

# Harmonised PPP Project Deed

Commercial Principles



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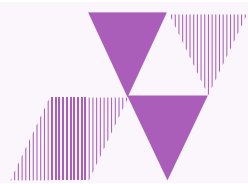
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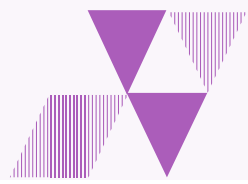
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# Contents

1. Availability PPP	1
<hr/>	
2. Primary Obligations	1
<hr/>	
3. Funding and Payment Regime	1
<hr/>	
3.1 Capital Payment	2
3.2 Service Payments	2
<hr/>	
4. Partnership framework	2
<hr/>	
5. Proactive Project Co	3
<hr/>	
6. Dispute Resolution	3
<hr/>	
7. Change Compensation Principles	4
<hr/>	
8. Pandemic Regime	6
<hr/>	
9. Approach to Key Risk Areas	6
<hr/>	
9.1 Site Conditions	6
9.2 Utilities	7
<hr/>	
10. Time	7
<hr/>	
10.1 Late Acceptance	7
10.2 Extension of Time	7
<hr/>	
11. Indemnity	7
<hr/>	
12. Security	8
<hr/>	
12.1 Bonds	8
12.2 Parent Company Guarantee	8
<hr/>	
Appendix	9
<hr/>	



**Note: The Harmonised PPP Project Deed document suite has not currently been endorsed for use by the New South Wales government.**

## 1. Availability PPP

The Harmonised PPP Project Deed is an availability-based PPP project deed without demand risk transfer.

## 2. Primary Obligations

Under the Harmonised PPP Project Deed, the State's primary obligations are to:

- obtain the State Approvals (specified in the Attachments to the Project Deed)
- provide Project Co with access to use and occupy land required for construction and maintenance
- pay Project Co in accordance with payment provisions in the Project Deed.

Project Co's primary obligations are to:

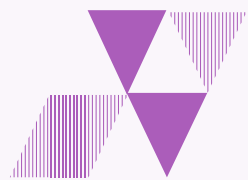
- finance the PPP Project
- design and construct the Works and maintain the Project Assets during the Term in accordance with the Project Deed, including the scope and performance requirements in the Project Scope and Delivery Requirements (PSDR) and any Modifications directed or approved by the State
- warrant that the Project Assets are Fit for Purpose during the Term
- handback the Project Assets to the State at the end of the Term in accordance with prescribed conditions.

Project Co can contract its Design and Construct (D&C) and Services Contractor to perform some or all of its obligations under the Project Deed. Project Co will remain directly responsible for all rights and obligations under the Project Deed with the State.

## 3. Funding and Payment Regime

PPP Projects in Victoria and NSW are financed through a combination of government and private funding. The government funding components comprise:

- Capital Payments (see paragraph 3.1)
- Service Payments (see paragraph 3.2)
- other funding elements in the form of Modifications
- compensation for Change Compensation Events in accordance with Template Schedule 5, Change Compensation Principles (see paragraph 7).



### 3.1 Capital Payment

Capital Payments may be amended on a project-specific basis. They comprise:

- a State Contribution, which is a lump sum payment by the State once Commercial Acceptance is reached
- Development Phase Capital Contributions, which are set out in the Development Phase Capital Contribution Schedule and paid by the State when:
  - 100 per cent of equity is committed, and
  - 50 per cent of the debt has been drawn down and deposited in the Construction Proceeds Account or used to pay Project Costs in accordance with the Financial Model
- a Conditional Debt Pay Down (CDPD) Amount, which is a lump sum payment by the State after completion equal to a percentage of Project Co's Project Debt, subject to a period of operation and satisfaction of prescribed conditions to demonstrate that the Project has been sufficiently de-risked.

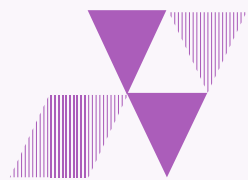
### 3.2 Service Payments

During the Operational Phase, Service Payments are made in accordance with a payment mechanism based on Project Co's service availability. The overarching principle for calibrating the Service Payment is no service, no fee. The entire monthly Service Payment can be abated for poor performance, including service delivery, quality, reporting, asset management and functionality.

