

# Harmonised PPP Project Deeds

Guidance Notes

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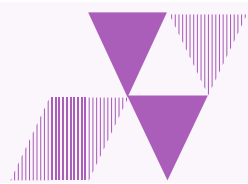
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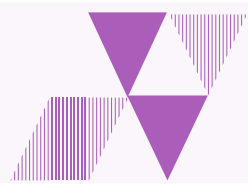
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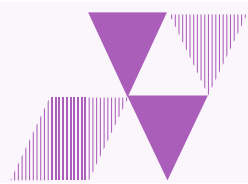


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# 1. Introduction

## 1.1 Overview of the Harmonised PPP Project Deeds

The Victorian Department of Treasury and Finance (DTF) and NSW Treasury (NSWT) (the State Treasuries) have developed a suite of harmonised standard form project deeds for Public Private Partnership (PPP) projects (Harmonised PPP Project Deeds), following a joint infrastructure procurement review.

The Harmonised PPP Project Deeds are based on the Partnerships Victoria Standard Form Project Deed (Social Infrastructure) published in 2018, with key elements adopted from the NSW Treasury (NSWT) Toolbox Project Deed and other PPP projects.

Table 1 summarises the use of the Harmonised PPP Project Deeds and these Guidance Notes in each jurisdiction:

**Table 1 – Use of the Harmonised PPP Project Deeds and Guidance Notes**

	Victoria	NSW
Harmonised PPP Project Deeds	Victoria to use the: <ul style="list-style-type: none"> <li>Social Infrastructure Availability PPP Projects, where core services are retained by the State, for example, hospitals, prisons and schools (Social Infrastructure Project Deed (SIPD))</li> <li>Linear Infrastructure Availability PPP Projects, for example, road and rail (Linear Infrastructure Project Deed (LIPD))</li> </ul>	<ul style="list-style-type: none"> <li>Only the SIPD is applicable</li> </ul> For Linear Infrastructure Availability PPP Projects, please consult with NSW Treasury for the applicable template
Guidance Notes	For use in Victoria and NSW	

## 1.2 Objectives of the Harmonised PPP Project Deeds

The purpose of the Harmonised PPP Project Deeds is to provide a consistent and efficient risk allocation for Victorian and NSW infrastructure projects, while recognising the need for flexibility to accommodate project specific requirements.

The State Treasuries’ aim in releasing the Harmonised PPP Project Deeds includes:

- **market standardisation** – to provide certainty and consistency on commercial principles and risk allocation across jurisdictions to improve value for money;
- **to promote confidence in the PPP model** – responding to recent delivery experience and lessons learnt;
- **to retain flexibility** – to cater for project specific and jurisdiction-specific requirements, and innovative commercial and financial structures;
- **being practical in application** – providing practical guidance to delivery agencies and industry;





- **lessons learnt** – to address common issues identified by the private sector;
- **a proactive Project Co** – to ensure that Project Co is encouraged and incentivised to play an active role in project delivery (see section 2.1.3.2); and
- **relationship principles** – encouraging collaborative behaviours by the State and Project Co towards achieving Project Objectives in delivering PPP Projects.

### 1.3 Victorian policy context

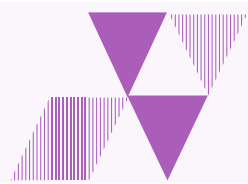
This Guidance Note is one of a suite of publications that comprises DTF's whole of government infrastructure procurement framework (Framework). It should be read in conjunction with the Partnerships Victoria Requirements available on [DTF's Partnerships Victoria Requirements webpage](#).

The Framework comprises three categories of procurement, being Whole of Life, Lump Sum and Cost Reimbursable. Each category contains a set of approved procurement models for use on Victorian Government infrastructure projects.

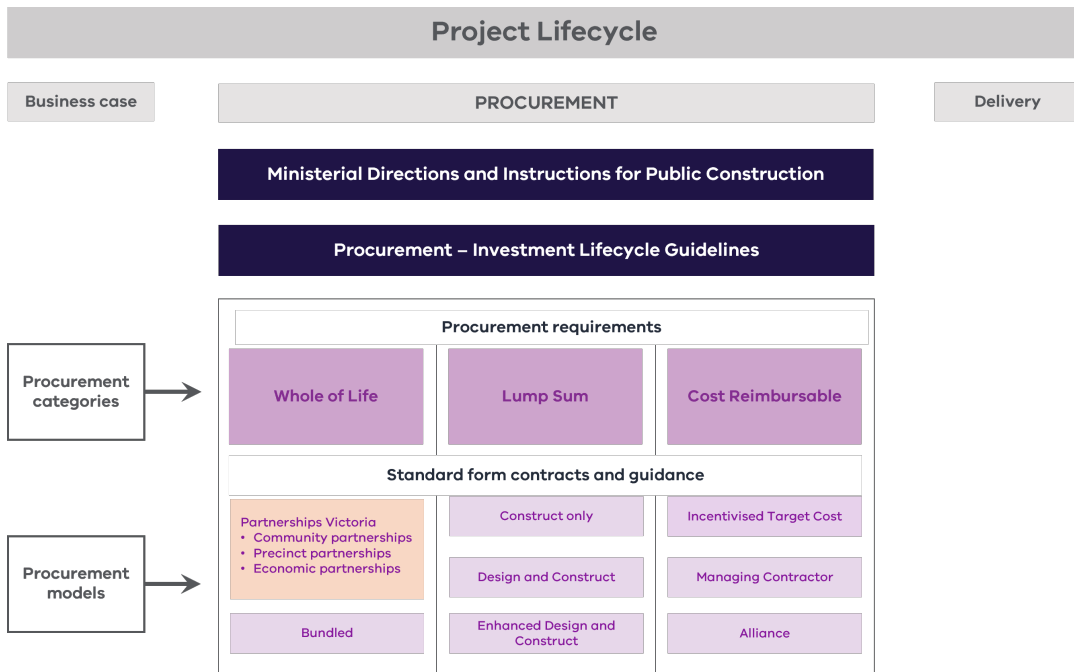
The policy, guidance and standard form contracts in the Framework include:

- the [Ministerial Directions and Instructions for Public Construction Procurement](#) (Ministerial Directions), established under Part 4 of the *[Project Development and Construction Management Act 1994 \(Vic\)](#)*
- the [Procurement - Investment Lifecycle Guideline](#), which outlines the three procurement categories and a set of approved procurement models
- a procurement requirements document for each of the three procurement categories; and
- standard form contracts and guidance for a subset of the approved procurement models.

Figure 1 provides an overview of the Framework and indicates where the Harmonised PPP Project Deeds sit within it, as part of Partnerships Victoria procurement models.



**Figure 1 – Victorian Government Infrastructure Procurement Framework**



Other Victorian Government legislation, policies and frameworks that are applicable across the project lifecycle include:

- the [Standing Directions 2018](#) under the *Financial Management Act 1994* (Vic)
- the [Investment Lifecycle Guideline series](#)
- the [Asset Management Accountability Framework](#), [Investment Management Standard](#) and [Bid Cost Reimbursement Policy](#) for Major Construction Projects
- the [High Value High Risk \(HVHR\) project assurance framework](#) and associated [Gateway Review Process](#).

National policies, such as the [National Alliance Contracting Guidelines](#) and the [National Public Private Partnership Policy](#), may also be applicable.

Where there is a difference in the application of this document from other policies and guidelines, the requirements in this document take precedence.

## 1.4 New South Wales policy context

This guidance note should be read in conjunction with the NSW Public Private Partnership Policy and Guidelines (TPG22-21), which requires that NSW Government public infrastructure projects with a total estimated capital value exceeding \$200 million must be assessed for possible PPP procurement, having regard to value for money drivers as part of the procurement strategy.



The NSW Government is committed to increasing the standardisation of contracts and procurement methods as part of the NSW Government Action Plan: a Ten Point Commitment to the Construction Sector. This action plan guides government and industry to work more effectively together on shared objectives and goals, including the development of standardised contracts and procurement methods to increase the efficiency of the procurement, delivery and management of infrastructure projects.

Other NSW Government legislation, policies and frameworks that are applicable across the major project lifecycle include:

- the *Public Works and Procurement Act 1912* (NSW)
- the NSW Government Procurement Policy Framework
- the NSW Business Case Policy and Guidelines
- the NSW Gateway Policy; and
- the NSW Bid Cost Contributions Policy.

The National Public Private Partnership Policy Framework and Guidelines may also be applicable.

## 1.5 Process to develop the Harmonised PPP Project Deeds

The State Treasuries consulted extensively with the market, industry and government agencies in developing the Harmonised PPP Project Deeds.

**Table 2 – Harmonised PPP Project Deeds Development Activities**

Activities undertaken
<ul style="list-style-type: none"><li>• Developed drafts of the Harmonised PPP Project Deeds based on internal workshops with legal advisors, using feedback, learnings and observations from PPP projects that have been recently awarded or are undergoing procurement</li></ul>
<ul style="list-style-type: none"><li>• Market consultation with and feedback (oral and written) from industry representatives of Design and Construction (D&amp;C) Contractors, Services Contractors, equity, legal and commercial advisors, and government agencies to test the risk allocation of key issues</li></ul>
<ul style="list-style-type: none"><li>• Legal peer review of draft Harmonised PPP Project Deeds at various stages throughout the development process, including workshops with subject matter experts</li></ul>
<ul style="list-style-type: none"><li>• Market testing and refinement of various drafts of the Harmonised PPP Project Deeds through current projects in procurement in Victoria and NSW</li></ul>

The State Treasuries will continue to monitor the PPP market and seek feedback from stakeholders. This will ensure the risk allocation in the Harmonised PPP Project Deeds remains consistent with best practice for Availability PPP Projects, and any changes or updates within the industry.



## 1.6 PPP procurement model

An availability model is a delivery model for PPP projects. It is where the primary revenue stream or source of funding that repays private sector finance used to build the asset takes the form of a payment from government over the Operational Phase of the project for ensuring the continuing availability of the asset (Availability PPP Projects).

This model is typically used for non-income producing infrastructure. Income producing or 'economic' infrastructure, such as toll roads, can be procured using a model that transfers the demand risk associated with the asset to the private sector.

## 1.7 Partnerships Victoria Framework and NSW Public Private Partnership Policy and Guidelines

The Harmonised PPP Project Deeds form part of:

- in Victoria, the Partnerships Victoria Framework (see section 12 of the Partnership Victoria Requirements (November 2016)); and
- in NSW, the NSW Public Private Partnership Policy and Guidelines.

The Harmonised PPP Project Deeds are consistent with the core principles set out at the beginning of each chapter of the National PPP Guidelines Volume 3: Commercial Principles for Social Infrastructure, as at the date of these Guidance Notes, except where otherwise indicated in section 3.

## 1.8 Purpose of Harmonised PPP Project Deeds and Guidance Notes

### 1.8.1 Harmonised PPP Project Deed templates

The Harmonised PPP Project Deeds will be used by procuring agencies when preparing a Request for Proposal (RFP) for an Availability PPP Project. Derogation from the Harmonised PPP Project Deeds requires prior approval of the applicable State Treasury. This is to ensure that consistency of risk allocation and drafting is maintained on Availability PPP Projects (other than for genuine project specific reasons), notwithstanding that the projects are procured by different agencies.



## 1.8.2 Harmonised PPP Project Deed Guidance Notes

These Guidance Notes provide guidance on some, but not all, provisions of the Harmonised PPP Project Deeds, including some schedules.

The purpose of the Guidance Notes is to:

- explain the rationale for the Harmonised PPP Project Deeds' position on key issues, or issues where bidders have historically raised queries or departures; and
- assist all relevant parties to understand the State's position, limit departures and facilitate a more efficient procurement process.

## 1.9 Choice and use of Harmonised PPP Project Deed templates

The Harmonised PPP Project Deeds for SIPD and LIPD are identical, except to the extent described in sections 1.9.11.9.1 and 1.9.21.9.2, where the nature of the infrastructure requires a different approach.

Sections 1.9.11.9.1 and 1.9.2 describe the key distinguishing features of each of the Harmonised PPP Project Deeds. Procurement agencies should consider the key distinguishing features of SIPD and LIPD when choosing the Harmonised PPP Project Deeds for a project.

### 1.9.1 Social Infrastructure Project Deed

Key distinguishing features of the SIPD from the LIPD are that:

- the Project Area is generally a single facility on a single site (for example, a hospital or prison), or, in the case of a PPP package (for example, a schools project), single facilities across multiple discrete sites
- there is a fixed Commissioning Period between the D&C Contractor having completed construction of the asset and the State paying for the asset. During this period, the State familiarises itself with the asset, trains staff, prepares for operation and ensures that the asset is fit for delivering the core services. Payment for the asset and delivery of the core services from the asset does not commence until this period is completed by achieving Commercial Acceptance
- a significant amount of furniture, fittings and equipment is required to be procured, installed and maintained by Project Co; and
- core operating services are retained by the State.

Where core services are outsourced to Project Co, but the other features of the SIPD are relevant, the SIPD is the appropriate base document. However, modifications will be required to reflect the important change in focus from asset delivery to core service delivery.



## 1.9.2 Linear Infrastructure Project Deed

Key distinguishing features of the LIPD from the SIPD are:

- that the infrastructure is typically elongated, crossing multiple sites
- the likelihood of proximate and onsite works by the State and its Associates as part of the overall Project
- the number of interfaces with third parties and government agencies, such as utilities and third-party operators; and
- the possible application of the *Major Transport Projects Facilitation Act 2009* (Vic) (MTPF Act) in Victoria only.

The LIPD is drafted on the assumption that demand risk for the use of the asset by the public is retained by the State. That is, the State payment for the asset is unrelated to the level of usage, if the asset meets the requirements of the Project Deed.

## 1.9.3 Hybrid projects

Certain projects are, by their nature, a hybrid of the Social Infrastructure Availability PPP Projects and Linear Infrastructure Availability PPP Projects. Examples include rolling stock projects and rail projects, including stations, where the State has a very active role in Operations or there is a third-party operator.

If a proposed Availability PPP Project is considered to be a hybrid project, guidance must be sought from the applicable State Treasury, regarding which of the Harmonised PPP Project Deeds should be used as the base document.

## 1.9.4 Economic Infrastructure PPP projects

There is currently no Harmonised PPP Project Deed available for demand based economic infrastructure PPP projects. Until this occurs, where demand risk is transferred to Project Co, but the other features of the LIPD are relevant, the LIPD is the appropriate base document. However, modifications will be required to reflect the change in risk allocation.

## 1.9.5 Project specific content

Throughout the Harmonised PPP Project Deeds, there are instances where the State's position will be determined on a project specific basis. Those instances are identified in these Guidance Notes and also as State 'Notes' or optional drafting shaded in yellow in the Harmonised PPP Project Deeds.

Departures from the Harmonised PPP Project Deeds that are identified in the Guidance Notes or in the Harmonised PPP Project Deeds do not require approval from the applicable State Treasury.



Procuring agencies may seek approval from the applicable State Treasury for departures from provisions of the Harmonised PPP Project Deeds that have not been identified in these Guidance Notes or in the Harmonised PPP Project Deeds as being determined on a project specific basis, where justified for project specific reasons.

Departures from the Harmonised PPP Project Deeds will not be approved where they are sought to satisfy drafting preferences, as opposed to reflecting a necessary change.

### **1.9.6 Jurisdiction-specific content**

The Harmonised PPP Project Deeds contain jurisdiction-specific drafting for Victorian and NSW projects. Project teams will need to make the necessary amendments flagged in grey shading and State 'Notes' throughout the Harmonised PPP Project Deed.

For example, grey shading in square brackets denotes jurisdiction-specific drafting, with the drafting preceding '/' being Victorian drafting, and drafting following '/' being NSW drafting. Jurisdiction-specific drafting may also be marked with 'For use in NSW/Victoria only'. Project teams must either insert the relevant drafting and delete the State 'Note', or replace the relevant clause with 'Not Used' (as applicable).

### **1.9.7 Form and structure of Harmonised PPP Project Deeds**

A Project Deed for an Availability PPP Project which uses one of the Harmonised PPP Project Deeds will consist of:

- clauses
- Schedules
- Annexures; and
- Attachments.

All clauses, Schedules and Annexures form part of the Harmonised PPP Project Deeds.

Some Schedules are documents created by the State, which will generally be included in the RFP for the Project. Examples include the Change Compensation Principles and the Termination Payments Schedules.

Other Schedules will be prepared by the State but completed by the Successful Respondent to reflect their proposal, such as the Equity Documents and Finance Documents Schedules.

Annexures should include large documents, such as the Project Scope and Delivery Requirements (PSDR). They may otherwise consist of documents that are exclusively prepared by the Successful Respondent and are generally included in the Successful Respondent's Proposal.



The Attachments to the Project Deed are included for convenience. They do not form part of the Harmonised PPP Project Deed (as stated in clause 2.2 (*Composition of this Deed*) of the Harmonised PPP Project Deeds) but they are often referred to in it. They are included as Attachments to ensure there is no confusion over the version being referred to in the Project Deed or the agreed baseline document at Contract Close.

The Harmonised PPP Project Deed for each Availability PPP Project must follow the numbering for clauses, Schedules, Annexures and Attachments set out in the Harmonised PPP Project Deeds to ensure consistent clause and document numbering.

Where clauses or components from the relevant Project Deed are not included in the final form of the Project Deed, or additional provisions or documents are required, the drafting conventions that should be applied include:

- if a clause or subclause is not required on a specific project, the numbering should be maintained and it should be shown as 'Not Used'; and
- all efforts should be made to include any new clauses under an existing clause by making them a new subclause at the end of the clause (for example, if clause 15 of the Harmonised PPP Project Deeds ends at clause 15.5, insert the new clause as clause 15.6. If clause 15 of the Harmonised PPP Project Deeds ends at clause 15.5(g), add a new subclause 15.5(h)). If this is not possible because the new clause requires multiple subheadings, the new clause should be added:
  - in an otherwise 'Not Used' clause (if the location is logical); and
  - as an additional clause in an appropriate location, without disturbing the existing numbering (15A, 15B, etc.).

## **1.9.8 Incorporation of the Successful Respondent's Proposal**

### **1.9.8.1 General principle**

As part of their Proposals, Respondents provide documents that will be included in the Project Deed in a form agreed by the parties. These will include the Project Scope, Bid Development Phase Program and Bid Project Plans. The location of these documents in the Project Deed may be determined on a project specific basis.

The Project Scope, together with the Delivery Requirements, make up the PSDR. In NSW, the PSDR may also be referred to as the 'General Specification' or 'Particular Specification'. The Delivery Requirements contain the technical, functional and Services requirements of the State that define the scope of the Project.

The Project Scope is bid by the Successful Respondent in their Proposal as the response to the Development Requirements. It will include those parts of Project Co's design and services solution that the parties agree should be included in the Project Deed.





As part of the RFP, the State will typically ask Respondents to develop drafts of the Development Phase Program and certain Project Plans, and to include them in their Proposals for evaluation. These documents will likely be amended throughout the Project. However, it is important that the versions of the Development Phase Program and the Project Plans agreed at Contract Close are included in, or attached to, the Project Deed, so there can be no doubt about the baseline versions.

The Bid Development Phase Program does not form part of the Project Deed, as the State does not require strict compliance with the Development Phase Program. This is on the basis that it is considered an unduly onerous obligation and not value for money (see section 2.27.3). The Bid Development Phase Program should therefore only be attached to the Project Deed to establish the baseline for the Development Phase Program, which Project Co is required to update and comply with under the Project Deed.

Due to the difference in approach to development of the PSDR during the Procurement Phase between Linear Infrastructure and Social Infrastructure Availability PPP Projects, the Bid Project Plans:

- for LIPDs, will typically be included in the PSDR and therefore form part of the Project Deed; and
- for SIPDs, the Bid Project Plans are typically attached to the Project Deed to establish the baseline for the Project Plans that Project Co is required to update and comply with under the Project Deed, but they do not typically form part of the Project Deed.

In both cases, Project Co is required to comply with and update the Project Plans. As the Project Plans are intended to set out Project Co's methodology and obligations, the Project Plans do not typically impose any obligations on the State. Language should be included in those Project Plans or in the PSDR to the effect that any such 'obligations' are not binding on the State.

Departures bid by the Successful Respondent to the Project Deed and PSDR included in the RFP will be resolved with the State before execution of the Project Deed, and included in updated versions of the PSDR or Project Deed.

### **1.9.8.2 Project specific amendments**

Those documents that make up the Project Scope will be agreed by the parties on a project specific basis.

Whether Bid Project Plans should be included in the Project Deed, and whether they are attached to the Project Deed or included in the PSDR, may be determined on a project specific basis.



The State will consider whether there are any additional parts of the Successful Respondent's Proposal (other than the Project Scope, Bid Development Phase Program and Bid Project Plans) that should be incorporated into the Project Deed. For example, details of the commercial opportunities that have been included in the Successful Respondent's Proposal will likely need to be incorporated into the Project Deed.

Where the Successful Respondent has made representations in other parts of its Proposal that the State has relied on in evaluating that Proposal, the State reserves the right to include these in the Project Deed.

## 1.10 Use of these Guidance Notes

The material contained in these Guidance Notes is made available on the understanding that the State is not providing professional advice. Users must exercise their own skill and care with respect to its use and seek independent advice as necessary. The State gives no warranty and does not make any representation, express or implied, as to the contents or accuracy of the information contained in this publication.

The State expressly disclaims any and all liability relating to or resulting from:

- the use of these Guidance Notes by any person; and
- anything done, or omitted to be done, in reliance on information contained in these Guidance Notes.

These Guidance Notes must not be used for the interpretation of the Harmonised PPP Project Deeds. Nothing in these Guidance Notes limits or affects the application, interpretation or enforcement of the terms and conditions:

- set out in any Expression of Interest or RFP; and
- in the Harmonised PPP Project Deeds or any Project Deed or Project Document entered into by the State.

## 1.11 Terminology

Unless otherwise defined in these Guidance Notes, capitalised terms used in these Guidance Notes have the meanings given to them in the Harmonised PPP Project Deeds or the glossary of terms to the RFP included in Appendix A, Volume 1 Part A of the Harmonised Form RFP.

Some terms have been defined in these Guidance Notes in a simplified manner for ease of understanding and do not override definitions in the Harmonised PPP Project Deeds.

Any reference to a clause is a reference to a clause in the Harmonised PPP Project Deeds.



**Table 3 – Defined terms and acronyms for these Guidance Notes**

Defined terms and acronyms	Meaning
30 Per Cent Rule	Has the meaning given to that definition in section 2.34.1
Availability PPP Projects	Has the meaning given in section 1.1
DPCC	Development Phase Capital Contribution
DTF	Department of Treasury and Finance in Victoria
FFP	Fit For Purpose
Linear Infrastructure Availability PPP Project	An Availability PPP Project for the delivery of linear infrastructure, such as roads and rail, and the performance of Services, in respect of those assets once constructed
LIPD	Has the meaning given in section 1.1
MTPF Act	Has the meaning given in section 1.12.1
Project Deed	Has the meaning given in section 1.9.7
PSDR	Has the meaning given in section 2.1.11
Harmonised PPP Project Deeds	Has the meaning given in section 1.1
Reserved Crown Land	Land that is reserved under the <i>Crown Land (Reserves) Act 1978</i> (Vic)
SIPD	Has the meaning given in section 1.1
Social Infrastructure Availability PPP Project	An Availability PPP Project for the delivery of social infrastructure, such as hospitals, schools, prisons and convention centres, and the performance of Services, in respect of those assets once constructed
State	State of Victoria or New South Wales, as applicable
State Treasuries	The relevant State Treasury department by which the Project is being delivered, being either the DTF in Victoria or the NSW Treasury.

## 1.12 MTPF Act

### 1.12.1 MTPF Act overview

This section applies to Victorian transport projects only.

The MTPF Act seeks to facilitate the development of major transport projects assessed by the Premier of Victoria as being of economic, social or environmental significance to the State or a region of the State.



### 1.12.2 Application of the MTPF Act

The MTPF Act applies to Victorian transport projects that are declared projects under section 10 of the MTPF Act. The Premier of Victoria is responsible for declaring projects under the MTPF Act.

A transport project for the purposes of the MTPF Act is broadly defined as a project for the development of:

- transport infrastructure; and
- transport infrastructure, together with non-transport infrastructure.

Accordingly, some non-transport infrastructure may also qualify as part of a transport project under the MTPF Act.

The declaration of a transport project may either be in relation to:

- the entire MTPF Act (including planning assessment and approval); and
- the MTPF Act, other than Part 3 and 8 (project delivery only).

If the entire MTPF Act applies, the transport project will attract both planning assessment and approval processes, and project delivery powers under the MTPF Act.

Alternatively, if the MTPF Act, other than Parts 3 and 8 applies, the transport project is able to benefit from the project delivery provisions of the MTPF Act once planning approval has been obtained under standard processes.

The planning assessment and approval provisions of the MTPF Act seek to streamline the assessment and approvals processes and to provide a range of planning and environmental Approvals for a project in a single Approval decision (see Parts 3 and 8 of the MTPF Act).

The project delivery provisions of the MTPF Act provide a range of project delivery powers, governing land acquisition and assembly, land management, road management, utilities and a range of other facilitating provisions.

