project Co a report (**Outstanding Matters Report**) specifying:
  - (i) the details of the maintenance and repair work (if any) required to be carried out by Project Co to meet the Handover Condition and a program for undertaking such works (**Final Refurbishment Works**); and
  - (ii) an estimate of the total costs of carrying out the Final Refurbishment Works under this Deed.
- (c) **(Disputing Outstanding Matters Report)**: If Project Co or the State do not agree with any aspect of the Outstanding Matters Report:
  - (i) they must give details of such objections to the Project Co Representative or the State (as the case may be) and the Handover Reviewer, within ten Business Days of receipt of that report; and

- (ii) the parties must confer in good faith with each other and the Handover Reviewer to reach agreement on the scope and cost of the Final Refurbishment Works,

and if the parties cannot reach agreement on the relevant aspect of the Outstanding Matters Report within a further ten Business Days of the date on which the details of the objections are provided under **Clause 33.4(c)(i)**, the Dispute may be referred by either party to expert determination in accordance with **Clause 43**.

- (d) **(Update of Outstanding Matters Report):** The Handover Reviewer must give to the State and Project Co an updated Outstanding Matters Report after each Condition Review Date subsequent to the first one, which includes details of:
  - (i) the Final Refurbishment Work that has been completed;
  - (ii) the Final Refurbishment Works still to be completed; and
  - (iii) the itemised cost of the remaining Final Refurbishment Works at that point in time.

### 33.5 State election

- (a) Notwithstanding the terms of this **Clause 33**, the State may by giving notice to Project Co:
  - (i) adjust any Condition Review Date to an alternative date which may not be earlier than three years before the Final Expiry Date, unless the Expiry Date is determined in accordance with **Clause 41**;
  - (ii) relieve Project Co from any obligation to undertake any of the Final Refurbishment Works in any Operating Year; or
  - (iii) acting reasonably, increase the number of times and frequency with which the Handover Reviewer must inspect and assess the condition of the Relevant Infrastructure, assess any Final Refurbishment Works or prepare the Outstanding Matters Report pursuant to **Clause 33.4(b)**.
- (b) If the State exercises its rights under **Clause 33.5(a)(ii)**:
  - (i) **Schedule 27 (Services Specifications)**, the relevant Operating Phase Management Plans and any other relevant parts of this Deed will be varied to the extent agreed by the parties or, where not agreed, as determined by an expert under **Clause 43**;
  - (ii) any subsequent Quarterly Service Payment will be reduced by the cost of the relevant Final Refurbishment Works determined in accordance with **Clause 33.4(b)** or **Clause 33.4(c)**; and
  - (iii) any security for the Final Refurbishment Works will be reduced by the cost of the relevant Final Refurbishment Works determined in accordance with **Clause 33.4(b)** or **Clause 33.4(c)**.

### 33.6 Implementing Final Refurbishment Works

- (a) Project Co must:
  - (i) within one Month of the delivery of each Outstanding Matters Report by the Handover Reviewer:
    - (A) amend the relevant Operating Phase Management Plans to include details of the Final Refurbishment Works that Project Co is required to undertake in accordance with the then current Outstanding Matters Report or as otherwise determined in accordance with **Clause 33.4**; and
    - (B) submit the updated Operating Phase Management Plans to the State for review in accordance with **Schedule 12 (Review Procedures)**;

- (ii) undertake the Final Refurbishment Works in accordance with the updated Operating Phase Management Plans.
- (b) At the Expiry Date the State may undertake and complete any Final Refurbishment Works which have not been completed by Project Co to the satisfaction of the Handover Reviewer and all costs incurred by the State in doing so will be a debt due and payable by Project Co to the State.

### 33.7 Security for Final Refurbishment Works

- (a) (**Security threshold**): After a Condition Review Date, if the aggregate of the remaining Quarterly Service Payments is equal to or less than the sum of:
  - (i) 120% of the estimated total cost of the remaining Final Refurbishment Works (**Threshold Amount**); and
  - (ii) the estimated amount payable to the Services Subcontractor under the Services Subcontract for the remainder of the Term (less any amount payable to the Services Subcontractor for the Final Refurbishment Works),

Project Co must make an election under **Clause 33.7(b)**.
- (b) (**Project Co election**): If so required under **Clause 33.7(a)**, Project Co must, within ten Business Days of the Condition Review Date either elect to:
  - (i) allow the State to deposit into a registered bank account opened by the State in the State's name (the **Handover Escrow Account**) each subsequent Quarterly Service Payment until the balance of the Handover Escrow Account equals or exceeds the Threshold Amount; or
  - (ii) provide to the State an unconditional on demand bond, in a form approved by the State and having a face value equal to the Threshold Amount, and which the State may call upon in accordance with **Clause 33.9(c)**,

as security for the performance of the Final Refurbishment Works by Project Co.
- (c) (**Project Co makes no election**): If Project Co fails to make an election in accordance with **Clause 33.7(b)** within 20 Business Days of the Condition Review Date, Project Co will be deemed to have elected that **Clause 33.7(b)(i)** will apply.
- (d) (**Changes to Outstanding Matters Report**): If the requirements of the Outstanding Matters Report are amended in accordance with **Clause 33.4**, the Threshold Amount will be adjusted accordingly.

### 33.8 Handover Escrow Account

Where the State opens a Handover Escrow Account in accordance with **Clause 33.7(b)(i)**:

- (a) interest earned on money in the Handover Escrow Account must be deposited into the Handover Escrow Account and Project Co is entitled, on request, to receive copies of the statements for the Handover Escrow Account;
- (b) the State must draw upon the Handover Escrow Account to pay Project Co:
  - (i) the cost of the Final Refurbishment Works completed, where the Handover Reviewer determines (following a Condition Review Date) that the Final Refurbishment Works required to be performed by Project Co at the date of the review have been satisfactorily performed, provided that after drawing such amount the balance of the Handover Escrow Account equals or exceeds the then current Threshold Amount;
  - (ii) the balance of the Handover Escrow Account no later than 20 Business Days after completion of all Final Refurbishment Works provided such Final Refurbishment Works are finished prior to the Expiry Date and have been satisfactorily performed; and

- (iii) if Final Refurbishment Works are not completed as at the Expiry Date, the balance of the Handover Escrow Account less the total cost of carrying out the remaining Final Refurbishment Works as set out in the then Outstanding Matters Report; and
- (c) the State may draw upon the Handover Escrow Account for its own benefit where:
  - (i) the State undertakes the Final Refurbishment Works in accordance with **Clause 33.6(b)**; and
  - (ii) there are any moneys remaining in the Handover Escrow Account after amounts have been drawn and paid to Project Co under **Clause 33.8(b)**.

### 33.9 Handover Bond

- (a) Any Handover Bond must have an expiry date no earlier than one year after the end of the Term.
- (b) Project Co may reduce the amount of the Handover Bond:
  - (i) where the State elects under **Clause 33.5(a)(ii)** to relieve Project Co from any obligation to undertake any of the Final Refurbishment Works in any Operating Year; and
  - (ii) otherwise no more than once an Operating Year and then at the Expiry Date to account for satisfactorily completed Final Refurbishment Works, provided that the amount of the Handover Bond is no less than the then current Threshold Amount.
- (c) The State may draw on the Handover Bond:
  - (i) to the extent that the State undertakes the Final Refurbishment Works in accordance with **Clause 33.6(b)**; and
  - (ii) for the full amount of the Handover Bond remaining after the Expiry Date.

## 34 PAYMENTS AND ADJUSTMENTS

### 34.1 Quarterly Service Payments and other payments

- (a) **(Payment for Services)**: In consideration of Project Co providing the Services, the State will pay Project Co the Quarterly Service Payments:
  - (i) calculated in accordance with **Schedule 3 (Payment)**; and
  - (ii) in arrears,
 with payment commencing from the end of the first Quarter immediately following the commencement of the first occurring Operating Phase.
- (b) **(Other payments)**: Other than the Quarterly Service Payments, the State will pay any payment that is due and payable to Project Co, and Project Co will pay any payment that is due and payable to the State, at the time specified in this Deed or the relevant State Project Documents for the particular payment.
- (c) **(Time for payment)**: If no time is specified for the payment of the relevant amount in accordance with **Clause 34.1(b)**, the payment will be made:
  - (i) prior to the commencement of the first occurring Operating Phase, 20 Business Days after a demand is made for payment of the amount; and
  - (ii) otherwise, at the same time as the next Quarterly Service Payment is to be paid to Project Co after the occurrence of the circumstances giving rise to the Liability.

### 34.2 Payment adjustments under the Abatement Regime

- (a) **(Abatement Regime applies)**: The Abatement Regime applies and the Quarterly Service Payments will be adjusted to the extent and in the manner described in the

Abatement Regime to reflect the agreed principle that the State will only pay for the quantum and quality of the Services actually provided.

- (b) **(Not to affect other rights):** Subject to **Clauses 34.2(c)** and **34.2(e)**, adjustment of the Quarterly Service Payments by application of the Abatement Regime under **Clause 34.2(a)**, will be the only monetary consequence for Project Co of Service Failures.
- (c) **(No limit): Clause 34.2(b)** does not limit or affect:
- (i) any other right or remedy under this Deed or at Law (other than, subject to this **Clause 34.2(c)**, for monetary compensation for Service Failures);
  - (ii) the State's rights under **Clause 33**;
  - (iii) the State's rights under **Clauses 38** (except **Clause 38.8**), **40** and **41**;
  - (iv) the State's rights under this Deed or any other State Project Document in respect of the event that caused or to the extent contributed to the Service Failure (as opposed to the Service Failure itself);
  - (v) any Termination Payment;
  - (vi) any Liability that Project Co may have for costs, losses, damage, destruction or other amounts which are indemnified by Project Co under **Clause 38.9**, including any third party property damage, personal injury or death or any other amount for which the State, or a State Associate is liable and is indemnified by Project Co under **Clause 38.9**; or
  - (vii) any Liability that Project Co may have for the costs or reasonably foreseeable economic loss of the State or any State Associate caused by any:
    - (A) fraudulent, unlawful or criminal act or omission; or
    - (B) any wilful breach of a Project Document,
 by Project Co or any other Project Co Associate where the State has not been completely compensated for that Liability by the adjustment in accordance with **Clause 34.2(a)**.
- (d) **(Payments):** To the extent that Project Co must pay to the State any costs contemplated by **Clause 34.2(c)** in excess of the Quarterly Service Payments, each future Quarterly Service Payment will be reduced to the extent necessary for the State to recover those costs in full. To the extent the State is then unable to recover its costs, all such amounts will be a debt due and payable by Project Co to the State.
- (e) **(Project Co acknowledgments):** Subject to **Clause 34.2(f)**, Project Co acknowledges and agrees that if the amount of any adjustment is held to be void or unenforceable for any reason, **Clause 34.2(a)** will not limit Project Co's Liability to the State under this Deed or otherwise at Law for any Liability suffered by the State up to an amount equal to the amount that would have been applied had it not been held to be void or unenforceable as a consequence of any Service Failure.
- (f) **(Project Co challenge to enforceability):** To the extent the amount of any adjustment is held to be void or unenforceable due to a challenge to its enforceability by Project Co, **Clause 34.2(e)** will not limit Project Co's Liability to the State under this Deed or otherwise at Law for any Liability suffered by the State as a consequence of any Service Failure.

### 34.3 Dispute

Any Dispute in respect of the calculation of the Quarterly Service Payment or the application of the Abatement Regime may be referred to expert determination in accordance with **Clause 43** no later than three Months after the issuing of the Payment Statement to which the Dispute relates.

### 34.4 Quarterly Service Payments

- (a) **(Quarterly Performance Report):** Project Co must, within five Business Days following the end of the relevant Quarter, provide the State with a Quarterly Performance Report in accordance with **Schedule 27 (Services Specifications)**.
- (b) **(Payment Claims):** Within five Business Days after the date Project Co delivers the Quarterly Performance Report for a Quarter, Project Co must prepare and provide to the State a Payment Claim for the Quarterly Service Payment for that Quarter, calculated in accordance with **Schedule 3 (Payment)** and any other amounts then due and payable by the State or by Project Co under this Deed.
- (c) **(Payment Statement):** The State will, within the later of:
- (i) five Business Days after receipt by the State of a Payment Claim; and
  - (ii) ten Business Days after receipt by the State of the relevant Quarterly Performance Report,
- provide to Project Co a statement (**Payment Statement**) stating the amount payable to or by Project Co (which may be more or less than the amount set out in the Payment Claim) and the reasons for any difference in the amount in the Payment Claim.
- (d) **(No Payment Claim):** If Project Co does not issue a Payment Claim or Quarterly Performance Report the State may still issue a Payment Statement setting out the amount payable to or by Project Co.
- (e) **(Registered):** Each of the State and Project Co acknowledges that it (or in the case of the State, an Entity on behalf of the State) is registered for GST when it enters into this Deed and that each party will notify the other party if it (or the relevant Entity) ceases to be registered.
- (f) **(Tax Invoice):** Without limiting Project Co's or the State's right to dispute the amount for payment stated in the Payment Statement, Project Co or the State (as applicable) will provide to the other a Tax Invoice (or adjustment note, as applicable) in accordance with **Clause 54.1**, in connection with any Taxable Supplies which are the subject of the Payment Statement for the amount stated in the Payment Statement within five Business Days of receipt of the Payment Statement.
- (g) **(Project Co failure to provide Tax Invoice):** Without limiting **Clause 34.4(h)**, if Project Co fails to provide any Tax Invoice or any adjustment note in the time required, the Project Co Representative may prepare the Tax Invoice on behalf of Project Co in accordance with **Clause 54.1** and provide that Tax Invoice to the State.
- (h) **(Timing of payment):** Subject to **Clause 34.7**, payment of the amount stated to be payable to or by Project Co in the Payment Statement will be made by the State to Project Co or by Project Co to the State (as the case may be) upon the later of:
- (i) 20 Business Days of receipt of the Payment Claim provided under **Clause 34.4(b)**; or
  - (ii) ten Business Days of receipt of any Tax Invoice or adjustment note provided under **Clauses 34.4(f)** or **34.4(g)**.
- (i) **(Payment not evidence of proper performance):** The payment of Quarterly Service Payments by the State to Project Co and the issuing of any Payment Statement is not evidence that the Project Activities have been carried out by Project Co in accordance with the State Project Documents, or an admission of Liability, and is only to be taken as payment on account.
- (j) **(Correction of previous Payment Statement):** The State may, in any Payment Statement, correct any error in any previous Payment Statement issued by the State.

**34.5 Interest**

- (a) **(Interest):** If a party fails to pay any amount payable by that party to the other party within the time required under this Deed, then it must pay interest on that amount:
- (i) from the date on which payment was due and payable until the date on which payment is made;
  - (ii) calculated on daily balances at the Default Rate; and
  - (iii) capitalised monthly.
- (b) **(Sole entitlement):** The amount specified in this **Clause 34.5** will be a party's sole entitlement to interest including damages for loss of use of, or the cost of borrowing, money.

**34.6 Refund**

If:

- (a) the State pays Project Co, or Project Co pays the State any amount under **Clause 34.4(h)** or otherwise; and
- (b) it is subsequently agreed or determined for any reason that the recipient was not entitled to that payment, in whole or in part, under this Deed,

the recipient will immediately refund that payment (or such part as constitutes an overpayment) to the party which made the payment.

**34.7 Set-off**

- (a) **(State's payments):** Without limiting the State's rights under this Deed or at Law, the State may deduct from any moneys due and payable to Project Co under the State Project Documents or otherwise at Law:
  - (i) any moneys due and payable by any Group Member to the State; and
  - (ii) any Claim that the State may have against any Group Member.
- (b) **(Details of set-off):** The State must provide Project Co with reasonable details of the basis on which it is setting off any amount pursuant to **Clause 34.7(a)** at the time set-off is made.
- (c) **(Project Co's payments):** Project Co must make all payments to the State free from any set-off or counterclaim and without deduction or withholding for or on account of any present or future Tax, unless Project Co is compelled by Law to make such a deduction or withholding.
- (d) **(Deduction or withholding):** If a party is compelled by Law to make a deduction or withholding for the benefit of an Authority, it must:
  - (i) remit the deducted or withheld amount to the relevant Authority within the time required by Law; and
  - (ii) provide to the other party all information and documentation relating to that deduction or withholding, including any information or documentation required to obtain a credit for or repayment of the deducted or withheld amount from an Authority.
- (e) **(Interest):** If following resolution of a Dispute, it is determined that the State was not entitled to all or part of the amount set-off or deducted in accordance with **Clause 34.7(a)**, the applicable sum set-off will be payable by the State to Project Co and the State must pay interest on that sum at the Default Rate calculated on a daily basis and capitalised monthly from the date on which the State should have paid that sum up to and including the date upon which that sum is paid.



**34.8 Payment**

Notwithstanding **Clause 5.3(a)** and without limiting **Clause 34.7**, a failure by the State to pay any amount due and owing to Project Co under this Deed in accordance with an express obligation to make that payment, will be a debt due and payable from the State to Project Co.

**35 MINOR WORKS****35.1 Process for performance of Minor Works**

- (a) **(State notice)**: The State may, at any time from the Operational Commencement Date, notify Project Co of any Minor Works required to be performed by way of a notice entitled 'Minor Works Notice' (**Minor Works Notice**).
- (b) **(Project Co Notice)**: As soon as possible, but in any event no later than five Business Days of receipt by Project Co of a Minor Works Notice, Project Co must prepare and submit, for the approval of the State, a notice entitled 'Minor Works Quote' (**Minor Works Quote**) which sets out:
- (i) the Minor Works Price calculated with the breakdown of goods, services, labour, equipment, materials, Subcontract costs and any recurring costs clearly set out and available for review by the State;
  - (ii) an estimate of the time to complete the proposed Minor Works;
  - (iii) details of any Subcontractors proposed to be engaged to implement the Minor Works;
  - (iv) details of the impact, if any, of the Minor Works on:
    - (A) the provision, by Project Co, of the Services;
    - (B) Project Co's ability to comply with this Deed; and
    - (C) the undertaking by the Services Subcontractor of the Services;
  - (v) whether the sum of the Minor Works Price and all other payments paid or payable for Minor Works, undertaken in accordance with this **Clause 35**, in that Operating Year will exceed the Minor Works Limit and if not, the amount available for future Minor Works in that Operating Year; and
  - (vi) any other particulars reasonably requested by the State.
- (c) **(State to advise)**: Within a reasonable time after receiving a Minor Works Quote, the State must advise Project Co whether the Minor Works Quote is approved or rejected by the State.
- (d) **(Rejection)**: If the State rejects the Minor Works Quote then the State may:
- (i) elect not to proceed with the proposed Minor Works;
  - (ii) proceed to implement the works itself or engage a third party to carry out the required works, in which case the works will not be Minor Works; or
  - (iii) take such other course of action it considers necessary in the circumstances.
- (e) **(Approval)**: If the State approves the Minor Works Quote, Project Co must carry out the Minor Works for the Minor Works Price included in the relevant Minor Works Quote.
- (f) **(Not to commence)**: Project Co must not commence any work or incur any cost, and will not have any entitlement to make any Claim in connection with any proposed Minor Works, unless a Minor Works Quote has been approved in accordance with **Clause 35.1(c)**.

### 35.2 Notice of Minor Works

- (a) If, in Project Co's opinion, any direction given by the State or the Services Subcontractor, other than any such direction given in a Minor Works Notice, constitutes or involves Minor Works, Project Co must provide notice to this effect to the State within 48 hours of receipt of the direction.
- (b) If the State agrees that the direction constitutes and involves Minor Works then the State will serve a Minor Works Notice and the process for performance of the Minor Works will proceed in accordance with **Clause 35.1**.
- (c) Except as set out in the Services Subcontract, Project Co must not commence any work the subject of a direction which it believes constitutes a direction to perform Minor Works unless the State agrees that the direction constitutes Minor Works and the State approves the Minor Works Quote under **Clause 35.1(c)**.

### 35.3 Variations to the approved Minor Works Costs

- (a) Unless otherwise agreed with the State at the time it receives the Minor Works Quote the Minor Works Price must be a fixed lump sum.
- (b) Where the actual Minor Works Costs incurred in connection with Minor Works implemented in accordance with **Clause 35.1(e)** are likely to exceed the Minor Works Price approved in accordance with **Clause 35.1(c)**:
  - (i) Project Co must ensure that prior to exceeding the approved Minor Works Price, it advises the State that the Minor Works Cost is likely to exceed the approved Minor Works Price, the amount by which it proposes the Minor Works Price should be increased and the reasons for this, including evidence reasonably acceptable to the State;
  - (ii) the State must advise Project Co within 72 hours of receiving the information required to be provided under **Clause 35.3(b)(i)**, whether the State approves the increased Minor Works Price and Project Co must not proceed with the additional Minor Works until such time as such approval is received; and
  - (iii) if the State does not approve the additional Minor Works Price, the State may direct Project Co to immediately discontinue the Minor Works and must (if applicable) pay Project Co the Minor Works Cost for the Minor Works undertaken by Project Co, and any reinstatement costs reasonably incurred, up to the date of any such direction up to the amount of the approved Minor Works Price.
- (c) **Clause 35.3** does not apply in respect of Minor Works Costs that are incurred unreasonably or as a result of Project Co undertaking the Minor Works otherwise than in accordance with Best Industry Practices.

### 35.4 Future maintenance or Lifecycle Works

Where the Minor Works require Project Co to perform maintenance and repair services or Lifecycle Works in a future Operating Year (or over a number of future Operating Years), the Minor Works Cost will, in accordance with **Schedule 5 (Change Compensation Principles)** include the amount of the Minor Works Limit for any future Operating Year which is allocated to funding those costs. To the extent that the Minor Works Limit for a future Operating Year is not sufficient to cover those costs, the Minor Works will only be undertaken to the extent the State agrees that it will fund the incremental costs in future Operating Years.

### 35.5 Completion

Project Co must notify the State upon completion of the Minor Works implemented in accordance with **Clause 35.1(e)**.