## 4. Partnership framework

The partnership framework ensures that the State and Project Co are aligned in pursuing the Project Objectives and minimising adversarial claims. The Harmonised PPP Project Deed is consistent with the Department of Treasury and Finance (DTF) and New South Wales Treasury (NSWT) policies, and lessons learned and feedback from recent PPP projects. It includes specific strategies to encourage collaborative behaviours, including:

- a commitment to the Project Objectives
- Kick-off Workshops
- the establishment of a Senior Representatives Group that includes the director of Project Co and senior representatives of the Equity Investors, Financiers, D&C and Services Contractors, Project Co and State
- the establishment of an Executive Review Group comprising two representatives of the State, a single representative each of the D&C Contractor, Services Contractor and Project Co and an Independent Member (by invitation only, if agreed by the State and Project Co)



- regular reporting to the Senior Representatives Group and the Executive Review Group against the Key Result Areas (KRAs)
- the establishment and monitoring of the Relationship Principles across the Project
- a commitment to early identification and collaborative resolution of disputes.

## 5. Proactive Project Co

The Harmonised PPP Project Deed emphasises the importance of a proactive Project Co to the successful delivery of the Project. It embeds specific requirements to ensure Project Co actively manages the Project and resolves issues and disputes.

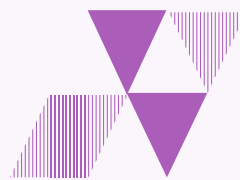
Project Co must ensure that Key Subcontractor claims are made in good faith, have a reasonable prospect of success and have a proper legal, technical or factual basis.

Changes in Management are only accepted if the new Equity Investor has a sufficient level of financial, commercial, managerial and technical expertise or experience and has made the necessary arrangements with third parties required to deliver the Project.