### 1.12.3 Harmonised PPP Project Deed implications

The LIPD has been drafted on the assumption that the MTPF Act applies. Accordingly, amendments may need to be made to clauses in the LIPD where there are project specific issues that do not accord with the assumptions or regimes included in the MTPF Act.

These clauses include:

- Traffic Management (clause 11.4) – potential traffic management implications
- Utilities (clause 12) – regime under Part 7 of the MTPF Act in relation to interface with utilities and discovery of unknown Utility Infrastructure



- Development Phase Licence (clause 20.1) – ability for a licence to be issued under section 173 of the MTPF Act
- Date of Commercial Acceptance (clause 24 and definitions); and
- Operational Phase Licence (clause 28.1) – ability for a licence to be issued under section 173 of the MTPF Act.

Further amendments will also need to be made to the above clauses if the MTPF Act does not apply to reflect the State's preferred risk allocation. See further comments throughout these Guidance Notes for more detail about the implications of the MTPF Act.

## 2. Harmonised PPP Project Deed guidance

### 2.1 Definitions

Some of the key defined terms included in the Harmonised PPP Project Deeds are explained below.

Definitions should not be changed by procuring agencies simply to accommodate terminology preferences, unless required to align with State-specific terminology. For example, amending terms such as 'PSDR' to 'PR' or 'PSTR', or changing terms such as 'Commercial Acceptance' to 'Provisional Acceptance' or 'Practical Completion' causes unnecessary confusion between projects. It also undermines the benefits of the standard form approach.

These Guidance Notes do, however, recognise that certain terminology may, for good reason, need to be different between Project Deeds, and identify where this may be the case.

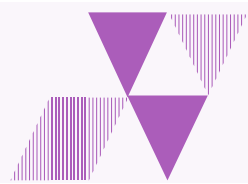
#### 2.1.1 Best Operational Practices (paragraph (h))

##### 2.1.1.1 General principle

Best Operational Practices sets out the standards that the State expects Project Co to meet in providing the Services. Amendments to this definition will be required when core services are outsourced to Project Co.

##### 2.1.1.2 Project specific amendments

The requirement in paragraph (h) of the definition of Best Operational Practices, which requires the implementation of advancements in technology, should only be included for projects where there is a high level of technical obsolescence.



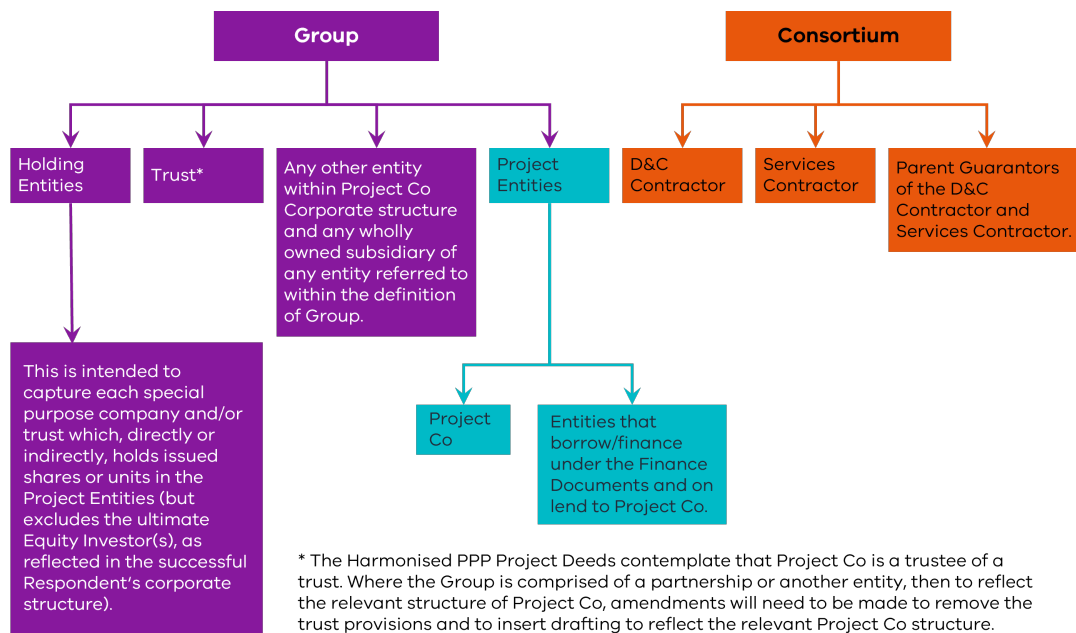
## 2.1.2 Consortium, Group, Holding Entity, Project Co and Project Entity

### 2.1.2.1 General principle

There are a number of definitions that relate to entities involved with the Project. Different clauses and regimes under the Harmonised PPP Project Deeds apply to different entities.

Figure 2 shows the interrelationship between the different entity definitions.

**Figure 2 – Interrelationship between entity definitions in Harmonised PPP Project Deeds**



The definitions for the different entities include:

- **Project Co** – the entity that will carry out the Project and is the counterparty to the State under the Project Deed. Project Co will always be a special purpose vehicle, but may be a corporate entity, a corporate trustee of a trust, or a partnership of corporate entities and/or trusts. Under the Harmonised PPP Project Deed, Project Co is a trustee of a trust
- **Project Entity** – the entities that will be treated as a 'Project Entity' will be determined by the Successful Respondent's financing structure. It will comprise Project Co and any separate borrower under the Finance Documents and, where relevant, any entity through which the borrower on-lends the finance to Project Co. If Project Co directly borrows finance under the Finance Documents with third-party Financiers, the definition of 'Project Entity' will not be required in the Project Documents
- **Group** – this definition will be tailored to reflect a Successful Respondent's corporate structure. It will include Project Co, any other Project Entity, each Holding Entity and the Trust (if applicable); and



- **Holding Entity** – this definition will be tailored to reflect the Successful Respondent’s corporate structure and is intended to capture each company and/or trust which, directly or indirectly through a chain of Holding Entities, holds issued shares or units in the Project Entities, but excludes the ultimate Equity Investor/s. The Harmonised PPP Project Deeds define Holding Entity as each entity that directly or indirectly holds shares or units in Project Co and which is not itself wholly owned. The standard definition will therefore exclude any entity through which multiple Equity Investors hold their interest in Project Co. The standard definition will require amendment if the Successful Respondent’s corporate structure includes multiple levels of Holding Entities, or if there is a single Equity Investor (to exclude the ultimate Equity Investor from the definition), or where there is no single entity that holds 100 per cent of Project Co (for example, where Project Co consists of a partnership of multiple entities, each of which is separately owned). In such cases, the standard definition will need to be amended and the relevant Holding Entities will be identified by reference to the Ownership Schedule, as at Financial Close. Project Co may only change the corporate structure set out in that Ownership Schedule with the State’s prior consent as part of a relevant Share Capital Dealing. In that case, the State’s consent will need to include a replacement Ownership Schedule that reflects any changes to the Holding Entities arising from the Share Capital Dealing.

See also section 2.13 on subcontracting entities.

### **2.1.2.2 Project specific amendments**

The definitions for the different entities will be determined on a project specific basis based on the Successful Respondent’s corporate and financing structure. Respondents will be required to identify the entities comprising Project Co, the Project Entities and any Holding Entities in their Proposals.

These entities will also be reflected in each Respondent’s Bid Ownership Schedule. The State will typically accept that some of these entities may not be incorporated until the Negotiation and Completion Phase of the Tender Process.

## **2.1.3 Equity Funding**

### **2.1.3.1 General principle**

One of Project Co’s principal obligations under the Harmonised PPP Project Deeds is to finance (in total or in part) the delivery of the Project. It will do this through a combination of debt funding and Equity Funding.

The definition of Equity Funding is intended to capture all sources of Project funding that are contributed, directly or indirectly, by the Equity Investors to any Group Member. Depending on a Respondent’s equity capital structure, this may include subscriptions for shares, units in a unit trust or shareholder loans, or a combination of these.



The State permits Respondents to freely determine their equity capital structure on the basis that Respondents can be expected to maximise the economic efficiency of that structure as a key element of producing a financially competitive Proposal.

The distinction between Equity Funding and debt funding is a critical one for the purposes of calculating the amount of any Termination Payment and compensation for Force Majeure Events under the Harmonised PPP Project Deed. This is discussed in sections 3.3 and 3.4.

In evaluating Proposals, the State will determine whether any proposed components of a debt funding structure, such as mezzanine debt, should in fact be defined as Equity Funding.

### **2.1.3.2 Active equity**

Equity Investors are expected to play a visible, active and independent role in project delivery by being involved in interface and asset management and by resolving issues and claims within the consortium and between Project Co and the State. The State may incentivise more equity (and debt) participation in the Project by requiring Respondents to respond to key requirements in their RFP returnables to demonstrate active equity.

For example, in RFP processes, the State may:

- explicitly address the role of equity in evaluation criteria;
- consider mandating certain key roles to be held by Project Co employees;
- mandate transparency of shareholders' agreement arrangements and deadlock resolution procedures, and make them evaluation considerations; and
- consider intra consortium Interface Agreement structures as part of the evaluation process.

The State may also require Respondents to:

- address the role and experience of equity in returnable schedules (including demonstrated experience);
- require Project Co and its Equity Investors to detail their approach to active project participation, including their role in interface arrangements and resolution of disputes and Subcontractor claims;
- describe the managerial involvement of Equity Investors over the life of the Project; and
- describe proposed asset management arrangements to ensure that Equity Investors actively monitor and manage asset performance, and do not unduly devolve responsibility to the asset manager.





Commercial engagement with market during the RFP process may also consider, as part of the RFP engagement process, the role of equity in supporting the delivery performance regime. This would include a potential key performance indicator (KPI) to assess the performance of equity in managing the Project, and the potential for a component of Equity Internal Rate of Return (IRR) being subject to performance against the KPIs, and equity hold periods.

This would continue until the Conditional Debt Pay Down (CDPD) conditions, to incentivise equity involvement in ensuring asset performance and close out of defects after completion, were satisfied.

### **2.1.3.3 Project specific amendments**

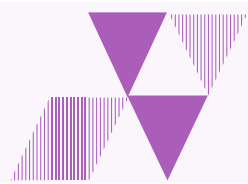
The Equity Funding definition will need to be updated to reflect the specific equity capital structure of the Successful Respondent. The definition will also be linked directly to the Equity Funding, as set out in the Financial Model.

On a project specific basis, project teams may consider amending the Harmonised PPP Project Deed to promote active equity principles, for example, by incorporating provisions to require equity participation in the delivery of cure and prevention plans and the dispute resolution process.

## **2.1.4 Maintained Assets, Moveable Assets, Hired Moveable Assets, Project Assets and Returned Assets**

### **2.1.4.1 General principle**

There are a number of categories of assets that are relevant to the Project. Table 4 and Figure 3 show the ownership of the assets (between the State and Project Co), the interrelationship between the categories of assets, and their relevance to each of the Development Phase and Operational Phase (where applicable).



**Table 4 – Ownership, interrelationship and relevance of assets**

State owned assets	Project Co owned assets
<b>Linear</b>	
<ul style="list-style-type: none"> <li>• Fixtures</li> <li>• Moveable Assets (other than Hired Moveable Assets) being:               <ul style="list-style-type: none"> <li>– Maintained Assets that are not affixed to, and not intended to be affixed to, the Operational Phase Site; and</li> <li>– all other chattels:                   <ul style="list-style-type: none"> <li>• used by Project Co for the purpose of carrying out the Services and which are, or will be, permanently stored within the Operational Phase Area (other than Services Equipment); and</li> <li>• which are included in the Asset Information System</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Temporary Works</li> <li>• Hired Moveable Assets</li> <li>• Services Equipment</li> </ul>
<b>Social</b>	
<ul style="list-style-type: none"> <li>• Fixtures</li> <li>• Moveable Assets (other than Hired Moveable Assets) being:               <ul style="list-style-type: none"> <li>– Maintained Assets and all other Equipment and Plant that is not affixed to, and not intended to be affixed to, the Operational Phase Site; and</li> <li>– all other chattels:                   <ul style="list-style-type: none"> <li>• used by Project Co for the purpose of carrying out the Services and which are, or will be, permanently stored in the Operational Phase Area (other than the Services Equipment); and</li> <li>• which are included in the Asset Information System</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Temporary Works</li> <li>• Hired Moveable Assets</li> <li>• Services Equipment</li> </ul>

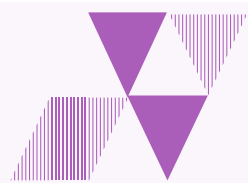
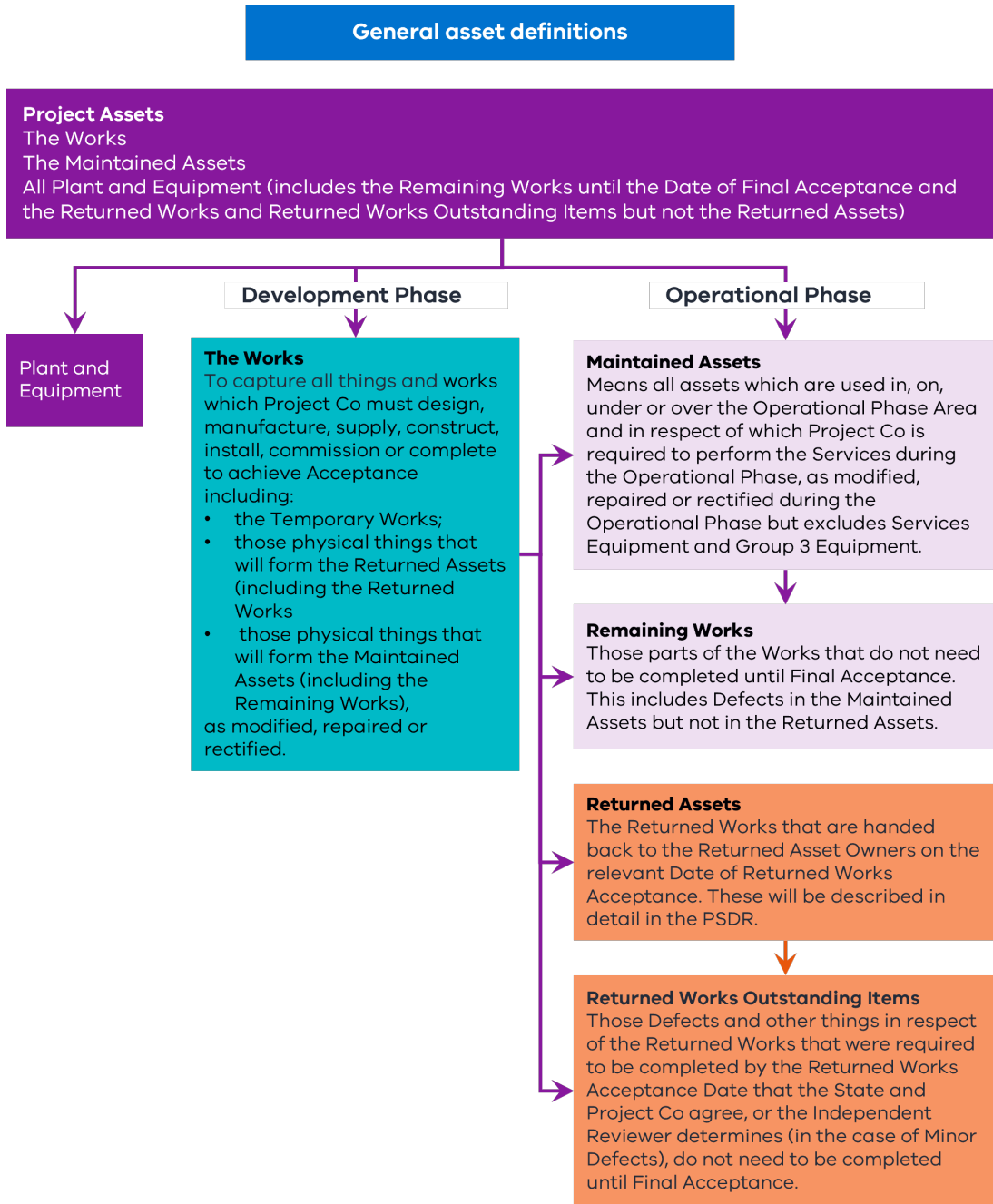


Figure 3 – General asset definitions





### **2.1.4.2 Project specific amendments**

Each of the asset definitions will need to be considered on a project specific basis to ensure the project captures all the relevant assets. Clause 20.3 (Construction) will also need to be reviewed on a project specific basis, as it provides that the Maintained Assets must be wholly located within the area identified in the Operational Phase Area Plan. This requirement may not be appropriate for certain Maintained Assets that the parties may locate outside of an Operational Phase Area.

### **2.1.5 Management Services**

While the Harmonised PPP Project Deeds include a definition for and references to Management Services and a Management Services Contract, these will only be required when a Management Services Contractor is proposed to provide Management Services to Project Co.

### **2.1.6 Operations and Functions**

#### **2.1.6.1 General principle**

'Operations' is used in the LIPD and 'Functions' is used in the SIPD to describe the core operations that will be undertaken in respect of the Project Assets. For example, core operations might include, among other things, operating a rail network or a road. Functions in a hospital will include the delivery of health services, ancillary health services, teaching and research.

#### **2.1.6.2 Project specific amendments**

These definitions will take into account whether or not the Project is fully outsourced. It is important that the term is comprehensively defined, as Project Co's obligations and liabilities regarding interfaces with the Operator are often limited to the Functions expressly identified in the Project Deed.

### **2.1.7 Parent Guarantees**

Consistent with the limited recourse nature of the finance provided for the Project, the State does not require shareholder guarantees for Project Co.

While the State does not require Project Co to obtain Parent Company Guarantees from the Key Subcontractors in favour of Project Co, the State will evaluate the financial capacity of the Consortium to deliver the Project. That evaluation will include an assessment of the credit worthiness of any proposed parent company guarantors. If the proposed parent guarantor is not the ultimate holding company, the State will need to be satisfied that there are sufficient controls in place to ensure the assets of that parent guarantor are retained for the duration of the parent company guarantee. This will be a matter of evaluation.



Where parent company guarantees for Key Subcontractors are provided as part of a Proposal, these should be captured as Project Documents in the Project Deed. Provisions are included in the Harmonised PPP Project Deeds to control changes in ownership of these parent companies. This ensures the level of financial capacity of the Key Subcontractor and the parent guarantor, as evaluated by the State, is retained for the period of involvement of the relevant Key Subcontractor and parent guarantor in the Project.

If a parent company guarantee is provided, the parent of a Key Subcontractor should be a party to the relevant Key Subcontractor Direct Deed. This is for the purposes of acknowledging the State's security rights, in respect of the Project and the Parent Company Guarantee.

## **2.1.8 Original Date for Commercial Acceptance**

The Original Date for Commercial Acceptance on which Project Co is required to achieve Commercial Acceptance is set at Financial Close. At Financial Close, the Original Date for Commercial Acceptance and the Date for Commercial Acceptance will be the same. However, while the Date for Commercial Acceptance is adjusted for extensions of time awarded to Project Co under the Project Deed, the Original Date for Commercial Acceptance is not.

The Original Date for Commercial Acceptance is used to calculate the incremental interest payable to Project Co under the Finance Documents for certain Change Compensation Events, in accordance with the Change Compensation Principles.

In SIPDs, the State also has no obligation to certify Commercial Acceptance prior to the Original Date for Commercial Acceptance. This is discussed in more detail in section 2.26.4.1.

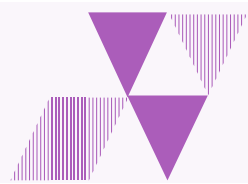
## **2.1.9 Performance Bonds**

### **2.1.9.1 General principle**

The security package put forward by Project Co to secure the performance of the Project Activities is relevant to the evaluation of Proposals. Where Performance Bonds are provided by Subcontractors in favour of Project Co, the State has certain limited rights to require Project Co to call those Performance Bonds, up to an amount specified in the Contract Particulars, and pay the proceeds to the State. This is discussed in more detail in section 2.23.

All Performance Bonds provided by Key Subcontractors must be bank guarantees or a letter of credit issued by an Australian licensed financial institution with the Required Rating (see section 2.1.12), and payable on demand by presentation at the issuer's office in Melbourne or Sydney (as applicable).

The Performance Bond must recognise the State as a beneficiary if the State exercises its step-in rights under the Project Deed.



### 2.1.9.2 Project specific amendments

The State may consider accepting insurance bonds as a form of Performance Bond, if the terms of the undertaking provide for on-demand, unconditional and clearly defined payment, subject to the insurance bond provider being regulated by the Australian Prudential Regulation Authority and maintaining a Required Rating (see section 2.1.12).

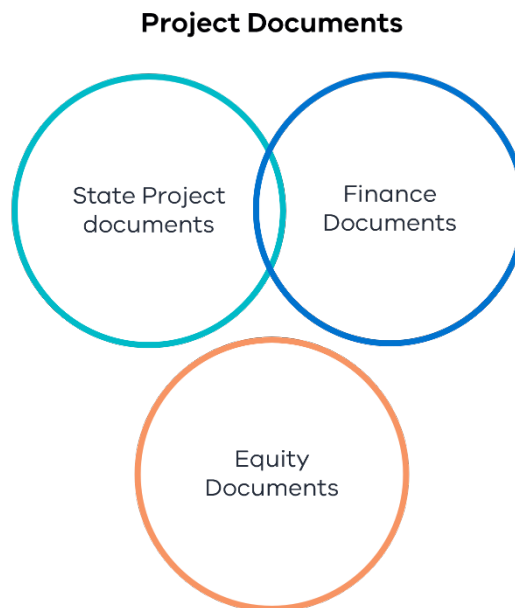
## 2.1.10 Project Documents

### 2.1.10.1 General principle

There are a number of different documents and document sets defined in the Harmonised PPP Project Deeds. Section 5 includes more information on the source and development path for the Project Documents.

Figure 4 and the notes below it explain the content and interrelationship between the different document sets. For a detailed overview of the Project Documents under the Harmonised PPP Project Deeds, refer to Annexure 7 – Roadmap of Project Documents.

**Figure 4 – Interrelationship between Project Documents**





**Project Documents** are documents relevant to the Project. This term is used here to cover:

- Subcontracts between Project Co and its Key Subcontractors;
- Parent Guarantees from Key Subcontractors; and
- agreements entered into with the State, in respect of the Project, and all Finance Documents and Equity Documents.

Project Documents are subject to a range of controls under the Project Deed, including the restrictions on amendment, replacement, assignment and a range of other actions in clause 52.1(a) (*Assignment, amendments to Project Documents and other dealings by Project Co*).

**State Project Documents** are those Project Documents to which the State is a party. These include:

- the Project Deed;
- the Finance Direct Deed;
- each Subcontractor Direct Deed;
- the State Security; and
- the Independent Reviewer Deed.

**Equity Documents** are the documents listed in the Equity Documents Schedule, which will set out the Equity Documents relating to Project Co and the Project.

**Finance Documents** are the documents listed in the Finance Documents Schedule, including the Finance Direct Deed, any document entered into in relation to a Refinancing of the Actual Debt and any other document the parties agree is a Finance Document. The Finance Documents should not include any Equity Documents.

### 2.1.10.2 Project specific amendments

The Project Documents definition will be updated to reflect the Successful Respondent's Proposal. Project Co's obligations under the Project Deed will often extend to compliance with, or procuring compliance with, the Project Documents.

The Equity Documents will be specific to each Respondent's equity capital structure, and will comprise the documents that set out the obligations to contribute the Equity Funding (such as an equity contribution deed and/or subordinated shareholder loan agreements), and associated documents setting out ownership and control rights between the Equity Investors (such as investor agreements or a partnership deed).

The Finance Documents will be specific to each Respondent's debt funding structure, and will include loan documents, hedging documents and security documents.



## **2.1.11 Project Scope and Delivery Requirements**

### **2.1.11.1 General principle**

As discussed in section 1.9.8.1, the PSDR are split into:

- the Delivery Requirements, which contain the technical, functional and Services requirements of the State that define the scope of the Project; and
- the Project Scope, which is Project Co's bid solution to the Delivery Requirements.

### **2.1.11.2 Project specific amendments**

The Delivery Requirements define the scope of the Project. They must be unambiguous, well drafted and consistent with the other parts of the Project Deed. Poorly structured and drafted PSDRs are fertile ground for Modifications and extension of time claims, and undermine the risk transfer, which is fundamental to an Availability PPP project.

Procuring agencies should ensure they have allowed for review of the PSDR for clarity, enforceability and consistency with the other parts of the Project Deed, prior to release of the RFP.

## **2.1.12 Required Rating**

### **2.1.12.1 General principle**

The Required Rating definition provides an independent benchmark for the minimum credit rating required for any issuer of a Performance Bond (including during the Development Phase and as part of Handover) and for any Reputable Insurer.

The benchmark is based on credit ratings by one of two internationally acknowledged ratings agencies: Standard and Poor's (S&P) or Moody's Investors Service (Moody's). The specified credit ratings of A- (S&P) or A3 (Moody's) provide the State with an appropriate degree of protection against the risk that any financial institution will be unable to meet its relevant obligations in respect of the Project.