### 35.6 Payment for Minor Works

- (a) **(State to pay):** If:

- (i) the performance of any Minor Works will result in the Minor Works Limit for any Operating Year being exceeded; and
- (ii) the State has approved the Minor Works that resulted in the Minor Works Limit being exceeded in accordance with **Clause 35.1(c)**,

the State must pay for such Minor Works as an adjustment to the Quarterly Service Payment at the same time as the next Quarterly Service Payment is to be paid to Project Co after the occurrence of the circumstances giving rise to the Liability, capped at the amount of the Minor Works Quote approved by the State plus any increase in the Minor Works Price approved by the State under **Clause 35.3(b)(ii)**.

- (b) **(No margin)**: For the purpose of preparing a Minor Works Quote, Project Co, the Services Subcontractor and any other Subcontractor who undertakes the Minor Works are not entitled to payment of any margin in connection with the Minor Works other than the Services Margin.
- (c) **(Minor Works Limit)**: If the Minor Works Limit for the previous Operating Year is not fully expended, any amount of the relevant Minor Works Limit not expended is to be carried over to the following Operating Year, in which case the amount of the Minor Works Limit for that following Operating Year will be increased by the amount not expended.
- (d) **(Project Co to pay)**: If one Month prior to the end of the Term, the then current Minor Works Limit for that Operating Year has not been fully expended in accordance with **Clause 35.6(c)**, the amount that has not been expended will be a debt due and payable by Project Co to the State payable as an adjustment to the final Quarterly Service Payment.
- (e) **(Final Month payment)**: The State must pay for any Minor Works undertaken during the final Month prior to the end of the Term within 20 Business Days of the Expiry Date.

### 35.7 Subcontract provisions

Project Co must ensure that any Services Subcontract in connection with Minor Works contains:

- (a) provisions (including acknowledgements, agreements and warranties) to give effect to the regime set out in **Clauses 35.1 to 35.6**; and
- (b) acknowledgements by the Services Subcontractor that:
  - (i) it will not be entitled to make any Claim in connection with the Minor Works unless it strictly complies with the notice provisions set out in this **Clause 35**; and
  - (ii) it will not be entitled to payment of any margin (other than the Services Margin) for Minor Works.

## 36 MODIFICATIONS

### 36.1 Modification Request by the State

The State may at any time issue a request for Project Co to submit a Change Notice for a proposed Modification including details of:

- (a) the proposed Modification;
- (b) the State's preferred financing for the proposed Modification in accordance with **Schedule 5 (Change Compensation Principles)** (where the Modification will result in an increase to the cost of the Relevant Infrastructure or the Services); and
- (c) any specific information that the State requires Project Co to include in its Change Notice or that may be relevant to the preparation of the Change Notice,

**(Modification Request)**.

### 36.2 Payment for Change Notice

If Project Co needs to engage a third party other than any Consortium Member to provide design, engineering or quantity surveying or other services to assist in the preparation of a Change Notice for a proposed Modification in response to the State's Modification Request under **Clause 36.1**, Project Co may issue a Change Notice to the State for these third party costs in accordance with **Schedule 5 (Change Compensation Principles)**.

### 36.3 Change Notice

Unless the State withdraws the Modification Request for the Modification, Project Co must submit a Change Notice in accordance with **Schedule 5 (Change Compensation Principles)**:

- (a) within 20 Business Days of the receipt of the Modification Request; or
- (b) at such later time as agreed by the State (acting reasonably, taking into account the size and complexity of the proposed Modification and the information to be included in the Change Notice).

### 36.4 Change Response

- (a) The State will issue a Change Response to the Change Notice in accordance with **Schedule 5 (Change Compensation Principles)**.
- (b) Subject to **Clauses 36.2** and **36.9**, Project Co must not begin any work or incur any cost, and will not have any entitlement to make any Claim in respect of a Modification unless a Change Response requiring Project Co to proceed with the Modification (**Modification Order**) has been issued by the State in accordance with **Schedule 5 (Change Compensation Principles)**.
- (c) Subject to **Clause 36.7**, the State may withdraw a Modification Request at any time prior to issuing a Modification Order, in which case Project Co must not proceed with the Modification.

### 36.5 Omission by State

- (a) (**Scope**): The State may issue a Modification Request that seeks to decrease, omit, delete or remove any of the Development Phase Activities and the whole or any part of the Services from the Project.
- (b) (**State Associate to perform**): The State may itself or may engage a State Associate to undertake any of the Development Phase Activities and the whole or any part of the Services where these have been omitted from the Project by the State.
- (c) (**Coordination with Project Activities**): Project Co must:
  - (i) permit the State or any of the State Associates to carry out any omitted Development Phase Activities or Services;
  - (ii) co-operate with the State and any of the State Associates in carrying out any omitted Development Phase Activities or Services; and
  - (iii) co-ordinate and interface the Project Activities with the work carried out or to be carried out by the State or any of the State Associates in connection with any omitted Development Phase Activities or Services.
- (d) (**Reviewable Services**): Nothing in this **Clause 36.5** limits or restricts the State's rights under **Clause 32** in relation to the Reviewable Services.

### 36.6 Modifications proposed by Project Co

- (a) (**Project Co may propose a Modification**): Notwithstanding **Schedule 5 (Change Compensation Principles)**, Project Co may request the State to direct a Modification by submitting a Change Notice to the State.
- (b) (**State may approve or reject**): Upon receipt of a Modification Proposal, **Schedule 5 (Change Compensation Principles)** will apply and the State will be

under no obligation to issue a Modification Order in respect of a Modification proposed by Project Co.

- (c) **(Project Co's obligations continue):** Project Co is not relieved from performing or observing its obligations in accordance with this Deed as a result of the failure by the State to issue a Modification Order in connection with a Modification Proposal requested by Project Co.
- (d) **(Sharing of third party costs):** Where Project Co will incur third party costs in preparing the Change Notice for a Modification it has proposed in accordance with **Clause 36.6(a)**, and the State issues a Modification Order in respect of the Modification, Project Co and the State will agree any sharing of payment of those third party costs in accordance with **Schedule 5 (Change Compensation Principles)**.
- (e) **(Sharing of Savings):** If the State issues a Modification Order in respect of a Modification proposed by Project Co which will give rise to any Savings, the State and Project Co will agree the share of any Savings between the parties in accordance with **Schedule 5 (Change Compensation Principles)**.

### 36.6A Pre-Agreed Modifications

- (a) If a licence specified in Part E of **Schedule 8 (Site Matters)** in respect of groundwater bores specified in Section F4.1 and F4.5 of **Schedule 26 (Design Brief)** for a Site is not provided by the State by the relevant dates as set out in Part E of **Schedule 8 (Site Matters)**, Project Co may request the State to direct a Modification by submitting a Change Notice to the State within 10 Business Days of that relevant date.
- (b) The State must issue a Modification Order omitting the relevant part of the Works for which the licence has not been issued or granted as set out in **Clause 36.6A(a)** where Project Co has provided a Change Notice under **Clause 36.6A(a)**, and the Modification will be dealt with in accordance with **Schedule 5 (Change Compensation Principles)**.
- (c) The State may issue a Modification Order to omit any part or all of the Works set out in Sections F4.1, F4.5 and G6.1.24 of **Schedule 26 (Design Brief)**. If that Modification Order is issued:
  - (i) in the case of omission of boreholes, on or before the relevant date set out in Part E of **Schedule 8 (Site Matters)**; and
  - (ii) in the case of the photovoltaic cells, on or before a date which is 6 months prior to the date for Commercial Acceptance of a Stage in respect of Primary Schools, and 9 months prior to the date for Commercial Acceptance of a Stage in respect of Secondary Schools,
 the Modification will be dealt with as a Modification issued under this **Clause 36.6A** in accordance with **Schedule 5 (Change Compensation Principles)**.
- (d) If any approval required for connecting the photovoltaic systems specified in Section G6.1.24 of **Schedule 26 (Design Brief)** back into the relevant Utilities Infrastructure grid are either:
  - (i) not granted by the relevant Authority for a Site three months prior to the Date for Commercial Acceptance for the relevant Stage; or
  - (ii) granted by that date, but on the basis of a lower permitted energy level than specified in Section G6.1.24 of **Schedule 26 (Design Brief)**,
 the State will issue a Modification Order omitting the connection of the relevant component of the system not approved by the relevant Authority, back into the (a) local electrical system within the School Facility; and (b) relevant Utilities Infrastructure grid and this Modification will be dealt with as if it were a Modification Order issued under **Clause 36** (which for the avoidance of doubt will entitle Project Co to respond within its Change Notice with any affected commissioning obligations in relation to the photovoltaic system only, which would otherwise have

been required as part of the Commercial Acceptance Tests). If such Modification Order is issued by the State, Project Co will still be obliged to carry out all works to enable the photovoltaic system to be ready for connection to both the (a) local electrical system within the School Facility; and (b) relevant Utilities Infrastructure grid, at a future date.

- (e) If the State issues a Modification Order under **Clause 36.6A(c)** or **Clause 36.6A(d)**, Project Co must issue a Change Notice in accordance with **Schedule 5 (Change Compensation)**.

### 36.7 Change in Mandatory Requirements

- (a) **(Change in Mandatory Requirements):** Where:
- (i) a Project Specific Change in Law occurs after the date of this Deed;
  - (ii) a Change in Quality Standards occurs after the date of this Deed; or
  - (iii) a General Change in Law occurs after the Operational Commencement Date for a Stage,

that will have an effect on the cost of carrying out the Project Activities (or, in the case of a General Change in Law, the Project Activities applicable to the relevant Stage) (in each case a **Change in Mandatory Requirements**), Project Co must provide a notice to the State within five Business Days of becoming aware of the relevant Change in Mandatory Requirements.

- (b) **(Project Co action):** Subject to **Clause 36.7(c)**, within 20 Business Days of the occurrence of the Change in Mandatory Requirements, or at such later time as agreed by the State (acting reasonably), Project Co must provide to the State:
- (i) where necessary, a price for preparing a Change Notice in accordance with **Clause 36.2**; or
  - (ii) a Change Notice in accordance with **Clause 36.3**, and **Schedule 5 (Change Compensation Principles)**.
- (c) **(State action):** The State must issue a Modification Order in respect of a Change in Mandatory Requirement unless the Change in Mandatory Requirement is a Change in Quality Standards:
- (i) described in **paragraphs (a) or (b)** of that definition; and
  - (ii) Project Co is not required by Law to comply with the relevant Quality Standard,

in which case the State will direct Project Co whether it requires Project Co to comply with the Change in Quality Standards or not prior to issuing any Modification Order.

- (d) **(Reviewable Services):** To the extent that a Change in Mandatory Requirements affects a Reviewable Service, this **Clause 36.7** will have no application to the financial effects of the change to Reviewable Service which will be subject to and addressed in accordance with **Clause 32**.

### 36.8 Compensation for a Change in Mandatory Requirements

- (a) The compensation payable in respect of a Change in Quality Standards that occurs:
- (i) during the Development Phase, is calculated in accordance with **Schedule 5 (Change Compensation Principles)**, provided that Project Co bears the first \$[*Not disclosed*] in capital and delay costs incurred by Project Co, aggregated with each other Change in Quality Standards; or
  - (ii) during the Operating Phase, is calculated in accordance with **Schedule 5 (Change Compensation Principles)**,

and the following thresholds:

Total cumulative capital Costs for the Term	Cumulative operating costs per annum	Net Costs payable by State to Project Co	Net Savings payable by Project Co to the State
Up to \$[Not disclosed]	Up to \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%
More than \$[Not disclosed] up to \$[Not disclosed]	More than \$[Not disclosed]* up to \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%
More than [Not disclosed]	More than \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%

\* The amounts in the column headed 'Cumulative operating costs per annum' in the above table must be Indexed.

- (b) The State will compensate Project Co for the Costs incurred directly as a result of:
- (i) the Project Specific Change in Law referred to in **Clause 36.7(a)(i)** calculated in accordance with **Schedule 5 (Change Compensation Principles)** and, to the extent Project Co is granted an extension of time in accordance with **Clause 36.10**, Prolongation Costs and Financing Delay Costs calculated in accordance with **Schedule 5 (Change Compensation Principles)**; and
  - (ii) the General Change in Law referred to in **Clause 36.7(a)(iii)**, calculated in accordance with **Schedule 5 (Change Compensation Principles)** and the following thresholds:

Total cumulative capital Costs for the Term	Cumulative operating costs per annum	Net Costs payable by State to Project Co	Net Savings payable by Project Co to the State
Up to \$[Not disclosed]	Up to \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%
More than \$[Not disclosed] up to \$[Not disclosed]	More than \$[Not disclosed]* up to \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%
More than \$[Not disclosed]	More than \$[Not disclosed]*	[Not disclosed]%	[Not disclosed]%

\* The amounts in the column headed 'Operating costs per annum' in the above table must be Indexed.

- (c) If the Project Specific Change in Law referred to in **Clause 36.7(a)(i)** or the General Change in Law referred to in **Clause 36.7(a)(iii)** gives rise to a Saving, the amount of the Saving will be a debt due and payable by Project Co to the State, which debt the State may set-off in accordance with **Clause 34.7**.
- (d) If the State considers that a Project Specific Change in Law has occurred in accordance with **Clause 36.7(a)(i)** or a General Change in Law has occurred in accordance with **Clause 36.7(a)(iii)** and Project Co has not submitted a Change Notice in accordance with **Clause 36.7(b)**, the State may request Project Co to submit a Change Notice that complies with the requirements of **Clause 36.3**.
- (e) If the Change in Mandatory Requirements gives rise to a Saving, the amount of the Saving will be a debt due and payable by Project Co to the State, which debt the State may set off in accordance with **Clause 34.7**.
- (f) If the State considers that a Change in Mandatory Requirements has occurred in accordance with **Clause 36.7(a)** and Project Co has not submitted a notice in

accordance with **Clause 36.7(b)**, the State may request Project Co to submit a notice that complies with the requirements of **Clause 36.7(b)**.

### 36.9 Directions giving rise to Modification

- (a) **(State direction)**: Without limiting **Clauses 5.1(b)** and **5.2(a)**, if a direction by the State constitutes or involves a Modification, Project Co must give the State a Change Notice in respect of the Modification.
- (b) **(Confirmation)**: Within ten Business Days of the State receiving a Change Notice under **Clause 36.9(a)** the State will issue a Change Response:
  - (i) confirming that the direction is in fact a Modification;
  - (ii) withdrawing the direction, in which case Project Co must not comply with the direction; or
  - (iii) informing Project Co that, in the State's view, the direction is not a Modification in which case Project Co must, subject to **Clause 5.2(a)**, comply with the direction but may refer the matter to dispute resolution in accordance with **Clause 43**.
- (c) **(Conditions for Project Co Claim)**: Project Co shall not be entitled to make any Claim in respect of a direction that gives rise to a Modification unless it has given a Change Notice under **Clause 36.9(a)**.

### 36.10 Extension of time

If:

- (a) a Modification or Change in Mandatory Requirements:
  - (i) is undertaken or occurs during the Development Phase for a Stage;
  - (ii) will delay Project Co in achieving Commercial Acceptance of that Stage; and
  - (iii) will cause activities on the critical path contained and shown in the then current Development Phase Program for that Stage to be delayed;
- (b) Project Co in its relevant Change Notice for the Modification or Change in Mandatory Requirements includes its Claim for an extension of time in accordance with **Schedule 5 (Change Compensation Principles)**; and
- (c) at the time it submits the relevant Change Notice and any updated Change Notice, Project Co is fully complying with its obligations in connection with the Development Phase Program in accordance with **Clause 11.2**,

Project Co will, subject to complying with **Schedule 5 (Change Compensation Principles)**, be entitled to an extension of time to the relevant Date for Commercial Acceptance for that Stage and its Prolongation Costs and Financing Delay Costs for the period of any such extension, calculated in accordance with **Schedule 5 (Change Compensation Principles)**.

## 37 REFINANCING

### 37.1 Consent to Refinancing

- (a) **(State consent)**: Project Co must not (and must ensure that each other Project Entity does not) enter into or implement any Refinancing without the prior consent of the State, which will:
  - (i) not be unreasonably withheld; and
  - (ii) be given or withheld within 20 Business Days of receipt of the information provided by Project Co in accordance with **Clause 37.2(a)**.
- (b) **(State may withhold consent)**: Without limitation, it will be reasonable for the State to withhold such consent if:



- (i) the effect of the Refinancing would be an increase or adverse change in the profile of the risks or Liabilities of the State under any State Project Document without adequate compensation to the State;
- (ii) the terms and conditions of the proposed Refinancing are not on arm's length commercial terms or are not in accordance with market practice at the time;
- (iii) the terms and conditions of the proposed Refinancing (taken as a whole) are materially more onerous or disadvantageous to any Project Entity than the terms and conditions under the existing Finance Documents and the State considers that entering into the proposed Refinancing will adversely impact on the Project Entity's ability to perform its obligations under the Project Documents;
- (iv) the Financial Indebtedness assumed in accordance with the proposed Refinancing will not be used solely for the Project;
- (v) the matters referred to in **Clause 37.4** have not been agreed or otherwise determined;
- (vi) [Not Used]; or
- (vii) in connection with the proposed Refinancing, Project Co has failed to comply with this **Clause 37**.

### 37.2 Details of Refinancing

- (a) **(Provision of details):** Project Co must:
  - (i) at least 60 Business Days prior to any proposed Refinancing, consult with the State to outline the proposed refinancing strategy and to alert the State to any changes that may have a material impact on the ability of any Project Co Entity to meet its obligations under the Project Documents;
  - (ii) promptly (and at least 30 Business Days prior to the proposed Refinancing) provide the State with full details of any proposed Refinancing, including:
    - (A) a copy of the proposed financial model relating to it;
    - (B) the basis for the assumptions used in the proposed financial model;
    - (C) a comparison with any refinancing assumed within the Financial Model;
    - (D) a certificate in terms acceptable to the State from the auditors of such financial model; and
    - (E) a copy of any draft document proposed to be entered into in connection with such Refinancing; and
  - (iii) at least ten Business Days prior to the proposed Refinancing, provide the State with final execution drafts of each document proposed to be entered into in connection with such Refinancing.
- (b) **(Material changes):** The proposed financial model provided under **Clause 37.2(a)**:
  - (i) must show, amongst other things, the material changes to Project Co's obligations to its Financiers, projected Distributions and any anticipated Refinancing Gain; and
  - (ii) may include adjustments to any relevant assumptions necessary to reflect the committed financing terms under the proposed Refinancing. Any assumptions relating to the period beyond the term of the proposed Refinancing must be the same as those in the Financial Model.

- (c) **(State's unrestricted rights):** Project Co agrees that the State, whether before, during or at any time after any Refinancing, will have unrestricted rights of audit of any financial model and documentation, including formulae and calculations used in connection with the Refinancing.

### 37.3 Refinancing documents

- (a) **(Consent):** Project Co must not (and must ensure that each other Project Entity does not) execute or amend any document in connection with a Refinancing (including by amending a Finance Document) without the prior consent of the State (such consent not to be unreasonably withheld if the relevant document is on substantially the same terms as provided to the State under **Clause 37.2(a)(iii)** and does not give rise to any grounds to withhold consent under **Clause 37.1(b)**).
- (b) **(Documents to be delivered to State):** Project Co must, within five Business Days of the execution of any document in connection with a Refinancing (including by amending, restating or replacing any Finance Document), deliver to the State a certified true copy of that document.
- (c) **(Execution of Refinancing documents):** Project Co must not (and must ensure that each other Project Entity does not) execute any Refinancing until any new Financiers have executed or agreed to be bound by a deed with the State substantially in the form of the Finance Direct Deed and any existing Financiers who will cease to be Financiers as a consequence of the Refinancing have executed any document reasonably requested by the State to terminate their rights in accordance with the then current Finance Direct Deed.

### 37.4 Calculation and Sharing of Refinancing Gains

- (a) **(Refinancing Gain calculation):** A Refinancing Gain arises where a Refinancing Event results in  $A - B$  being greater than zero, where A and B are defined as:
- A = the present value of the Distributions projected (using the Financial Model updated to reflect only the terms of the proposed Refinancing and in no other respect) at the proposed date of, and after executing, the Refinancing Event, discounted using the Equity IRR as set out or determined in the Financial Close Financial Model; and
- B = the present value of the Distributions projected (using the Financial Model) immediately prior to the Refinancing Event (without taking into account the effect of the proposed Refinancing Event), discounted using the Equity IRR as set out or determined in the Financial Close Financial Model,
- (Refinancing Gain).**
- (b) **(State's entitlement to Refinancing Gains):** The State is entitled to 50% of the benefit of any Refinancing Gain but only to the extent that after payment of such amount to the State under this **Clause 37.4**, the Equity IRR over the Term as reflected in the Financial Model (taking into account the proposed Refinancing Event and all previous Refinancing Events) would be at or above the Equity IRR over the Term as reflected in the Financial Close Financial Model (without taking into account the effect of any Refinancing Events) (**State Share of Refinancing Gain**).
- (c) **(State's election on Refinancing Gain):** The State may, after taking into account the nature and timing of the Refinancing Gain, elect to receive the State Share of Refinancing Gain as:
- (i) a direct payment (but only to the extent a Project Entity receives its Refinancing Gain as a direct payment, or to the extent that a Project Entity receives a lump sum payment or is able to pay all or part of the Refinancing Gain to another party as a lump sum payment as a result of the Refinancing (for example upon a release of funds from a reserve account));

- (ii) a reduction in the Quarterly Service Payment; or
- (iii) a combination of the above.
- (d) **(Negotiate in good faith)**: The State and Project Co must negotiate in good faith to agree the manner and timing of payments of the State Share of Refinancing Gain on the basis that the State is to be paid the State Share of Refinancing Gain no later than a Project Entity receives its share of the Refinancing Gain and subject to the State's rights under **Clause 37.4(c)**.
- (e) **(Dispute)**: If no agreement is reached by the parties under **Clause 37.4(d)**, then either party may refer the matter to expert determination in accordance with **Clause 43**.
- (f) **(Information)**: Project Co must provide (and must ensure that each other Project Entity provides) the State with all information concerning the Refinancing, projected Distributions and the Project that the State may require to calculate the Refinancing Gain and the State Share of Refinancing Gain.