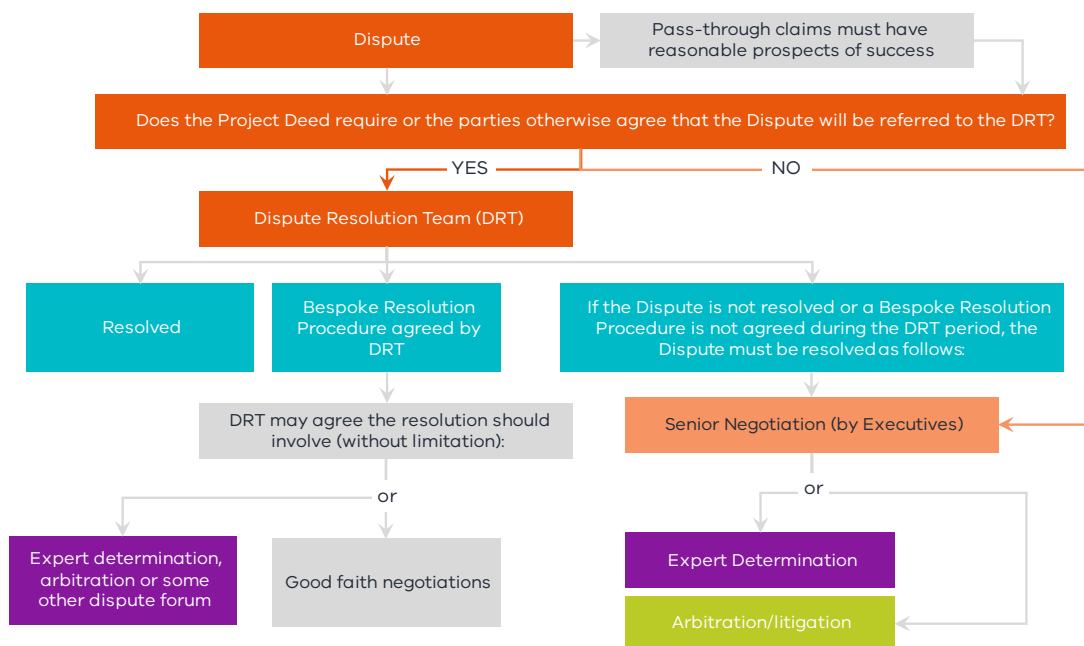
## 6. Dispute Resolution

The Harmonised PPP Project Deed provides a bespoke dispute resolution process that involves the parties' commitment to early identification and collaborative resolution of issues. The establishment of a Dispute Resolution Team provides a hold point for the parties to proactively resolve disputes before proceeding to further avenues of dispute resolution and escalation through expert determination, arbitration or litigation. The Dispute Resolution Team comprises:

- the State Representative
- the Project Co Representative
- a nominated senior representative of each party and the D&C or Services Contractor authorised to resolve the Dispute (according to the Development or Operational Phase unless the State notifies Project Co otherwise)
- a nominated representative of each party who can best speak to the facts or circumstances of the Dispute.



**Figure 1 – Diagram of the dispute resolution process**



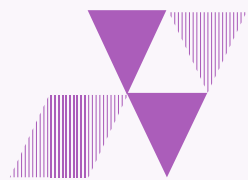
## 7. Change Compensation Principles

The Change Compensation Principles in Template Schedule 5 set out the compensation and Savings that Project Co and the State are entitled to for Change Compensation Events. These are events or circumstances that change Project Co's scope of work, costs or risks in ways not initially contemplated or priced. The Change Compensation Principles include mechanisms for identifying and assessing the event's impact and calculating compensation commensurate with the costs or risks incurred.

The following table summarises Change Compensation Events.

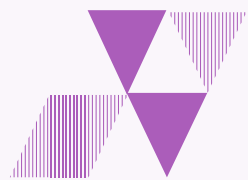
**Table 1 – Change Compensation Events**

No.	Event	
1.	Inspection or test	A State inspection or test of the Project Assets that incurs additional costs for Project Co not otherwise required under the Project Deed
2.	Compensable Extension Event	Includes a Pandemic Change in Law or a Pandemic Compensation Event; constitutes a Change Compensation Event in certain circumstances
3.	Extension Event – Force Majeure	Constitutes a Change Compensation Event in certain circumstances
4.	State Concurrent Event	Constitutes a Change Compensation Event in certain circumstances
5.	Acceleration	An Acceleration directed by the State



No.	Event	
6.	Compensable Intervening Event	Includes a Pandemic Change in Law or a Pandemic Compensation Event; constitutes a Change Compensation Event in certain circumstances
7.	Intervening Event – Force Majeure	Constitutes a Change Compensation Event in certain circumstances
8.	Intervening Event – Work Around	Where the State requires Project Co to perform a Work Around
9.	Modification Proposal – Consultant Costs	Where Project Co is entitled to claim compensation for preparing a Modification Proposal under clause 35.3 of the Project Deed
10.	State Initiated Modification	Constitutes a Change Compensation Event in certain circumstances
11.	Project Co–Initiated Modification	Where a Modification initiated by Project Co is approved by the State
12.	Minor Modification	
13.	General Change in Law (Development Phase)	Where a Compensable Change in Mandatory Requirements is the subject of a Modification Order during the Development Phase
14.	General Change in Law (Operational Phase)	Where a Compensable Change in Mandatory Requirements is the subject of a Modification Order during the Operational Phase
15.	Equipment Modification – General	Modification of Group 1, 2 or 3 Equipment (but not Group 3 Equipment in excess of the Group 3 Limit)
16.	Group 3 Purchase Cost Exceeding Group 3 Limit	Where the aggregate of the Group 3 Purchase Cost of all Group 3 Equipment approved under clause 21.5 of the Project Deed exceeds the Group 3 Limit, where this is not otherwise an Equipment Modification
17.	Equipment Modification – Excess Whole of Life Cost	
18.	Equipment Modification – Transferred Equipment	Modification of transferred Equipment that is a material change from the anticipated transfer condition
19.	Equipment Modification – State Requires Equipment Transfer	Modification of Equipment that the State requires Project Co to transfer that is not included in the Equipment List
20.	Omission of Reviewable Services	A Modification that omits any Reviewable Service