The nominated credit ratings are typically consistent with the credit ratings that the Financiers require under the Finance Documents for performance bond issuers.

### **2.1.12.2 Project specific amendments**

The State may consider including equivalent credit ratings from other rating agencies.





## **2.1.13 Services**

### **2.1.13.1 General principle**

Services are those provided by Project Co during the Operational Phase. For SIPDs, Services may include building maintenance, building management systems, cleaning, catering, pest control, logistics and portering. On a road project this may often include operation of the relevant road.

### **2.1.13.2 Project specific amendments**

This definition will be considered and confirmed by the State on a project specific basis in accordance with the categories of Services determined to be provided by Project Co in respect of the Project.

## **2.1.14 Services Equipment**

### **2.1.14.1 General principle**

Services Equipment is intended to cover the tools of trade used by Project Co solely to undertake the Services that are not listed on the Asset Management Plan. Project Co or its Subcontractors own the Services Equipment. It includes such items as cleaning and maintenance equipment and consumables.

As it is owned by Project Co, Services Equipment will not transfer to the State if the Project Deed is terminated. If the Services Equipment is owned by the Services Contractor, then that Services Equipment will not transfer to Project Co or the State if the Services Contractor is terminated.

### **2.1.14.2 Project specific amendments**

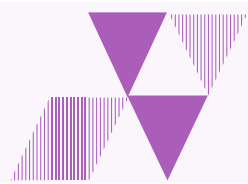
If the State wants to own any tools of trade, then these will need to be included in the Asset Management Plan. For example, given its integration with the facility, the State may want to own any automated guided vehicles that are used in the delivery of Services in a hospital.

At Contract Close, the procuring agency should ensure the Asset Management Plan includes details of the Equipment the State intends to own and that it is regularly updated to reflect new Equipment purchased that should be owned by the State.

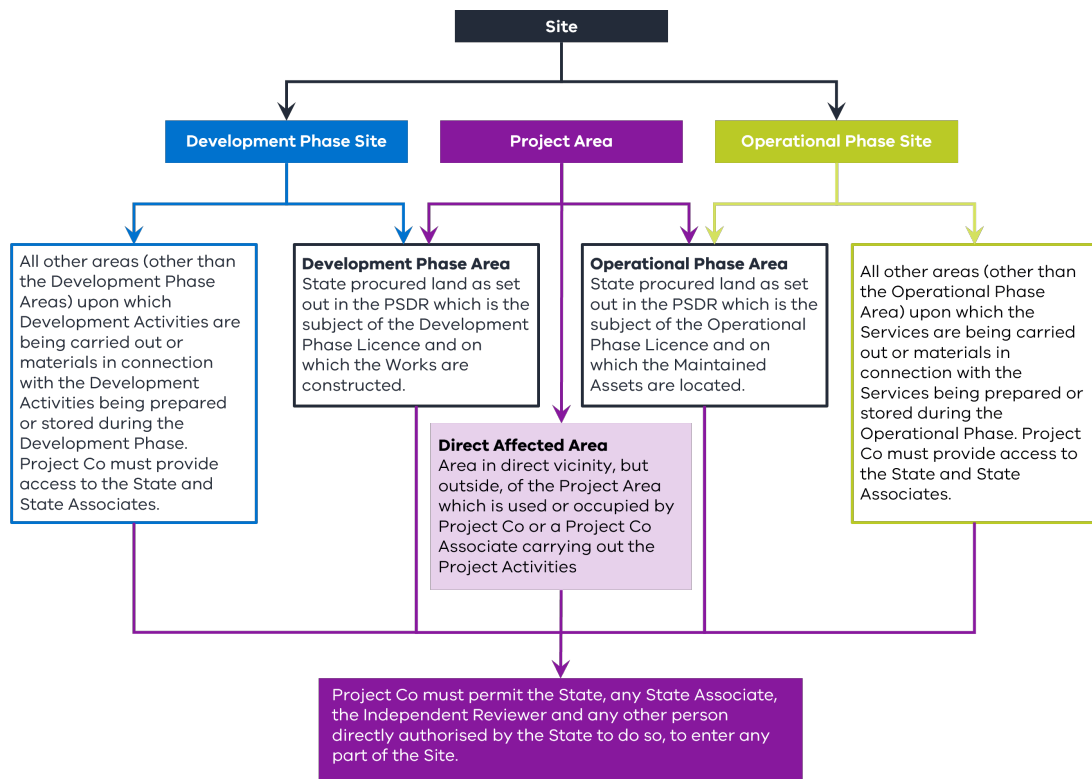
## **2.1.15 Site, Project Area, Development Phase Site, Operational Phase Site, Development Phase Area, Operational Phase Area and Direct Affected Area**

### **2.1.15.1 General principle**

There are a number of definitions for physical areas, sites or locations, which are relevant to the Project. Figure 5 shows the interrelationship between the different definitions.



**Figure 5 – Interrelationship between various area definitions**



The Development Phase Area is the subject of the Development Phase Licence, and the Operational Phase Area is the subject of the Operational Phase Licence.

### 2.1.15.2 Project specific amendments

The part of the Development Phase Area that is the subject of the Development Phase Licence, and the Operational Phase Area that is the subject of the Operational Phase Licence, will be determined on a project specific basis. For example, typically, the part of the Development Phase Area that is subject of the Development Phase Licence will cover the area on which the Maintained Assets and Returned Works are to be constructed. This is on the basis that the State should provide access to the areas where it requires work to be undertaken.

However, the State may not arrange access to the areas in respect of Temporary Works (such as lay down areas), on the basis that these may be selected and access procured by Project Co.

### 2.1.16 Further definitions

Guidance on further definitions is included elsewhere in this section 2 where the definitions relate to issues or clauses otherwise dealt with in section 2.



## 2.2 General rules of interpretation (clause 2)

### 2.2.1 Project Deed

The document is executed by the parties as a deed. The limitation period within which an action can be brought for breach of a deed is 15 years under Victorian law, and 12 years under NSW law, from the date of the breach. This compares to the period within which an action can be brought for breach of contract, which is six years from the date of the breach (see sections 5(1) and 5(3) of the *Limitation of Actions Act 1958* (Vic) and section 16 of the *Limitation Act 1969* (NSW)).

The time from which a limitation period runs varies with the nature of the Claim (for example, breach of contract, breach of warranty and negligence), and the Liability for Loss (for example, Liability for general damages or for losses on an indemnity basis).

Respondents should also be aware of other statutory limitation periods in Victoria and NSW that may limit the period in which actions can be brought under the various Project Documents. For example:

- Section 134 of the *Building Act 1993* (Vic) has the effect that a building action, which includes a building action in respect of Defects, cannot be brought more than 10 years after the issue of the Certificate of Commercial Acceptance for certain assets.
- Section 6.20 of the *Environmental Planning Act 1979* (NSW) has the effect that an action for loss or damage in connection with defective Building Work cannot be brought more than 10 years after the issue of the Certificate of Commercial Acceptance for certain assets.

### 2.2.2 Order of precedence (clause 2.3)

#### 2.2.2.1 General principle

Clause 2.3 contains the order of precedence that will apply between the various documents comprising the Project Deed. Generally, the clause provides that the terms and conditions take precedence over the technical and functional requirements. This is because the terms and conditions give context to and inform the technical and functional requirements.

In terms of the technical and functional requirements, while the PSDR will typically have its own order of precedence, the Delivery Requirements will take priority over the Project Scope.



### 2.2.2.2 Project specific amendments

The order of priority of schedules will be determined on a project specific basis. However, the general principle is that the legal and commercial schedules, which include terms and conditions, will take precedence over the technical schedules.

The order of priority may need to be amended to take into account any order of precedence in the PSDR.

### 2.2.3 Inconsistency between State Project Documents (clause 2.4)

If there is inconsistency, ambiguity or discrepancy between the Project Deed and any other State Project Document, then the order of precedence is:

- the Finance Direct Deed first;
- the Project Deed second; and
- the remaining State Project Documents third.

The Finance Direct Deed takes precedence over the Project Deed, as it places limitations on certain State rights under the Project Deed, in favour of the Financiers. For example, the State's rights to terminate the Project Deed under the Project Deed are subject to the restrictions agreed with the Financiers, in accordance with the Finance Direct Deed.

As the remaining State Project Documents are given equal priority, the parties need to apply the inconsistency regime set out in clause 2.6 (*Resolution of inconsistency, ambiguity or discrepancy*) to resolve inconsistencies, ambiguities or discrepancies within and between the State Project Documents, other than the Finance Direct Deed or the Project Deed.

## 2.3 Indexation (clause 2.17)

### 2.3.1 General principle

Indexation is intended to reflect the time value of money, given the long-term duration of a PPP project. Over the life of the Project, certain monetary thresholds (such as Insurance values) and payments for certain Services will be Indexed on the basis that the long-term risk of inflation is outside the control of Project Co.

The capital component of the Service Payment linked to the design and construction of the Works is not typically Indexed, given the shorter length of the Development Phase during which the construction component costs are incurred (that is, the rate of inflation can be reasonably forecast).

The Indexes Schedule sets out:

- the applicable indices (derived from Australian national sources);
- the frequency of indexation to apply in each case (typically, annually or quarterly); and
- the methodology that will apply if an Index ceases to be published by the relevant independent source.



### **2.3.2 Project specific amendments**

Indices are determined on a project specific basis. Indices should be chosen that most closely reflect the cost category to which they are being applied.

## **2.4 Conditions Precedent (clause 3)**

### **2.4.1 General principle**

The Project Deed does not come into full effect and operation until the Conditions Precedent are satisfied or waived by the parties named as the beneficiaries of the relevant Conditions Precedent. However, a limited number of provisions do commence from the time that the Project Deed is executed. Once the Project Deed is executed, it cannot be amended without a formal amending process. Accordingly, price, scope and terms are 'locked in' from execution.

### **2.4.2 Failure to satisfy Conditions Precedent**

The Harmonised PPP Project Deeds provide that, if the Conditions Precedent are not satisfied (or if they are waived) by the Condition Precedent Deadline, the State may terminate the Project Deed (and each State Project Document will also be terminated).

Neither the State nor Project Co will have any Claim against the other party in respect of the termination, but this does not limit any rights the parties may have for breach of the Project Deed that occurs prior to the termination.

The Harmonised PPP Project Deeds do not require the Successful Respondent to provide security between Contract Close and Financial Close, given that the period between the two dates is typically very short.

However, where this is not the case (for example, where Approvals are a Condition Precedent and may take a number of months to obtain), the State may require the benefit of an 'on demand' indemnity from the main sponsor(s) for the Project or a Performance Bond. This is to cover the State's costs of having to retender the Project or take other action, as a consequence of Project Co failing to satisfy the Conditions Precedent that it is obliged to meet.

The party providing the indemnity needs to have sufficient assets to support the potential Liability and will, therefore, typically be a sponsor of the Project. Where this is not possible, a Performance Bond can be provided for the satisfaction of the Conditions Precedent that Project Co is required to meet.



### 2.4.3 Project specific amendments

The Conditions Precedent are set out in the template Schedule 2 (*Conditions Precedent*) and may be amended on a project specific basis. For guidance, the Conditions Precedent will typically include:

- delivery of executed counterparts of each State Project Document;
- delivery of certified copies of all other Project Documents;
- legal opinions for the benefit of the State (and in a form and substance satisfactory to the State) from the solicitors acting for each Consortium Member (being the Project Entities, the D&C Contractor, the Services Contractor, and the Parent Guarantors of the D&C Contractor and Services Contractor) as to customary matters, including:
  - the legal capacity and corporate power of each Consortium Member to enter into and perform its obligations under the relevant Project Documents;
  - the enforceability against the relevant Consortium Member of the Project Documents to which it is a party; and
  - due execution by the Consortium Member of the Project Documents to which it is a party;
- pre-rate set satisfaction notice;
- Development Phase Insurance commencement and evidence; and
- receipt by the State of the Financial Close Financial Model.

Care should be taken in determining whether an event or requirement should be a Condition Precedent and determining which party benefits from the Condition Precedent. For example, requirements that could take a long time to be satisfied or may impact the scope of the Project on satisfaction, such as planning approvals and the conditions on which they are granted, may require bespoke treatment.

Clause 3.1 (*Commencement of obligations*) sets out the provisions that apply from execution of the Project Deed. Although the list of provisions is standard, it will need to be checked and confirmed on a project specific basis. This will ensure the clauses listed are still relevant and that any additional terms included in the Project Deed on a project specific basis, which are intended to apply from the date of the Project Deed, have been included.

Financial Close Adjustment Protocols will be used to update the Contract Close Financial Model (which includes the Model Output Schedule). It is important that the Financial Close Adjustment Protocols are updated on a project specific basis and include all the outputs for the Model Output Schedule.



## **2.5 Term (clause 4)**

### **2.5.1 General principle**

The Term of the Project Commences on the date of Financial Close and consists of:

- the Development Phase, during which Project Co designs and constructs the Project Assets (other than the Remaining Works), and Project Co and the State prepare for delivery of the Services. The Development Phase ends on the Date of Commercial Acceptance; and
- the Operational Phase, during which the Services are provided, which commences on the day after the Date of Commercial Acceptance (the Operational Commencement Date) and ends on the Final Expiry Date.

If the Project is terminated early, the Term will end on the Expiry Date.

#### **2.5.1.1 Development Phase**

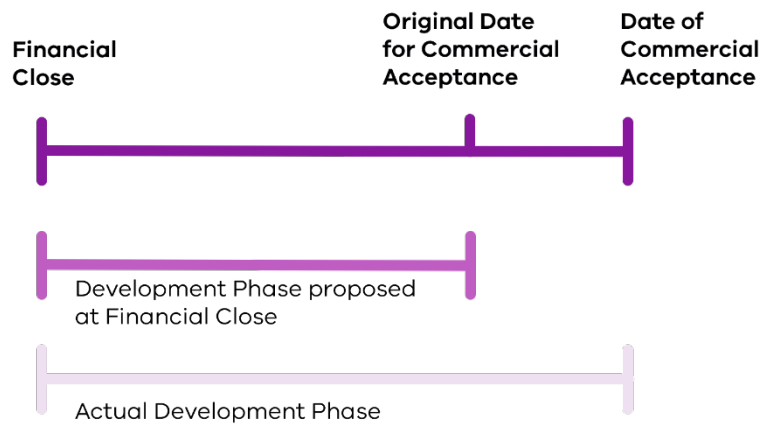
The length of the Development Phase will be competitively tendered as part of each Respondent's Proposal. The tendered period, being the period between an anticipated date for Financial Close and the Original Date for Commercial Acceptance, is then set out in the Contract Particulars at Contract Close. It will be adjusted depending on the date on which Financial Close is actually achieved, in accordance with the Financial Close Adjustment Protocols.

The actual Development Phase is the period between Financial Close and the Date of Commercial Acceptance. It may be longer or shorter than the period initially proposed, depending on whether Commercial Acceptance is achieved before (in circumstances where early Commercial Acceptance is permitted – see section 2.26.4.3) or after the Original Date for Commercial Acceptance.

The Date for Commercial Acceptance may be extended for Extension Events under the Project Deed (section 2.5.1.2). The Date of Commercial Acceptance may occur after the Date for Commercial Acceptance, where Project Co is delayed in achieving Commercial Acceptance by the Date for Commercial Acceptance and the Project Deed does not entitle Project Co to an extension to the Date for Commercial Acceptance. This is shown in Figure 6.



**Figure 6 – Commercial Acceptance and the Development Phase**



### 2.5.1.2 Operational Phase

The length of the Operational Phase is initially determined by the State on a project specific basis and included in the RFP, considering matters such as:

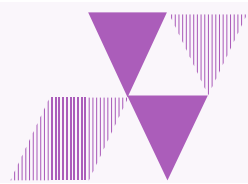
- the anticipated duration of the State’s need for the Services;
- whole of life costing benefits such as:
  - the expected economic life of the asset;
  - anticipated timing of major upgrades or refurbishment; and
  - expected technological life of the asset;
- the minimum term considered necessary to deliver a reasonable return to Project Co on its investment and amortise the capital value of the asset, such that the asset can revert to the State without further payment (which will depend on a variety of factors, including the likely length of the Development Phase); and
- the need to retain the State’s flexibility in the long term.

In the Harmonised PPP Project Deeds, the proposed Operational Phase is 25 years. This is the period between the Original Date for Commercial Acceptance and the Final Expiry Date.

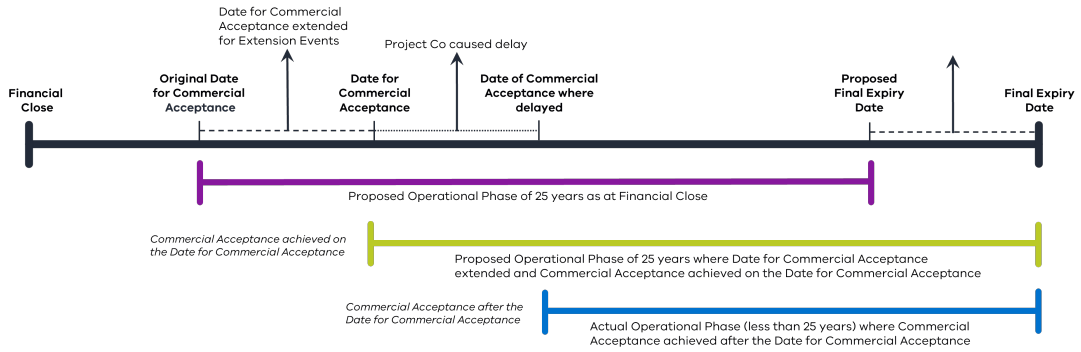
As the Final Expiry Date is defined as the twenty-fifth anniversary of either the Date for Commercial Acceptance or the Date of Commercial Acceptance (whichever comes first), this date will be extended for the same period as the Date for Commercial Acceptance for Extension Events under the Project Deed. This will retain the Operational Phase proposed by the State, unless Commercial Acceptance is achieved after the Date for Commercial Acceptance.

The actual Operational Phase is the period between the Date of Commercial Acceptance and the Final Expiry Date. If the Date of Commercial Acceptance is later than the Date for Commercial Acceptance, the Operational Phase is reduced correspondingly. This is shown in Figure 7.





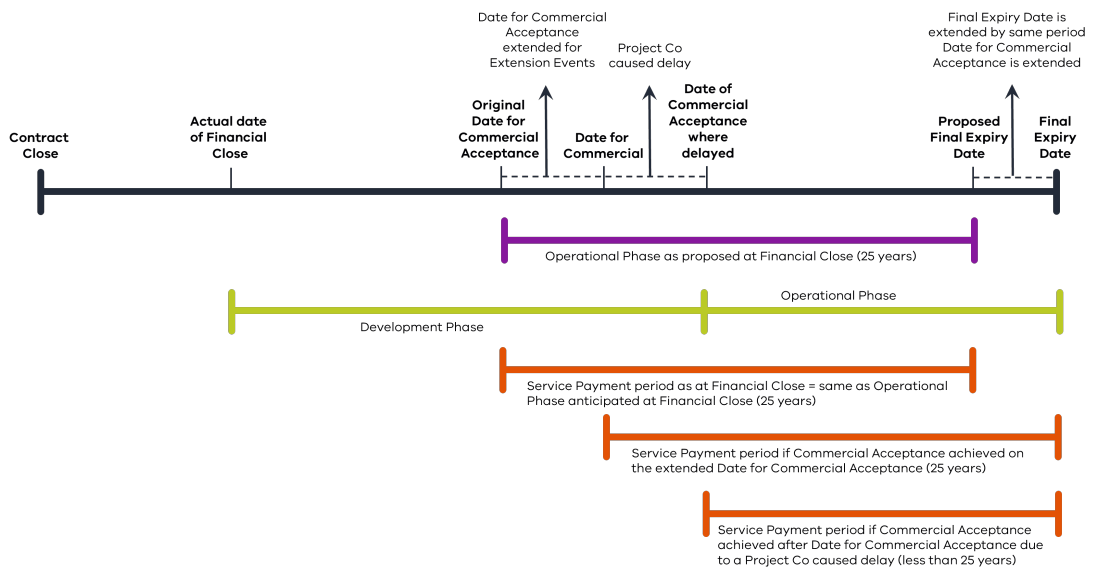
**Figure 7 – Commercial Acceptance, the Final Expiry Date and the Operational Phase**



The Service Payments payable to Project Co during the Operational Phase are fixed in time and amount, on the basis of the Operational Phase anticipated at Financial Close. The amount of the Service Payment is then adjusted for Change Compensation Events under the Change Compensation Principles. For example, if a Service Payment of \$5 million is intended to be made monthly over 25 years, there are intended to be 300 Service Payments for a total of \$1.5 billion.

If the actual Operational Phase is less than the proposed Operational Phase, because Commercial Acceptance is achieved after the Date for Commercial Acceptance, the Service Payments payable to Project Co are reduced accordingly. If the Operational Phase is actually 24 years, there will be 288 Service Payments for a total amount payable of \$1.44 billion. This assumes a flat Service Payment for the duration of the Operational Phase, which may not always be the case. This is set out in Figure 8.

**Figure 8 – Service Payments and the Date of Commercial Acceptance**





### **2.5.1.3 Commercial rationale for reduction in Service Payments where there is delay to Commercial Acceptance**

The reduction in the number of Service Payments for late Commercial Acceptance has been adopted by the State for the reasons that:

- it creates a commercial incentive to achieve Commercial Acceptance by the Date for Commercial Acceptance, as Project Co may lose a portion of the Service Payments as a consequence of truncating the Operational Phase (although this may depend on the way in which the Service Payment profile is sculpted by Project Co); and
- the consequences for delay are easy to enforce, as the number of Service Payments are simply reduced.

The greatest incentive to achieve Commercial Acceptance by the Date for Commercial Acceptance, however, is the likelihood that Project Co will have to make debt repayments or pay capitalised interest for late debt repayments, if the Service Payment is not payable until after the Date for Commercial Acceptance.

The Harmonised PPP Project Deeds provide that the reduction in Service Payments, in circumstances where there is a delay to achieving Commercial Acceptance, subject to some limited exceptions, is the State's sole financial remedy and Project Co's sole financial Liability for the delay.

If a procuring agency will incur significant out-of-pocket costs or losses as a consequence of late Commercial Acceptance, which are in excess of the amount saved from any reduction in Service Payments (for example, the cancellation of conferences as a consequence of the late completion of a convention centre), the procuring agency may consider including a liquidated damages regime.

The appropriate rate of liquidated damages should be a genuine pre-estimate of the losses likely to be incurred as a result of the delay to Commercial Acceptance, so as to be legally enforceable against Project Co.

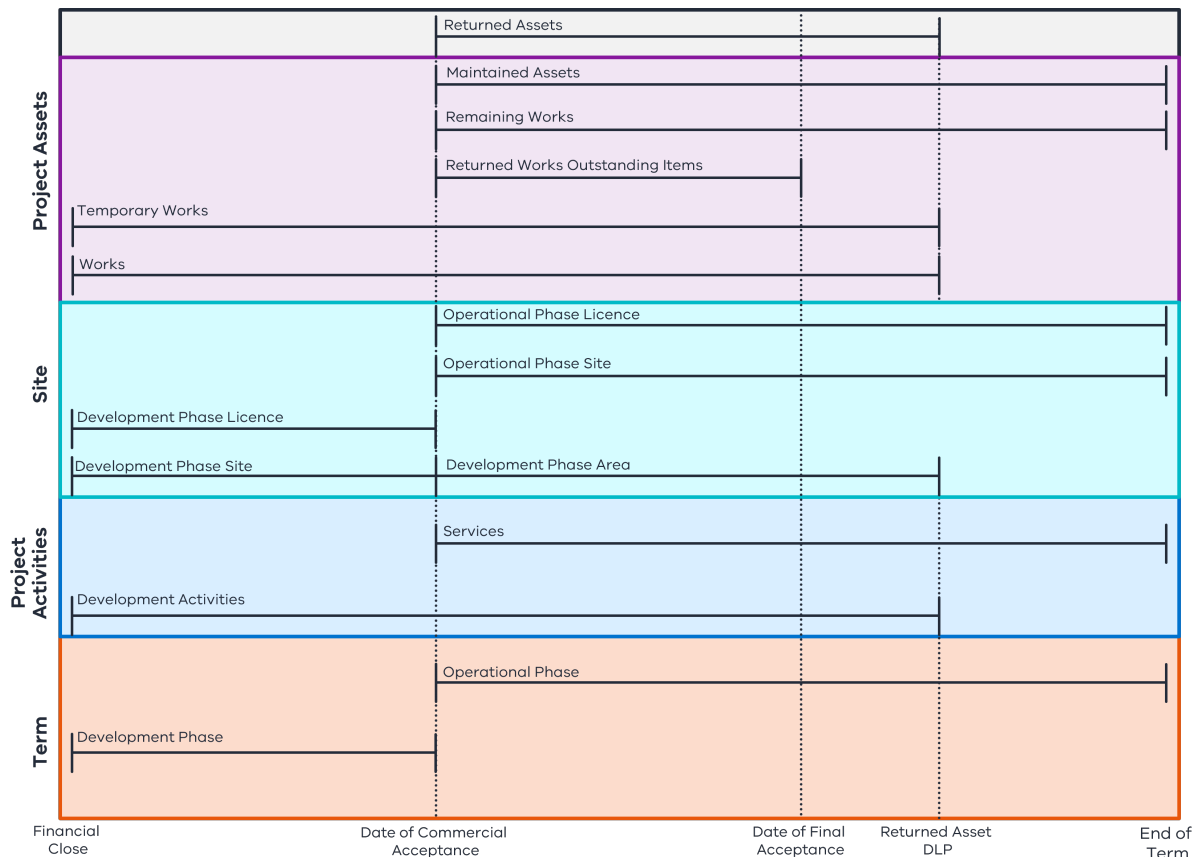
### **2.5.1.4 Reduction in Service Payments where there has been payment of the Development Phase Finance Amount**

Service Payments may also be reduced where the State pays Project Co the Development Phase Finance Amount, to ensure there is no increase to the Equity IRR. See section 3.3.4 for discussion on the Development Phase Finance Amount.