### 37.5 Costs Relating to a Refinancing

- (a) **(Project Co to pay State's reasonable costs)**: Project Co must reimburse the State its costs (including legal and financial advisers' fees) reasonably incurred in relation to considering or consenting to a Refinancing.
- (b) **(Estimate of costs)**: For the purposes of calculating any Refinancing Gain under this **Clause 37**, Project Co may include in the Financial Model as a cost associated with the Refinancing an estimate of those costs of the State referred to in **Clause 37.5(a)** to which the State has agreed.

## 38 RISK AND LIABILITY

### 38.1 Risk of loss or damage

Subject to this **Clause 38**, Project Co bears the risk of loss or damage to the Relevant Infrastructure and Project Co FF&E during the Term.

### 38.2 Notification of Loss and Damage

- (a) Project Co must promptly notify the State of any loss or damage to the Relevant Infrastructure including details of the nature and extent of such loss or damage.
- (b) Within 60 Business Days (or such longer period as the State reasonably requires in order to assess the situation and form its intention) of any loss or damage to the Relevant Infrastructure which is not subject to **Clause 38.5**, the State must notify Project Co whether it requires Project Co to repair or rebuild the Relevant Infrastructure for which Project Co retains the risk of loss or damage in accordance with this **Clause 38**.

### 38.3 Repairing and rebuilding

- (a) If the State notifies Project Co that it requires Project Co to repair or rebuild the Relevant Infrastructure, Project Co must:
  - (i) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work;
  - (ii) promptly repair or rebuild the Relevant Infrastructure in accordance with the Design Requirements unless otherwise directed by the State;
  - (iii) ensure that the repaired or reinstated Relevant Infrastructure complies with the requirements of this Deed;
  - (iv) ensure:
    - (A) there is minimal disruption to the Relevant Infrastructure; and
    - (B) to the greatest extent possible, continue to comply with its obligations under the Project Documents;

- (v) keep the State fully informed of the progress of the repair or rebuilding of the Relevant Infrastructure; and
- (vi) subject to **Clauses 38.3(b) to 38.3(d)**, pay for the cost of repairing or rebuilding the Relevant Infrastructure,

and the State will make available to Project Co the proceeds of any insurance received by the State for the purpose of repairing or rebuilding the Relevant Infrastructure [*Not disclosed*].

- (b) If:
  - (i) the State determines that the Relevant Infrastructure is to be repaired or rebuilt on the basis of different specifications to the Design Requirements; and
  - (ii) the incremental cost of repairing or rebuilding according to such specifications exceeds the total cost of repairing or rebuilding the Relevant Infrastructure according to the Design Requirements,
 the State will bear the amount (if any) of the excess as a Change Compensation Event.
- (c) Where the repairing or rebuilding of the Relevant Infrastructure to different specifications to the Design Requirements will increase or decrease the cost of providing the Services over the remainder of the Term, the difference will be a Change Compensation Event.
- (d) Where the loss or damage to the Relevant Infrastructure was caused by:
  - (i) a breach by the State of any Project Document;
  - (ii) reckless, unlawful or malicious act or omission of the State or any State Associate when acting in respect of the Project; or
  - (iii) [*Not disclosed*],
 then the State will pay the costs of any repair or rebuilding of the Relevant Infrastructure as a Change Compensation Event except to the extent that such costs are covered by Insurances (or would have been covered by Insurances but for any breach by Project Co or any Project Co Associate of the relevant Insurance policy).

#### **38.4 Uninsurable Risk or Day 1 Uninsurable Risk**

If the event which gave rise to the loss or damage to the Relevant Infrastructure is an Uninsurable Risk or a Day 1 Uninsurable Risk, then the parties' rights and obligations shall be subject to **Clauses 39.12** and **39.13** respectively.

#### **38.5 Minor damage**

If any loss or damage to the Relevant Infrastructure for which the State is liable to pay Project Co is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by Project Co:

- (a) without incurring additional costs;
  - (b) through the use of its site-based resources during normal working hours; and
  - (c) without adversely affecting the ability of Project Co to perform the Project Activities,
- then Project Co must bear the cost of rectifying such damage.

#### **38.6 Consequences of not repairing or rebuilding**

If the State notifies Project Co not to repair or rebuild the Relevant Infrastructure, the State must:

- (a) where the Relevant Infrastructure has not been wholly destroyed or substantially damaged, omit the relevant part of the Relevant Infrastructure from the Project, in which case that notice will be deemed to be a Modification; or

- (b) if the Relevant Infrastructure for a Stage has been wholly destroyed or substantially damaged and the loss or damage was caused by:
- (i) any Project Co Act or Omission, including a Major Default or Default Termination Event, terminate this Deed for default in accordance with **Clause 41.4**; or
  - (ii) a Force Majeure Event, Uninsurable Risk or Day 1 Uninsurable Risk, immediately terminate the affected Site, Verge Works Site, School Facility, Verge Infrastructure or Stage in accordance with **Clause 42.1** on the basis that a Force Majeure Termination Event is deemed to have occurred.

### 38.7 Damage to third party property

- (a) Other than in accordance with its obligation under this Deed, Project Co must not interfere with, obstruct, damage or destroy any property on, in or in the vicinity of any Site or Verge Works Site.
- (b) If Project Co or any Project Co Associate interferes with, obstructs, damages or destroys any property (other than the School Facilities) on, in or in the vicinity of a Site or Verge Works Site other than in accordance with its obligations under this Deed, Project Co must:
- (i) promptly repair any such loss or damage; and
  - (ii) reasonably compensate the affected person for that interference, obstruction, loss or damage (where Project Co has a legal Liability to do so).

### 38.8 Indemnity for Project Co breach

Subject to **Clause 34.2(b)**, Project Co indemnifies the State and [*Not disclosed*] against any Claim or Liability in connection with any breach by Project Co of this Deed or any breach by Project Co, Project Co Associates or any Group Member of any other State Project Document.

### 38.9 General indemnity

Project Co indemnifies the State and [*Not disclosed*] in respect of:

- (a) loss or damage to or of property including any real or personal property (and property belonging to the State other than the cost of repairing or rebuilding the Relevant Infrastructure on the basis that Project Co's Liability in this regard is addressed in **Clauses 38.1 to 38.6**);
- (b) any injury to, illness or death of, persons; or
- (c) any third party actions brought against the State or [*Not disclosed*],

to the extent caused by any Project Co Act or Omission.

### 38.10 Release

Project Co releases, and shall procure that each Project Co Associate releases, each of the parties indemnified by Project Co in accordance with **Clause 38.8** or **38.9** from any Claim or Liability for damage, destruction, loss, death, illness or injury to the extent caused or contributed to by any of the Project Activities or any Project Co Act or Omission.

### 38.11 Limits on Project Co Liability to indemnify and release

- (a) Project Co's Liability to indemnify the State and [*Not disclosed*] in accordance with this Deed will be reduced to the extent that any such Claim or Liability is caused or contributed to by:
- (i) (**breach**): any breach by the State of any State Project Document;
  - (ii) (**unlawful acts or omissions**): a reckless, [*Not disclosed*], unlawful or malicious act or omission of the State or any [*Not disclosed*];

- (iii) **(events)**: a Modification, a Contamination Modification Event, an Extension Event or Intervening Event, but only to the extent that Project Co is entitled to relief in connection with the relevant event under this Deed;
  - (iv) **(compliance with directions)**: Project Co complying strictly with a direction from the State (except to the extent that the direction is a direction to comply with a Project Document, is permitted in accordance with a Project Document or was given as a result of a Project Co Act or Omission) provided that prior to complying with the direction:
    - (A) Project Co notified the State that, in its opinion, compliance with the direction may directly result in a Claim or Liability that would otherwise be the subject of an indemnity by Project Co to the State; and
    - (B) notwithstanding having received the notification referred to in **Clause 38.11(a)(iv)(A)**, the State confirms that Project Co should comply or continue to comply with the direction; or
  - (v) **(Uninsurable Risks)**: circumstances in relation to which the State elects to indemnify Project Co in accordance with **Clause 39.13** and in respect of which Project Co has complied with its obligations under this Deed; or
  - (vi) *[Not disclosed]*.
- (b) Without limiting **Clause 5.3(b)**, Project Co's release of the State and *[Not disclosed]* in accordance with this Deed will be reduced to the extent that any Claim or Liability from which Project Co is releasing the State and *[Not disclosed]*, is caused or contributed to by:
- (i) **(breach)**: any breach by the State of any State Project Document;
  - (ii) **(unlawful acts or omissions)**: a reckless, unlawful or malicious act or omission of the State or any *[Not disclosed]*;
  - (iii) **(events)**: a Modification, a Contamination Modification Event, an Extension Event or Intervening Event, but only to the extent that Project Co is entitled to relief in connection with the relevant event under this Deed;
  - (iv) **(compliance with directions)**: Project Co complying strictly with a direction from the State (except to the extent that the direction is a direction to comply with a Project Document, is permitted in accordance with a Project Document or was given as a result of a Project Co Act or Omission) provided that prior to complying with the direction:
    - (A) Project Co notified the State that, in its opinion, compliance with the direction may directly result in a Claim or Liability that would otherwise be the subject of a release by Project Co to the State; and
    - (B) notwithstanding having received the notification referred to in **Clause 38.11(b)(iv)(A)**, the State confirms that Project Co; or should comply or continue to comply with the direction; or
  - (v) **(Uninsurable Risks)**: circumstances in relation to which the State elects to indemnify Project Co in accordance with **Clause 39.13** and in respect of which Project Co has complied with its obligations under this Deed.

### 38.12 Third party Claim under indemnity

If a Claim is made by a third party against the State or any *[Not disclosed]* in respect of which Project Co is required to indemnify the State or *[Not disclosed]* in accordance with this Deed (including under **Clause 51.8**), to the extent that the State's insurers in connection with such a Claim agree, the State must:

- (a) do all things reasonably required by Project Co in negotiating, defending or otherwise taking action or proceedings in respect of that Claim; and
- (b) not settle that Claim with the claimant without Project Co's involvement in and agreement to any such settlement.

### 38.13 Continuing obligation

- (a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity under this Deed.

### 38.14 Indirect or Consequential Loss

- (a) **(No Liability of State):** Neither the State nor any State Associate has any Liability to Project Co, Project Co Associates or any Group Member for any Indirect or Consequential Loss incurred or sustained by Project Co or Project Co Associates as a result of any act or omission of the State or State Associates (whether negligent or otherwise) or due to any breach of a State Project Document by the State or State Associates.
- (b) **(No Liability of Project Co):** Neither Project Co nor any Project Co Associate has any Liability to the State or State Associates for any Indirect or Consequential Loss incurred or sustained by the State or State Associates as a result of any Project Co Act or Omission (whether negligent or otherwise) or due to any breach of a State Project Document by Project Co or a Project Co Associate or Group Members.

## 39 INSURANCE

### 39.1 Development Phase Insurances

From Financial Close to the relevant date specified in Part A of **Schedule 13 (Insurance)** (with the exception of marine transit insurance which must be effected and maintained for the period set out in **Schedule 13 (Insurance)**), Project Co must effect and maintain, or cause to be effected and maintained, each of the Insurances:

- (a) stated in **Schedule 13 (Insurance)**; and
- (b) as a prudent owner and operator would obtain and maintain when undertaking works or carrying out activities of a similar nature to the Works or the Development Phase Activities.

### 39.2 Operating Phase Insurances

From the first occurring Operational Commencement Date to the Expiry Date, Project Co must effect and maintain, or cause to be effected and maintained, each of the Insurances:

- (a) stated in **Schedule 13 (Insurance)**; and
- (b) as a prudent owner and operator would obtain and maintain for the operation and maintenance of facilities of a similar nature to the School Facilities and when performing services of a similar nature to the Services.

### 39.3 General Insurance requirements

- (a) Project Co must:
  - (i) **(Reputable Insurers):** ensure that all Insurances are effected and maintained with Reputable Insurers;
  - (ii) **(deductibles):** pay all deductibles payable in connection with any of the Insurances including if the Claim is made by the State or any Entity referred to in **Clause 39.3(a)(xii)** insured under the Insurance, except:
    - (A) to the extent that the insured risk for which the deductible is to be paid has occurred as a consequence of any breach of a State Project Document by the State or any reckless, unlawful

- or malicious act or omission by the State or the relevant Entity, in which case the responsible party must pay the amount of the deductible; or
- (B) where the event that is insured under any Insurances is loss or damage caused by a Compensable Extension Event or a Compensable Intervening Event for which Project Co is entitled to relief under the Project Deed, in which case the State must pay the deductible;
- (iii) (**premiums**): punctually pay all premiums and other amounts payable in connection with the Insurances effected by it, and give the State evidence of payment of premiums if and when requested by the State;
- (iv) (**no alteration**): not alter, extend or discontinue or cancel any of the Insurances, or allow any of the Insurances to lapse, without the prior approval of the State;
- (v) (**do not prejudice**): not do or permit, or omit to do, anything which prejudices any of the Insurances;
- (vi) (**rectify**): promptly rectify anything which might, if not rectified, prejudice any of the Insurances;
- (vii) (**fully disclose**): fully and promptly disclose all material information to all relevant insurers (and any persons acting on their behalf) relating to the Insurances (whether held solely or jointly with others) in all respects;
- (viii) (**comply**): comply at all times with the terms of each of the Insurances;
- (ix) (**do everything to enable State recovery**): do everything reasonably required by the State or any Entity referred to in **Clause 39.3(a)(xii)** in whose name an Insurance policy is effected and maintained to enable the State or the relevant Entity (as applicable) to claim, and to collect or recover, money due in accordance with or in connection with any Insurance policy;
- (x) (**indemnities secondary**): ensure that the terms of the Insurances (with the exception of the workers' compensation Insurance policy) do not require the State or any Entity referred to in **Clause 39.3(a)(xii)** to exhaust any indemnities referred to in this Deed as a condition precedent to the insurer considering or responding to any Claim;
- (xi) (**notify**): promptly notify the State of any occurrence that may give rise to a Claim under any of the Insurances;
- (xii) (**references to State**): if the State is insured, or cover is extended to the State, ensure that the Insurance policy (other than a workers' compensation Insurance policy) expressly names the State of Western Australia, and any Entity, department, Authority or instrumentality of the State of Western Australia, the Minister for Works, the Minister for Education and any other Minister, whether body corporate or otherwise, and their respective employees, agents, contractors, consultants and officers; and
- (xiii) (**reinstatement**): promptly reinstate any Insurance required by this Deed if it lapses or if cover is exhausted.

#### 39.4 Terms of Insurances

Project Co must ensure that each of the Insurances it is responsible for effecting and maintaining or causing to be effected and maintained in accordance with this Deed:

- (a) contains terms, if relevant and to the extent permitted by Law, to the effect that:
- (i) the insurer will not impute to any Insured any knowledge or intention or a state of mind possessed or allegedly possessed by any other Insured;



- (ii) in the case of Insurances in accordance with which the State is also entitled to cover, any breach of the conditions of the Insurances by an Insured other than the State, must not in any way prejudice or diminish any rights which the State has under the Insurances;
  - (iii) in the case of Insurances in accordance with which the State is also entitled to cover, the relevant Insurance is primary with respect to the interest of the State, and any other insurance or self-insurance arrangements maintained by the State is excess to and not contributory with that Insurance;
  - (iv) in the case of Insurances in accordance with which the State is also entitled to cover, a notice of Claim given to the insurer by an Insured other than the State, will be accepted by the insurer as notice of Claim given also by the State;
  - (v) in the case of Insurances (except Services Subcontractor public and products liability insurance) in accordance with which the State is also entitled to cover, the insurer agrees that the interests of the Insured include the entire assets and undertaking of the Project, the School Facilities and the Verge Infrastructure and waives any rights of subrogation which it may have against any Insured;
  - (vi) in the case of Liability Insurances, the insurer agrees to treat each Insured as a separate insured party as though a separate contract of Insurance had been entered into with each of the Insured, without increasing the deductibles or reducing the overall limit of indemnity;
  - (vii) the insurer agrees that no reduction in limits or coverage affecting the Project, the School Facilities or the Verge Infrastructure will be made during the period of insurance, except under the circumstances and to the extent permitted by the *Insurance Contracts Act 1984* (Cth) and with not less than 30 days prior notification to the State, except for workers' compensation insurance, motor vehicle insurance, Services Subcontractor public and products liability insurance and Services Subcontractor professional indemnity insurance, provided such insurances comply with the minimum limits of coverage set out in **Schedule 13 (Insurance)**; and
  - (viii) if not included on the list of insurers maintained by the Australian Prudential Regulation Authority which are authorised to conduct new or renewal insurance business in Australia, the Insurances are governed by the laws of Western Australia and the insurers submit to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia and courts of appeal from them in respect of any proceedings arising in connection with the Insurances as well as waiving any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum; and
- (b) take proper account of the nature and objectives of the Project, the School Facilities and the Verge Infrastructure, the responsibilities and entitlements of the various Insureds in connection with this Deed and are on terms otherwise acceptable to the State (whose acceptance will not unreasonably be withheld).

### 39.5 Additional Insurance

- (a) If the State at any time reasonably requires Project Co to:
- (i) arrange insurance against a risk not specifically provided for or contemplated in accordance with **Schedule 13 (Insurance)**; or
  - (ii) increase the extent of, or change the terms of, an existing Insurance from that set out in **Schedule 13 (Insurance)**,
- it may notify Project Co and request that Project Co give effect to its requirements.

- (b) Project Co must promptly inform the State of the amount of any additional premium payable in giving effect to the requirement of the State in accordance with **Clause 39.5(a)** before it implements the requirement, and the State will advise Project Co whether it still requires Project Co to give effect to that requirement.
- (c) The cost of any additional premiums paid on any additional, increased or varied Insurances required by the State in accordance with **Clause 39.5(b)** will be a debt due and payable by the State to Project Co.

### **39.6 Insurances primary**

- (a) The Insurances are primary and not secondary to the indemnities referred to in this Deed.
- (b) The State is not obliged to make a Claim or institute proceedings against any insurer under the Insurances before enforcing any of its rights or remedies under the indemnities referred to in this Deed or generally.
- (c) Project Co is not relieved from, and remains fully responsible for, its obligations in accordance with this Deed regardless of whether the Insurances respond or fail to respond to any Claim and regardless of the reason why any of the Insurances respond or fail to respond.

### **39.7 Evidence of Insurance**

Project Co must give the State copies of all policies (except for the Services Subcontractor's public and products liability and professional indemnity policies in relation to which the State requires hard copies of the policies to be made available for inspection), certificates of currency, renewal certificates and endorsement slips evidencing the Insurances are effected and maintained:

- (a) as soon as it receives them from the insurer of the relevant Insurance; and
- (b) whenever reasonably requested by the State.

### **39.8 Failure to produce proof of Insurance terms**

- (a) If, after being requested in writing by the State to do so, Project Co fails to produce evidence of compliance with its Insurance obligations in accordance with **Clause 39.7** to the satisfaction and approval of the State, the State may:
  - (i) effect and maintain the Insurances and pay the premiums;
  - (ii) exercise its rights under **Clause 40**;
  - (iii) suspend the whole or part of the Development Phase Activities or the Services until evidence of Insurances required by this Deed is produced to the State, and Project Co must bear any cost it incurs as a result of the suspension; or
  - (iv) refuse payment of any moneys due to Project Co until evidence of Insurances required by **Clause 39.7** is produced to the State.
- (b) The costs reasonably incurred by the State in connection with taking any action in accordance with **Clause 39.8(a)** will be recoverable from Project Co as a debt due and payable on demand from Project Co to the State.
- (c) The rights given to the State by this **Clause 39.8** are in addition to any other rights the State may have.

### **39.9 Insurance claim**

- (a) If, and to the extent that, Project Co may be insured against loss that it suffers or incurs in respect of an event, occurrence or circumstance, Project Co must (unless the State assumes joint or sole responsibility in making the Claim) promptly make and pursue a Claim against the relevant insurer in respect of that event, occurrence or circumstance.

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- (b) The Insurance Claim must be properly prepared by Project Co in the manner and time required by the relevant insurer and Insurance.

### 39.10 Subcontractor Insurance

- (a) If Project Co subcontracts any part of the Development Phase Activities or Services, then Project Co must ensure that its Subcontractors are insured as required by this Deed, as appropriate (including as to amounts of insurance and type of insurance) given the nature of work or services to be performed by them, as if they were Project Co.
- (b) When determining whether its Subcontractors have appropriate Insurances in accordance with this **Clause 39.10**, Project Co must have regard to the Insurance cover its Subcontractors have under the contract works insurance described in **Schedule 13 (Insurance)**.
- (c) If Project Co fails to ensure that its Subcontractors effect and maintain all the Insurances required by this Deed, the State may:
- (i) exercise its rights under **Clause 40**;
  - (ii) suspend the whole or part of the Development Phase Activities or the Services until evidence of Insurances required by this Deed is produced to the State, and Project Co must bear any cost it incurs as a result of the suspension; or
  - (iii) refuse payment of any moneys due to Project Co until evidence of Insurances required by **Clause 39.7** is produced to the State.
- (d) The State is entitled to, but has no obligation to, satisfy itself as to Project Co's compliance with this **Clause 39.10**.