## 8. Pandemic Regime

The Harmonised PPP Project Deed incorporates a pandemic regime that considers the current and future potential impacts of COVID-19 or other pandemics declared by the World Health Organisation during the Development and Operational Phases. Project Co is entitled to claim compensation and an extension of time if a Pandemic Change in Law or a Pandemic Compensation Event occurs and results in a change to the Pandemic Management Plan. The Project Deed stipulates a specified moratorium period on claims for Pandemic Compensation Events and Pandemic Changes in Law after Financial Close (determined on a project-specific basis).

## 9. Approach to Key Risk Areas

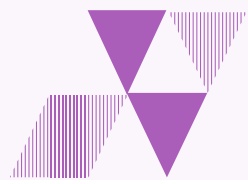
The Appendix summarises the general approach to risk allocation in key areas.

### 9.1 Site Conditions

Project Co assumes all Site Conditions risks other than those expressly stated otherwise in the Project Deed. Project Co warrants that it has been given the opportunity to undertake tests, enquiries and investigations of the Project Area and its surroundings, including all Site Conditions and the existence or availability of Utility Infrastructure.

Project Co's Contamination remediation obligations are determined by location. In Victoria, Project Co must comply with all obligations regarding any notifiable Contamination under the *Environment Protection Act 2017* (Vic). In New South Wales (NSW), the *Contaminated Land Management Act 1997* (NSW) and the *Protection of the Environment Operations Act 1997* (NSW) apply. Where the State directs remediation from Project Co where it would otherwise not be required, Project Co is entitled to a Contamination Compensation Event and relief as a State Initiated Modification. Project Co indemnifies the State and the State Associates for Contamination caused or contributed to by Project Co.

The State recognises that Site Conditions are a key risk and may consider including alternative regimes on a project-specific basis to address unknown Contamination, geotechnical conditions, Artefacts, Heritage Claims, Native Title Claims, Utility services or reliance on Site Information Reports. The Harmonised PPP Project Deed contains sample drafting for reference.



## 9.2 Utilities

Project Co assumes the risk regarding existing Utility Infrastructure and the continuous supply and sufficiency of Utilities required for the Project Activities. This includes the need to relocate, protect or modify Utility Infrastructure (or procure for the same). It also includes access to the Site or interference with the Project Activities by or on behalf of a Utility provider. Project Co is liable for Utility consumption or use in connection with the Development Activities.

# 10. Time

## 10.1 Late Acceptance

If Project Co fails to achieve Commercial Acceptance by the Date for Commercial Acceptance, the State's sole financial remedy is the reduction in Service Payments for the delay period.

If Project Co fails to achieve Final Acceptance by the Date for Final Acceptance, it may be liable to pay the greater of:

- costs incurred by the State to complete the remaining work, or
- Project Co's Savings through not completing the remaining work undertaken to achieve Final Acceptance.

## 10.2 Extension of Time

Project Co may request an extension of time for an Extension Event that delays Acceptance, subject to complying with the conditions precedent to extension. For example, there must be a critical path delay and Project Co must submit an updated Development Phase Program to the State and the Independent Reviewer, who determines the extension of time claim.

# 11. Indemnity

The Harmonised PPP Project Deed specifies a number of broad indemnities that Project Co must provide, including those in favour of the State, State Associates and applicable third parties regarding the following:

- property damage, personal injury or death in connection with any act or omission of Project Co or any Project Co Associate;
- breach of any State Project Documents by Project Co or a Project Co Associate
- any Defects required to be rectified;
- the provision and use of Project Information by Project Co;
- the disruption, damage, removal and relocation of Utility Infrastructure caused or contributed to by a Project Co Act or Omission;



- Contamination caused or contributed to by Project Co or any Project Co Associate; and
- any Claim or Liability arising in connection with any breach of representation, warranty or obligation by Project Co or a Project Co Associate in relation to Intellectual Property Rights or Moral Rights (other than State Intellectual Property).