### 2.5.1.5 Time-related definitions

Figure 9 defines how certain terms align with the different phases of the Project.

**Figure 9 – Defined terms throughout phases of the Project**



### 2.5.2 Project specific amendments

The terms used for ‘Development Phase’, ‘Operational Phase’ and related definitions should not be amended on a project specific basis, even where the Project does not include ‘operation’ of the Project Assets by Project Co.

The elements of the Term that will be considered on a project specific basis are:

- the proposed length of the Development Phase, which will be bid back by the Successful Respondent;
- the length of the Operational Phase, which will be determined by the State;
- whether a more complex, staged Development Phase or Operational Phase is required, for example, if there are multiple facilities being delivered or if delivery needs to be staged across an existing operating site; and
- whether liquidated damages are required in respect of delays to Commercial Acceptance.



## 2.6 Fit For Purpose Warranty (clause 5.5)

### 2.6.1 General principle

Project Co provides a warranty that each of the Maintained Assets, the Remaining Works and the Returned Assets will be Fit For Purpose and comply with:

- the requirements of the Project Deed;
- all applicable Laws; and
- all applicable Standards.

### 2.6.2 Operation of Fit For Purpose Warranty

Fit For Purpose is defined as fit for the intended purposes, functions and uses, as specified in, or reasonably inferred from, the PSDR or any other part of the Project Deed. The Fit For Purpose Warranty (FFP Warranty) applies to different classes of assets, including:

- Maintained Assets (other than Remaining Works) – on and from the Date of Commercial Acceptance, by reference to the purposes, functions and uses that are current and apply as at the Date of Commercial Acceptance;
- Maintained Assets (including Remaining Works) – on and from the Date of Final Acceptance, by reference to the purposes, functions and uses that are current and apply as at the Date of Final Acceptance;
- Returned Assets – as at the Date of Returned Works Acceptance for the relevant Returned Asset, by reference to the purposes, functions and uses that are current and apply at that date; and
- Returned Assets that were Remaining Works or Returned Works Outstanding Items – on the Date of Final Acceptance, by reference to the purposes, functions and uses that are current and apply as at the Date of Final Acceptance.

Each FFP Warranty is extended to the purposes, functions and uses 'reasonably inferred from' the PSDR, and not just those expressly stated in the PSDR. This is because the PSDR may specify requirements that are clearly assuming that the Project Assets will be used for a particular purpose, without specifying the use itself.

In order for the FFP Warranty to operate effectively, it is critical that the PSDR sets out the purposes and functions of the relevant Project Assets. This should be verified by the legal team drafting the Project Deed.

Under clause 51.3 (*Repetition of representation and warranties*) of the Harmonised PPP Project Deeds, the FFP Warranties for the Maintained Assets repeat every day from Commercial Acceptance to the Expiry Date. The warranty is expanded at the Date of Final Acceptance to include the Remaining Works that, by definition, are not completed at Commercial Acceptance, but are required to be completed by Final Acceptance.



The FFP Warranty for each Returned Asset is given at the Date of Returned Works Acceptance for the relevant Returned Asset. It is expanded at Final Acceptance, but only to cover those Returned Assets that were Remaining Works, or those parts of the Returned Assets that were the subject of Returned Works Outstanding Items.

The State is indemnified by Project Co under clause 43.2 (*Indemnity for Project Co breach*) of the Harmonised PPP Project Deeds for Liability that the State suffers as a consequence of the breach of the FFP Warranties. However, Project Co's Liability is limited by the limitations placed on the indemnity in clause 43.6 (*Limits on Project Co Liability to indemnity*) and the Indirect or Consequential loss exclusions in clause 43.11 (*Indirect or Consequential Loss*) of the Harmonised PPP Project Deeds.

Liability for warranties is also limited by the various statutory limitation periods referred to in section 2.2.1.

The State appreciates that a repeating warranty for the Maintained Assets can be a challenge for the construction market. However, repetition of the FFP Warranties is fundamental to the long-term nature of the Project Deed and the whole-of-life outcomes that the State is seeking from the PPP. It is therefore a risk that the State expects equity to take, allocate, manage and price, as appropriate.

Project Co is required to undertake the Development Activities, so that the Temporary Works are Fit For Purpose. This is because the Temporary Works (for example, scaffolding and temporary bypasses) can be significant.

As the Fit For Purpose test is by reference to the PSDR, it will be important to ensure that the purposes, functions and uses for the Temporary Works are specified in the PSDR. If they are not, the Project Deed should be amended so that a more general Fit For Purpose requirement, without reference to the PSDR, is used for the Temporary Works.

### **2.6.3 Warranted Life**

The FFP Warranties operate separately to the Warranted Life provisions of the Project Deed (although both regimes apply the definition of 'Fit For Purpose'). Generally, the Warranted Life regime applies for a period after the Expiry Date or, in respect of Returned Assets, after the date of handback of the Returned Asset. See section 2.35 for discussion on the Warranted Life regime.

### **2.6.4 Project specific amendments**

Procuring agencies may consider, on a project specific basis, whether to extend the FFP Warranty for certain Returned Assets where this may provide value for money for the State.



## **2.7 All risks – Project Documents (clause 5.6)**

### **2.7.1 General principle**

It is the intention of the parties that all rights and liabilities of the parties (including the calculation of compensation) are regulated by the terms of the Project Deed, limiting the ability of Project Co to make extra-contractual claims against the State, such as for negligence or misrepresentation. To give effect to this, specific provisions have been included in clause 5.6 and a detailed compensation regime is included in the Change Compensation Principles.

### **2.7.2 Operation of the all risks clause**

Clause 5.6 contains four key principles, which are summarised below.

#### **2.7.2.1 Principle 1**

Subject to Principle 2, Project Co:

- accepts all risks in connection with delivering the Project; and
- is not entitled to make any Claim against the State or any State Associate in connection with the Project or the Project Documents, including any Claim Project Co would otherwise be entitled to make at Law.

Principle 1 does not prevent Project Co from defending a Claim made by the State or State Associates against Project Co, except if there are provisions in the Project Deed that expressly set out the bases on which Project Co may defend or reduce its Liability.

Project Co's rights to defend a Claim are limited by those provisions. For example, clause 43.6 sets out the limitations on Project Co's Liability to the State in respect of the indemnities set out in the Project Deed. Project Co is not entitled to defend an indemnity claim made by the State on any basis other than those set out in clause 43.6. However, except for clause 43.6, Project Co may have had other rights available to it at common law or in equity, in defence of an indemnity.

#### **2.7.2.2 Principle 2**

Subject to Principle 3, the acceptance of all risks by Project Co does not exclude Project Co's right to claim:

- damages for breach of a State Project Document by the State or any State Associate; and
- compensation for Project Co's or any Project Co Associate's Liability to a third party in respect of death, personal injury or damage to property, to the extent that such Liability is a consequence of a fraudulent, reckless, unlawful or malicious act, or omission of the State or a State Associate.



Project Co's rights are extended in the circumstances set out in Principle 2, because the State recognises there are certain losses and liabilities that Project Co may incur, particularly to third parties that are not covered by the compensation regime in the Change Compensation Principles.

### **2.7.2.3 Principle 3**

Project Co's sole financial entitlement for delay, disruption or disturbance of the progress of any part of the Development Activities, or prevention of the performance of the Services, is limited to amounts payable under specified provisions of the Project Deed and the Change Compensation Principles.

### **2.7.2.4 Principle 4**

Project Co accepts all risk in connection with the PSDR and acknowledges and agrees that:

- the PSDR is fit for the purpose of enabling Project Co to carry out the Project Activities and ensuring that the Works satisfy the purposes that are set out in the PSDR; and
- it is not entitled to make any Claim against the State for any incompleteness, incorrectness, inaccuracy, inappropriateness, inadequacy or unsuitability of, or any omissions, ambiguities, discrepancies or inconsistencies in or between the PSDR.

The successful Respondent has been selected in part because of its expertise in delivering the type of infrastructure that is the subject of the Project. Accordingly, the State expects the successful Respondent to have reviewed and vetted the technical requirements for the Project set out in the PSDR.

## **2.8 Partnership Framework (clause 5A)**

The Partnership Framework has been introduced in the Harmonised PPP Project Deeds to drive collaborative behaviours, promote efficient dispute resolution and information sharing throughout the Term and to ensure that each party is committed to working together to achieve the Project Objectives and 'best for project' outcomes. The parties are encouraged to manage and resolve conflicts proactively for their mutual benefit.

Key elements of the Partnership Framework include:

- parties acknowledging their shared commitment to achieving Project Objectives (clause 5A.1(b));
- Handover Induction Workshops from procurement to delivery, and from delivery to operations (clause 5A.3) (see section 2.8.2);
- an acknowledgement that the State has a role in achieving the Project Objectives and should proactively engage with certain matters (for example, stakeholder management and timely provision of information) (clause 5A.4);



- clarifications regarding Subcontractor pass-through Claims (clause 9.7);
- a commitment to early identification and collaborative resolution of Disputes (clause 48); and
- a new dispute resolution process whereby Disputes can be referred to a Dispute Resolution Team (DRT) to be resolved by a Bespoke Resolution Procedure (clause 48A) (see section 2.56).

### 2.8.1 Project Objectives and Relationship Principles

The Project Objectives provide a clear and concise description of the goals and expectations of the project, to ensure that the parties agree to and are aligned on the collective goals in delivering the project.

The Project Objectives are defined in clause 5A.1 (*Project Objectives*) and may be amended on a project specific basis. The Project Objectives will be relevant for:

- the parties giving effect to the Project Objectives, by promoting Relationship Principles and holding Handover Induction Workshops;
- the parties' acknowledgement that the State's proactive engagement has the potential to facilitate achievement of the Project Objectives; and
- the DRT's consideration of Disputes and whether proposed resolutions of Disputes will maximise achievement of the Project Objectives.

The parties must also agree to abide by the Relationship Principles, being a range of principles of behaviour, including:

- promoting a 'one team' culture and cooperating to achieve the Project Objectives and a 'best for project' outcome;
- establishing and maintaining a culture that emphasises and reinforces safety and wellbeing, innovation and collaboration, excellence and achievement, certainty and responsiveness, integrity, mutual trust and respect, and personal relationships;
- notifying each other of perceived or real differences of opinion or conflicts of interest as soon as they arise, to promote the resolution of such issues within the shortest possible timeframe;
- always acting in a manner that delivers value for money for the State;
- being transparent in all dealings and sharing all relevant information in a timely way and on an open-book basis, in accordance with the Change Compensation Principles;
- ensuring their respective officers, agents, advisors, Consultants, Contractors, Subcontractors and employees are also committed to these Relationship Principles; and
- identifying and sharing learnings of the parties, and developing capability.





Each party must actively identify and support behaviour that reflects the Relationship Principles and must promptly address behaviour that does not reflect the Relationship Principles. The Senior Representatives Group and the DRT must also act consistently with the Relationship Principles. See section 2.56 for discussion on the DRT.

## **2.8.2 Kick-off Workshops**

Kick-off Workshops must be held to facilitate induction and transition from procurement to delivery, and delivery to operating teams, and to minimise double handling of key issues and risks. Kick-off Workshops must be held after Financial Close and after the Date of Commercial Acceptance.

The primary function of Kick-off Workshops is to ensure a smooth transition between procurement teams, delivery teams and operating teams. During the workshops, teams are given the opportunity to understand the key contractual, technical and commercial issues that have been raised during procurement and commercial negotiations of the deed.

The aim is to collaboratively identify and assess any managed risks and opportunities while facilitating early resolution, mitigation or proactive management of potential issues on a best for project basis. By seeking to avoid misunderstandings or double handling of key commercial or technical issues and risks, the workshops ensure that the expertise and experience of the relevant teams are appropriately used.

The workshops also encourage collaboration and interface coordination between the relevant teams, with the aim of avoiding double handling and misunderstanding of key issues, risks and information. The sharing of lessons learnt helps develop the capability of the relevant teams to ensure the next phase of the project is positioned for success.

Kick-off Workshops must be attended by key commercial, technical and legal stakeholders from the relevant teams, including the State Representative, Project Co Representative, and any onsite project directors of Project Co (as applicable).

Under the SIPD, Kick-off Workshops must also be attended by the Operator Representative and, if applicable, any onsite project directors of the Operator.



### **2.8.3 Proactive State engagement**

The State 'Key Result Areas' (KRAs) reflect the collaborative and cooperative nature of the relationship between the parties by demonstrating that the State also has performance expectations that will contribute to the success of the Project. The KRAs will be developed collaboratively during the RFP Phase.

Project Co is expressly prohibited from making any Claim against the State arising out of the State's performance against the KRAs. The KRAs are merely performance indicators, to be monitored and reviewed by the Senior Representatives Group and Executive Review Group.

## **2.9 Sustainability (clause 5B)**

Sustainable procurement, and in particular minimising the impact of climate change, is a key concern of the State. Both the Victorian and NSW States are committed to minimising greenhouse gas emissions with a goal of achieving Net Zero by 2050.

Clause 5B is intended to be used by project teams as a starting point for further development and consideration of additional sustainability requirements.

Project teams are encouraged to incorporate extra requirements where appropriate, such as:

- requiring Project Co to obtain and maintain Climate Active Carbon Neutral Certification;
- requiring Project Co to use best endeavours to not exceed the Delivery Phase Emissions Baseline (the estimated baseline of carbon emissions in the performance of the Development Activities, as at Financial Close);
- making Project Co's submission of a Sustainability Plan, which has been certified by the Independent Reviewer, a condition precedent to commencement of Works; and
- implementing a carbon offsetting regime.

## **2.10 Approvals (clause 6)**

### **2.10.1 Approvals and State Approvals**

Approvals mean the State Approvals and any other licence, permit, authorisation, consent, assessment, approval, determination, certificate, accreditation, registration, clearance, permission or the like, which must be obtained or satisfied in connection with the Project.



Project Co will be responsible for obtaining all other Approvals, including the development approval for the proposed scale, design and configuration of buildings, and for the work and Services undertaken by Project Co. Project Co is responsible for complying with all Approvals in carrying out the Project Activities.

### **2.10.2 Relevant definitions – State Approval Event**

A State Approval Event is defined as any legal action taken, or review, revocation or change made in connection with a State Approval, or any Approval, other than a State Approval resulting from such circumstances. However, it does not include events resulting from a Project Co Act or Omission, legal action by Project Co or a Project Co Associate, a General Change in Law or legal action being taken, or change to:

- any further or secondary Approval that relates to or that forms part of a State Approval; and
- a State Approval or further or secondary Approval due to:
  - a Project Co Act or Omission; and
  - a change to the design or delivery methodology in relation to the Project or the Project Assets (other than where this is due to a State Initiated Modification).

### **2.10.3 Compensation and relief**

A change to an Approval during the Operational Phase (including the introduction of any new Approval), other than a State Approval, is a General Change in Law (Operational Phase) and a Compensable Change in Mandatory Requirements. It is subject to the relief and compensation regime for General Changes in Law. See section 2.45 for the Change in Law regime.

The effect of this is that Project Co will be entitled to compensation for changes to and new Approvals (other than State Approvals) during the Operational Phase, but not during the Development Phase. This reflects an appropriate risk sharing in respect of Approvals over which the State has very limited, if any, control.

Change to a State Approval is included in the definition of State Approval Event, which has its own compensation regime. If a State Approval Event occurs, this will be deemed to be a Modification in respect of which Project Co may submit a Modification Proposal, and the Change Compensation Principles will apply as if the State Approval Event was a State Initiated Modification.



## **2.10.4 Project specific amendments**

State Approvals are Approvals required to be obtained by the State. They will be determined on a project specific basis. However, typically, the State's intention is that State Approvals will be limited to approval of the proposed land use that is consistent with the transfer of design risk to Project Co.

The way in which the State bears the risk of State Approvals, for example, whether they will be a Condition Precedent, will be determined on a project specific basis, depending on the nature of the Approval, how fundamental it is to the Project, the planning and procurement pathway, and the timing of Contract Close.

Other events that will not constitute a State Approval Event will be considered and included on a project specific basis. They will be identified by the State, taking into account the specific nature of the State Approvals for each project. For example, the State may exclude any Project Co initiated changes to land access arrangements from State Approval Events.

## **2.11 Parties and personnel (clause 7)**

### **2.11.1 Authorities (clause 7.1)**

Project Co must coordinate the Project Activities with Authorities and anticipate, plan for and price the impact on the Project of the acts and omissions of Authorities acting in accordance with their statutory powers.

To give effect to this risk allocation, clause 7.1 of the Harmonised PPP Project Deeds includes an acknowledgement from Project Co that Authorities may exercise their statutory functions and powers in a way that disrupts, interferes with or affects the Project Activities or the Project Area. When this occurs, Project Co is not entitled to relief or compensation.

This is a business-as-usual risk and the State does not consider that Project Co should be treated any differently from the rest of the community when it comes to exercising an Authority's statutory powers.

### **2.11.2 Other Representatives (clause 7.4)**

In addition to specific provision for a 'Project Co Representative', the Harmonised PPP Project Deeds include a provision to identify further Representatives on a project specific basis, who must be appointed by Project Co, approved by the State and available to the Project (defined as 'Other Representatives').

This reflects the importance of roles in addition to the Project Co Representative. It also provides a mechanism for appointing Key People who are not identified by name and included in the Contract Particulars on the date of the Project Deed.



### 2.11.3 Project specific amendments (clauses 7.4 to 7.10)

There are a number of matters dealt with in clause 7 in the Harmonised PPP Project Deeds that will be considered on a project specific basis, including:

- **Other Representatives** – in addition to the Project Representative to be included in clause 7.4;
- **Key People** – individuals named for particular roles on the Project in the Successful Respondent's Proposal that the State sees as integral to the success of the Project, and who will be included in the Contract Particulars. Examples of Key People on previous projects are the:
  - Project Director;
  - Technical Director;
  - Construction Director;
  - Communication and Stakeholder Management Officer;
  - Occupational Health and Safety Manager; and
  - Operational Support Manager;
- **Senior Representatives Group** – the members of the Senior Representatives Group will be determined on a project specific basis. The role of this group is to ensure all key stakeholders, including financiers, are informed of the status of the Project, and have the opportunity to address significant issues that may impact on the Project as early as possible, and to assess the State's performance against the KRAs;
- **Project Control Group** – while not involved in the day-to-day management of the Project, the Project Control Group has a more substantive role than the Senior Representatives Group in managing and monitoring the Project. The members of the Project Control Group will include:
  - the State Representative;
  - the Project Co Representative;
  - the Design Development Coordinator;
  - the Project Director of the D&C Contractor (during the Development Phase) and Services Contractor (during the Operational Phase); and
  - the Operator Representative, who may also be included;
- **Executive Review Group** – the purpose, function and members of the Executive Review Group are set out in Schedule 26 (Executive Review Group Terms of Reference). See section 3.11;
- **Working Groups** – the State will determine what, if any, Working Groups are required on a project specific basis and include them in the RFP. Some examples of Working Groups from previous Projects are for design, property acquisition and land, interfaces and system integration;



- **Chair** – the Harmonised PPP Project Deeds provide that the State Representative will be the chair for the Project Control Group, Executive Review Group and Senior Representatives Group. However, the State will consider whether an independent chair is more appropriate for specific projects. This may be the case where, for example, the State contracting party is a joint venture between State parties (such as a university and the State). Some Projects may also prefer to alternate the role between the State Representative and Project Co Representative; and
- **Stakeholder and community engagement** – the provisions in clause 7.11 in respect of stakeholder and community engagement are high level and limited. For some projects, this will be sufficient. However, for other projects, such as where Project Co is providing core services, Project Co may be required to undertake a greater role in stakeholder and community engagement.

## 2.12 Independent Reviewer (clause 8)

### 2.12.1 Procurement and appointment process

The Independent Reviewer performs an integral role during the Development Phase, particularly in monitoring construction progress and certifying Acceptance (subject to the State's role in certifying Commercial Acceptance on Social Infrastructure Availability PPP Projects – see section 2.26.4.1). The Independent Reviewer is appointed by the State and Project Co under an Independent Reviewer Deed of Appointment.

The role of the Independent Reviewer on Linear Infrastructure Availability PPP Projects is typically broader than on Social Infrastructure Availability PPP Projects. For example, on Linear Infrastructure Availability PPP Projects, the Independent Reviewer will undertake the role of reviewing Design Documentation for compliance with the PSDR, whereas this role is typically undertaken by the State on Social Infrastructure Availability PPP Projects.

It is important that any entities appointed are independent of the State, Project Co and the Consortium Members to avoid conflicts of interest. For larger projects, many of the entities that could carry out the Independent Reviewer role, whether themselves or in joint venture, are designers and other consultants for the Respondents. Accordingly, it can be difficult to identify one or more independent entities able to carry out the role.

This is exacerbated in circumstances where the State project team is of the view that the skills required to carry out the role of Independent Reviewer adequately will require a joint venture of a number of eligible consultants.

It is for this reason that it is common on larger Linear Infrastructure Availability PPP Projects for the State to manage the Independent Reviewer procurement. Generally, the procurement process is commenced during the Tender Process for the Project, based on the provision of a reference design and RFP documentation.



Entities associated with any Respondent's consortium (a Project Affiliation) are able to bid for and may be shortlisted for the role of Independent Reviewer, but are advised that, if the entity with which they have a Project Affiliation is the Successful Respondent, they will not be eligible for appointment as Independent Reviewer.

On Social Infrastructure Availability PPP Projects, Project Co will usually nominate a shortlist from which the State will select the Independent Reviewer.

### **2.12.2 Independent Reviewer Deed of Appointment**

The role of the Independent Reviewer is set out in the Independent Reviewer Deed of Appointment and the Project Deed. The Independent Reviewer Deed of Appointment describes the scope of the role, the standard of care and the level of monitoring of works required to be carried out.

On Linear Infrastructure Availability PPP Projects, the role of the Independent Reviewer includes a 'general overview and reasonable checking' role, in relation to carrying out Project Activities, review of Design Documentation, certifications and extensions of time. On Social Infrastructure Availability PPP Projects, the role is typically limited to determining extensions of time and other 'time-related' issues, and certifying Acceptance.

The Independent Reviewer Deed of Appointment requires the Independent Reviewer to carry out the role in accordance with the Project Deed, including in accordance with any timeframes set out in the Project Deed or where no time is specified, within a reasonable time.

Consistent with clause 8.2(b) of the Harmonised PPP Project Deeds, the Independent Reviewer Deed of Appointment also acknowledges the importance and independence of the role of the Independent Reviewer under the Project Deed.

### **2.12.3 Payment of the Independent Reviewer**

Responsibility for payment of the Independent Reviewer is typically shared equally between the State and Project Co.

The exception to this rule is where a party requests the Independent Reviewer to prepare a report, which is not otherwise required by the Project Deed or the Independent Reviewer Deed of Appointment. In this case, the party requesting the report is responsible for the relevant costs (clause 8.1(j)).

Payments to the Independent Reviewer must not include payment for, or cross- subsidisation of, any other roles (clause 8.2(d)).



#### **2.12.4 Determinations of the Independent Reviewer**

Determinations of the Independent Reviewer are final and binding, meaning that the parties are not able to have the decision reviewed, except:

- under clause 2.18, where there is a manifest error;
- where there is an express provision otherwise in the Project Deed, including determinations of:
  - extensions of time by the Independent Reviewer (clause 26.21);
  - the Independent Reviewer, in relation to the review of progress (clause 26.4);
  - the Independent Reviewer, in relation to Defects (clause 27.8); and
  - extensions of time by the Independent Reviewer, in relation to a Modification (clause 35.8); and
- under the Design Development Process, where the Independent Reviewer is the Primary Reviewer or the Secondary Reviewer (the role of the Primary and Secondary Reviewer is to be determined on a project specific basis).

This approach is taken for a number of reasons, including that:

- the Independent Reviewer is an independent party appointed by both parties, and is experienced and professional, with a thorough understanding of the Project; and
- it enables the Independent Reviewer to be able to properly perform their role and for the Project to proceed efficiently.

#### **2.12.5 Other Project roles of the Independent Reviewer**

Care should be taken in extending the Independent Reviewer's role on the Project, as conflicts of interest, actual or perceived, can arise. The State prefers to have other independent parties having roles in the project (such as the Financiers' Certifier) to increase the likelihood that if an issue is missed by one person, it will be picked up by another.