### 39.11 Settlement of Claims

- (a) **(Establish account):** Project Co must:
- (i) establish an account to be known as the "Insurance Proceeds Account";
  - (ii) maintain that account in the name of Project Co with a financial institution nominated by Project Co and approved by the State (such approval not to be unreasonably withheld) or with a financial institution that is a party to the Finance Direct Deed;
  - (iii) give details of that account to the State;
  - (iv) notify the financial institution referred to in **Clause 39.11(a)(ii)** of the charge over the Insurance Proceeds Account in accordance with the State Security document and procure, and copy the State with, acknowledgement of the notice from the financial institution; and
  - (v) procure the agreement of the financial institution referred to in **Clause 39.11(a)(ii)** not to exercise any right of set-off or combination of accounts in relation to the Insurance Proceeds Account.
- (b) **(Application of moneys):** Upon settlement of a Claim under the Insurances:
- (i) to the extent that the work to be reinstated or services to be repeated have been the subject of a payment or allowance by the State to Project Co, the State must be repaid that amount out of the proceeds of Insurances;
  - (ii) to the extent that the work reinstated or services repeated have not been the subject of a payment or allowance by the State to Project Co, Project Co is entitled immediately to receive the proceeds of Insurance, and the amount of such proceeds must be applied to any loss suffered by Project Co relating to those works or services; and
  - (iii) if Project Co has not completed reinstatement of work required to be reinstated, or repeated services required to be repeated, insurance

proceeds received (other than on account of advance loss of profits or business interruption) must, if requested by either party, be paid into the Insurance Proceeds Account.

- (c) **(Insurance Proceeds Account):** Subject to the Finance Direct Deed, moneys in the Insurance Proceeds Account may only be applied towards the repair or reinstatement of the Project.
- (d) **(Records):** Project Co must give the State records of expenditure from the Insurance Proceeds Account within 45 days of such expenditure.
- (e) **(Surplus funds):** Any funds remaining in the Insurance Proceeds Account after application in accordance with **Clause 39.11(c)** will be treated by Project Co as revenue for the Project.

### 39.12 Uninsurable Risks

- (a) **(Risk likely to become Uninsurable Risk):** If any risk becomes or is likely to become an Uninsurable Risk, then:
  - (i) Project Co must notify the State within five Business Days of becoming aware that the risk has become or is likely to become an Uninsurable Risk;
  - (ii) the State must meet with Project Co within five Business Days after receipt of Project Co's notice to discuss the risk, including whether the risk is in fact an Uninsurable Risk; and
  - (iii) if the parties cannot agree that the risk is an Uninsurable Risk, either party may refer the matter for expert determination in accordance with **Clause 43**.
- (b) **(Parties to discuss management of an Uninsurable Risk):** If both parties agree (or if not, it is determined under **Clause 43** that a risk is an Uninsurable Risk), the parties must meet further to discuss the means by which the risk should be managed, including:
  - (i) consideration of self-insurance by either party;
  - (ii) assigning some other allocation of responsibility to the risk; or
  - (iii) varying the Development Phase Activities or Services to overcome the risk.
- (c) **(Uninsurable Risk):** If both parties agree (or if not, it is determined in accordance with **Clause 43**), that a risk is an Uninsurable Risk:
  - (i) Project Co is not required to procure insurance against that risk for so long as that risk is, and remains, an Uninsurable Risk; and
  - (ii) the Quarterly Service Payment will be immediately adjusted to deduct an amount equal to the premium that was payable by Project Co to insure such risk immediately prior to the risk becoming an Uninsurable Risk.

### 39.13 Damage caused by Day 1 Uninsurable Risk or Uninsurable Risk

- (a) **(Occurrence):** If a Day 1 Uninsurable Risk or Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure, the State must within 20 Business Days of the occurrence of the Day 1 Uninsurable Risk or Uninsurable Risk (as the case may be) (or such longer period as is reasonable in the circumstances) either:
  - (i) subject to **Clause 39.13(b)** and **39.13(c)**, where the Relevant Infrastructure at a School Facility is not wholly or substantially damaged or destroyed by a Day 1 Uninsurable Risk or Uninsurable Risk, require Project Co to repair or rebuild the Relevant Infrastructure in accordance with **Clause 38.3(a)**, in which case the State will indemnify Project Co for the reasonable costs of the repair or rebuilding and all other Liabilities incurred by Project Co to the extent such Liabilities arose from the

- occurrence of the Day 1 Uninsurable Risk or Uninsurable Risk (as the case may be); or
- (ii) where the Relevant Infrastructure at a School Facility is wholly or substantially damaged or destroyed by the Day 1 Uninsurable Risk or Uninsurable Risk, either:
- (A) subject to **Clause 39.13(b)**, require Project Co to repair or rebuild the Relevant Infrastructure in accordance with **Clause 38.3(a)**, in which case the State will indemnify Project Co for the reasonable costs of the repair or rebuilding and all other Liabilities incurred by Project Co to the extent such Liabilities arose from the occurrence of the Day 1 Uninsurable Risk or Uninsurable Risk (as the case may be); or
- (B) terminate the affected Site, Verge Works Site, School Facility, Verge Infrastructure or Stage under **Clause 42.1** by notice to Project Co, in which case a Force Majeure Termination Event will be deemed to have occurred on the date stated in the State's notice and that affected Site, Verge Works Site, School Facility, Verge Infrastructure or Stage will be terminated on the date specified in the State's notice.
- (b) **(Maximum indemnity amount):** The maximum amount for which the State must indemnify Project Co in accordance with **Clauses 39.13(a)(i) or 39.13(a)(ii)(A)** will be:
- (i) for a Day 1 Uninsurable Risk, an amount that is equal to the Insurance proceeds that would have been payable under the Insurances had the event been insurable under those Insurances; and
- (ii) for Uninsurable Risks, an amount equal to the Insurance proceeds that would have been payable had the relevant Insurance continued to be available on the previous terms of that Insurance.
- (c) **(If parties unable to agree on repair or rebuilding):** If the parties are unable to agree on how the Relevant Infrastructure will be repaired or rebuilt in accordance with **Clause 39.13(a)(i) or 39.13(a)(ii)** (including the reasonable costs), the State must issue a Modification Order requiring Project Co to repair or rebuild the Relevant Infrastructure.

### 39.14 Review of Uninsurable Risks

Project Co must be vigilant in reviewing the insurance market generally, to ascertain whether an Uninsurable Risk has become insurable, and in any event must require its insurance brokers to test the market and determine whether, and if so, what insurance terms (as to both premium and coverage) are available in connection with that risk from Reputable Insurers, at intervals of not more than 12 Months. If upon such review it is found that the relevant Uninsurable Risk is insurable, then Project Co will promptly procure the Insurance in connection with that risk in accordance with this **Clause 39** and the Quarterly Service Payment will be immediately adjusted to add an amount equal to the premium that was payable for that Insurance.

## 40 DEFAULT

### 40.1 Meaning of remedy or cure

Where the word 'remedy' or 'cure' or any other grammatical form of those words is used in this **Clause 40**, it means to cure or redress the relevant occurrence or overcome its consequences so that there ceases to be any continuing detrimental effect of that potential or actual Default, Major Default or Default Termination Event and so that any prior detrimental effect is rectified so that the State and any State Associate are in the position they would have been in had the relevant occurrence not taken place.

## 40.2 Notice of Service Failure or Default by the State

- (a) If the State considers that a minor Service Failure has occurred, the State may give Project Co a notice in writing:
- (i) stating that such a Service Failure has occurred;
  - (ii) identifying and providing details of the Service Failure; and
  - (iii) requiring Project Co to remedy the Service Failure where it is capable of remedy, or comply with any reasonable requirements of the State where it is not, within five Business Days of Project Co receiving that notice (**Service Failure Notice**).
- (b) If Project Co:
- (i) fails to remedy the Service Failure in accordance with the Service Failure Notice; or
  - (ii) fails to comply with the reasonable requirements of the State and the Service Failure is not capable of being remedied,
- within five Business Days of Project Co receiving the Service Failure Notice, the Service Failure will be escalated to a Default.
- (c) If:
- (i) a minor Service Failure becomes a Default in accordance with **Clause 40.2(b)**;
  - (ii) the State considers that a Service Failure has occurred which is not minor; or
  - (iii) any other Default (other than a Service Failure) occurs,
- the State may give Project Co a notice in writing:
- (iv) stating that a Default has occurred;
  - (v) identifying and providing details of the Default; and
  - (vi) requiring Project Co to remedy or procure the remedy of the Default where it is capable of remedy, or comply with any reasonable requirements of the State where it is not, within 20 Business Days of Project Co receiving that notice (**Default Notice**).
- (d) If Project Co:
- (i) fails to remedy or procure the remedy of the Default in accordance with the Default Notice; or
  - (ii) fails to comply with the reasonable requirements of the State and the Default is not capable of being remedied,
- within 20 Business Days of Project Co receiving the Default Notice, the Default will be escalated to a Major Default.

## 40.3 Notice of Project Co Major Default

- (a) (**Project Co's obligations**): Project Co must:
- (i) promptly notify the State upon the occurrence of a Major Default; and
  - (ii) immediately take steps to mitigate, minimise or avoid the effects, consequences or duration of the Major Default.
- (b) (**Major Default Notice**): If Project Co notifies the State of the Major Default under **Clause 40.3(a)** or the State considers a Major Default has occurred, the State may give Project Co a notice (**Major Default Notice**) which contains:
- (i) details of the Major Default; and
  - (ii) if the Major Default:

- (A) is capable of remedy, a date by which Project Co must remedy the Major Default (which, subject to **Clause 40.4(d)**, must allow for a reasonable period of time to remedy the Major Default in the circumstances);
  - (B) is a failure to achieve Commercial Acceptance by the Date for Commercial Acceptance for a Stage and Project Co has a Remedy Implementation Plan in place under **Clause 19.2(g)(i)** which sets out a date by which Commercial Acceptance of the Stage will be achieved that is after the Date for Commercial Acceptance for the Stage, the Date for Commercial Acceptance for the Stage in the Major Default Notice shall be no later than the Date for Commercial Acceptance for the Stage specified in the Remedy Implementation Plan;
  - (C) is not capable of remedy, a date by which Project Co must comply with any reasonable requirements of the State in connection with that Major Default (which, subject to **Clause 40.4(d)**, must allow for a reasonable period of time to comply with the State's requirements in the circumstances); or
  - (D) is not capable of remedy and the State has formed the view (acting reasonably) that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, a Major Default, a statement to that effect.
- (c) **(Unreasonable requirements):** If Project Co considers, in good faith, that:
- (i) the time stated in a Major Default Notice (or any other requirements of the Major Default Notice) is not reasonable; or
  - (ii) it does not agree with the State's view that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, a Major Default,
- it must promptly notify the State specifying what it considers the reasonable requirements are, including the reasons why and the time which it believes is reasonably required to remedy the Major Default, comply with any reasonable requirements of the State or overcome the consequences of, or compensate the State for, the Major Default.
- (d) **(State to consider):** The State will reasonably consider Project Co's notice under **Clause 40.3(c)** and make any changes to the Major Default Notice that it considers reasonable as a consequence of Project Co's notice.
- (e) **(Major Default not capable of remedy or cure):** If having considered Project Co's notice under **Clause 40.3(c)**, the State maintains the view (acting reasonably) that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, a Major Default, that Major Default will be deemed to be a Default Termination Event.
- (f) **(Project Co not satisfied):** If Project Co is not satisfied with the changes made by the State under **Clause 40.3(d)** or the decision of the State under **Clause 40.3(e)**, it may refer the matter to expert determination under **Clause 43**.

#### **40.4 Project Co to provide remedy program and comply with Major Default Notice**

- (a) **(Remedy program):** If the State gives a Major Default Notice to Project Co, then notwithstanding its rights under **Clause 40.3(c)** to **40.3(f)**, Project Co must:
- (i) where the Major Default is capable of remedy, unless the relevant Major Default is a failure to pay money, give the State a program to remedy the Major Default;
  - (ii) where the Major Default is not capable of remedy, give the State a program to comply with any reasonable requirements of the State (which

may include a plan to replace the Subcontractor causing the Major Default); and

- (iii) where Project Co already has a Remedy Implementation Plan in place in accordance with **Clause 19.2**, update the Remedy Implementation Plan as necessary, which shall become a Major Default Notice remedy program and the Remedy Implementation Plan will cease to apply and the requirements of this **Clause 40** will apply instead,

in accordance with the terms of the Major Default Notice, for review by the State in accordance with **Schedule 12 (Review Procedures)**. In the case of a Major Default referred to in **paragraph (q)** of the definition of 'Major Default', Project Co may include in such a program a proposal that the relevant D&C Subcontractor or Parent Guarantor of a D&C Subcontractor in relation to which an Insolvency Event has occurred not be replaced on the basis that the other D&C Subcontractor (together with the Parent Guarantor of that other D&C Subcontractor named in **paragraph (q)** of the definition of 'Major Default') is financially and technically capable of undertaking the Development Phase Activities on its own.

- (b) **(Content of remedy program)**: Any program provided to the State under **Clause 40.4(a)** must include:
  - (i) each task to be undertaken, the date by which each task is to be completed and the additional resources and personnel (if applicable) to be applied to cure the Major Default; and
  - (ii) any temporary measures that will be undertaken while the Major Default is being cured to ameliorate the impact of the Major Default.
- (c) **(Comply)**: Notwithstanding the fact that it may have exercised its rights under **Clause 40.3(c) to 40.3(f)**, Project Co must comply with the Major Default Notice and any program to remedy or comply under **Clause 40.4(a)** as reviewed by the State in accordance with **Schedule 12 (Review Procedures)**.
- (d) **(Maximum remedy period)**: Subject only to the Finance Direct Deed and **Clause 40.5(a)**, the maximum period of time including any extension under **Clause 40.5(b)** which Project Co may be given to remedy a Major Default will be:
  - (i) where the applicable Major Default occurred during the Development Phase for a Stage and solely relates to that Stage:
    - (A) in respect of a Major Default referred to in **paragraph (q)** of the definition of 'Major Default', 180 days; or
    - (B) in respect of all other Major Defaults, 12 Months,
 in the aggregate from the date of the applicable Major Default Notice; or
  - (ii) six Months in the aggregate from the date of the applicable Major Default Notice where the applicable Major Default occurred during the Operating Phase for a Stage or **Clause 40.4(d)(i)** does not otherwise apply.

#### 40.5 Extension of remedy program

- (a) **(Impact of Relief Event)**: If Project Co is prevented from carrying out its obligations in accordance with the Major Default Notice program referred to in **Clause 40.4**, as a direct result of a Relief Event, then the program (including the time to remedy the Major Default or comply with the State's requirements), the periods identified in **Clause 40.4(d)** and the time set out in the Major Default Notice must be extended:
  - (i) to reflect the period Project Co is prevented from carrying out its obligations in accordance with the remedy program by that Relief Event; or
  - (ii) without limiting **Clause 38**, in respect of loss or damage caused by that Relief Event for the period from the commencement of that loss or



damage until the earlier of the date the necessary repairs or rebuilding have been completed or ought reasonably to have been completed,

subject to Project Co demonstrating to the State's satisfaction (acting reasonably) that Project Co has diligently pursued and, to the extent reasonably possible, continues to diligently pursue the program agreed or determined under **Clause 40.4(a)**.

- (b) **(Extension of Major Default Notice)**: Subject to **Clause 40.5(d)** and **Clause 40.4(d)**, if Project Co has been diligently pursuing:
- (i) where the Major Default is capable of remedy, the remedy of that Major Default; or
  - (ii) where the Major Default is not capable of remedy, compliance with any reasonable requirements of the State,

then, the time stated in the Major Default Notice will be extended by such period as the State determines is required (acting reasonably) to enable Project Co to either remedy the Major Default or comply with any reasonable requirements of the State.

- (c) **(Request for further information)**: The State may request, and Project Co must provide, any further information reasonably required by the State in respect of Project Co's cure of the Major Default to enable the State to determine the required extension under **Clause 40.5(b)**.
- (d) **(Limitation)**: Project Co is only entitled to one extension in accordance with **Clause 40.5(b)** in connection with the same Major Default.

#### 40.6 Not Used

#### 40.7 Default Termination Event

If any Default Termination Event occurs, the State may, without limiting any rights (other than rights of termination) it has at Law or otherwise under this Deed, elect to terminate this Deed at any time after the occurrence of a Default Termination Event in accordance with **Clause 41.4**.

#### 40.8 Effect of curing

If a Major Default or Default Termination Event occurs and is cured by any person, any rights in respect of that Major Default or Default Termination Event (as the case may be) that are not exercised prior to it being cured, may not be exercised after that cure.

### 41 TERMINATION

#### 41.1 Sole basis

- (a) **(Sole basis)**: Termination under this **Clause 41** or under **Clause 3.4** is the sole basis at Law or otherwise upon which the State or Project Co is entitled to terminate, rescind or accept a repudiation of this Deed.
- (b) **(No limitation)**: Termination and the payment of the relevant Termination Payment will not in any way prejudice or limit either party's Liability to the other in respect of the events giving rise to the termination.

#### 41.2 Termination for convenience

- (a) **(Termination for convenience notice)**: The State may, at any time, for its convenience, terminate this Deed by giving Project Co not less than 20 Business Days' notice.
- (b) **(Date of termination)**: Termination of this Deed for convenience will take effect upon the date specified in the notice given under **Clause 41.2(a)**.

**41.3 Termination for Force Majeure Event**

- (a) **(Force Majeure Termination Event notice):** If a Force Majeure Termination Event occurs and its effects are subsisting or **Clause 38.6(b)(ii)** applies, then the State may terminate this Deed or the affected Sites, Verge Works Site, School Facilities, any Verge Infrastructure or Stage in accordance with **Clause 42.1** by giving notice to Project Co.
- (b) **(Date of termination):** Termination for a Force Majeure Termination Event will take effect upon the date specified in the notice given under **Clause 41.3(a)**.

**41.4 Termination for Default Termination Event**

- (a) **(Termination for Default Termination Event):** Subject to the Finance Direct Deed, if a Default Termination Event occurs, the State may terminate this Deed by giving notice to Project Co.
- (b) **(Date of termination):** Termination of this Deed for a Default Termination Event will take effect upon the date specified in the notice given under **Clause 41.4(a)**.

**41.5 Termination and payments**

Upon termination under this **Clause 41**, the State's future obligation to pay the Quarterly Service Payment will cease.

**41.6 Assistance**

Project Co will use its best endeavours to assist the State in the exercise of the State's rights in accordance with this **Clause 41**.

**41.7 Payment on termination**

- (a) **(Payment):** Subject to **Clause 41.7(b)**, no later than the Termination Payment Date:
  - (i) where the Termination Payment is a positive amount, the State must pay; and
  - (ii) where the Termination Payment is a negative amount, Project Co must pay, as a debt due and payable, the absolute value of:
    - the relevant Termination Payment, being:
      - (iii) for termination of this Deed for convenience in accordance with **Clause 41.2**, the Termination For Convenience Payment (as that term is defined in **Schedule 7 (Termination Payments)**) calculated in accordance with section 5 of **Schedule 7 (Termination Payments)**;
      - (iv) for termination of this Deed for a Force Majeure Termination Event in accordance with **Clause 41.3**, the Force Majeure Termination Payment (as that term is defined in **Schedule 7 (Termination Payments)**) set out in section 6 of **Schedule 7 (Termination Payments)**; or
      - (v) for termination of this Deed for a Default Termination Event in accordance with **Clause 41.4**, the Default Termination Payment (as that term is defined in **Schedule 7 (Termination Payments)**) calculated in accordance with sections 3 or 4 (as applicable) of **Schedule 7 (Termination Payments)**.
- (b) **(Project Co obligations):** The State's obligation to pay a Termination Payment under **Clause 41.7(a)** is subject to Project Co having delivered up the vacated Sites and the Relevant Infrastructure to the State pursuant to **Clause 33** and this **Clause 41**, and otherwise having satisfied its obligations under this Deed connected with termination of this Deed.
- (c) **(State's rights):** If the State is not satisfied that Project Co has satisfied its obligations in **Clause 41.7(b)**, Project Co will be Liable to the State for the amount that is reasonably necessary to cover the expected costs of performing those

obligations (including reasonable contingencies) in addition to any Termination Payment payable by Project Co.

#### 41.8 Novation of Liabilities to the State

- (a) **(State's election):** Where this Deed terminates and a Project Entity has any Actual Debt outstanding, the State may elect to assume some or all of the Liability for that Actual Debt that would otherwise have been payable by the Project Entity, and to the extent the State so elects:
- (i) Project Co must ensure (and must procure that each other Project Entity ensures) that such Liability is novated to the State; and
  - (ii) the amount of the Termination Payment which the State would otherwise be obliged to pay will be reduced by:
    - (A) the amount of the Liability; and
    - (B) the amount of any costs of terminating the Finance Documents which would otherwise have been taken into account in determining the Termination Payment, but which are not incurred by reason of the novation.
- (b) **(Finance Documents):** Project Co must ensure that each Project Entity is permitted, in accordance with the terms of the Finance Documents, to procure the novation of its debt obligations in accordance with this **Clause 41.8**.

#### 41.9 Waiver

If a termination occurs under this Deed, then:

- (a) subject to **Clause 41.7**, Project Co waives any right it might otherwise have to make any Claim against the State by reason or as a result of a termination; and
- (b) Project Co's only entitlement will be in connection with its rights to a Termination Payment.

#### 41.10 Additional rights and obligations on termination

The additional rights and obligations of the parties on a termination of this Deed are set out in **Clause 33**.

## 42 PARTIAL TERMINATION

### 42.1 State's Right of Partial Termination

- (a) Where a Default Termination Event or Force Majeure Termination Event affects one or more, but not all, of the Sites, Verge Works Sites, School Facilities, any Verge Infrastructure or Stages then, subject to **Clause 42.1(c)**, the State will have the right at its sole and unfettered discretion to elect whether to terminate the affected Sites, Verge Works Site, School Facilities, any Verge Infrastructure or Stages (or some of them) or this Deed as a whole.
- (b) The State's right of termination for convenience under **Clause 41.2** also applies at its sole and unfettered discretion in respect of individual Sites, Verge Works Sites, School Facilities, any Verge Infrastructure or Stages as well as this Deed as a whole.
- (c) If the right to terminate arises under **Clauses 38.6(b)(ii)** or **Clause 39.13**, then the State will only exercise its right to terminate the affected Sites, Verge Works Sites, School Facilities, any Verge Infrastructure or Stages.
- (d) Where some but not all of the Sites, Verge Works Site, School Facilities, any Verge Infrastructure or Stages are terminated, all references in this Deed and any Project Document to "Site", "Verge Works Sites", "School Facility", "Verge Infrastructure" and "Stage" will be read by reference to the remaining Sites, Verge Works Sites, School Facilities, Verge Infrastructure and Stages.