However, Project Co's liability to indemnify the State is limited by the Indirect or Consequential Loss exclusion and the limitations set out in the Harmonised PPP Project Deed, including those for any State breach or fraudulent, negligent, reckless, unlawful or malicious Act or Omission.

## **12. Security**

### **12.1 Bonds**

The State does not require Project Co to provide Performance Bonds in favour of the State as security for the performance of the Development Activities. However, the State may require Project Co to call on a Performance Bond from the D&C Contractor (D&C Contractor Construction Bond) to satisfy any debt due and payable by Project Co to the State. This applies where Project Co has a right to call on the D&C Contractor Construction Bond under the D&C Contract and the debt has not been paid within the relevant timeframe.

### **12.2 Parent Company Guarantee**

The State requires Project Co to provide a Parent Company Guarantee for Key Subcontractors. If the proposed Parent Guarantor is not the ultimate holding company, the State must be satisfied that the Parent Guarantor's assets are retained for the duration of the Parent Company Guarantee. This is a matter of evaluation.

Where a Parent Company Guarantee is provided for a Significant Subcontractor, the parent of a Significant Subcontractor should be a party to the relevant Significant Subcontractor Direct Deed to acknowledge the Principal's security rights in respect of the Project.



# Appendix

This table summary reflects the risk allocation under the Harmonised PPP Project Deed (subject to project-specific amendments).

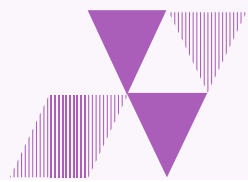
## Risk allocation summary table

No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
<b>Approvals</b>					
1.	Obtaining, maintaining and complying with approvals	1.1 Obtaining State Approvals	✓		
		1.2 Obtaining approvals that must be obtained or satisfied (as the case may be) in connection with the Project (other than State Approvals)			✓
		1.3 Complying with all applicable Approvals (including State Approvals) when carrying out the Project Activities			✓
<b>Site Risks</b>					
2.	The cost of Remediating Contamination <sup>1</sup> and its associated impact on the program	2.1 Remediating Contamination to the extent that: (a) Project Co has caused or contributed to the Contamination, and the Contamination is: (i) in, on, over or under the Project Area; or (ii) in the Direct Affected Area; and (b) the Remediation is required to comply with any Law, to ensure the Project Area or the Direct Affected Area (as applicable) meet certain requirements, or to prevent the Contamination migrating to adjoining sites			✓
		2.2 Remediating Contamination to the extent necessary to meet the requirements of an Approval	✓	The State may be required to compensate Project Co, grant an extension of time and pay delay costs.	✓ Project Co is obliged to Remediate, but may be entitled to compensation, an extension of time and delay costs.

<sup>1</sup> For brevity, this section is based on the relevant Victorian provisions, which use 'Contamination', rather than the NSW document, which uses 'Contamination and Pollution' to align with the *Contaminated Land Management Act 1997* (NSW).



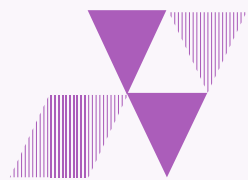
No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
2.3	Remediating Contamination to the extent that:	<ul style="list-style-type: none"> <li>(a) Project Co disturbs or interferes with the Contamination;</li> <li>(b) the Contamination is:               <ul style="list-style-type: none"> <li>(i) in, on, over or under the Project Area; or</li> <li>(ii) in the Direct Affected Area (where it is part of Contamination that is also in, on, over or under the Project Area) and Project Co is required to Remediate the Contamination in accordance with Best Industry Practices; and</li> </ul> </li> <li>(c) the Remediation is required to comply with any Law, to ensure the Project Area or the Direct Affected Area (as applicable) meet certain requirements or to prevent the Contamination migrating to adjoining sites</li> </ul>	✓		✓
2.4	Remediating Contamination to extent that the Contamination is in, on, over or under an area that is not:	<ul style="list-style-type: none"> <li>(a) the Project Area; or</li> <li>(b) the Direct Affected Area</li> </ul> <p>because it has migrated from the Project Area or the Direct Affected Area, and:</p> <ul style="list-style-type: none"> <li>(a) Project Co or any Project Co Associate has caused or contributed to that Contamination; and</li> <li>(b) the Contamination is the subject of a Contamination Notice</li> </ul>			✓
2.5	Remediating Contamination to the extent that the Contamination:	<ul style="list-style-type: none"> <li>(a) is the subject of a Contamination Notice to Project Co; and</li> <li>(b) is not Contamination that Project Co is otherwise required to Remediate pursuant to items 2.1, 2.2, 2.3 or 2.4.</li> </ul>	✓		✓
			The State will be required to compensate Project Co, and may be required to grant an extension of time and pay delay costs.		Project Co is obliged to Remediate, but will be entitled to compensation, and may be entitled to an extension of time and delay costs.