The State considers that there is an inherent conflict in the Independent Reviewer certifying Acceptance and also for certifying progress payments payable to the D&C Contractor under the D&C Contract. For example, it would be difficult for an Independent Reviewer to have certified all progress claims as payable to the D&C Contractor during the Development Phase, and then to determine that Acceptance has not been or cannot be achieved on time. Accordingly, the State will not typically allow the Independent Reviewer to undertake payment certification and certification of Acceptance.

The State will consent to the Independent Reviewer acting as Sub-Independent Reviewer under the D&C Contract, provided the necessary separation arrangements are put in place.





To avoid the inefficiencies associated with any double up of the role of Independent Reviewer and Sub-Independent Reviewer, the State will usually accept the D&C Contractor having a direct Deed or collateral warranty from the Independent Reviewer, where the role to be performed under both the Project Deed and the D&C Contract is the same. However, the D&C Contractor must agree to the importance of the role and determinations under the Project Deed in those circumstances.

To ensure that the independence of the Independent Reviewer is maintained during the period of appointment, neither the State nor Project Co may appoint the Independent Reviewer in respect of any role in the Project, without the consent of the other party.

### **2.12.6 Term of the Independent Reviewer**

The Independent Reviewer is generally appointed until Final Acceptance or to the end of the final Defects Liability Period (DLP) under the D&C Contract. This should be agreed on a project specific basis.

If the appointment of the Independent Reviewer is terminated, or the Independent Reviewer is not appointed or ceases to act as Independent Reviewer, the parties must jointly appoint another entity to act in that capacity, either by agreement or as selected by the State, in accordance with the process set out in clause 8.4. The process involves the nomination of a list of five qualified candidates by the State, from which Project Co is required to nominate three entities from which to seek a proposal.

The replacement Independent Reviewer is to be appointed on substantially the same terms as the previous Independent Reviewer and is bound by the decisions of the previous Independent Reviewer.

The Harmonised PPP Project Deeds include an interpretation provision that addresses the situation where the Project Deed requires the Independent Reviewer to perform a function when no Independent Reviewer is appointed. In those circumstances, the State will make the necessary determination, acting fairly and reasonably. Unlike the Independent Reviewer, any such determination of the State will be capable of review.

### **2.12.7 Project specific amendments**

The procurement process for the role of Independent Reviewer may differ between projects and may include:

- a process that is run by the State during the procurement for the Project, prior to a joint appointment before Financial Close;
- the appointment of a party identified by Project Co in its tender, following Contract Close; and
- the appointment of a party determined by the State from a list of up to three parties identified by Project Co in its tender, prior to Financial Close.



The process will depend on the size and nature of the Project, the experience required by the Independent Reviewer entity or joint venture to perform the role and the number of suitable candidates for the role.

Considerations on a project specific basis include:

- the timing of the appointment and role of the Independent Reviewer; and
- whether there are any exclusions to the determinations of the Independent Reviewer being final and binding under clause 8.3.

## 2.13 Subcontracting and third-party arrangements (clause 9)

### 2.13.1 General principle

The State's intention is to ensure it has full visibility of contractual arrangements and access to documentation in connection with the Project, and appropriate rights in respect of those arrangements.

The two key principles that underlie the subcontracting provisions in the Harmonised PPP Project Deeds include that:

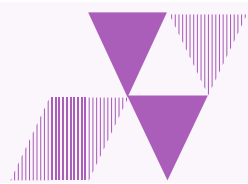
- Project Co is ultimately responsible for the delivery of the Project, regardless of the acts or omissions of its Subcontractors. One of the benefits of a PPP is the transfer of risk for Subcontractor performance to Project Co; and
- there are certain minimal levels of control that the State requires over subcontracting arrangements, given how critical some Subcontracts are to the successful delivery of the Project. These are to ensure that the State's rights are acknowledged by Subcontractors, the State has rights to secure continuity of the Project in circumstances of Project Co insolvency, and statutory protections for the Subcontractor market are upheld.

### 2.13.2 Relevant definitions

There are a number of definitions that relate to Subcontracts, and different clauses and regimes under the Harmonised PPP Project Deeds apply to different groups of Subcontracts and Subcontractors.

**Key Subcontractors** are critical to the success of the Project. The State will have a Subcontractor Direct Deed with each of the Key Subcontractors. This ensures the State can continue to engage Services of that Key Subcontractor on the same terms if the Project Deed is terminated.

All Subcontractors engaged by Project Co are Key Subcontractors. Some Subcontractors engaged below this level may also be Key Subcontractors (for example, where the Services Contractor providing maintenance Services subcontracts another Subcontractor to perform the 'soft' Services, such as cleaning and catering).



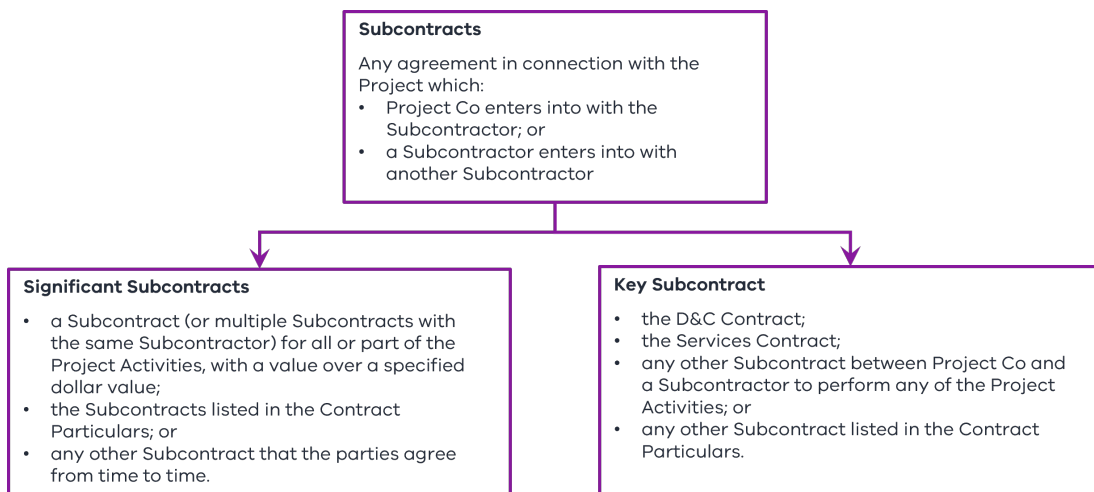
**Significant Subcontracts** are those Subcontracts under which the State requires visibility over the appointment of the Subcontractor, as well as the terms of their appointment. These Subcontracts cannot be changed without State Approval.

Significant Subcontractors often play an important role in the success of a Respondent's Proposal, but are typically one step removed from Project Co, being a Subcontractor to the D&C Contractor or the Services Contractor. Their work will often be important to the success of the Project. While they will vary from Project to Project, examples of Significant Subcontractors include designers and manufacturers of key aspects of the Project (such as vertical transportation).

The State may require the Significant Subcontractor to enter into a direct arrangement with the State via a Subcontractor Direct Deed, although this is not mandated in the Project Deed, as it is agreed directly with the Key Subcontractors.

**Subcontractors** are defined to be any person who enters into a contract in connection with the Project Activities with Project Co, or any Key Subcontractor or Significant Subcontractor. The State has limited the extent to which it reaches down the supply chain, in recognition of the administrative burden that this might otherwise create. Figure 10 shows the interrelationship between the different Subcontract definitions.

**Figure 10 – Interrelationship between different Subcontract definitions**



### 2.13.3 Subcontracting requirements

Subcontracting requirements are contained in clause 9 and throughout the Harmonised PPP Project Deed. In summary, the matters that the provisions primarily focus on include:

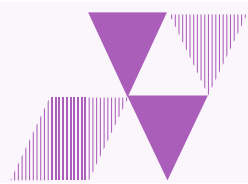
- the role of Subcontractors in the Project Control Group and Working Groups;
- Project Co responsibility for Subcontractors;
- approval of Subcontractors;
- access to and approval of subcontracting contractual documentation, and access to project documentation, sites and assets;



- consistency between subcontracting arrangements and Project Deed requirements and Standards;
- changes to or significant impacts on Subcontracting arrangements;
- direct contracting requirements between the State and subcontractors;
- Subcontractor termination entitlements (see section 2.13.4 for further discussion);
- payments of amounts owed to Subcontractors, including addressing matters dealt with under the *Building and Construction Industry Security of Payment Act 2002* (Vic);
- Subcontractor Claims and Disputes;
- probity requirements;
- the application of government policy and Law to Subcontracts and Subcontractors, including work, health and safety matters; and
- end of term arrangements.

**Table 5 – Key Contractor provisions and definitions**

Key Contractor provisions	Definitions
Hired Moveable Assets	The definition of Hired Moveable Assets extends to those Moveable Assets hired, leased or licensed by a Key Subcontractor. As a result, the Moveable Assets of a Key Subcontractor may be relevant for the provisions dealing with Hired Moveable Assets.
Indirect or Consequential Loss	The definition of Indirect or Consequential Loss does not include any penalties payable under a Key Subcontract.
Clause 9.2(c) – Subcontracting requirements	Project Co is required to ensure that its Key Subcontractors must not engage any Significant Subcontractor, unless the State, within 12 Business Days after receipt of notification under clause 9.2(a), does not require a Probity Investigation to be carried out in respect of that Significant Subcontractor.
Clause 9.2(d) – Copies of Subcontracts	Project Co is not permitted to redact any Commercially Sensitive Information from a Key Subcontract provided to the State under clause 9.2(d)(i), before providing it to the State.
Clause 9.3(g) – Subcontractor Termination Amount	If Project Co terminates a Key Subcontract due to the termination of the Project Deed by the State under clause 46.2 ( <i>Termination for convenience</i> ) or clause 46.3 ( <i>Termination for Force Majeure</i> ), and is obliged to pay the Key Subcontractor any amount under that Key Subcontract as a consequence of any such termination, the State’s Liability to Project Co is for any such amount that the State is otherwise liable to pay Project Co, in accordance with the Termination Payment Schedule, and is capped.



Key Contractor provisions	Definitions
Clause 9.7 – Obligations as to Claims made on a pass-through basis	<p>Before Project Co passes through a Claim to the State from a Key Subcontractor, it must certify to the State and take reasonable steps to ensure that the claim is bona fide (that it is made in good faith, has reasonable prospects of success, has a proper legal, technical or factual basis, and is not grossly in excess of the amount reasonably recoverably (where the claim is for a compensation amount)).</p> <p>The State may require Project Co to procure a signed letter from the King’s Counsel, Senior Counsel or a reputable firm within Australia:</p> <ul style="list-style-type: none"><li>• for Victorian PPP projects, certifying that on the factual and legal material available at present, the Claim has a proper basis; and</li><li>• for NSW PPP projects, certifying that there are reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the Law, that the Claim has reasonable prospects of success.</li></ul>
Clause 35.3 – Modification Proposal Quote	<p>Where Project Co intends to make a Claim for payment from the State in relation to the preparation of any Modification Proposal, it must, prior to preparing the Modification Proposal, promptly notify the State if a Key Subcontractor needs to engage certain third parties to assist in the preparation of the Modification Proposal.</p>
Clause 54.4 – Other Information	<p>Project Co must give the State details of any material changes in the financial condition of a Key Subcontractor (since the date of their last audited accounts) that would prejudice the ability of Project Co to perform its obligations under the Project Documents.</p>
Clause 63.11 – Moratorium Legislation	<p>Project Co is required to procure that each Key Subcontractor waives any right or remedy it may have under any Law that comes into effect after the date of the Project Deed, if the exercise of such right or remedy would:</p> <ul style="list-style-type: none"><li>• lessen any obligation or Liability of Project Co; and</li><li>• prejudicially affect the rights, powers or remedies of the State, under a State Project Document to which it is a party.</li></ul>
Clause 63.12 – PPSA	<p>Project Co must ensure that each Key Subcontractor complies with the requirements of the Harmonised PPP Project Deeds relating to Relevant Personal Property and the State’s Security Interests. Project Co must notify the State if a Key Subcontractor becomes aware of any person other than the State taking steps to register, or registering, a financing statement in relation to the Relevant Personal Property.</p>
Schedule 25 – OHS Schedule	<p>Project Co must ensure that its Key Subcontractors comply with obligations under the Harmonised PPP Project Deeds relating to work health and safety.</p>



## 2.13.4 Subcontractor Termination Amount (clause 9.3(g))

### 2.13.4.1 General principle

In the event of termination of the Project Deed by the State for convenience or for a Force Majeure Termination Event, the State will be liable to Project Co for, among other things, amounts reasonably and properly incurred by Project Co and payable to the Key Subcontractors (**Subcontractor Termination Amount**), subject to the restrictions set out in clause 9.3(g) of the Harmonised PPP Project Deeds.

Clause 9.3(g) reflects the principles that:

- the Subcontractor Termination Amount must not exceed, and is limited by, the requirements under clause 9.3(g) (for example, demobilisation costs must be reasonably and properly incurred by the Key Subcontractor with respect to the Project Activities and that could not reasonably have been avoided);
- the State agrees that the Key Subcontractor will be entitled to costs and a percentage of the unpaid balance of the Contract Sum;
- the State requires certainty as to the percentage of the unpaid balance of the contract sum that will be payable, by including that amount in the Project Deed and requiring the Respondents to bid it in their Proposals. This ensures that the State is able to quantify this exposure before terminating the Project for convenience, and avoids protracted negotiations or Disputes over quantum on a termination for convenience;
- where the State has terminated the Project Deed for convenience only, in respect of the percentage of the unpaid balance of the contract sum payable, the Key Subcontractor will be entitled to the lesser of:
  - the specified percentage of the unpaid balance of the contract sum that would have been payable to the relevant Key Subcontractor in accordance with the Key Subcontract, but for the State's termination for convenience; and
  - the specified percentage of the unpaid balance of the contract sum that would have been payable to the relevant Key Subcontractor, but for the State's termination for convenience, for the 12-month period from the date of the termination; and
- The specified percentage should be no greater than the relevant Key Subcontractor's before tax profit. The purpose of this calculation is to compensate the Key Subcontractor for the profit that the Key Subcontractor is prevented from earning as a result of that termination during the 12-month period after the date of termination. However, if the remaining period of the Key Subcontract is less than 12 months, the Key Subcontractor will only be compensated for the lost profit during that remaining period.

The State will not pay termination amounts to Key Subcontractors, other than where the State terminates the Project Deed for convenience or for a Force Majeure Termination Event.



#### **2.13.4.2 Project specific amendments**

The following parts of the Harmonised PPP Project Deeds that will require consideration on a project specific basis include:

- the Subcontractor Termination Amounts payable by the State, where the State terminates the Project Deed for convenience under clause 46.2 or a Force Majeure Termination Event under clause 46.3, will be considered and confirmed on a project specific basis, including the percentage of the unpaid contract sum and whether different values should apply during the Development and Operational Phases. These amounts are to reflect actual profit as bid by the Key Subcontractors only. All payments amounts must be approved by the applicable State Treasury prior to Contract Close;
- identification of the Subcontracts that will fall within each of the subcontract definitions referred to in section 2.13.2;
- the value to be used to determine whether a Subcontract is a Significant Subcontract, with different value thresholds for Subcontracts for Development Activities and for the Services;
- clause 9.2(c)(ii) may, in very limited circumstances, require amendment to reach further down the subcontracting chain, depending on the subcontracting structure proposed by the Successful Respondent; and
- that while the Harmonised PPP Project Deeds include a definition for and references to a Management Services Contract and Management Services Contractor, this will only be required when a Management Services Contractor is proposed by the Successful Respondent.

### **2.14 Industrial issues (clause 9.8)**

#### **2.14.1 General principle**

Subject to the compensation and relief referred to in section 2.14.2, Project Co has sole responsibility for, and must manage all aspects of, industrial relations in connection with the Project Activities and must keep the State fully informed, in accordance with its contractual obligations.



## 2.14.2 Compensation and relief

Project Co is entitled to compensation and relief for a Compensable Extension Event and/or Compensable Intervening Event for Industrial Action, which occurs at or in the direct vicinity of the Project Area, and is the direct result of an act or omission of the State or State Associate acting in connection with the Project, other than an act or omission which:

- is permitted, authorised or required under a State Project Document or required to comply with any Law or Standard;
- is undertaken as part of any Interface Works (refer to section 2.21); and
- is contemplated by clause 7.1 (*Authorities*) where the Authority is acting in accordance with its statutory powers (see section 2.11.1 for further discussion on the operation of clause 7.1).

## 2.15 Site Information and Site Conditions (clauses 10, 11 and 12)

### 2.15.1 General principle

Project Co is liable for all Site Conditions, other than where it is expressly stated otherwise in the Harmonised PPP Project Deeds that Project Co will not be liable for Site Conditions.

The State will typically engage consultants to undertake site investigations prior to and during the RFP Phase, and will release the information prepared by those consultants to Respondents. Where there are significant Site Condition risks, the State may invite Respondents to suggest any additional survey work for the State to undertake during the RFP Phase.

Where it is able to do so, the State will require its Site investigation consultants to provide a collateral warranty in favour of Project Co, or assign its rights to Project Co in respect of the Site Information Report, as to the accuracy of the information contained in their report, and the skill and care used in the preparation of the reports.

The Harmonised PPP Project Deeds provide sample drafting for guidance if the State elects either of these options. The State disclaims responsibility or Liability for the accuracy of the information contained in these reports, and the skill and care used in the preparation of the reports, and Project Co will have no Claim against the State in respect of the reports.





## 2.15.2 Unknown Geotechnical Conditions

On a project specific basis, the State may consider including a bespoke regime to share the risk of Unknown Geotechnical Conditions, where geotechnical conditions are a significant risk on the project, there is insufficient information and/or investigations available and the private sector has not been able to conduct investigations as part of the tendering process.

The Harmonised PPP Project Deeds provide sample drafting for guidance if the State elects to include this regime (see optional drafting at clause 10.3 (*Representations and warranties by Project Co*)).

Under the sample regime, 'Unknown Geotechnical Conditions' means a material factual inaccuracy in raw factual data baselined in specific sections in the PSDR or the Project Information, to the extent that the inaccuracy was not known or reasonably foreseeable by Project Co at the date of the deed.

If Project Co provides notice and the State agrees that an Unknown Geotechnical Condition has been encountered, this will be a deemed Change Compensation Event, and Project Co will be entitled to Construction Base Costs and Construction Margin on Base Costs during the Development Phase.

Project Teams may consider adopting the sample clause (or another bespoke regime as appropriate on a project specific basis), where geotechnical conditions pose a significant risk to the project, (for example, where tunnelling and excavation works comprise a significant portion of the Works, or where it is not possible to conduct sufficient physical investigations prior to the commencement of the Deed, due to site constraints, access restrictions or geographical limitations).

## 2.15.3 Interference, obstruction and nuisance (clause 11.3)

Under the Harmonised PPP Project Deeds, Project Co has an obligation (clause 11.3(a)) to:

- not interfere with traffic;
- prevent nuisance;
- ensure the safety of people and property;
- prioritise and minimise the impact on the safety of persons or property; and
- remove structures or equipment on completion.

Where the State or the Independent Reviewer reasonably believes that Project Co is failing to meet those obligations, Project Co must comply with any reasonable directions to stop or change the manner of undertaking the Project Activities, and amend the relevant Project Plan to Cure the issue.



#### 2.15.4 Contamination and Remediation (clauses 11.6, 11.7 and 43.4)

Other than Contamination, Project Co retains all Site Condition risk. Project Co's Contamination Remediation obligations are determined on a location basis. In formulating the risk allocation for the Harmonised PPP Project Deeds, the State formed the view that there is value for money in limiting Project Co's Remediation obligations, so that Project Co is not automatically required to:

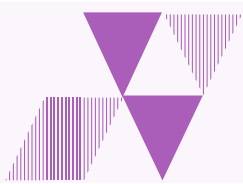
- remediate all Contamination in the Project Area or Direct Affected Area; and
- remediate the Contamination back to source (except to the extent caused or contributed to by Project Co or Project Co Associates).

The Harmonised PPP Project Deeds contain State-specific regimes, due to the different environmental legislation in each jurisdiction.

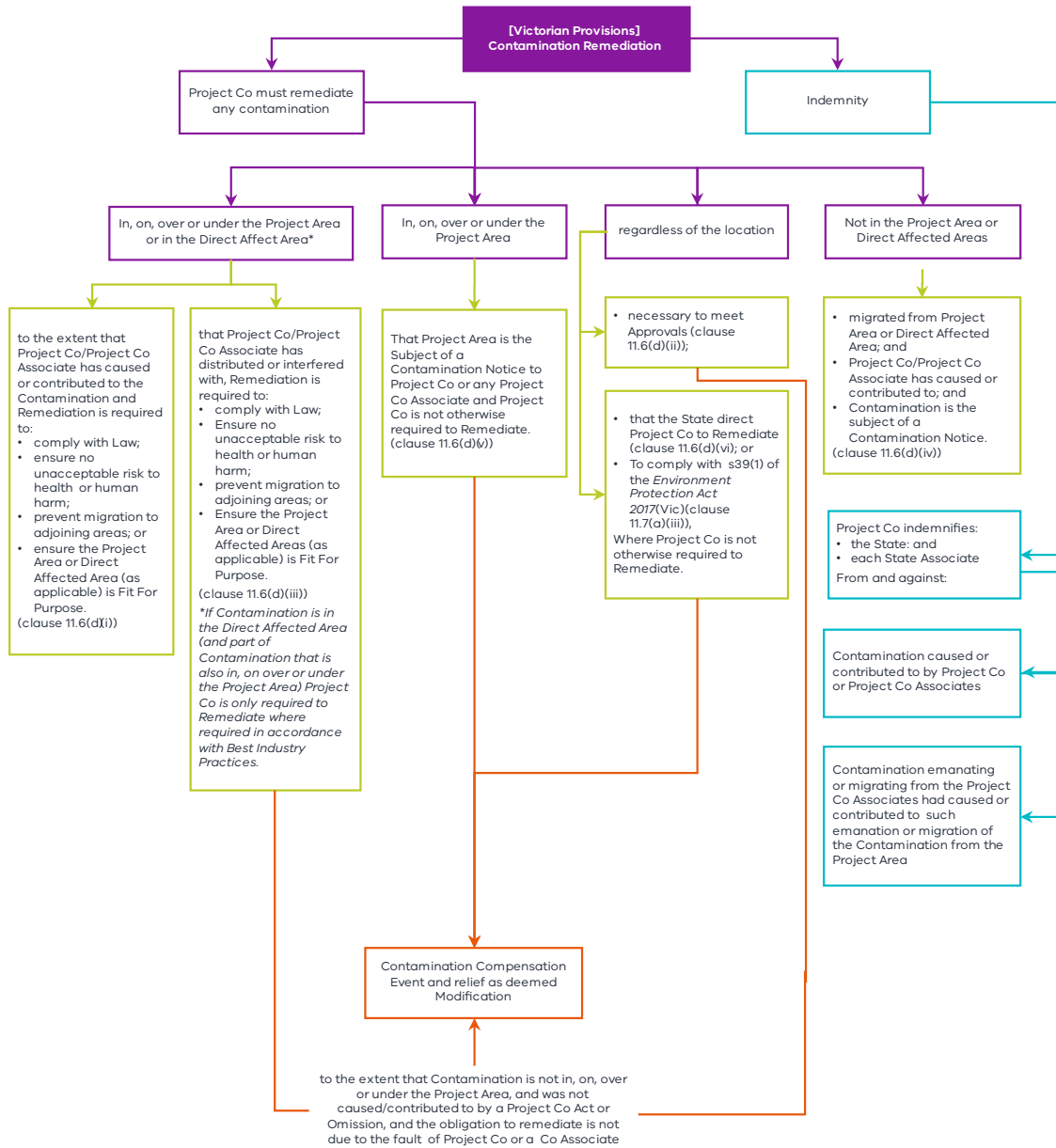
Key distinctions include:

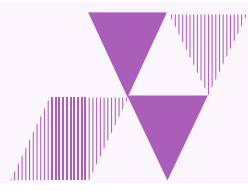
- different definitions of 'Contamination' and 'Pollution';
- different notification requirements on Project Co's discovery of Contamination; and
- in Victoria, Project Co is also required to remediate Contamination to where required, to comply with section 39(1) of the *Environment Protection Act 2017* (Vic) (see clause 11.7(a)(iii)).

Figure 11 and Figure 12 summarise the Victorian and NSW provisions respectively, on Project Co's Contamination Remediation obligations, and any Contamination (and Pollution for the NSW provisions) and Remediation work for which Project Co will be entitled to compensation and relief.