- (e) A reference to the termination of a Site, Verge Works Sites, School Facility, Verge Infrastructure or Stage in this Deed means the requirement for any Development Phase Activities or Services or any other requirements of this Deed in respect of the Site, Verge Works Site, School Facility, Verge Infrastructure or Stage will be terminated, including the State's obligation to pay the Quarterly Service Payment in respect of the relevant Site, Verge Works Site, School Facility, Verge Infrastructure or Stage.

## 42.2 Facilitation

To the extent reasonably requested by the State, Project Co will comply with **Clause 33** as if it relates only to the relevant Site, Verge Works Site, School Facility, Verge Infrastructure or Stage affected by the Partial Termination.

## 42.3 Circumstances following Partial Termination

Following a Partial Termination, subject to **Clause 42.2**:

- (a) Project Co must continue to comply with the State Project Documents;
- (b) subject to **Clause 57.4**, each of the Project Documents to which Project Co is a party will be deemed not to apply to the Site, Verge Works Site, School Facility, Verge Infrastructure or Stage affected by the Partial Termination and those documents will be of no further force or effect in relation to the relevant Site, Verge Works Site, School Facility, Verge Infrastructure or Stage;
- (c) Project Co is not entitled to make any Claim against the State as a consequence of either party exercising its right of Partial Termination; and
- (d) the State or Project Co, as applicable, will pay the applicable Partial Termination Payment determined in accordance with **Schedule 7 (Termination Payments)**.

## 42.4 Project Co's Right of Partial Termination

- (a) **(Right to partially terminate)**: If a Force Majeure Termination Event affects a Site (**Affected Site**) then, subject to the remainder of this **Clause 42.4**, Project Co may terminate the Affected Site by giving notice to the State. Any such notice can only be given in accordance with **Clauses 42.4(c) to (l)** and must be provided to the State no later than 20 Business Days before Project Co has the right to terminate the Affected Site due to the Force Majeure Termination Event.
- (b) **(Date of Partial Termination)**: Termination of the Affected Site for a Force Majeure Termination Event will take effect upon the date specified in the notice given under **Clause 42.4(a)**.
- (c) **(No right to partially terminate)**: Project Co may not terminate the Affected Site for a Force Majeure Termination Event during the period Project Co:
- (i) is able to recover foregone revenue under a relevant Insurance policy; or
- (ii) would have been able to recover foregone revenue had it effected and maintained relevant Insurance policies in accordance with **Clause 39**,
- in respect of the relevant Force Majeure Event giving rise to the Force Majeure Termination Event.
- (d) **(Suspension Notice)**: Subject to **Clause 42.4(e)**, if Project Co gives a Partial Termination notice under **Clause 42.4(a)**, the State may suspend Project Co's right to partially terminate by giving a suspension notice (**Suspension Notice**) on or before the date which is the later of 20 Business Days after receipt of Project Co's Partial Termination notice and the date on which the right to partially terminate arose, provided that the period of suspension under any Suspension Notice will not be more than 12 months after the date on which the relevant Force Majeure Termination Event first occurred.

- (e) **(No right to issue a Suspension Notice):** Notwithstanding **Clause 42.4(d)**, if Project Co has recovered foregone revenue under a relevant Insurance policy in respect of the Force Majeure Event giving rise to the Force Majeure Termination Event for a period of 12 months or more from the date the Force Majeure Termination Event first occurred, the State may not issue a Suspension Notice.
- (f) **(Payment during period of Suspension Notice):** If the State gives a Suspension Notice, **Clause 31.4** no longer applies and the State must pay to Project Co in respect of the Affected Site:
- (i) for a Stage located at the Affected Site where the Development Phase Activities have commenced and the Suspension Notice is given prior to the Date of Commercial Acceptance for that Stage:
    - (A) the portion of the Project Entities' debt servicing costs under the Finance Documents for the period of the suspension directly attributable to the financing of the Development Activities for that Stage; and
    - (B) Project Co's holding costs actually and reasonably incurred for the period of the suspension directly attributable to the Development Activities for that Stage,

less any foregone revenue recovered by a Project Entity under a relevant Insurance policy (or which Project Co would have recovered had it complied with **Clause 39**) in respect of the Force Majeure Event giving rise to the Force Majeure Termination Event; and
  - (ii) for each Stage located at an Affected Site where the Operational Commencement Date for that Stage has occurred before the Suspension Notice is given, the portion of Quarterly Service Payment which would have been payable with respect to that Stage if the Services then required to be carried out under this Deed, which Project Co is relieved from performing in accordance with this Deed due to the occurrence of the Force Majeure Event giving rise to the Force Majeure Termination Event, were being performed in full less the aggregate of:
    - (A) the costs not incurred by Project Co as a result of the non-performance of the Services as reasonably determined by the State, including as a result of any mitigation undertaken by Project Co;
    - (B) any foregone revenue recovered by Project Co under a relevant Insurance policy (or which would Project Co would have recovered had it complied with **Clause 39**) in respect of the Force Majeure Event giving rise to the Force Majeure Termination Event; and
    - (C) the proportion of all amounts referable to that Stage which, in accordance with the Financial Model, would have been payable as a return on equity investment but for this **Clause 42.4(f)(ii)**,

provided, in both cases, that Project Co has mitigated all such costs to the extent reasonably practicable to do so and provided that such amounts have not been recovered by way of any other payments being made during the period of the Force Majeure Event giving rise to the Force Majeure Termination Event.
- (g) **(Services not suspended):** To the extent that the Services are not suspended during the period of the Force Majeure Event giving rise to the Force Majeure Termination Event, those Services will remain subject to Abatement in accordance with **Schedule 3 (Payment)** to the extent that those Services are not being provided in accordance with this Deed.
- (h) **(Partial Termination on expiry of Suspension Notice):** The Affected Site identified in Project Co's notice given under **Clause 42.4(a)** will not partially

terminate until the expiry of the Suspension Notice, including as a result of an amendment to reduce the suspension in accordance with **Clause 42.4(i)**.

- (i) **(Amended Suspension Notice)**: The State may amend the Suspension Notice at any time, provided that the total period of suspension under the Suspension Notice will not be more than 12 months after the date the relevant Force Majeure Termination Event first occurred.
- (j) **(Recommencement of obligations)**: If, following a Suspension Notice but before the end of the period the subject of that Suspension Notice in accordance with **Clause 42.4(d)**, Project Co becomes able to recommence performing some or all of the relevant obligations such that there would no longer be a Force Majeure Event:
  - (i) Project Co must recommence performance of its obligations within a reasonable period of time as determined by the State (acting reasonably and having regard to the extent to which Project Co has mitigated its costs under **Clause 42.4(f)**);
  - (ii) Project Co's Partial Termination notice under **Clause 42.4(a)** and the Suspension Notice will cease to have any effect; and
  - (iii) this **Clause 42.4** no longer applies.
- (k) **(Remaining Sites)**: If the Affected Site is partially terminated, all references in this Deed and any Project Document to "Site", "Verge Works Sites", "School Facility", "Verge Infrastructure" and "Stage" will be read by reference to the remaining Sites, Verge Works Sites, School Facilities, Verge Infrastructure and Stages.
- (l) **(Termination of related obligations)**: A reference to the termination of the Affected Site in this Deed means the requirement for any Development Phase Activities or Services or any other requirements of this Deed in respect of the Affected Site or the Verge Work Site, School Facility, Verge Infrastructure and Stage located at or in the vicinity of the Affected Site will be terminated, including the State's obligation to pay the proportion of the Quarterly Service Payment in respect of the Affected Site.

## 43 DISPUTE RESOLUTION PROCEDURE

### 43.1 Disputes

- (a) Unless a State Project Document provides otherwise, if a dispute arises between the State and Project Co in connection with any fact, matter or thing in connection with the State Project Documents (including questions concerning the existence, meaning or validity of a State Project Document) or the Project Activities, including any dispute in connection with a determination of the Independent Certifier, (each a **Dispute**), the Dispute must be resolved in accordance with this **Clause 43**.
- (b) If there is a Dispute, then a party may deliver to the other party a notice of dispute which sets out the party's contentions, including any relevant legal basis of Claim (**Notice of Dispute**).
- (c) Despite the existence of a Dispute, or the referral of the Dispute for resolution in accordance with this **Clause 43**, each party must continue to comply with its obligations in accordance with the State Project Documents.
- (d) Subject to **Clause 43.5**, the parties agree that unless and until a party has complied with the requirements of this **Clause 43**, a party may not commence any court proceedings in connection with any Dispute, except if the party seeks urgent interlocutory, injunctive or declaratory relief.

### 43.2 Consideration by Contract Management Team

If a Notice of Dispute has been delivered in accordance with **Clause 43.1(b)**, the Contract Management Team must, within ten Business Days of the delivery of the Notice of Dispute,

meet, give due consideration to the submissions by the parties in connection with the Dispute and attempt in good faith to:

- (a) assist the parties to resolve the Dispute; or
- (b) agree that the Dispute be referred to an expert for determination in accordance with **Clause 43.3**.

### 43.3 Expert determination

- (a) **(Referral to expert for determination)**: Disputes that arise between the parties in connection with **Clauses 5.2(a), 12.4(d) and 12.4(e), 15.3, 15.5, 19.2, 19.8 20.3(d), 26.6(h), 33.4(c), 33.5(b), 34.3, 36.9, 37.4(e), 39.12(a) and 40.3(f)**, and any other Dispute agreed by the parties for referral to an expert for determination, will be referred to an expert for determination in accordance with this Deed.
- (b) **(Appointment)**: If this Deed expressly provides that a Dispute will be referred to an expert for determination, then **Clause 43.2** will not apply and, within five Business Days of the delivery of the Notice of Dispute in accordance with **Clause 43.1(b)**, the parties must agree on an expert to determine the Dispute.
- (c) **(Appropriate skills)**: It is the intention of the parties that the expert appointed to determine a Dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.
- (d) **(Expert)**: For the purpose of **Clause 43.3(b)**, unless the Dispute is in connection with a determination by the Independent Certifier, the parties may appoint the Independent Certifier, or some other person, to act as the expert.
- (e) **(Failure to agree on expert)**: If the parties fail to agree on the expert within the time referred to in **Clause 43.3(b)**, then:
  - (i) an expert will be nominated by the president of the institute or governing body for the technical or professional discipline the subject of the relevant Dispute having regard to any experts proposed by the parties as notified in writing to the president and to the other party (which in the case of each party, must not exceed two proposed experts); or
  - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant Dispute, an expert will be nominated by the President of the Institute of Arbitrators and Mediators, Australia having regard to any experts proposed by the parties as notified in writing to the President and to the other party (which in the case of each party, must not exceed two proposed experts).
- (f) **(Agreement)**: Within ten Business Days after the agreement on, or nomination of, the expert in accordance with **Clauses 43.3(b) or 43.3(e)** (as applicable), the State and Project Co must enter into an agreement with the expert on the terms of the process set out in **Schedule 25 (Expert Determination Agreement)** or such other reasonable terms as the expert may require.
- (g) **(Referral)**: If the expert so agreed or nominated executes an agreement in accordance with **Clause 43.3(f)**, then the Dispute must be referred to that expert for determination.
- (h) **(New expert)**: If the expert agreed or nominated does not, or either party does not, execute an agreement in accordance with **Clause 43.3(f)**, then the parties must agree or nominate another expert in accordance with this **Clause 43.3** (but the parties will only have the opportunity to agree or nominate one further expert after the initial expert).
- (i) **(Rules of expert determination)**: The expert determination process will be administered, and the expert will be required to act, under the terms of **Schedule 25 (Expert Determination Agreement)**.

- (j) **(Conference):** After the Dispute has been referred to the expert, the expert may call and conduct a conference in accordance with **Schedule 25 (Expert Determination Agreement)**.
- (k) **(Basis for determination):** The expert will make his or her determination based upon:
  - (i) the Notice of Dispute;
  - (ii) the written submissions provided by the parties in accordance with **Schedule 25 (Expert Determination Agreement)**;
  - (iii) any conference called by the expert in accordance with **Schedule 25 (Expert Determination Agreement)**;
  - (iv) the expert's own expertise; and
  - (v) any further information provided by the parties in accordance with any request by the expert for further submissions, documents or information from either or both parties.
- (l) **(Visit):** The expert may visit the Site, the Verge Works Site, the Relevant Infrastructure and Verge Infrastructure (as applicable), and the parties will facilitate the expert's access to any of those areas.
- (m) **(Not arbitrator):** The expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.
- (n) **(Final and binding):** The determination of the expert will be final and binding on the parties, unless within ten Business Days of the determination, a party notifies the other party of its dissatisfaction and that it intends to commence litigation to appeal the determination in accordance with **Clause 43.6(b)**.
- (o) **(Mistake):** The expert may, on the application of a party or, after notifying the parties, on the expert's own initiative, correct the determination made where the determination contains:
  - (i) a clerical mistake or an error arising from an accidental slip or omission; or
  - (ii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter.
- (p) **(Costs):** The parties must:
  - (i) bear their own costs in connection with the expert determination proceedings; and
  - (ii) pay an equal portion of the costs of the expert.

#### **43.4 Impact of application for adjudication under the Construction Contracts Act**

The Construction Contracts Act will have the following impact on this **Clause 43**:

- (a) an application for adjudication under Part 3 of the Construction Contracts Act will not be considered a Notice of Dispute;
- (b) if a Notice of Dispute is given in accordance with **Clause 43.1** and the Dispute the subject of that Notice of Dispute is, or subsequently becomes, the subject of an application for adjudication under Part 3 of the Construction Contracts Act, the operation of **Clause 43.1** will be stayed in relation to that Dispute until such time as the application is dismissed or determined under the Construction Contracts Act; and
- (c) if a determination is made pursuant to Part 3 of the Construction Contracts Act, this **Clause 43** will have no application in relation to the Dispute the subject of that determination and either party may commence court proceedings relating to the Dispute in accordance with the Construction Contracts Act.



## 43.5 Mediation

- (a) If the Dispute referred to in **Clause 43.1**, excluding Disputes that have been referred to an expert for determination in accordance with **Clause 43.3**, is not settled within 30 Business Days of receipt of the Notice of Dispute the parties will, if mutually agreed, submit the Dispute to mediation in accordance with the Mediation Rules of the Institute of Arbitrators and Mediators Australia as applicable at the date of the Dispute.
- (b) The mediator will be:
- (i) a retired judge of the High Court of Australia or the Supreme Court of a State or Territory of Australia; or
  - (ii) a dispute resolution practitioner with legal qualifications and at least 20 years' experience in the legal profession,
- as agreed between the parties to the Dispute or, failing agreement, a mediator satisfying the requirements of **Clauses 43.5(b)(i)** or **43.5(b)(ii)** will be appointed by the President of the Institute of Arbitrators and Mediators Australia.
- (c) Any mediation meetings and proceedings under this **Clause 43.5** must be held in Perth, Western Australia.
- (d) The costs of the mediation process under this **Clause 43.5** will be shared equally between the parties to the Dispute, which for the avoidance of doubt, does not include the costs incurred by each party associated with preparing for and attending mediation, including the costs of any legal representatives.

## 43.6 Litigation

Either party may commence litigation in connection with a Dispute if, and only if, a Notice of Dispute has been delivered in accordance with **Clause 43.1(b)** and:

- (a) **Clause 43.2** applies and, within 20 Business Days after the delivery of the Notice of Dispute in accordance with **Clause 43.1(b)**, the Contract Management Team has not:
- (i) resolved the Dispute; or
  - (ii) agreed that the Dispute be referred to an expert for determination in accordance with **Clause 43.3**; or
- (b) the Dispute has been referred to an expert for determination in accordance with **Clause 43.3** and:
- (i) the agreed or nominated expert, and any new expert agreed or nominated in accordance with **Clause 43.3(f)**, or any of the parties, did not execute an agreement in accordance with **Clause 43.3(f)**;
  - (ii) the expert failed to make a determination in accordance with **Clause 43.3**, including within the time set out in **Schedule 25 (Expert Determination Agreement)**;
  - (iii) the expert made a determination and, within ten Business Days of receipt of the determination, a party has notified the other party of its dissatisfaction and intention to commence litigation to appeal the determination; or
  - (iv) either party has failed to comply with any of the requirements of this **Clause 43**.

## 44 REPRESENTATIONS AND WARRANTIES

### 44.1 State's representations and warranties

The State represents and warrants for the benefit of Project Co that:

- (a) **(power to execute)**: it has the power to execute, deliver and perform its obligations under the State Project Documents and all necessary action has been taken to authorise that execution, delivery and performance;
- (b) **(validity)**: each State Project Document constitutes a valid and legally binding obligation on it in accordance with its terms; and
- (c) **(legality)**: the execution, delivery and performance of each State Project Document does not violate any Law to which the State is subject.

#### 44.2 Project Co's representations and warranties

Project Co represents and warrants for the benefit of the State (except as to matters notified by it to the State and accepted by the State in writing) that:

- (a) **(power to execute)**: it has the power to execute, deliver and carry out its obligations under the Project Documents and all necessary action has been taken to authorise that execution, delivery and performance;
- (b) **(legality)**: the execution, delivery and performance of each Project Document to which a Project Entity is a party does not violate any Law, document or agreement to which a Project Entity is a party or which is binding on it or any of its assets;
- (c) **(validity)**: each Project Document to which a Project Entity is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
- (d) **(registration)**: each Project Entity is duly registered, properly constituted and remains in existence;
- (e) **(no trust relationship)**: except as stated in this Deed, no Project Entity is the trustee or Responsible Entity of any trust nor does it hold any property subject to or impressed by any trust;
- (f) **(no subsidiaries)**: no Project Entity has any subsidiaries;
- (g) **(no Tax consolidation)**: no Project Entity is part of any Tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) or GST grouping arrangement contemplated by the GST Law, except with the consent of the State;
- (h) **(no trading)**: no Project Entity has traded since its incorporation, other than for the purposes of entering into the Project Documents and no Project Entity has any Liabilities other than those that have arisen in connection with entering into the Project Documents;
- (i) **(no material change)**: there has been no material change in the financial condition of each Project Entity (since its incorporation) or any other Group Member, the Equity Investors or the Subcontractors (since the date of their last audited accounts) which would prejudice the ability of each Project Entity to perform its obligations under the Project Documents;
- (j) **(information true and correct)**: all information that has been provided to the State is true and correct and no Project Entity is aware of any material facts or circumstances that have not been disclosed to the State and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Deed with Project Co;
- (k) **(no other security interests)**: none of the assets are subject to any Encumbrance other than a Permitted Encumbrance (as each of those terms is defined in the State Security);
- (l) **(due performance)**: in executing the Project Documents and entering into the Project Documents Project Co has properly performed its obligations to the Trust Beneficiaries;
- (m) **(status of Project Entities and Holding Entities)**: each of the Project Entities and the Holding Entities are corporations limited by shares duly and validly incorporated and existing under the Corporations Act, where Project Co is the sole

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- trustee of the Project Trust and Project HoldCo is the sole trustee of the Project Holding Trust;
- (n) **(no action to remove Project Co or Project HoldCo)**: Project Co and Project HoldCo have been validly appointed as trustee of the Project Trust or Project Holding Trust (as applicable) and no action has been taken or threatened to remove Project Co as trustee of the Project Trust or Project HoldCo as trustee of the Project Holding Trust, nor to appoint an additional trustee of the Project Trust or Project Holding Trust (as applicable);
- (o) **(no intention to retire)**: Project Co has not given notice of its intention to retire as trustee of the Project Trust and Project HoldCo has not given notice of its intention to retire as trustee of the Project Holding Trust;
- (p) **(power of each Project Entity and each trustee)**: each of the Project Entities and Project HoldCo has, and has properly exercised, the power (including Project Co under the Project Trust Deed and Project HoldCo under the Project Holding Trust Deed (as applicable)) to enter into, deliver and to perform and observe its obligations under, the Project Documents to which it is expressed to be a party and to hold the assets, undertakings and rights both present and future of the Project Trust or Project Holding Trust (as applicable) and there are no limitations on or conditions of it doing so other than as set out in the Project Trust Deed and the Project Holding Trust Deed (as applicable);
- (q) **(right to be indemnified)**:
- (i) Project Co and Project HoldCo are entitled to be fully indemnified out of the assets of (and a lien over the assets of) the Project Trust Deed and the Project Holding Trust Deed (as applicable in respect of obligations and liabilities incurred by it in its capacity as trustee of the Project Trust or Project Holding Trust (as applicable) arising from, or in connection with, the Project Documents to which it is expressed to be a party; and
- (ii) there are no limitations on the rights of indemnification of Project Co and Project HoldCo out of the assets of the Project Trust or Project Holding Trust (as applicable), other than:
- (A) those limitations permitted by Law; and
- (B) any limitation arising as a result of Project Co's or Project HoldCo's fraud, negligence or breach of trust;
- (r) **(no release or disposal)**: neither Project Co nor Project HoldCo has released or disposed of in any way any part of the whole of the indemnity identified in **Clause 44.2(q)** or any lien over the assets of the Project Trust or Project Holding Trust (as applicable) other than (in the case of the Project Trust) under the State Security or the Finance Documents and neither Project Co nor Project HoldCo as trustee has a material liability which may be set off against this right of indemnity or lien;
- (s) **(sufficiency of indemnity)**: the assets of the Project Trust or Project Holding Trust are sufficient to satisfy the indemnity of each of Project Co and Project HoldCo (as applicable) referred to in **Clause 44.2(q)**;
- (t) **(prior rights)**: the rights of any Trust Beneficiary relating to, and its interests in, the Trust Property, as the case may be, are subject to:
- (i) the rights and interests of the State under the Project Documents;
- (ii) any rights or interests in the Trust Property to which the State may from time to time be subrogated; and
- (iii) the rights and interests of Project Co in the Trust Property pursuant to its right of indemnities and any lien;
- (u) **(title and assets)**:
- (i) neither the Project Trust nor the Project Holding Trust has been terminated, no beneficiary of the Project Trust or Project Holding Trust is
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presently entitled to the assets of the Project Trust or Project Holding Trust (as applicable), neither Project Co nor Project HoldCo is required to wind up or terminate the Project Trust or Project Holding Trust (as applicable) under the terms of the Project Trust or Project Holding Trust or applicable Law nor has any winding up or termination of the Project Trust or Project Holding Trust commenced; and

- (ii) no asset of the Project Trust or Project Holding Trust has been re-settled, distributed, set aside or transferred to any other trust except to the extent permitted or not restricted under any Project Document or Finance Document;
- (v) **(no breach of trust deed)**: Project Co is not in breach of the Project Trust Deed and Project HoldCo is not in breach of the Project Holding Trust Deed;
- (w) **(no trust default)**: neither Project Co nor Project HoldCo has defaulted in the performance and observance of its obligations as trustee of the Project Trust or Project Holding Trust (as applicable) in any material respect;
- (x) **(internal management)**: all acts of internal management of the Project Trust in connection with the Project Documents or Finance Documents and the assumption by Project Co of liability for the performance of its obligations in connection with the Project Documents and Finance Documents to which it is a party have been duly performed and all consents, authorisations and approvals required are in full force and effect;
- (y) **(trustee relationship Trust)**: the Project Trust Deed comprises all the terms relevant to the relationship of trustee and beneficiary between Project Co, as the trustee of the Project Trust, and the Trust Beneficiaries and constitutes legal, valid and binding obligations enforceable in accordance with its terms and neither the Project Trust Deed nor any part of it is void, voidable or otherwise unenforceable;
- (z) Project Co has disclosed to the State full details of:
  - (i) the Project Trust and any other trust or fiduciary relationship affecting the Trust Property and, without limitation, has given to the State copies of any instruments creating or evidencing the Project Trust; and
  - (ii) its other trusteeships (if any);
- (aa) **(trustee relationship Project Holding Trust)**: the Project Holding Trust Deed comprises all the terms relevant to the relationship of trustee and beneficiary between Project HoldCo as the trustee of the Project Holding Trust and the beneficiaries of the Project Holding Trust and constitutes legal, valid and binding obligations enforceable in accordance with its terms and neither the Project Holding Trust Deed nor any part of it is void, voidable or otherwise unenforceable; and
- (bb) **(copy of trust deeds)**: a copy of the Project Trust Deed and the Project Holding Trust Deed has been delivered to the State before the execution of this Deed and that copy is a true, correct and up to date copy of the Project Trust Deed and the Project Holding Trust Deed as at execution of this Deed and there are no other documents governing the Project Trust or the Project Holding Trust.