No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
		<p>2.6 The State directs Project Co to Remediate Contamination that Project Co was not otherwise required to Remediate pursuant to items 2.1, 2.2, 2.3 or 2.4</p>	<p>✓</p> <p>The State will be required to compensate Project Co and may be required to grant an extension of time and pay delay costs.</p>		<p>✓</p> <p>Project Co is obliged to Remediate but will be entitled to compensation, and may be entitled to an extension of time and delay costs.</p>
		<p><b>Victoria only</b></p> <p>2.7 Remediating Contamination to comply with section 39(1) of the <i>Environmental Protection Act 2017</i> (Vic) where Project Co was not otherwise required to Remediate pursuant to items 2.1, 2.2, 2.3, 2.4, 2.5 or 2.6</p>	<p>✓</p> <p>The State will be required to compensate Project Co and may be required to grant an extension of time and pay delay costs.</p>		<p>✓</p> <p>Project Co is obliged to Remediate but will be entitled to compensation and may be entitled to an extension of time and delay costs.</p>
3.	Native Title Claims	<p>Cessation or suspension of any part of the Project Activities, or a material change to the way in which the Project Activities are carried out, because of:</p> <ul style="list-style-type: none"> <li>• a Commonwealth or State direction;</li> <li>• an order of a court or tribunal of competent jurisdiction; or</li> <li>• a requirement of Law,</li> </ul> <p>in connection with a Native Title Claim in the Project Area</p>	<p>✓</p>		
4.	Heritage Claims	<p>Cessation or suspension of any part of the Project Activities, or a material change to the way in which the Project Activities are carried out, because of:</p> <ul style="list-style-type: none"> <li>• a Commonwealth or State direction;</li> <li>• an order of a court or tribunal of competent jurisdiction; or</li> <li>• a requirement of Law,</li> </ul> <p>in connection with a Heritage Claim in the Project Area</p>	<p>✓</p>		
5.	Other Site and environmental risk	<p>Risk of adverse Site and environmental conditions (excluding those specified in items 2, 3 and 4)</p>			<p>✓</p>

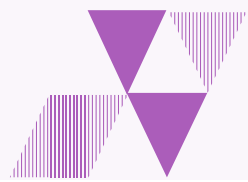


No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
<b>Design, construction and commissioning risks</b>					
6.	Force Majeure	Risk that a Force Majeure Event delays or will delay Project Co in achieving Acceptance		✓ State grants an extension of time and pays the Development Phase Finance Amount. Project Co bears its Prolongation Costs.	
7.	Design risk	7.1 Risk that the Design Development Process is not completed on time or to budget			✓
		7.2 Risk that the design of the Project Assets does not meet the Delivery Requirements			✓
8.	Construction risk	Risk that Development Activities are not completed on time or to budget	✓ This applies where caused by a State breach and specified relief events.		✓ This applies otherwise.
9.	Equipment	9.1 Responsibility for the selection, procurement and maintenance of Group 1 Equipment			✓
		9.2 Responsibility for the selection, procurement and maintenance of Group 2 Equipment		✓ This applies where responsibility for selection is shared with Project Co.	✓ This applies otherwise.
		9.3 Responsibility for the selection, procurement and maintenance of Group 3 Equipment	✓ This applies where the State is responsible for selection and maintenance.		✓ This applies where Project Co is responsible for procurement in consultation with the State.