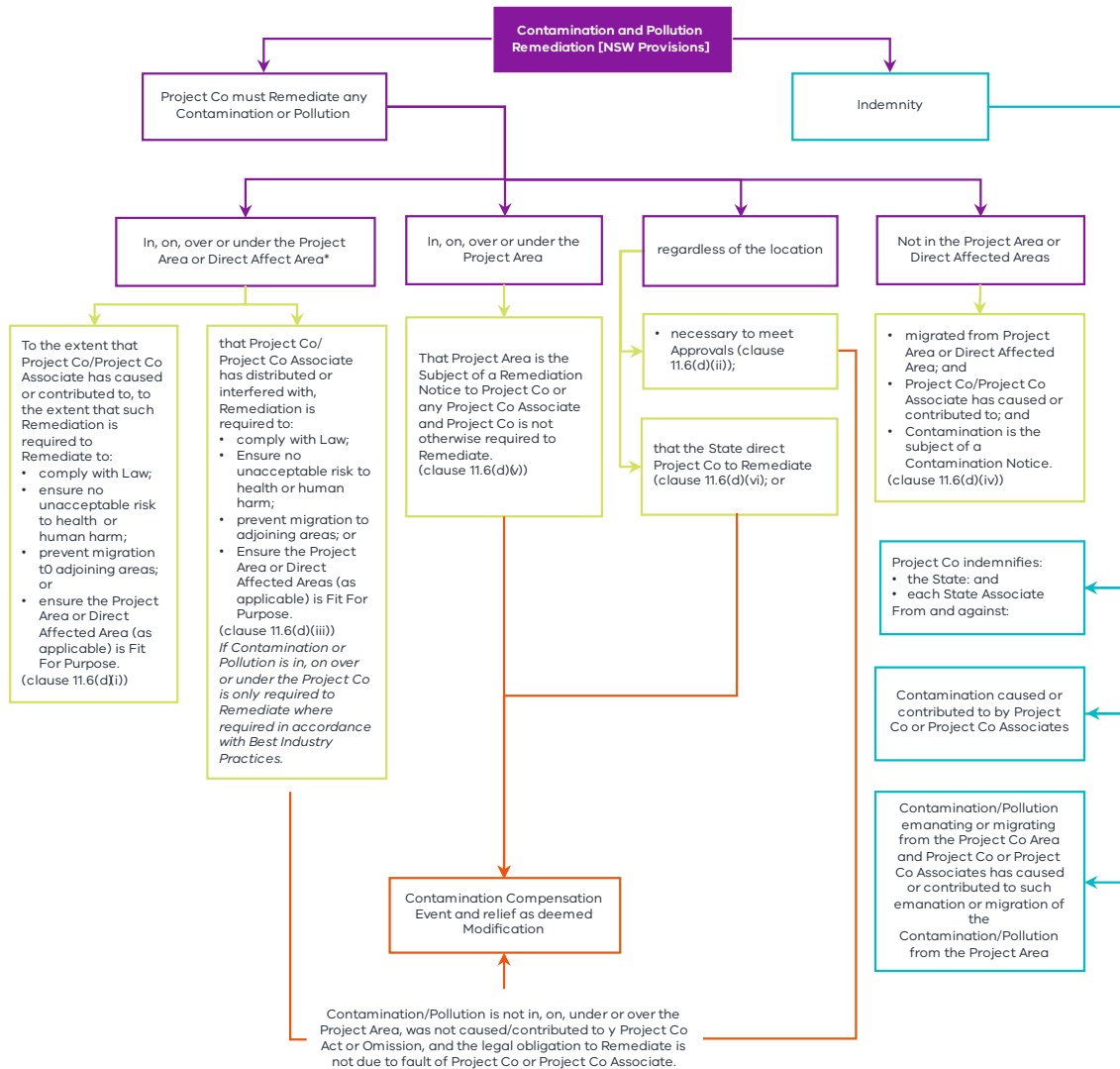


**Figure 11 – Remediation obligation and potential compensation (Victoria)**





**Figure 12 – Remediation obligation and potential compensation (NSW)**



The State also requires Project Co to indemnify the State for Liability the State suffers for Contamination, that Project Co was not obliged to Remediate, but that Project Co or any Project Co Associate caused to occur or to spread, so that Project Co will put in place reasonable measures to contain such Contamination.

The State recognises that the risk allocation for Contamination Remediation is often project specific and may be amended accordingly (see section 2.15.7 on project specific amendments).



### 2.15.5 Notifiable Contamination (clause 11.1(b))

Project Co must notify the Environment Protection Authority and the State accordingly, in respect of any 'notifiable incident' or 'notifiable contamination', as defined in:

- section 30 and 37 (respectively) of the *Environment Protection Act 2017* (Vic); or
- section 60 of the *Contaminated Land Management Act 1997* (NSW) and section 148 of the *Protection of the Environment Operations Act 1997* (NSW).

### 2.15.6 Contamination Compensation Event (clause 11.7)

When a Contamination Compensation Event occurs (see Figure 11 and Figure 12):

- the Remediation will be treated as a State Initiated Modification;
- relief and compensation will be provided in accordance with Item 10 (*State Initiated Modification – Costs (other than time-related costs)*) and Item 11 (*State Initiated Modification – Time-related costs*), in Table 1 of the Change Compensation Principles;
- during the Development Phase, this will be an Extension Event; and
- during the Operational Phase, this will not be an Intervening Event (on the basis that the State's position is that Project Co will not automatically be entitled to be relieved of its obligations to perform the Services, and any specific relief will be addressed as part of the Modification process).

### 2.15.7 Project specific amendments

The general principles outlined above in relation to Site Conditions, including the definition for Contamination Compensation Event, may be varied on a project specific basis, depending on the state or condition of the Site.

For example, the State may consider an alternative risk allocation, which it will set out in its RFP documentation, including:

- where the Project involves the extension or modification of existing infrastructure, where it is difficult to access the Project Area to carry out investigations, such as dilapidation surveys, and to gain a good understanding of the condition of the asset;
- depending on the amount of site investigation work undertaken by the State;
- where the extent, impact or nature of pre-existing Contamination cannot reasonably be adequately assessed before or during the procurement process;
- where there is extensive pre-existing Contamination of the Project Area;
- where Site Information Reports or the nature of the Site (for example, a brownfield site with a history of industrial waste contamination) suggest that pre-existing Contamination of the Project Area is highly likely and poses a significant risk;



- where the State considers that extending or reducing Project Co's Remediation obligations will provide value for money for the State; and
- where pre-existing contamination with respect to perfluoroalkyl and polyfluoroalkyl substances (PFAS), groundwater or Unknown Contamination poses a significant risk (see sample drafting at clause 11.8 for a bespoke regime in respect of 'Unknown Contamination' (including PFAS), which project teams may consider, including in full or adapting, as appropriate).

The prevention of nuisance is to be reviewed on a project specific basis. There may be circumstances where the noise level set out in the Environmental Management Plan is too high. In this case, the Project Deed should include an obligation to reduce noise levels to the State's reasonable requirements.

The Harmonised PPP Project Deeds carve out the asset condition from any State (or State Associate) representations, warranties, guarantees or any duty of care obligations (clause 10.1(e) (*No representations or warranties from the State*)). This needs to be considered on a project specific basis, as it will not be required if there are no Project Assets made available by, or on behalf of, the State during the Term.

## **2.15.8 Traffic management (clause 11.4)**

### **2.15.8.1 General principle**

Project Co is responsible for managing all traffic on, and to and from, the Project Area to ensure the safe, efficient and continuous movement of traffic, and to minimise congestion. Project Co must undertake traffic management in accordance with the Traffic Management Strategy, the *Road Management Act 2004* (Vic), the Relevant Legislation (for example, the *Road Safety Act 1986* (Vic)), and the MTPF Act in Victoria only, if the project is a declared project for the purposes of the MTPF Act.

Project Co must also comply with the directions of the State, the Relevant Legislation and any relevant road authority under the Road Management Act, in connection with the management of traffic.

### **2.15.8.2 Project specific amendments**

The definition of Traffic Management Strategy will need to be completed on a project specific basis.

In Victoria, where the Project is delivered under the MTPF Act, the Relevant Legislation will be defined to include the MTPF Act.



## **2.15.9 Utilities and underground structures (clause 12)**

### **2.15.9.1 General principle**

Project Co is required to make enquiries about the location of existing Utility Infrastructure, and must liaise with the owner of that Utility Infrastructure and the relevant Utility provider as to the need for carrying out Utility Activities (constructing, providing, relocating, removing, reinstating, repairing, protecting, decommissioning or modifying any Utility Infrastructure).

Project Co is required to obtain the State's consent to carry out any Utility Activities outside the Project Area during the Term, or within the Project Area during the Operational Phase.

Project Co assumes the risk in relation to existing Utility Infrastructure, and the continuous supply and sufficiency of Utilities in connection with the Project Activities, the need to relocate, protect or modify such Utility Infrastructure, and any access to the Site or interference with the Project Activities by, or on behalf of, a Utility provider (for Victorian projects, see section 2.15.9.2 for a discussion of the Utilities regime under the MTPF Act).

### **2.15.9.2 Project specific amendments**

If the Project represents a significant utilities interface risk, the State could consider including regimes in respect of delays in critical non-contestable utilities or Unknown Utilities (i.e. where Project Co could not foresee the utility or the treatment of the utility). The Harmonised PPP Project Deed contains sample drafting for a shared risk allocation in respect of these utilities risks.

Such project specific amendments are unlikely to be appropriate for social infrastructure Projects, but may be potentially relevant to certain types of Linear Infrastructure Projects.

During the Development Phase, Project Co will typically be liable for utility consumption in undertaking the Development Activities. There are rare exceptions to this on a project specific basis where it may be difficult for the State to distinguish between its own utility consumption and that of Project Co. Project Co is also obliged to pay for utilities consumed for undertaking Remaining Works and Returned Works Outstanding Items after the Development Phase.

Whether Project Co will be liable for the cost and volume of utilities consumed during the Operational Phase in the provision of the Services is determined on a project specific basis.

Where consumption levels are predictable, or where the operation of the Project Assets is fully outsourced to Project Co, procuring agencies should consider transferring volume risk to Project Co. Where consumption levels are not predictable and/or are heavily dependent on the way in which the Project Assets are operated by the State (where core services are retained by the State), volume risk is not generally transferred.



Pricing risk is typically not transferred to Project Co in recognition of the difficulty of locking in long term pricing for Utility supply with Utility providers. If pricing risk is transferred to Project Co, then pricing will typically be adjusted at intervals during the Term depending on the period for which prices are fixed in arrangements between Project Co and Utility providers. This should be tendered as part of the RFP Phase to ensure a competitive Proposal from Respondents.

For Victorian projects only, if the MTPF Act applies to the Project, there is a regime under Part 7 of the MTPF Act for the interface with utilities, which includes a process for negotiating utility agreements with utilities. This could occur where the Project requires relocation or otherwise that impacts those utilities, and a dispute resolution process, if no agreement is reached within the timeframes specified in the MTPF Act.

The regime also includes a process for the removal, relocation or protection of unknown Utility Infrastructure encountered during the course of a Project, either by the Utility or the project authority.

The transfer of volume and price risk, particularly during the Operational Phase, should be considered and determined on a project specific basis.

## **2.16 Land (clause 13)**

### **2.16.1 General principle**

A placeholder has been included in the Harmonised PPP Project Deeds for a clause that deals with acquisition of land, where this is required for the Project after the date of the Project Deed. This can be relevant to road and rail projects.

### **2.16.2 Project specific amendments**

Where relevant, provisions will need to address:

- identification of land to be acquired;
- responsibility for acquisition;
- required timing of acquisition; and
- consequences of a delay to, or failure to achieve, the acquisition.

## **2.17 Occupations (clause 14)**

### **2.17.1 General principle**

A placeholder has been included in the Harmonised PPP Project Deeds for a clause that deals with occupations, where this is required for the Project. Occupations are relevant to rail infrastructure projects, road projects and any other infrastructure project that requires Project Co to occupy an operating road or track for a period of time for the purposes of the Project Activities.





## 2.17.2 Project specific amendments

If required, the following provisions will need to be included on a project specific basis:

- a track occupation (rail) or lane occupation (road) Schedule, which includes details of the required occupations (including area and timing);
- Project Co's responsibility for procuring occupations;
- a process for identifying and procuring additional occupations;
- any payment obligations that Project Co has in respect of occupations; and
- requirements applying to the occupations imposed by third-party transport operators or the State.

## 2.18 State access and Project monitoring (clause 15)

### 2.18.1 General principle

Project Co and its Subcontractors are licensed by the State during the Development Phase to use and occupy the Development Phase Area to carry out Development Activities. Consistent with occupational health and safety requirements, Project Co and the D&C Contractor control access to the Site during the Development Phase, including State access.

The State is entitled to enter the Development Phase Site for the purposes of inspecting, observing and testing, and to exercise any other right, power or function, or carry out any obligation that the State has under any State Project Document or at law, in respect of the Development Activities.

During the Operational Phase, Project Co is granted a licence by the State to access the Operational Phase Area to carry out services, undertake the Development Activities remaining after Commercial Acceptance and perform any other obligations required during the Operational Phase. The licence is subordinate to the overriding rights of the State and its Associates to have unfettered access to the Operational Phase Area, to carry out the State's Functions and Operations.

The draft Development Phase Licence and Operational Phase Licence to be granted to Project Co are typically included in the Project Deed. The terms of these licences are usually limited, given most of the substantive requirements are included in the Project Deed.



## **2.18.2 State inspection audit (clauses 15.1, 15.3 and 15.4)**

The State has broad powers to inspect and test the Works and Maintained Assets, and to conduct Asset Condition Surveys, to ensure Project Co is meeting its obligations under the Project Deed. To satisfy public accountability and relevant legislative obligations (including the *Audit Act 1994* (Vic) in Victoria), the State also requires broad audit rights in relation to Availability PPP Projects.

Although the State has included specific provisions to facilitate its potential audit activities, nothing in the State Project Documents limits the powers and responsibility of the Auditor-General for the applicable State Treasury.

## **2.18.3 State costs for inspection, survey and audit**

The State will bear its own costs of any audit, inspection or survey, apart from certain express exceptions, which are generally where the inspection, test or audit reveals a failure of Project Co to meet its obligations under the Project Deed (see clauses 15.1(g) (*State's right to enter, inspect and test*), 15.3(g) (*State audits*) and 15.4(e) *Asset Condition Survey*) of the Harmonised PPP Project Deeds).

## **2.18.4 Project specific amendments**

As discussed in section 2.20, the State will own the Project Asset during the Operational Phase. The nature of the legal rights that Project Co has to access the Project Asset to perform the Services should be determined on a project specific basis.

On a project specific basis, the State may wish to also include compliance with quality management systems and other requirements of the State Project Documents, as part of the State Audit powers under clause 15.3(c) (*State audits*).

## **2.19 Work health and safety and Quality Assurance System (clause 16)**

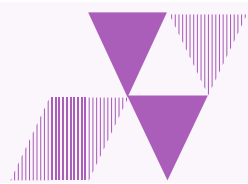
### **2.19.1 General principle**

Project Co's obligations with respect to the work health and safety of its employees, and compliance with Occupational Health and Safety Legislation, are set out in Schedule 25 (Occupational Health and Safety Schedule in Victoria, or the Workplace Health and Safety Schedule in NSW).

See section 3.10 for discussion on Schedule 25.

### **2.19.2 Quality Assurance System (clause 16.2)**

Project Co is required to develop, implement and maintain a quality assurance system that covers the Development Activities, performance of the Services, and personnel and human resources during the Term.



### 2.19.3 Project specific amendments

Quality Assurance System requirements will be considered by the State on a project specific basis and included in the PSDR taking into account the system and Standards applicable to the relevant Works and Project Assets. Care should be taken to ensure that the Quality Assurance System and the Project Deed work together and consistently. This is particularly an issue in respect of Defects and Defect rectification.

## 2.20 Title and Ownership (including Moveable Assets) (clause 18)

### 2.20.1 General principle

Table 6 sets out the ownership arrangements for assets under the Harmonised PPP Project Deeds.

**Table 6 – Ownership arrangements for assets**

Transfer of Ownership in Moveable Assets	
When Project Co is required to acquire title	When Project Co is required to transfer title to the State
<p>Where the Moveable Asset:</p> <ul style="list-style-type: none"> <li>• forms part of the Works, by no later than the earlier of:               <ul style="list-style-type: none"> <li>– the date that the Moveable Asset is paid for; or</li> <li>– the Date of Commercial Acceptance; and</li> </ul> </li> <li>• is acquired during the Operational Phase, the date the Moveable Asset is paid for; and</li> <li>• in all other cases, no later than the Expiry Date.</li> </ul>	<p>The earlier of:</p> <ul style="list-style-type: none"> <li>• where the Moveable Asset               <ul style="list-style-type: none"> <li>– forms part of the Works, the Date of Commercial Acceptance; and</li> <li>– is acquired by Project Co during the Operational Phase, when Project Co acquires title (and not later than the date that the Moveable Asset is paid for); and</li> </ul> </li> <li>• the Expiry Date.</li> </ul>

Title in specialised equipment used to deliver the Services should be retained by the State on the Expiry Date. It should, therefore, not be Services Equipment, on the basis that this type of equipment will need to be used by the State after the Expiry Date. Accordingly, the parties should agree prior to Contract Close which equipment falls into this category and include it in the Asset Management Plan at Contract Close.

In that way, disputes over ownership and negotiations for transfer of the equipment can be avoided on expiry of the Project. Examples of the type of Services Equipment that falls into this category include:

- where it is bespoke for the Project, for example, automated guided vehicles that are used in hospital projects as part of Project Co’s logistics solution; or
- where it is not part of the business-as-usual equipment provided by a Services Contractor as part of their services solution.



At times, this type of equipment may be hired rather than owned by Project Co so that it cannot transfer title to the State. Under the Harmonised PPP Project Deeds, the State must pre-approve hiring of equipment, and the hire arrangements must be capable of novation to the State or its nominee. During the Term, the State may (on payment of the relevant residual value) require Project Co to procure that the title to such equipment is transferred to the State.

In the case of Group 3 Equipment, the State must be the counterparty to any applicable lease or hire purchase arrangement, unless the State agrees otherwise.

See section 2.1.4 for relevant definitions.

## **2.20.2 Project specific amendments**

The title and ownership regime will need to be considered on a project specific basis, including:

- the list of Services Equipment;
- whether the State requires a licence to use the Hired Moveable Assets. If so, that licence will need to be included in clause 18; and
- timing and inclusion of ownership arrangements for major assets that are procured after the Development Phase (for example, additional trains for a rolling stock project).

## **2.21 Interface requirements (clause 19.2)**

### **2.21.1 General principle**

It is anticipated that there will be a range of works, services, activities and functions (interfaces) that will impact on any Availability PPP Project and Project Co's performance of its obligations under the State Project Documents. Generally, given the elongated nature of the asset and its interaction with other infrastructure, interfaces are more significant on Linear Infrastructure Availability PPP Projects.

For all Interface Works, Project Co has a general obligation to cooperate and coordinate with any Interface Parties, including an obligation to provide access to the Project Area and carry out Project Activities to minimise interference, disruption or delay to the Interface Works.

The State is obliged to procure that any Interface Party complies with the relevant Site Access and Interface Protocols, and provides Project Co with relevant as-built drawings of the Interface Works.

Otherwise, the extent to which either the State or Project Co are responsible for the impact of the interface and the actions of the Interface Party depends on:

- the nature and location of the Interface Works, and the identity of the party carrying them out; and



- the extent to which interface arrangements have been negotiated and documented in agreements proposed with the Interface Parties at Contract Close.

Accordingly, the Harmonised PPP Project Deeds set out a regime that takes these matters into account and categorises the different types of Interface Works and Interface Parties, and then applies different provisions and risk accordingly.

### 2.21.2 Relevant definitions – types of Interface Works

Interface Works is defined to include Direct Interface Works, Proximate Interface Works and Site Interface Works.

These are works undertaken by the State, its Associates or other Authorities. It does not apply to interfaces with other contractors for projects where there are multiple works packages. This will need to be addressed on a project specific basis.

**Direct Interface Works** means works, services, activities or functions in connection with the Project Assets or the Project Activities, or on, in, under, over, or in the direct vicinity of the Project Area, which are undertaken by a Direct Interface Party during the Term simultaneously with Project Co's performance of the Project Activities, and, that are the subject of a Direct Interface Deed between Project Co and the Direct Interface Party.

Each Direct Interface Deed regulates the rights and liabilities of Project Co and the Direct Interface Party in respect of those works (for example, agreements with the franchisee on rail projects). The Direct Interface Deeds will be procured by the State and provided to Respondents during the RFP Phase, as part of the proposed Project Documents.

**Proximate Interface Works** means works, services, activities or functions carried out by the State, the Operator or any of their officers, agents, advisors, consultants, contractors or employees (acting in connection with the Project), the Operator Representative or the State Representative, or a delegate of the State, which are carried out simultaneously with Project Co's performance of the Project Activities and in the direct vicinity, but outside, of the Project Area (excluding any Direct Interface Works, any Site Interface Works and any works, services, activities or functions undertaken by a Utility provider or any of its Associates in respect of Utility Infrastructure).

**Site Interface Works** means works, services, activities or functions carried out by the State, the Operator or any of their officers, agents, advisors, consultants, contractors or employees (acting in connection with the Project), the Operator Representative, or the State Representative, or a delegate of the State during the Term, which are carried out simultaneously with Project Co's performance of the Project Activities on, in, under or over the Project Area (including where they also extend to outside of the Project Area, but excluding any Direct Interface Works and any works, services, activities or functions undertaken by a Utility provider, or any of its Associates in respect of Utility Infrastructure).



Unless they are expressly addressed as Direct Interface Works in a Direct Interface Deed with a Utility provider, the Harmonised PPP Project Deeds exclude Utilities from Interface Works on the basis that Utilities works are a business-as-usual risk and are regulated under relevant legislation.

The definitions of Site Interface Works and Proximate Interface Works do not pick up all State Associates. In particular, given the size of the State and its varying functions across multiple departments, the State will not accept liability for the acts or omissions of those parties who are not engaged by the State in respect of the Project (Associates of the State's Associates).

### **2.21.3 Compensation and relief**

Provided Project Co has complied with its general interface requirements, Project Co is entitled to a Compensable Extension Event and Compensable Intervening Event on the occurrence of any Proximate Interface Works or Site Interface Works.

This entitlement is only to the extent that those works are not works of the relevant Interface Party undertaken regularly as part of its business-as-usual, day-to-day works, services or functions, and either:

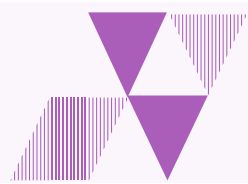
- the nature, extent or impact of the works on the Project Activities were not otherwise reasonably foreseeable at the date of the Project Deed by a person in the position of Project Co exercising Best Industry Practices; or
- Works performed in a manner that is inconsistent with the performance standards and practices that would reasonably be expected of a prudent, experienced and competent person undertaking works, services, activities or functions, similar to the relevant Proximate Interface Works.

In general, Project Co's relief is limited to circumstances where the relevant Interface Works are not functions or activities that Project Co could reasonably foresee at the date of the Project Deed or where the relevant Interface Works were performed negligently.

This position requires Project Co to bear the risk of ordinary, day-to-day works or activities of Interface Parties throughout the Term, provided that those works were performed to a reasonable standard. Given that Project Co controls and manages the Project Area, Project Co is seen to be in a better position to manage the interface risk for foreseeable Interface Works.

The threshold for relief and compensation for Proximate Interface Works and Site Interface Works is the same, to ensure consistent risk allocation for interface risks that impact on Project Activities, regardless of the location.

Project Co is entitled to an extension of time (as an Extension Event) and relief from performance (as an Intervening Event) on the occurrence of any breach of a Direct Interface Deed by a Direct Interface Party, to ensure that Project Co will not be in breach of the Project Deed as a result of such a breach.



However, the Harmonised PPP Project Deeds assume that Project Co will be able to seek recourse against the Direct Interface Party under the Direct Interface Deed, notwithstanding that relief from default and performance is provided by the Extension Event or Intervening Event (as applicable).

Accordingly:

- Project Co is not entitled to any compensation from the State in respect of any Direct Interface Works; and
- during the Operational Phase, the Service Payment will still be subject to Abatement during the period of any suspension of the Services as a result of any breach of a Direct Interface Deed by a Direct Interface Party.

Table 7 explains the differences between the various types of Interface Works.

**Table 7 –Types of Interface Works**

Requirement	Direct Interface Works	Site Interface Works	Proximate Interface Works
Carried out by the State or its Associates	Not in all cases – party has a Direct Interface Deed with Project Co	✓	✓
Location	In Project Area or direct vicinity, or in connection with the Project Assets or Project Activities	In Project Area	In direct vicinity of, but outside, the Project Area
Simultaneous with Project Activities	✓	✓	✓
Excludes Utilities	x	✓	✓
Project Co compensation and relief	Intervening Event and Extension Event for breach of the Direct Interface Deed by Direct Interface Party Assumes compensation paid by Direct Interface Party under Direct Interface Deed	Compensable Intervening Event and Compensable Extension Event, unless: <ul style="list-style-type: none"> <li>• business as usual; and</li> <li>• reasonably foreseeable or performed to poor standards</li> </ul>	Compensable Intervening Event and Compensable Extension Event unless: <ul style="list-style-type: none"> <li>• business as usual; and</li> <li>• reasonably foreseeable or performed to poor standards</li> </ul>



## 2.21.4 Project specific amendments

While the Harmonised PPP Project Deeds set out an extensive interface regime that reflects the principles discussed above, the interface arrangements need to reflect the actual interfaces that will, or are likely to, arise for each Project.