#### 44.3 Repetition of representation and warranties

Each representation and warranty given by Project Co under this Deed:

- (a) **(date of Deed)**: is made on the date of this Deed; and
- (b) **(repetition)**: will be deemed to be repeated each day during the period from the date of this Deed to the Expiry Date,

with reference to the facts and circumstances then subsisting.

#### 44.4 Undertakings in relation to the Project Trust

Project Co must:

- (a) not, without the prior written consent of the State, amend or revoke the Project Trust Deed;
- (b) comply fully with its obligations under the Project Trust Deed and at Law, and not by any act or omission lose or cease to be entitled to its rights of indemnity in accordance with the Project Trust Deed against the Trust Property; and
- (c) ensure that:
  - (i) there is no restriction or limitation on or derogation from its right of subrogation or indemnity (whether or not arising under the Project Trust Deed) as trustee of the Project Trust; and
  - (ii) the rights of the Trust Beneficiaries relating to, and their interest in, Trust Property are subject to the prior rights and interests of:
    - (A) the State under the State Security; and
    - (B) Project Co in the Trust Property pursuant to its right of indemnity.

#### 45 **BENEFITS HELD ON TRUST FOR STATE ASSOCIATES**

- (a) **(Benefit of Indemnities):** The State holds on trust for the State Associates the benefit of:
  - (i) each indemnity and release given by Project Co under this Deed in favour of the State Associates; and
  - (ii) each right in this Deed to the extent that such right is expressly stated to be for the benefit of the State or the State Associates.
- (b) **(Project Co acknowledgement):** Project Co acknowledges the existence of such trusts and consents to:
  - (i) the State exercising rights in relation to, or otherwise enforcing such indemnities, releases and rights on behalf of the State Associates; and
  - (ii) the State Associates exercising rights in relation to, or otherwise enforcing the indemnities, releases and those rights as if they were a party to this Deed.
- (c) The parties agree that the State does not require the consent of any State Associate to amend or waive any provision of any State Project Document.

#### 46 **PROJECT CO TO INFORM ITSELF**

##### 46.1 **No representations from the State**

Project Co acknowledges and agrees that the State and State Associates have not made and make no representation, and give no warranty or guarantee and owe no duty of care in respect of:

- (a) **(Project Information):** the accuracy, adequacy or completeness of the Project Information;
- (b) **(Sites):** the Site Conditions, title to the Sites or Verge Works Sites or adequacy of or access to the Sites and the Verge Works Sites and their surroundings for the Project;
- (c) **(Utility Infrastructure):** the existence, location, condition, availability or required capacity of any Utility Infrastructure; or
- (d) **(Easement):** any Easements and rights of way.

##### 46.2 **Representations and Warranties by Project Co**

Without limiting **Clause 46.1**, Project Co acknowledges and agrees that:

- (a) **(entry into Deed)**: it enters into this Deed based on its own investigations, interpretations, deductions, information and determination;
- (b) **(opportunity to investigate)**: it was given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:
  - (i) relating to the subject matter of any Project Information; and
  - (ii) of each of the Sites and the Verge Works Sites;
- (c) **(Project Information)**: the Project Information was provided by the State, State Associates and any Information Document providers for the information only of Project Co;
- (d) **(no invitation, offer or recommendation)**: the Project Information does not form part of this Deed or constitute an invitation, offer or recommendation by or on behalf of the State;
- (e) **(no reliance)**: it did not rely upon any Project Information or any other information, data, representation, statement or document or the accuracy, adequacy, suitability or completeness of the Project Information or other such information, data, representation, statement or document for the purposes of entering into this Deed or delivering the Project;
- (f) **(State entry into Deed)**: the State has entered into this Deed relying upon the warranties, acknowledgements, representations and agreements set out in this Deed; and
- (g) **(Intellectual Property Rights)**: all Intellectual Property Rights in the Project Information remain the property of the State, any State Associates or any Information Document providers (as the case may be).

### 46.3 Release and indemnity

Project Co:

- (a) indemnifies the State and State Entities against any Claim or Liability suffered or incurred by the State or State Entities; and
- (b) releases and will procure that Project Co Associates release the State and State Entities from any Claim,

arising in connection with the provision of, or the purported reliance upon, or use of, the Project Information by Project Co, a Project Co Associate or any other person to whom the Project Information is disclosed by Project Co, a Project Co Associate or any person on Project Co's or Project Co Associate's behalf.

### 47 RESTRICTIONS ON PROJECT CO

- (a) **(Restrictions)**: Project Co must not:
  - (i) conduct any business other than the Project and the performance of its obligations and the exercise of its rights under the Project Documents;
  - (ii) acquire or hold any property or incur any Liability other than for the purposes of the Project;
  - (iii) enter into contracts with, or assume or permit to subsist any Liability in favour of, other Consortium Members, the Equity Investors or any of their respective associates (as that term is used in the Corporations Act); or
  - (iv) engage in any Tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) or GST grouping arrangement contemplated by the GST Law,

without the State's prior consent.
- (b) **(Consent)**: The State must not unreasonably withhold its consent under **Clause 47(a)(iii)** if the relevant transaction is on arm's length commercial terms.

## 48 ASSIGNMENT AND CHANGE IN OWNERSHIP

### 48.1 Assignment and other dealings by a Project Entity

- (a) **(Restrictions on Project Co):** Except as expressly permitted by this Deed, the Finance Direct Deed or the State Security, Project Co must not (and must ensure that no Project Entity does) assign, sell, novate, transfer, (subject to **Clause 48.2**) mortgage or charge, create or allow to exist any security interest over, or otherwise deal with all or any part of its interest in, or obligations under, any of the Project Documents, the whole or any part of any Site, Verge Works Site or the Relevant Infrastructure without the prior consent of the State and on such terms and conditions as are determined by the State.
- (b) **(Exceptions):** **Clause 48.1(a)** does not apply in respect of:
- (i) a Refinancing, which is to be dealt with in accordance with **Clause 37**; or
  - (ii) a Share Capital Dealing, which is to be dealt with in accordance with **Clauses 48.4** and **48.6**.

### 48.2 Financiers' securities

A Project Entity may mortgage or charge its interest under the Project Documents to secure its obligations to any Financier (or the trustee or agent for any Financier) under the Finance Documents, if, and for so long only as, the Financier (or the trustee or agent for the Financier) is a party to the Finance Direct Deed.

### 48.3 Initial status of ownership

Project Co represents and warrants that, as at Financial Close, each Project Entity will be indirectly and beneficially owned and Controlled as set out in **Schedule 17 (Ownership)**.

### 48.4 Restrictions on Share Capital Dealings

Subject to **Clause 48.6**, Project Co must not and must ensure that each Group Member does not:

- (a) **(restrictions on Project Entities):** at any time:
- (i) redeem, repurchase, defease, retire or repay any share capital or units in a Project Entity or the Project Trust respectively, or resolve to do so;
  - (ii) issue or agree to issue any share capital or units in a Project Entity or the Project Trust respectively;
  - (iii) issue or agree to issue any warrants or options over any unissued share capital or units in a Project Entity or the Project Trust respectively; or
  - (iv) permit or suffer any change to (or transfer of) the issued share capital or units in a Project Entity or the Project Trust respectively, which results in either Project Entity ceasing to be directly and beneficially wholly owned and Controlled by a Holding Entity;
- (b) **(restrictions on Holding Entity):** allow a Holding Entity, at any time, to:
- (i) redeem, repurchase, defease, retire or repay any share capital or units in a Holding Entity, or resolve to do so;
  - (ii) issue or agree to issue any share capital or units in a Holding Entity;
  - (iii) issue or agree to issue any warrants or options over any unissued share capital or units in a Holding Entity;
  - (iv) permit or suffer any change to (or transfer of), the issued share capital or units in a Holding Entity which changes the percentage of issued share capital or units owned (legally and/or beneficially) by any Equity Investor; or

- (v) permit the transfer of unitholder or shareholder loans (or other loans in the nature of equity funding) from an Equity Investor to a party other than one wholly owned and Controlled by that Equity Investor;
  - (c) **(no Change in Control)**: at any time, permit or suffer any Change in Control of a Consortium Member; or
  - (d) **(no Change in trustee)**: permit or suffer a change in the manager, trustee or Responsible Entity of any Group Member that is a trust,
- (each a **Share Capital Dealing**), without the State's prior consent which must be requested by notice from Project Co to the State.

#### 48.5 State's right to withhold consent

Subject to **Clauses 48.6(b)** and **48.9**, the State may only withhold its consent to a proposed Share Capital Dealing if the State is of the opinion (acting reasonably) that:

- (a) a proposed new Equity Investor or Equity Investors (or any Entity which Controls the new Equity Investor or Equity Investors):
  - (i) is or are not Solvent and reputable; or
  - (ii) has or have an interest or duty which conflicts or may conflict in a material way with the interests of the State; or
- (b) the proposed Share Capital Dealing:
  - (i) is against the public interest;
  - (ii) would adversely affect the ability or capability of a Project Entity to perform its obligations in accordance with any Project Document;
  - (iii) would lead to a Probity Event;
  - (iv) would, in respect of a Change in Control of a Consortium Member (who is not an Equity Investor) result in:
    - (A) the Consortium Member being Controlled by an Entity that has an interest or duty which conflicts or may conflict in a material way with the interests of the State; or
    - (B) the Consortium Member not having a sufficient level of financial, managerial and technical capacity to deliver the Project;
  - (v) would have a material adverse effect on the Project; or
  - (vi) would increase the Liability of, or risks accepted by the State under the State Project Documents or in any other way in connection with the Project.

#### 48.6 Permitted Share Capital Dealings and on-market acquisitions

- (a) **(Permitted Share Capital Dealings)**: Project Co may effect, permit, suffer or allow a Permitted Share Capital Dealing at any time without the State's prior consent, provided that Project Co provides notice to the State of the proposed Permitted Share Capital Dealing:
  - (i) subject to **Clause 48.6(a)(ii)**, as soon as reasonably practicable and, in any event, not less than five Business Days prior to the Permitted Share Capital Dealing; or
  - (ii) in relation to a Permitted Share Capital Dealing which relates to a transfer of shares or other interests which are listed on a stock exchange, as soon as reasonably practicable.
- (b) **(On-market acquisitions)**: If:



- (i) a Share Capital Dealing by way of a Change in Control occurs due to the transfers of shares or other interests which are listed on a stock exchange; and
- (ii) the consent of the State is required under this Deed but could not have been obtained prior to the Share Capital Dealing, that consent must be sought immediately after the Share Capital Dealing and Project Co must procure that the Controlling Entity ceases to have the Control which resulted in the Change in Control within 60 Business Days after receiving any notice under **Clause 48.7** that the State does not consent to the Change in Control.

#### **48.7 Consent to a Share Capital Dealing**

The State must advise Project Co, within ten Business Days (or such longer period as the State reasonably requests given the nature of the proposed Share Capital Dealing) of receiving Project Co's request for consent in accordance with **Clause 48.4** or **48.6**, that:

- (a) **(consent)**: it consents to the Share Capital Dealing;
- (b) **(unacceptable)**: subject to **Clause 48.5**, the Share Capital Dealing is unacceptable to it and the reasons why the Share Capital Dealing is unacceptable; or
- (c) **(further information)**: it requires further information from Project Co regarding the Share Capital Dealing, in which case Project Co must provide the additional information sought by the State within a further period of ten Business Days, after which the State must respond in terms of **Clause 48.7(a)** or **48.7(b)** within ten Business Days.

#### **48.8 Costs relating to a Share Capital Dealing**

Project Co must pay the State its costs (including legal and financial advisers' fees) reasonably incurred in relation to considering or consenting to a proposed Share Capital Dealing.

#### **48.9 [Not disclosed]**

[Not disclosed].

#### **48.10 Assignment by the State**

- (a) **(Project Co consent required)**: Subject to **Clause 34.7(a)**, the State may not sell, transfer or assign or otherwise dispose of all or any part of its interest in the State Project Documents without the prior consent of Project Co.
- (b) **(No consent required)**: The State may sell, transfer or assign or otherwise dispose of all or any part of its interest in the State Project Documents without Project Co's consent, if:
  - (i) it has provided Project Co with details of the proposed transferee and the terms and conditions of the proposed transfer;
  - (ii) the proposed transferee is an Authority (including any Minister) which is an agent of, or the obligations of which are supported by, the Crown in the right of the state of Western Australia; and
  - (iii) the proposed transferee has agreed to be bound by the relevant State Project Documents.

### **49 FINANCIAL MODEL**

#### **49.1 Provision of the Base Case Financial Model**

Project Co must provide to the State on the date of this Deed Project Co's audited financial model for the Project as at that date in the form and substance approved by the State (**Base Case Financial Model**).

## 49.2 Status of the Financial Model

The State must not be adversely affected by any ambiguities, discrepancies, inconsistencies, conflicts, errors or omissions in the Financial Model, or by the fact that it may not reflect the actual financial performance or the projected performance or budgets of the Project or the Project Entities and is purely a model to be used in order to process Model Variation Events and Termination Payments.

## 49.3 Varying the Financial Model

The Financial Model must be varied in accordance with this **Clause 49** upon the occurrence of any of the following events (each a **Model Variation Event**):

- (a) **(Refinancing)**: a Refinancing;
- (b) **(Change Compensation Event)**: a Change Compensation Event (other than a Modification with a capital cost or Saving of less than \$1,000,000 or an annual operating cost or Saving of \$1,000,000) which results in a permanent adjustment to the Quarterly Service Payment;
- (c) **(Lower value Modification)**: following the end of each Financial Year, to take account of any permanent adjustments to the Quarterly Service Payment due to Modifications with either a capital cost or Saving of less than \$1,000,000 or an annual operating cost or Saving of less than \$1,000,000 occurring in that Financial Year;
- (d) **(Reviewable Services)**: following the price review of a Reviewable Service in accordance with **Clause 32**; or
- (e) **(Agreed Events)**: any other event which Project Co and the State agree to be a Model Variation Event.

## 49.4 Principles for variations to the Financial Model

When a Model Variation Event occurs, the Financial Model will be varied by taking into account only the amounts:

- (a) determined under this Deed;
- (b) agreed between the State and Project Co; or
- (c) determined in accordance with **Clause 43**.

## 49.5 Procedures for variations to the Financial Model

Any variation to the Financial Model to take account of a Model Variation Event must be made as follows:

- (a) **(Project Co Proposal)**: Project Co must propose the variation by notice to the State within 15 Business Days of the Model Variation Event occurring, giving full details of the assumptions and calculations used;
- (b) **(review)**: the review of the varied Financial Model must be undertaken in accordance with **Schedule 12 (Review Procedures)**; and
- (c) **(amendment)**: once the variation to the Financial Model is agreed or is determined in accordance with **Clause 43**, Project Co must promptly amend the Financial Model accordingly.

## 49.6 Access to information

Project Co must provide the State and any other authorised representatives of the State with:

- (a) full access to electronic copies of the varied Financial Model;
- (b) a log of all changes that have been made to the Financial Model;
- (c) all supporting calculations; and
- (d) any other information reasonably requested by the State,

for a Model Variation Event, including reasonable access to any financial modeller (including Project Co's financial modeller) with ability to access that information, and relevant passwords or other access information.

#### 49.7 Auditing the Financial Model

- (a) **(Model auditors):** The State may at any time appoint a model auditor to audit the Financial Model and:
- (i) the results of the audit must be disclosed to both the State and Project Co; and
  - (ii) to the extent any inconsistencies, ambiguity, discrepancy, conflict, error or omission is revealed in the audit by the State, Project Co must promptly correct the Financial Model accordingly.
- (b) **(Costs):** If an audit by the State results in a correction to the Financial Model, Project Co must pay the reasonable costs of the State in conducting the audit, but, if not, the State must bear the costs of the audit.

## 50 RECORDS AND ACCOUNTS

### 50.1 Accounting records

- (a) **(Proper books of account):** Project Co must keep proper books of account and all other records (**Accounts and Records**) it has relating to the Project at its offices, and must ensure that each other Group Member, the D&C Subcontractor (during the Development Phase for each Stage) and the Services Subcontractor (during the Operating Phase for each Stage) does likewise.
- (b) **(Annual audit):** Project Co must have its accounts audited annually on both an unconsolidated basis and on a consolidated basis (to the extent that Project Co is part of a consolidated Entity, within the meaning of the Corporations Act) and must ensure that each other Group Member, the D&C Subcontractor (during the Development Phase for each Stage), and the Services Subcontractor (during the Operating Phase for each Stage) does likewise in respect of its consolidated accounts. The Services Subcontractor does not produce its accounts on an unconsolidated basis, but will provide accounts on a consolidated basis.
- (c) **(Accounting principles):** Project Co must ensure that its Accounts and Records are prepared in accordance with the Corporations Act and generally accepted Australian accounting principles and practices consistently applied, and fairly represent its operations and financial condition or consolidated financial position (as the case may be).
- (d) **(Availability of accounting records):** Project Co must ensure that its Accounts and Records are available to the State and any person authorised by the State at any time during Business Hours (subject to receiving two Business Days' notice from the State) during the Term for examination, audit, inspection, transcription and copying, and must ensure that each other Group Member does likewise.
- (e) **(Availability of accounting records if Deed is terminated):** Without limiting its obligations in accordance with **Clause 33**, if this Deed is terminated, Project Co must give to the State and State Associates access to all of its Accounts and Records which are necessary for the carrying out of the Project Activities, and must ensure that each other Group Member does likewise.
- (f) **(Access to Group Members' accounting records):** The State must give Project Co access to any Accounts and Records given to it by a Group Member for a period of seven years after the date they are given.

### 50.2 Cost to complete information

Project Co must give to the State (or procure that a Group Member provide to the State) the same information required to be given to any Financier in accordance with the Finance

Documents in relation to the costs to complete construction of the Works, at such times as are required in accordance with the Finance Documents, and must ensure that each other Group Member does likewise.

### 50.3 Financial statements

- (a) **(Audited financial statements)**: As soon as practicable (and in any event not later than 120 days) after the close of each Financial Year, Project Co must give to the State certified copies of the consolidated (if applicable) and unconsolidated audited financial statements for the previous Financial Year for Project Co and each Group Member and, if requested by the State, the D&C Subcontractor (during the Development Phase for each Stage) and the Services Subcontractor (during the Operating Phase for each Stage).
- (b) **(Cash flow and profit and loss statements)**: Not later than 30 days after the end of each Quarter, Project Co must give to the State certified copies of cash flow and profit and loss statements, and must ensure that each other Group Member does likewise.

### 50.4 Other information

Project Co must give to the State the following information:

- (a) **(copies)**: copies of all documents or information given or received by any Group Member to or from the Australian Securities & Investments Commission or Australian Stock Exchange Limited, promptly after the information is first given or received;
- (b) **(counterparty changes)**: details of any changes to the Counterparty Details within 20 Business Days after the change; and
- (c) **(other information)**: such other information relating to the Project as the State may reasonably require from time to time.

### 50.5 Project Co Material

Without limiting its other obligations under the State Project Documents, Project Co must maintain a document management system during the Operating Phase for all Project Co Material and Project Information that:

- (a) is safe, secure and compatible with the Department's document management systems;
- (b) enables the State and State Associates (including, for the purposes of **Clause 33**, any nominee) to quickly and easily retrieve, review and utilise the Project Co Material;
- (c) tracks the distribution of all Project Co Material and Project Information to any Project Co Associates; and
- (d) is in accordance with the standards under the *State Records Act 2000* (WA).