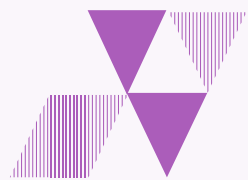


No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
10.	Defects risk	Risk that Defects are identified in a Project Asset or a Returned Asset			✓
11.	Fitness for intended purpose	Risk that the Project Assets or the Returned Assets are not Fit for Purpose or otherwise do not comply with the Delivery Requirements			✓
12.	Commissioning requirements	Risk that the Project Assets are not commissioned in accordance with the Commissioning Requirements			✓
13.	State Initiated Modifications	The State elects to make a change to the Works or the Delivery Requirements by issuing a Modification Order	✓		
<b>Operating risks</b>					
14.	Force Majeure	Risk that a Force Majeure Events prevents or will prevent the performance of the Services		✓ The State grants relief from the performance of the affected Services and pays Operational Phase Force Majeure Event Costs.  Project Co incurs Abatements to the Service Payment in respect of the affected Services.	
15.	Services	Risk that the Services are not carried out in accordance with the Services Specification			✓





No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
16.	Utilities	Payment for Utilities consumed or used at the Operational Phase Area during the Operational Phase	✓ This applies otherwise.		✓ This applies in respect of any Utilities consumed during the Operations Phase for the Development Activities and otherwise in connection with any Project Co Areas or Commercial Opportunities.
17.	Residual life and end of term handover	Risk that the residual life requirements for the relevant Project Assets are not met at the end of the Operational Phase			✓
<b>Industrial relations</b>					
18.	Industrial relations risk	Risk of Industrial Action impacting the Project Activities (other than Industrial Action which only occurs at or in the direct vicinity of the Project Area and which is the direct result from an act or omission of the State when acting in connection with the Project or a State Associate (subject to certain exclusions)).			✓
<b>Change in law or policy risks</b>					
19.	General Change in Law	19.1 Risk of a General Change in Law during the Development Phase		✓ Project Co will bear the time and cost implications up to specified thresholds.  The State will bear the time and cost implications above those thresholds.	
		19.2 Risk of a General Change in Law during the Operations Phase	✓		



No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
20.	Project-Specific Change in Law	Risk of a Project-Specific Change in Law during the Term	✓		
21.	Change in Policy	21.1 Risk of additional cost or delay resulting from a Change in Policy (other than a Change in Environment Protection Authority (EPA) Standard) where Project Co is legally obliged to comply or the State directs Project Co to comply	✓		
		21.2 Risk of additional cost or delay resulting from a Change in EPA Standard where Project Co is legally obliged to comply or the State directs Project Co to comply, and the change has a material adverse effect on the manner in which Project Co undertakes the Project Activities	✓		
<b>Financing</b>					
22.	Financing	Obtaining and maintaining private sector financing for the Project			✓
23.	Refinancing	23.1 Risk of refinancing losses			✓
		23.2 Potential for refinancing gains		✓	
<b>Pandemic</b>					
24.	Pandemic Changes in Law	Risk that a Pandemic Change in Law: <ul style="list-style-type: none"> <li>delays or will delay Project Co in achieving Acceptance</li> <li>prevents or will prevent the performance of the Services</li> </ul>	✓		
25.	Pandemic Compensation Events	25.1 Risk that a Pandemic Subcontractor's Plant Closure: <ul style="list-style-type: none"> <li>(a) delays or will delay Project Co in achieving Acceptance</li> <li>(b) prevents or will prevent the performance of the Services</li> </ul>	✓		



No.	Type of risk	Description	Allocation		
			State	Shared	Project Co
		25.2 Risk that: (a) a full day delay in the supply of Key Plant and Equipment from a Key Plant and Equipment Manufacturing Country due to certain quarantine restrictions or border closures (b) a Pandemic Development Phase Area Closure  delays or will delay Project Co in achieving Acceptance	✓		