In addition to consideration of the overall regime, the State will address the identity of the Direct Interface Parties and procure execution of agreements with Direct Interface Parties on a project specific basis. The definitions of Direct Interface Works, Proximate Interface Works and Site Interface Works will need to be updated accordingly.

There may also be Direct Interface Agreements that Project Co is required to enter into, under which Project Co is not entitled to relief or compensation for the acts or omissions of the Interface Party. In those circumstances, the risk allocation in respect of Direct Interface Parties under the Harmonised PPP Project Deeds will need to be reconsidered.

Work undertaken by statutory authorities as part of their statutory functions, or by utilities, will typically not be included in Site Interface Works or Proximate Interface Works. This is on the basis that Project Co will not be entitled to any compensation or relief for the impact of this work, as it typically reflects business-as-usual practices that Project Co should have anticipated and accommodated in its solution for the Project at Contract Close.

However, the exclusion should be considered on a project specific basis where the interface of the Project with the statutory authority or Utility provider is significant and their likelihood of impacting the Project is high.

## 2.22 Development Phase Licence (clause 20.1)

### 2.22.1 General principle

The Harmonised PPP Project Deeds provide that the State must grant, or must procure the grant of, a non-exclusive licence (Development Phase Licence) to Project Co, to use and occupy the Development Phase Area to perform the Development Activities.

The Development Phase Licence will be on the terms and conditions set out in the PSDR and other terms as imposed by the State (acting reasonably).

For Victorian transport infrastructure projects, if the MTPF Act applies, the project authority may issue a licence for the purposes of an approved project in respect of any project land that is Crown Land (on behalf of the Crown), or any project land that it holds in fee simple (s173).

A licence issued under the MTPF Act cannot exceed the period of the approved project, and the terms and conditions of the licence cannot be inconsistent with the approved project.





Where land is licensed under the MTPF Act:

- there is no land tax payable by a licensee in respect of the land (s256(3));
- the land is not rateable land within the meaning of section 154 of the *Local Government Act 1989* (Vic) (s257(1)); and
- a local council must not make a local law under the *Local Government Act 1989* (Vic) for, or with respect to, restricting the use of any road for access to, or egress from, licensed land or a temporary construction site to carry out works for the purposes of an approved project (s258(1)(c)).

### **2.22.2 Project specific amendments**

Land tenure will be considered on a project specific basis and in conjunction with the land provisions (if any) in clause 13 (*Land*) of the Project Deed.

## **2.23 D&C Contractor Construction Bond (clause 20.4)**

### **2.23.1 General principle**

In the construction industry, in addition to parent company guarantees, Performance Bonds are generally provided by D&C Contractors as security for the D&C Contractor's performance. The amount secured usually reflects a percentage of the construction price.

In the context of Availability PPP Projects, Performance Bonds provided by the D&C Contractor can be called by Project Co in a range of circumstances related to performance defaults, including when, for example, the Date for Commercial Acceptance is missed.

The Harmonised PPP Project Deeds provide that the State may require Project Co to call on any Performance Bond provided by the D&C Contractor in favour of Project Co, for up to the relevant amount specified in the Contract Particulars, where:

- there is a debt due and payable by Project Co to the State that has not been paid within 10 Business Days after receipt of a demand for payment;
- Project Co has the right to call on the D&C Contractor Construction Bond under the D&C Contract; and
- if the State requires Project Co to call on the D&C Construction Bond, Project Co must procure that the proceeds are paid directly to the State.

Procuring agencies must review the terms of the D&C Contract to ensure that the State is comfortable that Project Co's rights to call, in respect of the D&C Contract Construction Bond, are sufficient for Project Co to make a call in circumstances where the State requires Project Co to do so.



Where the State does not make a significant capital contribution to the Project prior to Commercial Acceptance, the circumstances should be very limited, given that the State has not paid for the asset at that point in time. They will typically be linked to default termination of the Project by the State, where the default has been caused by the D&C Contractor.

### **2.23.2 Project specific amendment**

The D&C Contractor Construction Bond Amount (for which the State can require Project Co to make a call on the D&C Contractor Construction Bond) is equal to 5 per cent of the total original fixed contract price under the D&C Contract. The D&C Contractor Construction Bond Amount is typically less than the total value of the D&C Contractor Construction Bond, as Project Co and its Financiers will seek to retain a percentage of the D&C Contractor Construction Bond as security, which cannot be accessed by the State.

Subject to this, procuring agencies must evaluate the value for money of the total security package offered by the Respondents in their Proposals.

On a project specific basis, the State will consider whether it requires equivalent rights in respect of any bond provided by the Services Contractor under the Services Contract. The State may require the right in respect of fully outsourced projects, or where the Services Contractor has significant obligations prior to Commercial Acceptance.

However, agencies should only seek to access bonds during the Operational Phase, where the State considers that its rights of set-off against Service Payments will not be sufficient to cover its potential liabilities.

## **2.24 Procurement and installation of Equipment (clause 21)**

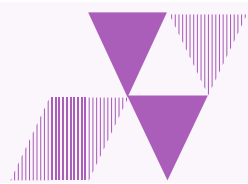
### **2.24.1 General principle**

Social Infrastructure Availability PPP Projects typically involve the procurement and installation of large amounts of Equipment.

On Social Infrastructure Availability PPP Projects, Equipment is typically divided into groups based on whether there is a difference in allocation of activities between the State and Project Co for the selection, procurement, installation, maintenance or ownership of the Equipment. For every difference in allocation, there is a new group or subgroup.

The Equipment List setting out the Equipment to be procured for the Project is included by the State in the RFP and is divided into groups identified by the State.

Set out below are the groups of Equipment set out in the SIPD and, between the State and Project Co, who owns the entitlement and who is responsible for the selection, procurement, installation and maintenance.



**Table 8 – Groups of Equipment, entitlement and responsibilities**

Equip.	Selection		Procurement		Installation		Maintenance		Ownership	
	State	PCo	State	PCo	State	PCo	State	PCo	State	PCo
Group 1		✓		✓		✓		✓		✓
Group 2	✓	✓		✓		✓		✓		✓
Group 3	✓			✓		✓	✓			✓

\* In consultation with the State

The drafting in Table 8 has been based on the approach typically used in hospital projects where the Equipment regime is often complex. However, different projects will have different Equipment requirements, and groups should be determined on a project specific basis.

The Project Deed requires Project Co to procure the Group 1 Equipment or Group 2 Equipment as per the State’s direction or the relevant Equipment Selection Notice. The exception to this is if Project Co demonstrates to the State’s satisfaction that the procurement will not enable Project Co to satisfy the FFP Warranty, will cause a delay to Technical Acceptance or Commercial Acceptance, or will cause Project Co to breach the PSDR requirements.

The SIPD provides that the Equipment List for Group 1 Equipment and Group 2 Equipment is indicative only. This is because the time between the date the Equipment List is created and updated (during the RFP Phase) and when the Equipment is actually procured may mean that the Equipment in the Equipment List is superseded by a superior product.

Nevertheless, the Equipment List sets a baseline for the standard and quality of Group 1 Equipment and Group 2 Equipment to be procured by Project Co. The effect of this is that Project Co cannot procure Equipment that is inferior to, or in lesser quantities, than specified in the Equipment List, unless Project Co can demonstrate that the procurement will not enable Project Co to satisfy the FFP Warranty, will cause a delay to Technical Acceptance or Commercial Acceptance, or will cause Project Co to breach the PSDR requirements.

However, Project Co is required to procure Equipment that exceeds the baseline in the Equipment List if this is necessary to meet the requirements of the Project Deed (such as the FFP Warranty) and must do so at its own cost.

The rationale for this is that:

- the State pays for the minimum standards and quantities reflected in the Equipment List; and
- Project Co should be incentivised to accurately reflect the Equipment required for the Maintained Asset in its Proposal, to limit the State’s exposure to additional claims for changes to the Equipment List after Financial Close.



Project Deeds for Linear Infrastructure Availability PPP Projects may include an Equipment regime, where there is a significant amount of specialised Equipment and the State wants to be involved in procurement, or otherwise regulate procurement and replacement.

### **2.24.2 Project specific amendment**

The parties acknowledge in the Project Deed that the Equipment will change from that identified in the Equipment List and as such, the Equipment List is indicative only. This is inevitable, where Equipment Lists are often prepared years in advance of actual Equipment procurement.

The Equipment List is not updated when changes are made to Equipment that is procured. The purpose of the Equipment List, from a legal perspective, is as a reference point to determine Equipment Modifications after Financial Close.

Group 3 Equipment (and sometimes, some Group 2 Equipment) is often highly specialised Equipment that is relevant to the delivery of core services. Accordingly, the State selects that Equipment. If not managed appropriately by the State, selection and procurement of Group 3 Equipment can be grounds for Modifications and delay claims.

Group 2 and 3 Equipment is often the type of Equipment that the State will not want to select until late in the procurement process, to ensure that it has the most up-to-date model at the Operational Commencement Date. However, this Equipment can often impact the design and construction of the asset.

It is important that the parties agree on the timing for the selection and procurement of this Equipment at Contract Close, and that Project Co accepts that, provided the Equipment is selected and procured at the agreed times, it will not be entitled to make Claims for delay or Modification. Drafting to this effect is included in the SIPD.

Subject to the Group 3 Limit, Project Co is responsible for the Purchase Cost of all Group 3 Equipment, as well as the costs of ordering, delivery, relocation, transport, installation, connection, commissioning or testing of any items of Group 3 Equipment that are not included in the Group 3 Purchase Costs. If the Group 3 Equipment costs exceed the Group 3 Limit, then the State may elect to either not purchase certain items, or to proceed and pay for the excess.

An Equipment regime has not been included in the LIPD. As a general rule there is minimal Equipment required, so a separate process is not warranted. However, where there is a large amount of Equipment to be procured (which are not fixtures), as part of the Project for which the State considers there should be robust State oversight of procurement and installation, a separate process may be warranted.

Transferred Equipment is Equipment in another asset that is transferred for use in the new asset. Most Equipment, particularly when the Equipment is a Maintained Asset, will be procured new, as there is often limited (if any) value in transferring existing Equipment from a whole-of-life perspective.



Equipment in an existing asset that is relatively new at Commercial Acceptance or expensive to replace may be transferred to the new asset. Where Transferred Equipment is contemplated, the definition of Transferred Equipment will need to be defined on a project specific basis and can include Group 1, Group 2 or Group 3 Equipment.

If the Transferred Equipment is intended to be a Maintained Asset, then condition surveys will need to be done at Contract Close to determine the Anticipated Transfer Condition, and then again at Commercial Acceptance, to determine whether there are any deviations from the Anticipated Transfer Condition. Only a material change in the condition of an item of Transferred Equipment from the Anticipated Transfer Condition will be an Equipment Modification.

## **2.25 Independent Reviewer review of construction (clause 20.6 LIPD only)**

The Independent Reviewer role under the LIPD includes general oversight and checking Development Activities throughout the Development Phase. In contrast, under the SIPD, this function is retained by the State.

On Social Infrastructure Availability PPP Projects, the State typically carries out the Functions at the Maintained Asset, once it is completed. To avoid a situation where issues as to whether the Maintained Asset will meet the State's functional requirements are only discovered late in construction (when they are difficult and expensive to address), the State has a more active oversight and checking role during the Development Phase.

## **2.26 Acceptance (clause 22 to clause 25)**

### **2.26.1 General principle**

As the State commences paying for the Project Assets from the Operational Commencement Date, the State typically requires the Maintained Asset to be operational from that date. For example, a hospital needs to be treating patients, and a road needs to be open to traffic, from the Date of Commercial Acceptance. On some projects this requires the State to have access to the asset for a period of time before Commercial Acceptance to prepare for the operation of the Maintained Assets from the Operational Commencement Date. Accordingly, the Harmonised PPP Project Deeds allow for either a two or three-stage Acceptance regime.

A two-stage Acceptance regime consists of Commercial Acceptance and Final Acceptance. This is typically used on infrastructure where services are fully outsourced so that there is limited or no preparation required by the State for operations.



A three-stage Acceptance regime comprises Technical Acceptance, Commercial Acceptance and Final Acceptance, with a Commissioning Period between Technical Acceptance and Commercial Acceptance, during which the State can access the Project Assets to prepare for operations.

The Technical Acceptance and commissioning regimes have been included in the SIPD, as this is the typical model for Social Infrastructure Availability PPPs. If the LIPD is used, but a Technical Acceptance regime is necessary, clause 22 (*Technical Acceptance*) and clause 23 (*Commissioning*) from the SIPD (and associated definitions and operative provisions) should be included in the LIPD used for the Project.

The criteria for achieving acceptance, and the tests that must be performed for the Independent Reviewer or the State (as applicable) to determine whether Acceptance has been achieved, must be set out in the PSDR.

Certification of Acceptance will not of itself be evidence that the Works have been carried out in accordance with the Project Deed or that Project Co has satisfied the FFP Warranty.

A Major Default will occur if:

- Project Co fails to achieve:
  - Technical Acceptance by the Date for Technical Acceptance (if applicable);
  - Commercial Acceptance by the Date for Commercial Acceptance; or
  - Final Acceptance by the Date for Final Acceptance; or
- the Independent Reviewer considers that Commercial Acceptance will not be achieved by the Date for Commercial Acceptance (refer to section 2.27.5 for further discussion).

Project Co may be entitled to an extension of time to a Date for Acceptance if there is an Extension Event (refer to section 2.27 for further discussion).

The Acceptance process is set out in Annexure 2.

## **2.26.2 Technical Acceptance (clause 22)**

### **2.26.2.1 General principle**

Technical Acceptance generally occurs when all technical aspects of the Works have been completed and the Project Assets are Fit For Purpose. As stated above, the regime is used where the State requires priority access to the Project Area between Technical Acceptance and Commercial Acceptance, to prepare for operation of the Maintained Assets, but still expects a strong Project Co presence and for Project Co to control the Development Phase Area.



A Technical Acceptance regime should be considered if the Maintained Assets are not being operated by Project Co and:

- there are things that the State needs to install, commission and test before the Operational Commencement Date (for example, specialist information and communications technology), and the State requires priority access to the Development Phase Area to do this;
- the State requires time to work with Project Co to commission the Project Assets after the building works have been largely completed;
- significant staff training and induction are required before operations can commence; or
- a large number of transitional activities need to be undertaken before the Maintained Assets are operational.

The Independent Reviewer certifies whether Technical Acceptance has been achieved. A Certificate of Technical Acceptance will be final and binding, other than in the case of manifest error.

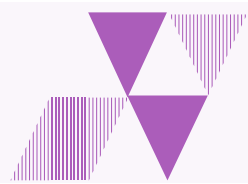
The Certificate of Technical Acceptance does not constitute:

- evidence that Project Co has satisfied the FFP Warranties;
- approval by the State of the completion of acceptance of the relevant Works; or
- evidence that any other obligations under the Project Deed have been satisfied.

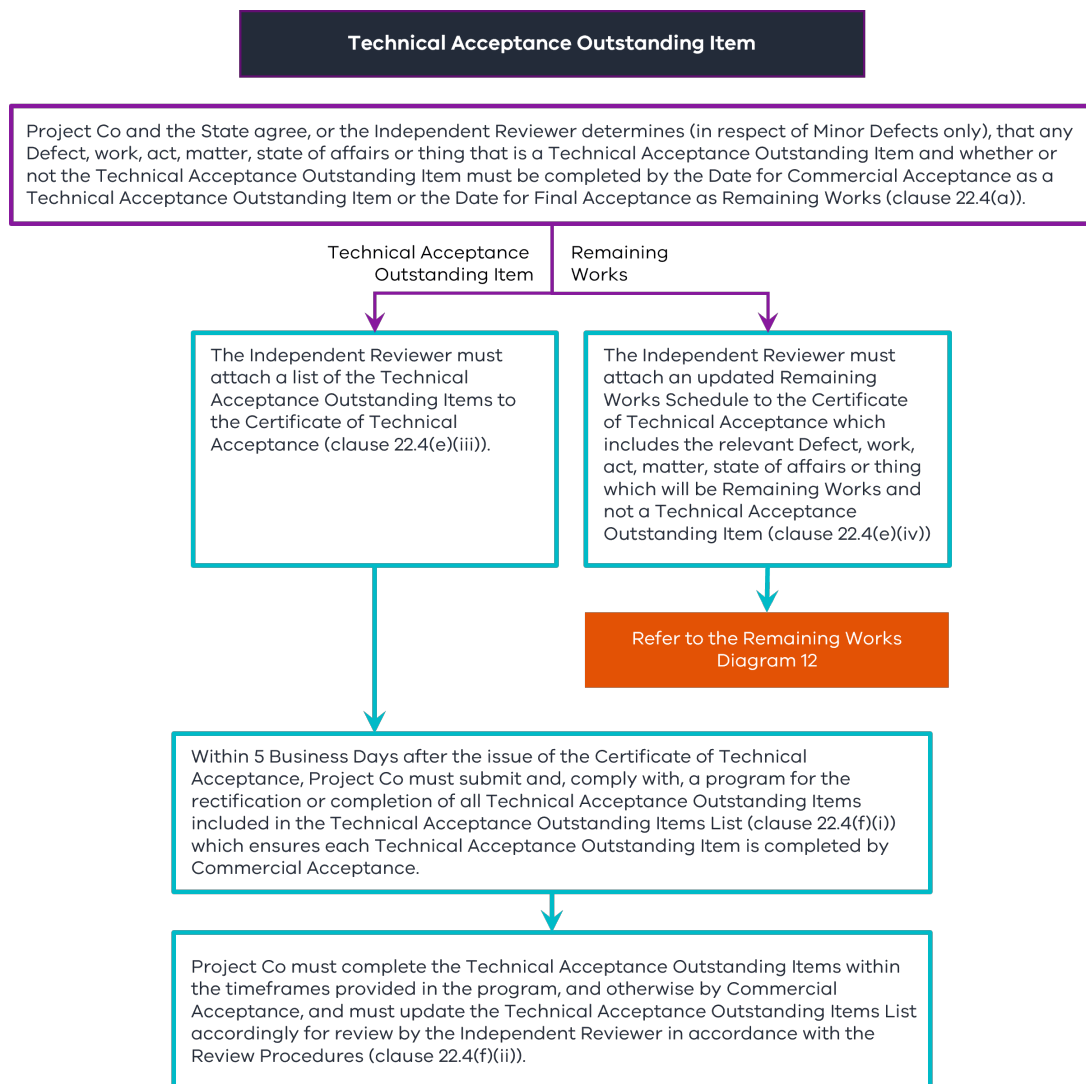
### **2.26.2.2 Technical Acceptance Outstanding Items**

The Independent Reviewer may determine, or Project Co and the State may agree, that certain Works or Development Activities that were otherwise required to be completed by Technical Acceptance can be deferred. The Independent Reviewer may only exercise this right where the Works or Development Activities are Minor Defects. Such deferred work will either need to be completed by Commercial Acceptance as Technical Acceptance Outstanding Items or by Final Acceptance as Remaining Works.

The approach to Technical Acceptance Outstanding Items is set out in Figure 13.



**Figure 13 – Technical Acceptance Outstanding Items**



## 2.26.3 Commissioning (clause 23)

### 2.26.3.1 General principle

If a Technical Acceptance regime is required for a Project, the State should specify in the RFP the fixed or minimum period it requires between Technical Acceptance and Commercial Acceptance to access the Development Phase Area to carry out activities such as training, commissioning, testing and transition in preparation for the operation of the Maintained Assets.

The activities that the State and Project Co must perform during this Commissioning Period must be set out in the PSDR. Respondents will need to allow for this Commissioning Period in their Proposals and in setting the Date for Commercial Acceptance.





The State will usually require priority access to at least parts of the Development Phase Area during this Commissioning Period. Priority access means that Project Co will need to work around the access requirements and timetable of the State.

If the State does not specify a fixed or minimum Commissioning Period, then Shortlisted Respondents are likely to assume either no time or very limited time is required between Technical Acceptance and Commercial Acceptance.

### **2.26.3.2 Project specific amendment**

Those aspects of the Works that are required to be completed in order to achieve Technical Acceptance need to be determined on a project specific basis.

In sizing the Commissioning Period, agencies need to balance the importance of having time to ensure the Maintained Assets are running smoothly before the Operational Commencement Date with the high cost the State will pay for each day of this period, given that, at that point in time, debt will be almost fully drawn down.

The duration of the Commissioning Period needs to be determined on a project specific basis prior to the release of the RFP and must be agreed with the applicable State Treasury.

The definition of Commissioning Requirements and State Operational Commissioning needs to be completed on a project specific basis.

## **2.26.4 Commercial Acceptance (clause 24)**

### **2.26.4.1 General principle**

A Commercial Acceptance regime will be used on every Availability PPP Project.

Commercial Acceptance generally occurs when:

- the Works have been completed and all Returned Works have achieved Returned Works Acceptance (except for any Remaining Works and Returned Works Outstanding Items (see 2.26.4.2 and 2.26.5)); and
- if applicable, the Commissioning Period activities have been carried out.

Given the importance to the State of timely achievement of Commercial Acceptance, clause 26.4 (*Independent Reviewer's review of progress*) of the Harmonised PPP Project Deeds provides that during the Development Phase, the Independent Reviewer is required to continuously review the progress of the Development Activities, and to determine whether it believes that Project Co will achieve Commercial Acceptance by the Date for Commercial Acceptance (refer to section 2.27.5).



Consistent with the fact that the Maintained Assets are intended to be operating from Commercial Acceptance, the Harmonised PPP Project Deeds assume that full Services delivery and, therefore, payment in full of each Service Payment, will commence from the Operational Commencement Date. This may need to be considered on a project specific basis if Services are ramped up over time or if some Services are provided prior to Commercial Acceptance.

On Linear Infrastructure Availability PPP Projects, the Independent Reviewer certifies whether Commercial Acceptance has been achieved. On Social Infrastructure Availability PPP Projects, the State will typically certify whether Commercial Acceptance has been achieved, with input from the Independent Reviewer.

This is because the criteria to achieve Commercial Acceptance are less technical in nature and more government or Operator specific (for example, in the case of a school, prison or hospital), and the State is the best party, in terms of expertise and experience, to determine whether the asset meets the purposes set out in or inferred from the PSDR.

The State and Project Co may agree to direct the Independent Reviewer to issue the Certificate of Commercial Acceptance and agree that any outstanding work will be completed by Final Acceptance as Remaining Works. As the State will be paying for the Project Assets after Commercial Acceptance, this power should only be used in very limited circumstances (for example, for Minor Defects or in the context of a negotiated settlement for delayed Commercial Acceptance). Where outstanding issues will impact Operation or Functions, exercise of this power will require agreement from the applicable State Treasury.

Certification of Commercial Acceptance is final and binding on the parties, other than in the case of manifest error.

The issue of the Certificate of Commercial Acceptance does not constitute:

- evidence that Project Co has satisfied the FFP Warranties;
- approval by the State of the completion or acceptance of the relevant Works; or
- evidence that all or any other obligations under the Project Deed have been satisfied.

Certification of Commercial Acceptance is effectively confirmation of achievement of a milestone to trigger commencement of Service Payments.



#### 2.26.4.2 Remaining Works

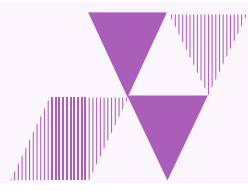
The Harmonised PPP Project Deeds include a concept of Remaining Works, being those Works that are required to achieve Final Acceptance, but do not prevent the Project Assets from being operational, and are not required to be completed to achieve Commercial Acceptance.