## 51 INTELLECTUAL PROPERTY RIGHTS

### 51.1 Warranties

Project Co warrants to the State that:

- (a) **(No infringement of rights)**: no Intellectual Property Rights or Moral Rights or other rights of any person will be infringed or breached:
  - (i) in undertaking the Project Activities; or
  - (ii) by:
    - (A) the Use of any Developed IP; or
    - (B) the Use of any other Project Co Material or the Relevant Infrastructure as permitted or contemplated by this Deed,

by the State, its State Associates or any person nominated or authorised by the State; and

- (b) **(ownership of rights):** it owns all Intellectual Property Rights in the Project Co Material or, to the extent that it does not, it has the authority to grant the assignments and licences in this **Clause 51** and none of:
- (i) the Use of any Developed IP by the State, State Associates or any person nominated or authorised by the State;
  - (ii) the Use of any other Project Co Material or the Relevant Infrastructure by the State, State Associates or any person nominated or authorised by the State as permitted or contemplated by this Deed; or
  - (iii) the possession of any such Material,

will give rise to any Liability on the part of the State, State Associates or any person nominated or authorised by the State, including to pay any compensation (including any royalty) to any person, or give rise to a right entitling any person to make a Claim against the State, State Associates or any person nominated or authorised by the State for any attribution or acknowledgment or rectification in relation to the Developed IP or other Project Co Materials.

## 51.2 Background IP

- (a) Project Co acknowledges and agrees that the State, State Associates or their respective head licensors, as the case may be, are and remain the owner of all State Background IP. Neither Project Co nor any Project Co Associate has (under this Deed or otherwise) any title, entitlement to or rights in relation any State Background IP or the Intellectual Property Rights in any State Background IP except to the extent provided in this **Clause 51**.
- (b) The State acknowledges and agrees that Project Co, Project Co Associates or their respective head licensors is and remains the owner of all Project Co Background IP. Neither the State nor any State Associate has (under this Deed or otherwise) any title, entitlement to or rights in relation any Project Co Background IP or the Intellectual Property Rights in any Project Co Background IP except to the extent provided in this **Clause 51**.

## 51.3 Developed IP

- (a) All rights (including Intellectual Property Rights) in the Developed IP vest in the State at the time of its creation and at each and every stage of its development as Developed IP, and Project Co irrevocably assigns to the State all right, title and interest (including Intellectual Property Rights) in all Developed IP with effect from the time of creation, development or production of that Developed IP.
- (b) Project Co must ensure, where necessary, that it secures the right to effect such vesting and shall do all such things and sign such documents (and cause Project Co Associates to also do so if and when required) to ensure that all Developed IP is assigned to the State, including as the State may require from time to time in order to perfect or record the assignments under **Clause 51.3(a)**.
- (c) The State grants to Project Co a non-exclusive, royalty-free, non-transferable, worldwide licence to use the Developed IP:
- (i) for the purposes of carrying out the Project Activities; and
  - (ii) for any other purpose provided that:
    - (A) no Personal Information is disclosed; and
    - (B) the State has given its prior consent, which consent must not be unreasonably withheld where the Developed IP does not disclose the identity of the Project.

- (d) The licence granted to Project Co under **Clause 51.3(c)** includes the right on the part of Project Co to grant a sub-licence to each Project Co Associate engaged in the performance of the Project Activities on the terms referred to in **Clause 51.3(c)**.

#### 51.4 Project Co licence for Project Co Background IP

Project Co:

- (a) hereby grants to the State and State Associates;
- (b) without limiting Project Co's obligations under **Clause 51.9**, must procure that each Project Co Associate legally entitled to do so grants to the State and each State Associates (with effect from the date the relevant Material comes into existence); and
- (c) must do all things necessary to give effect to the grant to the State and each State Associate,

a world-wide, perpetual, irrevocable, non-exclusive, transferable, royalty-free licence (including the right to sub-license) to Use the Project Co Background IP for the purposes of any of:

- (d) the Project (including, where this Deed is terminated or there is Partial Termination in accordance with **Clause 42**, to complete any Project Activities which have not been carried out, or carried out in accordance with the applicable State Project Documents, as at the date of termination);
- (e) the exercise of the rights of the State or State Associates in accordance with the State Project Documents; or
- (f) the operation, maintenance, rebuilding, repair and alteration of the Relevant Infrastructure on and from the Expiry Date or on and from the date of Partial Termination.

#### 51.5 Third Party Materials

- (a) Notwithstanding this **Clause 51**, to the extent that any item of Project Co Material is commercially available off-the-shelf third party software, the obligation of Project Co is to (at the State's option):
- (i) license that item of Project Co Material to the State and the State Associates, if Project Co is legally able to do so, and on the terms of the licence granted to Project Co or Project Co Associates by the third party licensor (and Project Co must use all reasonable endeavours to procure the consent of that licensor to grant that licence to the State and the State Associates); or
- (ii) procure (at the State's cost) a licence of that item of Project Co Material from the third party licensor to the State and the State Associates on terms approved by the State.
- (b) If, despite using all reasonable endeavours to do so, Project Co is unable to license (or, if applicable, procure a licence of) any Project Co Material owned by a third party to the State and the State Associates, as required under **Clause 51.5(a)**, Project Co must consult with the State and do all things reasonably necessary to obtain for the State's benefit such rights or arrangements as the State requires for any purpose under, or contemplated by any State Project Document or for the Relevant Infrastructure and its use or the Project more generally.

#### 51.6 Project Co Material and Relevant Infrastructure

Without limiting Project Co's other obligations under this Deed with respect to the delivery of any Project Co Material or the Relevant Infrastructure, Project Co will provide all documentation, information and assistance and materials as the State may from time to time reasonably require in connection with the Use of any of the Project Co Material and the Relevant Infrastructure.

## 51.7 Use of State Background IP

- (a) The State grants to Project Co and Project Co Associates a non-transferable, non-exclusive, royalty-free licence to Use the State Background IP, but only to the extent necessary to carry out the Project Activities, which licence will terminate automatically on the Expiry Date.
- (b) The licence granted by the State under **Clause 51.7(a)** is not sub-licensable to any third party save where such third party is a Project Co Associate and is undertaking Project Activities.
- (c) At the request of the State, Project Co must immediately deliver the original and all copies of State Background IP to the State.

## 51.8 Indemnities

- (a) **(Intellectual Property Rights, Moral Rights or other rights):** Project Co must indemnify the State and State Associates and the State's respective sub-licensees **(Indemnified Persons)** against any Claim or Liability suffered or incurred by the Indemnified Persons arising in connection with any infringement, violation, alleged infringement or alleged violation by any Indemnified Person of any Intellectual Property Rights, Moral Rights or other rights of any person in connection with:
  - (i) delivery of the Project;
  - (ii) any Use of Developed IP by the State, the State Associates or any person nominated or authorised by the State;
  - (iii) any Use of Developed IP by or on behalf of Project Co as referred to in **Clause 51.3(c)**;
  - (iv) any Use of other Project Co Material or the Relevant Infrastructure as delivered by or on behalf of Project Co to the State or as modified by Project Co; or
  - (v) any other Use of other Project Co Material or the Relevant Infrastructure by the State, the State Associates or any person nominated or authorised by the State as permitted or contemplated by this Deed.
- (b) **(Project Co obligations to replace, modify or obtain new licence):** If a Claim referred to in **Clause 51.8(a)** substantially interferes with the Indemnified Persons' Use of any Developed IP or other Project Co Material or the Relevant Infrastructure, Project Co will (at the State's option, and without limiting any of the State's other rights under any State Project Document, any Approval or at Law):
  - (i) replace the Developed IP or other Project Co Material or the Relevant Infrastructure, with a non-infringing product or service of at least equivalent functionality and performance, and which otherwise meets all relevant requirements for that Project Co Material or the Relevant Infrastructure in accordance with the Project Documents;
  - (ii) without additional charge, modify the Developed IP, other Project Co Material or the Relevant Infrastructure to overcome the infringement without materially impeding functionality or performance or rendering it non-compliant with any relevant requirements for that Material or the Relevant Infrastructure in accordance with the Project Documents; or
  - (iii) obtain a licence for the Indemnified Persons to continue use and enjoyment of the Developed IP, other Project Co Material or the Relevant Infrastructure and pay any additional fee required for such licence.
- (c) **(No limitation):** Neither the State's rights nor Project Co's Liabilities or obligations, whether under this Deed or otherwise according to Law, in connection with Intellectual Property Rights, will be limited by the terms of this **Clause 51.8**.

## 51.9 Moral Rights

Project Co must, unless otherwise agreed with the State in relation to a particular case, procure from every person who is an author for the purposes of Part IX of the *Copyright Act 1968* (Cth) of Material forming part of the Project Co Material, a written consent which is valid and effective under the *Copyright Act 1968* (Cth) and signed by that person by which that person irrevocably and unconditionally consents to the State, the State Associates, any person nominated or authorised by the State (including sub-licensees), Project Co and Project Co Associates (**Beneficiaries**):

- (a) (**exercise of rights**): using, disclosing, reproducing, transmitting, exhibiting, communicating, adapting, publishing or otherwise exercising its rights in relation to the Material anywhere in the world in whatever form any of the Beneficiaries thinks fit, including the making of any distortions, additions or alterations to the Material or any adaptation thereof, or to any part of the Material in a manner which, but for the consent, infringes or may infringe that person's Moral Rights in the Material; and
- (b) (**no identification**): taking any action referred to in **Clause 51.9(a)** without making any identification of the author of the Material.

## 52 CONFIDENTIAL INFORMATION AND DISCLOSURE

### 52.1 Confidential Information and disclosure by the State

- (a) (**Public Disclosure Obligations**): The State or any Authority may disclose any information in connection with the Project (including any Confidential Information):
  - (i) in accordance with all Laws or Approvals;
  - (ii) to the Auditor General of Western Australia for the purposes of satisfying its statutory duties;
  - (iii) to satisfy the requirements of parliamentary accountability;
  - (iv) where the disclosure is in the course of the official duties of the Department, the Minister or the Director General;
  - (v) to any State Associate or State Entity to the extent necessary for the purpose of undertaking the Project provided they agree to maintaining the confidentiality of the Confidential Information;
  - (vi) in annual reports of the State;
  - (vii) in accordance with policies of the State or any Authority; or
  - (viii) to satisfy any other recognised public requirement,

(**Public Disclosure Obligations**) and Project Co must use all reasonable endeavours to assist the State or an Authority in meeting its Public Disclosure Obligations.
- (b) (**State's rights**): Subject to **Clause 52.1(c)**, in meeting its Public Disclosure Obligations or as otherwise considered necessary by the State in connection with the Project, the State may publish, disclose or make generally available each Project Document on a Western Australian government website.
- (c) (**Commercially sensitive information**): The State will not publish or disclose on any Western Australian government website the information which is specified in **Schedule 14 (Confidential Information)** (including the Financial Model), except if required to do so to comply with the Public Disclosure Obligations under **Clauses 52.1(a)(i), 52.1(a)(ii), 52.1(a)(iv), 52.1(a)(v), or 52.1(a)(viii)**.
- (d) (**Exercise of Licence**): Nothing in this Deed prevents the State and any sub-licensees using or disclosing any information (including Confidential Information) to the extent necessary or desirable for, or in connection with, the exercise of any licence granted under **Clause 51**.



## 52.2 Confidential Information and disclosure by Project Co

- (a) **(Confidentiality obligation):** Subject to **Clauses 52.2(b)** and **58.10**, Project Co must treat as secret and confidential all Confidential Information.
- (b) **(Disclosure of Confidential Information):** Without limiting Project Co's obligation under **Clause 52.2(a)** and subject to **Clause 52.2(c)**, Project Co may disclose Confidential Information to:
  - (i) Project Co Associates to the extent necessary for the purpose of undertaking the Project;
  - (ii) any Financier, prospective financier or Equity Investor in relation to the Project, subject to the State having been provided necessary information in respect of the proposed parties and having carried out any Probity Investigation that the State considers necessary; or
  - (iii) to the extent necessary to facilitate a transaction described in **Clause 48.9(c)** or **Clause 48.9(d)**.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, Project Co must ensure that the person to whom the information is disclosed enters into a confidentiality deed with Project Co on terms reasonably acceptable to the State.

## 52.3 Disclosure by Project Co

- (a) **(Project Co's disclosure obligations):** Subject to **Clause 52.3(b)**, Project Co must:
  - (i) not make any public disclosures, announcements or statements in relation to the Project or the State's or any of the State Associates' involvement in the Project, without the State's prior consent;
  - (ii) comply with any terms and conditions the State imposes and must use all reasonable endeavours to agree with the State the wording and timing of all public disclosures, announcements or statements by it or any of the State Associates relating to the Project or the State's or any of the State Associates' involvement in the Project before the relevant disclosure, announcement or statement is made; and
  - (iii) as soon as practicable, give to the State a copy of any public disclosure, announcement or statement agreed to or approved by the State in accordance with this **Clause 52.3(a)** or for which the State's consent or approval was not required in accordance with **Clause 52.3(b)**.
- (b) **(Permitted disclosure):** For the purposes of **Clause 52.3(a)**, Project Co will not be required to obtain the State's consent or approval to the extent that any disclosure, announcement or statement is:
  - (i) required by Law, provided that it:
    - (A) notifies the State of the requirement to make that disclosure; and
    - (B) takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
  - (ii) required to obtain legal or other advice from its advisers;
  - (iii) required to be made to a court in the course of proceedings to which Project Co is a party; or
  - (iv) required by a relevant stock exchange, subject to:
    - (A) such disclosure, announcement or statement not referring to the State's or the State Associates' involvement in the Project; and

- (B) Project Co having used all reasonable endeavours to obtain the State's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant stock exchange.

## 53 PRIVACY

- (a) Project Co must comply with:
- (i) its obligations (if any) under, or arising pursuant to, the *Privacy Act 1988* (Cth) to the extent relevant to this Deed;
  - (ii) any directions made by a Privacy Commissioner relevant to this Deed; and
  - (iii) any other reasonable direction relating to privacy which is given by the State or the Services Subcontractor.
- (b) If Project Co is exempt from compliance with the *Privacy Act 1988* (Cth), and if Project Co is not subject to an approved privacy code, Project Co must comply with the National Privacy Principles and, when enacted, the Australian Privacy Principles, set out in the *Privacy Act 1988* (Cth) as if it were required to comply with that legislation.

## 54 TAXES

### 54.1 GST General

- (a) **(Amount payable):** Notwithstanding any other provision of this Deed, any amount payable for a supply made under or in connection with this Deed which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any Input Tax Credits which that party is entitled to in connection with that cost, expense or other amount.
- (b) **(GST payable by Supplier):** If GST becomes payable on any Taxable Supply made by a party (**Supplier**) under or in connection with this Deed:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Deed for that supply (**Agreed Amount**) is exclusive of GST;
  - (ii) an additional amount will be payable by the party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable:
    - (A) in respect of a payment to which **Clause 54.1(h)** applies, at the time specified in **Clause 54.1(h)**; or
    - (B) in any other case, at the same time and in the same manner as for the Agreed Amount; and
  - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Deed or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided under this Deed. The Recipient is not obliged to pay any amount in accordance with this **Clause 54.1(b)** unless and until a Tax Invoice is received by the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.
- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under **Clause 54.1(b)** in connection with that supply, the Supplier will provide a refund or credit to, or will be entitled to receive from, the Recipient (as appropriate) the

amount of this variation. Where an adjustment event occurs in relation to a supply, and except where the Recipient is required to issue an adjustment note:

- (i) the Supplier will issue an adjustment note to the Recipient in connection with that supply within 14 days after becoming aware of that adjustment event occurring; and
  - (ii) no additional amount will be payable by the Recipient unless and until an adjustment note is received by the Recipient.
- (d) **(GST ceasing to be payable):** No amount is payable by a party in accordance with **Clause 54.1(b)** or **54.1(c)** to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier by the Commissioner of Taxation under the GST Law.
- (e) **(Revenue net of GST):** Any reference in this Deed or any Project Document to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (f) **(Cost net of GST):** Any reference in this Deed or any Project Document to cost, expense, Liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (g) **(General obligation):** Each party agrees to do all things, including providing Tax Invoices and other documentation, that may be necessary or desirable to enable or assist the other party in determining its GST payable on any supply made by that other party in connection with this Deed, or any Input Tax Credits, adjustments or refunds in relation to any amount of GST paid or payable in connection with any supply made in connection with this Deed.
- (h) **(Construction Payment):** Notwithstanding any other provision of this **Clause 54.1**:
- (i) the parties agree that the State will not bear any net costs (including funding costs arising from timing differences) in respect of GST payable on any Taxable Supply or Input Tax Credit in respect of any Creditable Acquisition to which a Construction Payment or a Securitised Modification Payment relates;
  - (ii) the parties will use their reasonable endeavours to obtain and implement an agreement by the Commissioner of Taxation to offset, in the parties' running balance accounts, Project Co's liability to pay GST on the Taxable Supplies to which Construction Payments or a Securitised Modification Payment relate and the State's entitlement to Input Tax Credits for any Creditable Acquisition to which Construction Payments or a Securitised Modification Payment relate. The setting off by the Commissioner of Taxation of these amounts in the parties' running balance accounts will be taken to satisfy any obligation of the State to pay to Project Co an amount in respect of GST on the relevant Taxable Supply (whether or not the amount set-off is equal to the whole of that GST);
  - (iii) Project Co must, on or before a Construction Payment Date or an Additional Purchase Date (as applicable), issue the State a Tax Invoice for any Taxable Supply to which the relevant Construction Payment or Securitised Modification Payment relates;
  - (iv) to the extent that an agreement to offset is not obtained with the Commissioner of Taxation under **Clause 54.1(h)(ii)**, the State is not required to make a payment to Project Co in respect of GST in respect of a Supply to which a Construction Payment or a Securitised Modification Payment relates on a Construction Payment Date or Additional Purchase Date (as applicable) until it has received the benefit of an Input Tax Credit for such GST (by the Input Tax Credit being offset against a GST or other

- tax liability, credited to the State's running balance account, being refunded to the State or a combination of the above);
- (v) if the State is denied an Input Tax Credit by the Commissioner of Taxation, Australian Taxation Office, a Court or other appropriate Authority for all or part of the GST in respect of a Construction Payment or a Securitised Modification Payment, Project Co must reimburse the State for any part of the relevant GST amount it has paid to Project Co in excess of the State's Input Tax Credit entitlement and indemnify the State for an amount equal to any penalty or interest as a result of claiming an Input Tax Credit for the whole of the GST on that Construction Payment or Securitised Modification Payment (as applicable);
  - (vi) if **Clause 54.1(h)(v)** applies, the State will cooperate with Project Co as reasonably required by Project Co to enable the State and Project Co to discuss with the Australian Taxation Office the reasons for the denial of an Input Tax Credit and will take reasonable steps, as reasonably directed by Project Co, to dispute the denial (provided that the obligation to dispute is not a condition precedent to the operation of **Clause 54.1(h)(v)**). Project Co indemnifies the State for its costs incurred in disputing any denial of an Input Tax Credit;
  - (vii) if as a result of **Clause 54.1(h)(vi)** the State's entitlement to an Input Tax Credit is increased, the State will promptly pay to Project Co an amount equal to that increase together with any interest to which the State is entitled in relation to that amount;
  - (viii) the State must take all reasonable steps to ensure it (or the State entity that is treated as making the supplies and acquisitions under the State Project Documents for GST purposes) receives the benefit of the Input Tax Credit from the Australian Taxation Office as quickly as possible, including:
    - (A) claiming the Input Tax Credit in the "Business Activity Statement" for the Tax Period to which the Input Tax Credit is attributable;
    - (B) lodging the Business Activity Statement in which the Input Tax Credit is reported no later than the due date for that Business Activity Statement;
    - (C) forwarding any queries or correspondence from the Commissioner of Taxation in respect of that Business Activity Statement (but only to the extent that the queries or correspondence relates to the relevant Input Tax Credit) to Project Co; and
    - (D) promptly informing Project Co of any delays or other related issues in respect of the Input Tax Credit;
  - (ix) if at any time this Deed is terminated, the obligation of the State to pay Project Co any amount in accordance with **Clause 54.1(h)(iv)** continues in full force and effect and is an obligation separate, independent and additional to the State's obligation to make a termination payment in accordance with **Clause 41.7**. Notwithstanding the termination of this Deed, the State is obliged to use reasonable endeavours to obtain the Input Tax Credit and to pay to Project Co each amount in accordance with **Clause 54.1(h)(iv)**; and
  - (x) if at any time this Deed is terminated, the obligation of Project Co to pay the State any amount in accordance with **Clause 54.1(h)(v)** continues in full force and effect.
- (i) **(GST Groups):** For the purposes of this Deed, a reference to GST payable on a Taxable Supply made by a party includes any corresponding GST payable by the

representative member of any GST group of which that party is a member and a reference to an Input Tax Credit entitlement of a party includes any corresponding Input Tax Credit entitlement of the representative member of any GST group of which that party is a member.

- (j) **(Project Deed to prevail):** If, but for this **Clause 54.1(j)**, a GST clause in another Project Document would apply in connection with a Taxable Supply to which this **Clause 54.1** also applies, then this **Clause 54.1** will apply in connection with that supply and the GST clause in the other Project Document will not apply.

## 54.2 General Liability for Taxes

- (a) **(Payment):** As between the State and Project Co, the State bears the risk of, and must pay, all Rates and Taxes incurred or imposed in connection only with each of the Sites except to the extent that Project Co caused or causes any such Rates or Taxes to be assessed by or as a result of a Project Co Act or Omission, other than an act or omission expressly permitted by this Deed.
- (b) Subject only to **Clause 54.2(a)**, and as provided in **Clause 54.1**, Project Co must pay all Rates and Taxes in respect of:
- (i) delivery of the Project;
  - (ii) payments, income or net income received or receivable by any Group Member;
  - (iii) the execution, stamping and registration of any Project Document;
  - (iv) the performance of any Project Document and each transaction effected by or made under or in connection with any Project Document, including the Project Activities;
  - (v) any amendment to, or any consent, approval, waiver, release, surrender or discharge of or under any Project Document; and
  - (vi) any transaction, assignment, transfer or other dealing by or in relation to a Group Member (including dealings in the shares or other interests in a Group Member), whether or not related to the Project or the Project Documents, including in connection with a Change in Control and any Refinancing.
- (c) **(Indemnity):** Project Co must indemnify the State against any Claim or Liability arising in connection with the Rates and Taxes which Project Co is required to pay in accordance with **Clause 54.2(b)**.

## 55 PROBITY EVENTS AND DISCIPLINARY EVENTS

### 55.1 Probity Event

- (a) **(Notice):** Project Co must give notice to the State immediately upon becoming aware that a Probity Event has or may have occurred or is likely to occur. The notice must at a minimum describe the Probity Event, when the Probity Event occurred or is likely to occur and the circumstances giving rise to the Probity Event.
- (b) **(Meeting):** Within ten Business Days of receipt of a notice under **Clause 55.1(a)** or otherwise upon the occurrence of a Probity Event:
- (i) the State and Project Co will meet to agree a course of action to remedy or otherwise address the Probity Event and the timeframe in which that will occur; and
  - (ii) Project Co must comply with any agreement made in accordance with **Clause 55.1(b)(i)** in accordance with the timeframe agreed.
- (c) **(Failure to agree):** If the State and Project Co fail to agree to a course of action in accordance with **Clause 55.1(b)**, Project Co must take any action as required by the State to remedy or otherwise address the Probity Event immediately in accordance with any timeframe determined by the State.

## 55.2 Probity Investigation

- (a) **(Requirement for Probity Investigation):** Without limiting the State's rights or powers provided by Law, Project Co agrees that the State may, or may require that Project Co, conduct a Probity Investigation in respect of a Relevant Person or a Subcontractor or a Consortium Member or any person who is proposed to become a Relevant Person, a Subcontractor or a Consortium Member.
- (b) **(Consents required for Probity Investigation):** Project Co must procure all consents necessary to enable Project Co or the State to conduct any Probity Investigation.
- (c) **(Costs of Probity Investigation):** Project Co will be liable for the State's costs of conducting a Probity Investigation in respect of a Probity Event, otherwise each party will bear its own costs of a Probity Investigation.
- (d) **(Cooperation):** Project Co must fully cooperate with, and ensure that all Relevant Persons fully cooperate with, the State in any Probity Investigation.

## 55.3 Notification of appointments of Relevant Persons

Project Co must:

- (a) in respect of a person:
  - (i) described in **paragraphs (a) or (b)(i)** of the definition of Relevant Person; or
  - (ii) to be engaged as Caretaker in respect of a Site,
 advise the State at least 20 Business Days prior to the proposed appointment of that Relevant Person; and
- (b) in respect of any other Relevant Person, advise the State as soon as practicable of the proposed appointment of the Relevant Person.

## 55.4 Checks and notifications

- (a) **(National Police History Check):** Project Co:
  - (i) subject to **Clauses 55.4(a)(ii) and 55.4(c)** must obtain a National Police History Check for all Relevant Persons who carry out Project Activities on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site prior to them commencing such Project Activities, or recommencing such Project Activities after a break of six Months or more;
  - (ii) is not obliged to obtain a National Police History Check for a Relevant Person pursuant to **Clause 55.4(a)(i)** if that Relevant Person has previously had a National Police History Check which is dated no more than six Months before the date on which the Relevant Person will commence the Project Activities;
  - (iii) without limiting **Clause 55.4(a)(iv)**, must obtain an updated National Police History Check for any Relevant Person who carries out Project Activities on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site every three years throughout the Term for so long as any such Relevant Person continues to carry out such Project Activities;
  - (iv) if requested by the State, must obtain a further National Police History Check for any Relevant Person from time to time throughout the Term; and
  - (v) must supply evidence to that effect to the State if requested by the State.
- (b) **(Working with children):** Project Co must:

- (i) prior to allowing any Relevant Person to do any Child Related Work on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site, ensure that the Relevant Person has applied for or been issued with an assessment notice in accordance with the *Working with Children (Criminal Record Checking) Act 2004 (WA)*;
- (ii) ensure that a Relevant Person who does any Child Related Work on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site, continues to hold an assessment notice, and has not been issued a negative notice or an interim negative notice, in accordance with the *Working with Children (Criminal Record Checking) Act 2004 (WA)*; and
- (iii) must supply evidence to that effect to the State.

For the purposes of this **Clause 55.4**, any Project Activities carried out on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site, will be considered to be Child Related Work.

- (c) **(Criminal Record Check)**: For a School Facility with two Stages, one Stage of which is in the Operating Phase and the other Stage of which is in the Development Phase, Project Co:
  - (i) subject to **Clauses 55.4(c)(ii)** and **55.4(d)**, must obtain a Criminal Record Check for all Relevant Persons who carry out Project Activities on or in the vicinity of a Site during the Development Phase of the Stage located at that Site, prior to them commencing such Project Activities;
  - (ii) is not obliged to obtain a Criminal Record Check for a Relevant Person pursuant to **Clause 55.4(c)(i)** if that Relevant Person has previously had a National Police History Check pursuant to **Clause 55.4(a)(i)** or a Criminal Record Check which is dated no more than 2 years before the date on which the Relevant Person will commence the Project Activities; and
  - (iii) must supply evidence to that effect to the State if requested by the State.
- (d) **(Ad-Hoc Basis)**: Project Co is not obliged to obtain a National Police History Check for a Relevant Person pursuant to **Clause 55.4(a)(i)** or a Criminal Record Check for a Relevant Person pursuant to **Clause 55.4(c)(i)** if:
  - (i) the Relevant Person will only carry out Project Activities on or in the vicinity of a Site on an Ad-Hoc Basis;
  - (ii) the Principal for the School Facility at that Site has given Project Co his or her prior consent to the Relevant Person carrying out the Project Activities; and
  - (iii) Project Co complies with any conditions of the Principal's consent.
- (e) **(Uncleared Personnel)**: If:
  - (i) Project Co does not obtain a National Police History Check for a Relevant Person in accordance with **Clause 55.4(a)** or does not supply evidence to that effect to the State if requested by the State, or the State, acting reasonably, has concerns in relation to the results of a National Police History Check obtained for a Relevant Person;
  - (ii) any Relevant Person referred to in **Clause 55.4(b)(i)** has not applied for or does not hold an assessment notice in accordance with the *Working with Children (Criminal Record Checking) Act 2004 (WA)*, does not supply evidence to that effect to the State or has been issued a negative notice or an interim negative notice; or
  - (iii) Project Co does not obtain a Criminal Record Check for a Relevant Person in accordance with **Clause 55.4(c)** or does not supply evidence to that effect to the State if requested by the State, or the State, acting

reasonably, has concerns in relation to the results of a Criminal Record Check obtained for a Relevant Person,

then Project Co must not, except to the extent expressly authorised by the State, permit the Relevant Person (**Uncleared Personnel**) to undertake any Project Activities on or in the vicinity of a Site during the Operating Phase of the Stage located at that Site.

- (f) **(Ongoing notification)**: Without limiting Project Co's obligations under **Clause 55.1(a)**, Project Co must notify the State without delay of any:
- (i) actual or suspected Disciplinary Event in respect of a Relevant Person; or
  - (ii) other behaviour by any Relevant Person, or of any other complaints or circumstances, of which Project Co or its Subcontractors are aware or should have reasonably been aware that may cast doubt on that Relevant Person's fitness to be involved in with the Project.
- (g) **(State rights)**: Without limiting **Clause 55.5**, and the State's rights or powers provided by Law, if the State:
- (i) considers or suspects that a Disciplinary Event has occurred in respect of a Relevant Person; or
  - (ii) considers or suspects that any Relevant Person:
    - (A) is or becomes incapable of efficiently performing his or her duties;
    - (B) is or becomes a person whom it would not be in the public interest for Project Co to engage or be associated with;
    - (C) has, or becomes likely to have, a criminal history; or
    - (D) is not, or becomes a person who is not, in the State's opinion, suitable to be involved in providing any of the Project Activities,

the State may give notice to Project Co and Project Co must without delay remove such person from the performance of any of the Project Activities and from any Site or the vicinity of any Site and not allow such person to re-enter any of the Sites. The State has no obligation to disclose to Project Co the reasons for a decision made under this **Clause 55.4(g)**.

## 55.5 Unsuitable Third Parties

- (a) **(Notice)**: If Project Co is aware or should have reasonably been aware that an Unsuitable Third Party is engaged in the delivery of the Services or is on or in the vicinity of a Site, it must:
- (i) promptly notify the State;
  - (ii) take all reasonably necessary steps to protect Students and all other persons on or in the vicinity of a Site from harm;
  - (iii) procure the removal of the Unsuitable Third Party from the Site or the vicinity of the Site without delay provided that if there is an unacceptable risk to the physical safety of people to do so, Project Co must without delay request immediate police assistance; and
  - (iv) comply with any reasonable direction of the State with respect to the Unsuitable Third Party.
- (b) **(Removal)**: Without limiting **Clause 55.5(a)**, if the Unsuitable Third Party is a:
- (i) Project Co Associate;
  - (ii) Relevant Person; or



- (iii) person at a Site or in the vicinity of a Site at the invitation of Project Co or a Subcontractor and under the control of Project Co or a Subcontractor (excluding any person that falls within the definition of User),

Project Co must ensure that such person is without delay (and in any event, within 60 minutes from the time that Project Co or its Subcontractors became aware or should have reasonably become aware of the presence of the Unsuitable Third Party):

- (iv) removed from the performance of any of the Project Activities; and
- (v) removed from the Site or the vicinity of the Site, and not permitted to re-enter or access, any Site.

If there is an unacceptable risk to the physical safety of people from removing such a person from a Site or the vicinity of a Site as otherwise required by this **Clause 55.5(b)**, Project Co must without delay request immediate police assistance and otherwise demonstrate to the reasonable satisfaction of the State that Project Co and its Subcontractors have taken all necessary steps to diligently pursue the removal of such a person as soon as possible having regard to the unacceptable risk to the physical safety of people.

## 56 NOTICES AND BAR TO CLAIMS

### 56.1 Notices

All communications (including approvals, consents, directions, requirements, requests, Claims, notices, agreements and demands) in connection with this Deed:

- (a) **(in writing)**: must be in writing;
- (b) **(addressed)**: must be addressed as set out in **Schedule 1 (Contract Particulars)** (as the case may be);
- (c) **(signed)**: must, unless the parties otherwise agree, be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in **Schedule 1 (Contract Particulars)**; and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in **Schedule 1 (Contract Particulars)**:
  - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
  - (ii) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia and on the fifth Business Day after the date of posting by airmail to an address outside Australia; and
  - (iii) in the case of email, the first to occur of:
    - (A) receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
    - (B) the time that the communication enters an information system which is under the control of the addressee; or
    - (C) the time that the communication is first opened or read by the addressee,

unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day.

## 56.2 Notices of Claims

Subject to any other provisions of this Deed which contain specific notice requirements, the State and State Associates will not be liable upon any Claim that Project Co is entitled to make against the State or State Associates under any State Project Document or otherwise arising in connection with the Project Documents, the Relevant Infrastructure or the Project unless Project Co gives the State the notices required by **Clause 56.3** and, if applicable, **Clause 56.4**.

## 56.3 Prescribed notices

The required notices referred to in **Clause 56.2** are:

- (a) **(intention to submit Claim)**: a notice from Project Co in which Project Co states that it intends to submit a Claim and identifies the event on which the Claim will be based and which must be given to the State within 20 Business Days of when Project Co or the Consortium Members first became aware of the event on which the Claim is based; and
- (b) **(Claim)**: a written Claim by Project Co to be given to the State within 60 Business Days of giving notice under **Clause 56.3(a)**, which must include:
  - (i) detailed particulars concerning the event on which the Claim is based;
  - (ii) the legal basis for the Claim, whether based on a term of the State Project Documents or otherwise, and if based on a term of the State Project Documents, clearly identifying the specific term;
  - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
  - (iv) details of the amount claimed and how it has been calculated.

## 56.4 Continuing events

If the event upon which the Claim under **Clause 56.3(b)** is based is continuing, or the consequences of that event are continuing, Project Co must continue to give information required by **Clause 56.3(b)** every 20 Business Days after the Claim under **Clause 56.3(b)** was submitted (unless otherwise directed by the State), until after the event or consequences of the event have ceased.

## 56.5 Notice to Financiers

The State may provide to the Financiers a copy of any notice from:

- (a) Project Co to the State; or
- (b) the State to Project Co,

in connection with the State Project Documents or the Project.

## 57 MISCELLANEOUS

### 57.1 Governing Law and jurisdiction

- (a) **(Governing Law)**: This Deed is governed by, and must be construed according to, the Laws of Western Australia, Australia.
- (b) **(Jurisdiction)**: Without limiting **Clause 43**, each party irrevocably submits to the non-exclusive jurisdiction of the courts of Western Australia, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed.

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## 57.2 Entire agreement

To the extent permitted by Law and in relation to their subject matter, this Deed and the other State Project Documents:

- (a) **(entire understanding)**: embody the entire understanding of the parties and constitute the entire terms agreed by the parties; and
- (b) **(prior agreements)**: supersede any prior agreement of the parties.

## 57.3 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in such form and content reasonably satisfactory to both parties) required by any Approval, Law or reasonably requested by another party to give effect to this Deed.

## 57.4 Survival of certain provisions

- (a) **(Surviving clauses)**: All provisions of this Deed which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Deed or Partial Termination of a Site, Verge Works Site, School Facility or Stage, will survive the rescission, termination or expiration of this Deed or Partial Termination of a Site, Verge Works Site, School Facility or Stage, including any provision in connection with:
  - (i) the State's rights to set-off and recover money;
  - (ii) confidentiality or privacy;
  - (iii) Intellectual Property Rights;
  - (iv) any obligation to make any records available to the State;
  - (v) any indemnity or financial security given under this Deed;
  - (vi) any limitation on Liability; and
  - (vii) any right or obligation arising on termination of this Deed.
- (b) **(Interpretation)**: No provision of this Deed which is expressed to survive the termination of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination of this Deed.
- (c) **(Survival of rights and obligations)**: No right or obligation of any party will merge on completion of any transaction under this Deed. All rights and obligations under this Deed survive the execution and delivery of any transfer or other document which implements any transaction under this Deed.

## 57.5 Waiver

- (a) **(Writing)**: A waiver given by a party under this Deed is only effective and binding on that party if it is given or confirmed by that party.
- (b) **(No waiver)**: A failure to, a delay in or the partial exercise or enforcement of a right provided by Law or under this Deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this Deed.
- (c) **(No waiver of another breach)**: No waiver of a breach of a term of this Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

## 57.6 Consents, approvals and directions

- (a) **(State)**: A consent or approval required under this Deed from the State, the Principal or the Principal's Representative may be given or withheld, or may be given subject to any conditions, as the State thinks fit, unless this Deed expressly provides otherwise.

- (b) **(Project Co):** A consent or approval required under this Deed from Project Co may not be unreasonably withheld, unless otherwise expressly provided in this Deed.

## 57.7 Amendments

- (a) **(Deed):** Except as otherwise expressly provided in this Deed, this Deed may only be varied by a deed executed by or on behalf of each party.
- (b) **(Other State Project Documents):** Except as otherwise expressly provided in the State Project Documents, no amendment to any other State Project Document is valid or binding on a party unless executed by the State and all other parties to the relevant State Project Document.

## 57.8 Expenses

Except as otherwise expressly provided in this Deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.

## 57.9 Not Used

## 57.10 Counterparts

This Deed may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same Deed.

## 57.11 Moratorium legislation

To the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect any obligation in favour of Project Co under this Deed, or to prejudicially affect the exercise by the State of any right, power or remedy under this Deed or otherwise, are expressly waived.

## 57.12 Proportionate Liability

- (a) **(Excluded operation of Part 1F of the Civil Liability Act):** The operation of Part 1F (Proportionate liability) of the *Civil Liability Act 2002 (WA)* is excluded in relation to all and any rights of either party under this Deed whether such rights are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights):** Without limiting **Clause 57.12(a)**, the rights of the parties (including those relating to proportionate Liability) are as specified in this Deed and not otherwise.

## 58 PERSONAL PROPERTIES SECURITY ACT

### 58.1 State's Personal Property

For the purposes of this **Clause 58**, "State Personal Property" means all personal property the subject of a Security Interest granted under this Deed.

### 58.2 Further assurance

- (a) If the State determines that this Deed (or a transaction in connection with it) is or contains a Security Interest for the purposes of the PPS Law, Project Co agrees to do anything (including obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the State asks and considers necessary for the purposes of:
- (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
  - (ii) enabling the State to apply for any registration, complete any financing statement or give any notification, in connection with the Security Interest so that the State has the priority required by it; or

- (iii) enabling the State to exercise rights in connection with the Security Interest.
- (b) Project Co agrees to cause any financing statements required pursuant to **Clause 58.2(a)(ii)** to be registered in accordance with the PPS Law and, in any event, at such times as may be directed by the State to maintain the priority required by the State.

### **58.3 No requirement for PPSA notices**

The State need not give any notice under the PPSA (including notice of a verification statement) unless the notice is required by the PPSA to be given and cannot be excluded.

### **58.4 Priority of State's interest**

Nothing in this Deed will be taken or construed as an agreement or consent by the State to:

- (a) subordinate the State's interest in State Personal Property (or any part thereof) to any other encumbrance or interest affecting State Personal Property at any time; or
- (b) delay the time when a Security Interest created or provided for under this Deed attaches to the relevant collateral.

### **58.5 Notices to be given to the State**

Project Co must notify the State as soon as Project Co becomes aware of any of the following:

- (a) if any personal property which does not form part of State Personal Property becomes an accession to State Personal Property and is subject to a Security Interest in favour of a third party, that has attached at the time it becomes an accession;
- (b) if any State Personal Property is located or situated outside Australia; and
- (c) upon request by the State, of the present location or situation of any State Personal Property.

### **58.6 Negative undertakings**

Subject to **Clauses 48.1** and **48.2** Project Co must not:

- (a) create any Security Interest or lien over any State Personal Property whatsoever (other than Security Interests granted in favour of the State under this Deed);
- (b) sell, lease or dispose of its interest in or control or use of any State Personal Property;
- (c) give possession of State Personal Property to another person other than the State or where the State expressly authorises it to do so;
- (d) permit any State Personal Property to become an accession to or commingled with any asset that is not part of a School Facility or Verge Infrastructure;
- (e) change its name without first notifying the State of the new name not less than 15 Business Days before the change takes effect;
- (f) relocate its principal place of business outside Australia or change its place of registration or incorporation;
- (g) move any State Personal Property outside Australia; or
- (h) allow any other person to acquire control of any personal property forming part of State Personal Property at any time.

### **58.7 Assistance with registration**

- (a) Project Co must provide all necessary information and take all necessary action and execute all necessary documents as requested by the State to enable the State to perfect, within the time limit specified in the PPSA, any Security Interest

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created or provided for by this Deed in relation to any personal property including any Security Interest granted temporary perfection under the PPSA at any time.

- (b) Project Co must promptly provide all necessary information and take all necessary action (including obtaining any consent or agreement or giving any notice) to enable the State to register fully valid and effective financing statements or financing change statements with respect to any Security Interest held or intended to be held by the State under this Deed at any time.

#### **58.8 State's interest remains unaffected**

The State's interest in State Personal Property is not affected by anything which, but for this provision might have that effect, including any failure to perfect or to continuously perfect (within the meaning of the PPSA) the Security Interest in relation to any personal property forming part of State Personal Property at any time.

#### **58.9 Costs and expenses relating to PPSA and registration**

- (a) Everything Project Co is required to do under this **Clause 58** is at Project Co's expense.
- (b) Project Co agrees to pay or reimburse, upon demand, all costs and expenses of the State in connection with anything the State is required to do under this **Clause 58**, including preparing, registering and maintaining any financing statement or financing change statement.

#### **58.10 Confidentiality for the purposes of the PPSA**

- (a) Notwithstanding **Clause 52.2**, neither the State nor Project Co will disclose information of the kind mentioned in section 275(1) of the PPSA and Project Co will not authorise, and will ensure that no other party authorises, the disclosure of such information.
- (b) **Clause 58.10(a)** does not prevent disclosure where such disclosure is required under section 275 of the PPSA because of the operation of section 275(7) of the PPSA.

#### **58.11 Severability of provisions**

Any provision of this Deed that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this Deed nor affect the validity or enforceability of that provision in any other jurisdiction.

**Executed as a Deed**

**Executed** by THE HONOURABLE DR MIKE NAHAN MLA Treasurer for the time being, on behalf of the State of Western Australia, and as delegate of the Minister for Works pursuant to section 5A of the *Public Works Act 1902 (WA)*, in the presence of:

.....  
Signature of Witness

.....  
The Hon. Dr Mike Nahan MLA

.....  
Witness name

.....  
Witness address

.....  
Witness occupation

THE COMMON SEAL of the MINISTER  
FOR EDUCATION was hereunto affixed  
in the presence of THE HON PETER  
CHARLES COLLIER MLC Minister for  
Education for the time being,  
in the presence of:

.....  
Signature of Witness

.....  
The Hon. Peter Charles Collier MLC

.....  
Witness name

.....  
Witness address

.....  
Witness occupation



**Signed sealed and delivered** for and on )  
behalf of **EduWest Project Co Pty Ltd** )  
(ACN 608 027 434) in its personal  
capacity and as trustee for the EduWest  
Project Trust by its attorneys pursuant to  
power of attorney dated  
who each states that no notice of  
revocation of the power of attorney has  
been received in the presence of:

.....  
Witness

.....  
Attorney

.....  
Name of Witness (print)

.....  
Name of Attorney (print)

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Witness

.....  
Attorney

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Name of Witness (print)

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Name of Attorney (print)