Remaining Works consist of:

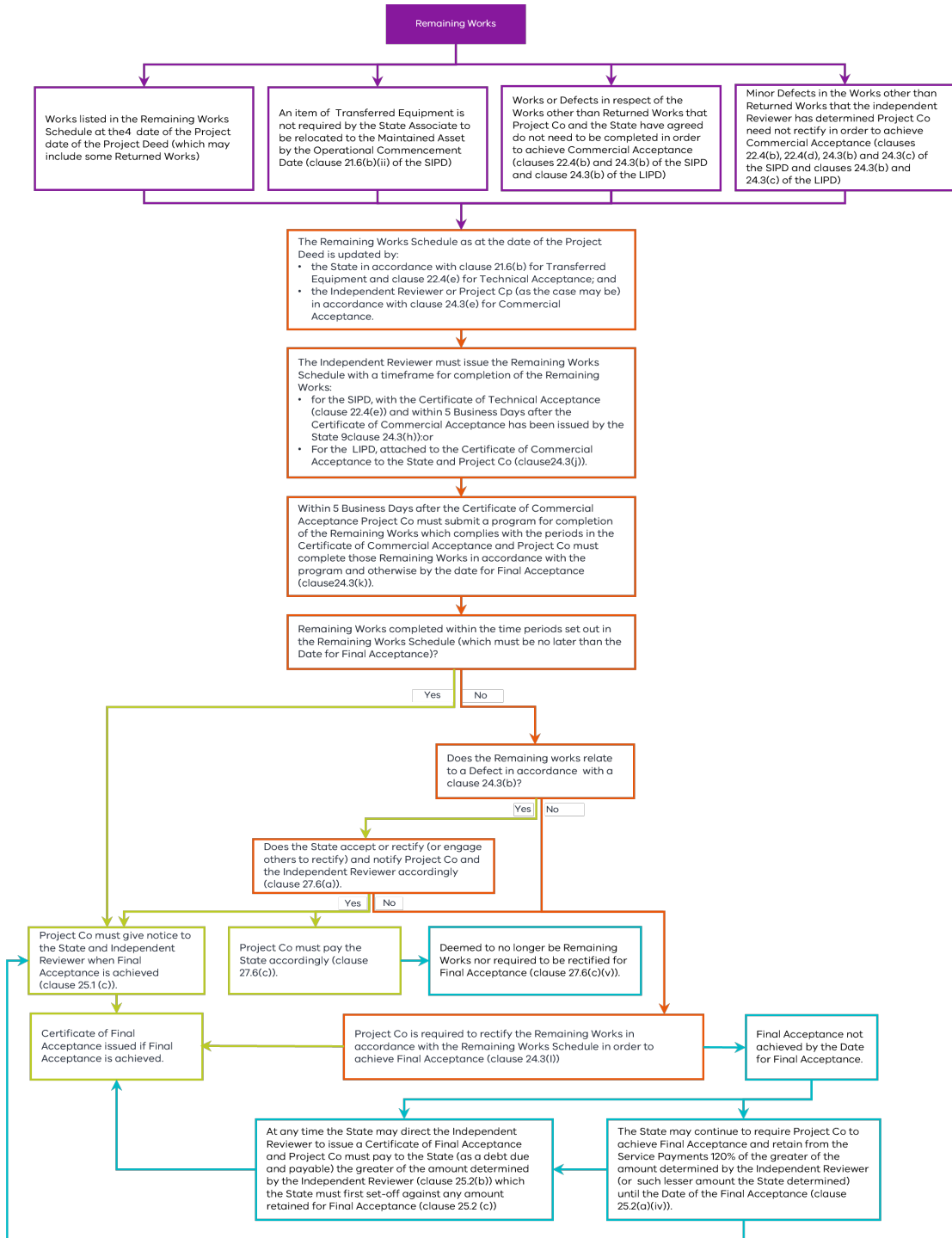
- those Works identified in the Remaining Works Schedule at Contract Close. These may include parts of the Maintained Assets and specified Returned Assets;
- in the SIPD, an item of Transferred Equipment that is not required by the State or a State Associate to be relocated to the Maintained Asset until after the Operational Commencement Date;
- Minor Defects that the Independent Reviewer determines prior to Technical Acceptance or Commercial Acceptance do not need to be rectified prior to Commercial Acceptance;
- work in respect of the Maintained Assets that was originally required to be completed by Commercial Acceptance, but which the parties agree can be completed after Commercial Acceptance; and
- Defects (including Minor Defects) in the Maintained Assets that the parties agree can be completed after Commercial Acceptance.

All Remaining Works must be included in the Remaining Works Schedule, which is attached to the Certificate of Technical Acceptance and updated for the Certificate of Commercial Acceptance. The Works must be completed within a timeframe determined by the Independent Reviewer, which is before the Date for Final Acceptance (see section 2.26.6), unless they are otherwise accepted by the State.

Defects and outstanding work in respect of the Returned Works (which are not included in the Remaining Works Schedule at Contract Close) are not included in the Remaining Works regime, as they are addressed as Returned Works Outstanding Items (see section 2.26.5.2). Figure 14 sets out the approach to Remaining Works.



**Figure 14 – Types of, and approaches to address, Remaining Works**





### **2.26.4.3 Early Commercial Acceptance**

Under the SIPD, the State has no obligation to certify Commercial Acceptance prior to the Original Date for Commercial Acceptance. This is to manage the budgetary implications of early Commercial Acceptance. There is often minimal benefit to the State of an early completion, where it has significant commissioning activities it must undertake itself, including engagement of new staff and transfer from an existing asset.

Other considerations, such as the best time of the year to transition patients from existing hospitals, and school terms, also reduce the benefits to the State of any early Commercial Acceptance.

The LIPD allows the Independent Reviewer to certify Commercial Acceptance before the Original Date for Commercial Acceptance. The State recognises that there may be productivity benefits associated with early Commercial Acceptance of Linear Infrastructure, which may outweigh any budgetary or operational implications. However, this should be considered on a project specific basis taking into account whether there are other constraints that would prevent the asset from being fully operational from any early Date of Commercial Acceptance.

### **2.26.4.4 Project specific amendments**

The matters that will be considered and completed by the State on a project specific basis include:

- whether there is a requirement to ramp up Services, if full Services delivery and full Service Payment will not commence from the Date of Commercial Acceptance;
- Works and Defects (other than Minor Defects) that are agreed to be Remaining Works (which must be approved by the applicable State Treasury);
- the time periods for notice to the State of when Project Co reasonably expects to achieve Commercial Acceptance;
- the requirements for Commercial Acceptance (which will be set out in the PSDR); and
- that generally due to the legislative and contractual framework for roads projects, the Date of Commercial Acceptance must be the date of the Certificate of Commercial Acceptance, but for other Projects, the Date of Commercial Acceptance can be prior to the date of the Certificate of Commercial Acceptance.



## **2.26.5 Returned Works Acceptance (clause 24.4)**

### **2.26.5.1 General principle**

Returned Works are those parts of the Works designed or constructed by Project Co during the Development Phase that will not form part of the Maintained Assets during the Operational Phase, but will instead be progressively handed back to the relevant Returned Asset Owner prior to Returned Works Acceptance (for example, footpaths, utility pits and conduits, water and sewerage reticulation, and flyovers).

The Independent Reviewer will determine (in consultation with the relevant Returned Asset Owner) whether a Returned Work has achieved Returned Works Acceptance.

Returned Works are likely to achieve Returned Works Acceptance at different stages during the Development Phase, in accordance with requirements set out in the PSDR.

### **2.26.5.2 Returned Works Outstanding Items**

In the Harmonised PPP Project Deeds, Project Co must achieve Returned Works Acceptance for all Returned Works, in order to achieve Commercial Acceptance, unless the Returned Works are included in the Returned Works Outstanding Items List or are Remaining Works.

Returned Works Outstanding Items consist of those parts of the Returned Works that were, at Contract Close, required to be completed by Returned Works Acceptance, but:

- the State and Project Co agree do not need to be completed by Returned Works Acceptance; or
- are Minor Defects that the Independent Reviewer determines do not need to be completed by Returned Works Acceptance.

Returned Works Outstanding Items must be completed within a timeframe determined by the Independent Reviewer, which must be prior to Final Acceptance.

Care must be taken by agencies before agreeing that Works or Defects (that are not Minor Defects) in Returned Works can be completed after Returned Works Acceptance, and agencies should not do so without approval by the applicable State Treasury.

The approach to Returned Works Outstanding Items is set out in Annexure 1.



### **2.26.5.3 Project specific amendments**

The matters that will be considered and completed by the State on a project specific basis include:

- the inclusion of a Returned Works regime, which is applicable only where it is part of Project Co's scope to undertake works and construct infrastructure that will be owned and operated by others during the Operational Phase; and
- the timing for Returned Works Acceptance, which will depend on when the Returned Asset is required by the Returned Asset Owner and is assumed in the Harmonised PPP Project Deeds to occur by Commercial Acceptance at the latest. If this is not the case, and certain Returned Works will be completed or accepted after Commercial Acceptance, then these Returned Works should be included in the Remaining Works Schedule for completion by Final Acceptance.

### **2.26.6 Final Acceptance (clause 25)**

A Final Acceptance regime will be used on every PPP Project, and occurs once the Remaining Works and Returned Asset Outstanding Works have been completed.

The Independent Reviewer certifies whether Final Acceptance has been achieved. A Certificate of Final Acceptance will be final and binding on the parties, other than in the case of manifest error.

The issue of the Certificate of Final Acceptance does not constitute:

- evidence that Project Co has satisfied the FFP Warranties;
- approval by the State of the completion or acceptance of the Works; or
- evidence that all or any other obligations under the Project Deed have been satisfied.

If Project Co does not achieve Final Acceptance by the required Date for Final Acceptance, the State is entitled to retain the amount equal to 120 per cent of the cost of the work remaining to be completed, to achieve Final Acceptance from the Service Payments.

The State may then elect to direct the Independent Reviewer to issue a Certificate of Final Acceptance, and to accept or complete the Final Acceptance Works itself. In those circumstances, Project Co is required to pay the State the greater of the costs saved by Project Co in not completing the works required to achieve Final Acceptance and the costs that will be incurred by the State in undertaking those works itself, as determined by the Independent Reviewer.



## **2.27 Time, Extension Events and Compensable Extension Events (clause 26)**

### **2.27.1 General principle**

Project Co is entitled to:

- time relief during the Development Phase for Extension Events; and
- compensation and time relief during the Development Phase for Compensable Extension Events.

Project Co and Project Co Associates must take all reasonable steps that a prudent, competent and experienced entity would have taken to minimise the effects, consequence and duration of the Extension Event.

As with all Relief Events, the State's liability to Project Co in connection with an Extension Event will be reduced, to the extent that Project Co causes or contributes to the Extension Event or the consequences of the Extension Event (clause 43.10(a) (*Limitation on State Liability to Project Co for Relief Events*) of the Harmonised PPP Project Deeds).

### **2.27.2 Primary obligation (clause 26.1)**

Project Co has an obligation to commence and diligently progress the Development Activities and achieve Acceptance by the relevant Date for Acceptance.

### **2.27.3 Development Phase Program (clause 26.2)**

#### **2.27.3.1 General principle**

Project Co must update the Bid Development Phase Program, in accordance with the PSDR and the Project Deed. The updated Bid Development Phase Program will become the Development Phase Program.

The Development Phase Program does not form part of the Project Documents, and Project Co is not required to comply with the Development Phase Program. The State recognises that requiring Project Co to continually comply with the Development Phase Program is an unduly onerous obligation. In most circumstances, the State will not suffer any loss for a minor non-compliance.





The Development Phase Program is a tool that can be used by the State and Independent Reviewer to:

- track Project Co's progress;
- determine whether Project Co will achieve Commercial Acceptance by the Date for Commercial Acceptance, in accordance with clause 26.4 (*Independent Reviewer's review of progress*) of the Harmonised PPP Project Deed; and
- determine whether Project Co has been delayed in achieving Acceptance by a Date for Acceptance or by an Extension Event, where Project Co claims an extension of time to a Date for Acceptance.

It is therefore important that the Development Phase Program is always accurate and up to date. Given that Project Co may need to change the Development Phase Program, as unforeseen issues arise in respect of the Project that cause delay or acceleration, Project Co must ensure that the Development Phase Program accurately reflects the status and progress of the Development Activities.

Project Co must notify the State and the Independent Reviewer on becoming aware of any proposed or likely departure from the critical path in the Development Phase Program.

Project Co must also warrant that each update of the Development Phase Program accurately reflects the progress of the Works and the date by which Project Co will achieve Acceptance.

Clause 26.2(d)(ii) of the Harmonised PPP Project Deeds clarifies that neither the State nor the Independent Reviewer is required to use the Development Phase Program in assessing an extension of time Claim. This is because the Development Phase Program reflects the D&C Contractor's view of the progress and timing for Acceptance. This view may not be accurate, and determining whether it is will often require detailed analysis.

The State will only be obliged to extend the Date for Acceptance where there is an actual delay to Acceptance. The State will, accordingly, rely on a number of tools to determine the actual status and likely timing for completion of the Works.

### **2.27.3.2 Project specific amendments**

Where the State requires Project Co to meet specific dates (such as Commercial Acceptance by the Date for Commercial Acceptance), these should be identified as separate milestones in the Project Deed. These milestone dates should also be extended for delays to completion of the milestones caused by Extension Events, to preserve the State's ability to enforce the milestone dates. However, Project Co will not be entitled to compensation for any extension to a milestone.



## **2.27.4 Sole remedy for late Acceptance (clause 26.3)**

As discussed in section 2.5.1, where Project Co fails to achieve Commercial Acceptance by the Date for Commercial Acceptance, subject to some limited exceptions, the State's sole financial remedy is limited to the amount of the Service Payment not required to be paid by the State in those circumstances.

The principle set out in clause 26.3 does not limit the State's rights in relation to a Major Default or Default Termination Event, the event giving rise to the delay or the consequence of such event (other than the delay itself). This provision should be further considered if a procuring agency considers that the savings the State realises as a result of the truncation of the Operational Phase and consequent reduction in the number of Service Payments payable is insufficient to cover the loss to the State of late Commercial Acceptance.

In those circumstances a liquidated damages regime or an indemnity for losses due to late Commercial Acceptance may be appropriate. If either of those options are considered then Project Co's liability should typically be capped.

## **2.27.5 Independent Reviewer's review of progress (clause 26.4)**

### **2.27.5.1 General principle**

The Independent Reviewer review of progress regime provides an effective mechanism to manage and oversee the performance of Project Co during the Development Phase. It also mitigates against delays to Commercial Acceptance at the earliest possible opportunity, when the ability to successfully undertake measures to avoid the delay is greatest. Annexure 3 summarises the Independent Reviewer review of progress regime.

### **2.27.5.2 Project specific amendments**

The elements of the regime that may be subject to project specific considerations include:

- the period of time (if any) before the Independent Reviewer can issue a notice of non-compliance (this should be determined taking into account the length of the Development Phase);
- the frequency of the Independent Reviewer's notices of non-compliance; and
- the maximum period of time after the Date for Commercial Acceptance within which Project Co must demonstrate that Commercial Acceptance will be achieved (see sections 2.55.3 and 2.55.5 for a discussion on the Cure Program and Cure periods).



### 2.27.6 Extension of time (clauses 26.5 to 26.9)

Compensable Extension Events, which are a subcategory of Extension Events, are:

- a limited category of events that are generally within the control of the State;
- risks that are considered to be better managed or mitigated by the State; and
- events in respect of which the State retains time and cost risk.

Extension Events that are not Compensable Extension Events are neutral events. For example, Force Majeure Events where the risk allocation is shared with the State, whereby the Date for Commercial Acceptance is extended, but Project Co has no, or more limited, entitlement to compensation, or obtains compensation through another mechanism under the Project Deed, such as where an Uninsurable Risk or Day 1 Uninsurable Risk causes loss or damage to the Project Assets.

The Conditions Precedent to Project Co's entitlement to an extension of time for Extension Events are where:

- Project Co submits a Change Notice within the timeframe specified in clause 26.7 (*Change Notice*) and otherwise, in accordance with the Change Compensation Principles;
- Project Co demonstrates that:
  - it has been, or will be, delayed from carrying out the Development Activities by the relevant Extension Event, in a manner that has delayed, or will delay, the achievement of Acceptance; and
  - the relevant Extension Event has caused, or will cause, activities on the critical path contained in the then current Development Phase Program to be delayed; and
- Project Co, at the time it submits the relevant Change Notice, submits an updated Development Phase Program which:
  - takes into account the impact of the relevant Extension Event; and
  - contains a level of detail that is sufficient to enable the Independent Reviewer to determine Project Co's entitlement to an extension of time.

If the Independent Reviewer determines that the updated Development Phase Program does not comply with the requirements set out above, Project Co must, within 10 Business Days after receipt of the Independent Reviewer's notice, submit an updated Development Phase Program.

If Project Co does not submit an updated Development Phase Program, Project Co will not be entitled to claim an extension of time for the relevant Extension Event.



If Project Co submits an updated Development Phase Program and the Independent Reviewer determines that the updated Development Phase Program:

- addresses the non-compliances previously notified by the Independent Reviewer, Project Co will be deemed to have met the requirements of the Condition Precedent in respect of the submission of the updated Development Phase Program; or
- does not address the non-compliances previously notified by the Independent Reviewer, is not sufficiently detailed and does not accurately reflect the status and progress of the Development Activities, Project Co will not be entitled to claim an extension of time for the relevant Extension Event.

The Harmonised PPP Project Deeds provide one opportunity for Project Co to resubmit an updated Development Phase Program, in circumstances where the Independent Reviewer determines that the Development Phase Program does not comply with the extension of time Conditions Precedent. This is so that Project Co is not significantly prejudiced by a minor non-conformance in a complex Development Phase Program, which is potentially unrelated to an extension of time claim.

If the Conditions Precedent (as set out above) have been satisfied, the Independent Reviewer must extend the relevant Date for Acceptance by a reasonable period determined by the Independent Reviewer, within 10 Business Days of the later of the receipt of the relevant Change Notice or receipt of a compliant updated Development Phase Program.

The Independent Reviewer must, if it is reasonably able to, give interim determinations of Project Co's entitlement to an extension of time, notwithstanding that the effects of the relevant Extension Event are continuing.

### **2.27.7 Unilateral extensions (clause 26.10)**

Irrespective of Project Co's entitlement to an extension of time, the State may unilaterally extend a Date for Acceptance.



### **2.27.8 Entitlement to financial compensation for delay (clause 26.12)**

If Project Co is granted an extension of time to a Date for Acceptance then, if the Extension Event is a Compensable Extension Event or a Force Majeure Event, Project Co will be entitled to claim compensation, in accordance with the Change Compensation Principles, as determined by the Independent Reviewer (see section 3.3).

However, to the extent the Compensable Extension Event or Force Majeure Event has given rise to loss or damage to the Project Assets, and clause 42.4 (*Cost and risk of repairing or reinstating*) or clause 42.5 (*Consequences of not repairing or reinstating*) applies, Project Co's entitlement to claim any compensation in respect of that loss or damage to the Project Assets is as set out in clauses 42.4 or 42.5 respectively (see section 2.52).

Compensable Extension Events include acts or omissions of the State, other than those that are Permitted Acts or contemplated by clause 7.1 (*Authorities*), where the Authority is acting in accordance with its statutory powers. Procuring agencies should include any act that they are likely to undertake to be a Permitted Act in the Project Deed, to ensure they are not exposed to costly delay claims when they carry out those acts. These should be carefully drafted so they can be taken into account by Respondents in their Proposal and should not include those things that are unlikely to occur.

If the Extension Event is required to be covered by the Insurances as part of an Insured Risk, Project Co will not be entitled to claim compensation from the State for that Extension Event, unless Project Co can demonstrate that the compensation is not covered by the proceeds of such Insurance, due to a State Insurance Breach (clause 43.10(b) (*Limitation on State Liability to Project Co for Relief Events*)). See section 2.53.3.

If the State exercises its power under clause 26.10 (*Unilateral extensions*) to unilaterally extend the Date for Acceptance in respect of a Compensable Extension Event, a Force Majeure Event or a State Initiated Modification (for which Project Co would otherwise be entitled to an extension of time to a Date for Acceptance for those events) Project Co will be entitled to claim compensation in accordance with the Change Compensation Principles (refer to section 3.3).



### 2.27.9 Concurrent Delays (clause 26.14 and 35.8)

The Concurrent Delay principle limits Project Co's entitlement to time and cost relief for an Extension Event or a State Initiated Modification where, at the same time as the delay caused by the Extension Event or the State Initiated Modification, Project Co is also being delayed by an event which is not an Extension Event or a State Initiated Modification (refer to section 2.44.2 for more details). This limitation applies whether the Extension Event or State Initiated Modification occurs first in time.

The exception to this principle is where there is a State Concurrent Event that occurs before the other concurrent event, which is not an Extension Event or State Initiated Modification.

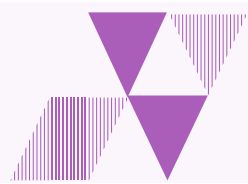
State Concurrent Events consist of:

- a Compensable Extension Event that is a State breach of a State Project Document, or an act or omission of the State or an Associate of the State, when acting in connection with the Project, which is not a Permitted Act; and
- State Initiated Modifications.

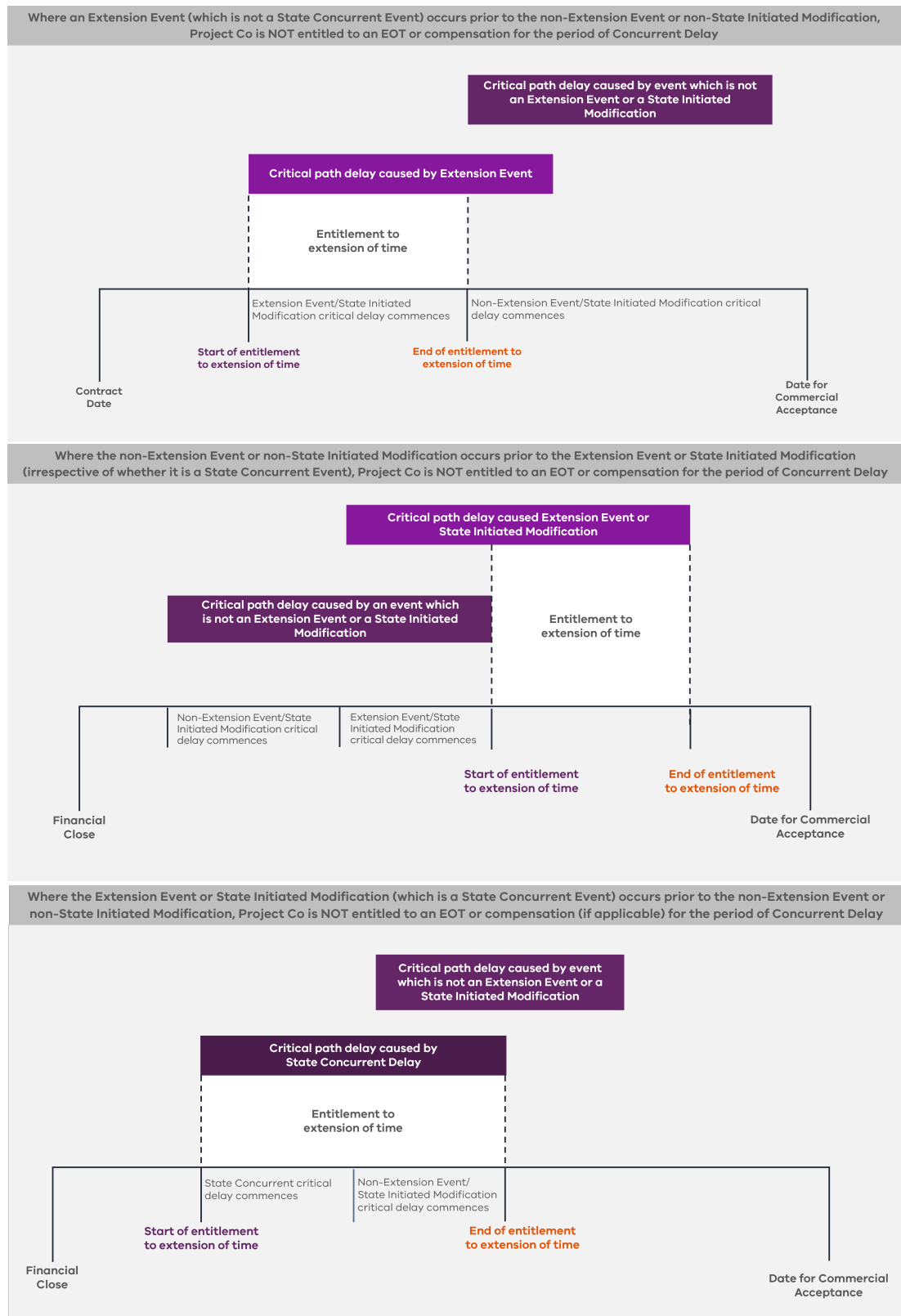
In those circumstances, Project Co will be entitled to be paid the Development Phase Finance Amount, but not Prolongation Costs for the extension of time for the State Concurrent Event, effectively ensuring Financiers are kept whole and, therefore, relieving the D&C Contractor from paying liquidated damages. Project Co is expected to bear the risk of prolongation and other costs incurred from the delay to Acceptance caused by the State Concurrent Breach.

This approach to risk sharing for Concurrent Delay reflects a fair and common-sense approach to causation. It has been accepted by the State and the market as a settled precedent.

Figure 15 illustrates where Project Co's entitlement to claim an extension of time is limited by the Concurrent Delay principle set out in clauses 26.14 (*Concurrent Delays*).



**Figure 15 – Concurrent Delays**





### **2.27.10 Acceleration (clauses 26.15 to 26.19)**

Project Co may choose to compress the Development Activities or otherwise accelerate progress at its own cost and risk.

The State may direct Project Co to submit a Change Notice setting out the estimated time and cost consequences of accelerating any part or the whole of the Development Activities to overcome or minimise the extent and effect of some or all of the delay, if:

- any part or the whole of the Development Activities are delayed by an Extension Event; and
- Project Co would have been entitled to an extension of time to a Date for Acceptance for that Extension Event.

Project Co will be entitled to a payment of 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 Activities (but no margin on those costs) calculated, in accordance with the Change Compensation Principles (refer to section 3.3), if:

- the State gives Project Co a Change Response to accelerate in response to a Change Notice; and
- Project Co would, but for the instruction, have been entitled to an extension of time to the relevant Date for Acceptance for the Extension Event.

## **2.28 Force Majeure (clauses 26.11, 26.12, 32.4, 32.5, 32.9 and 42.5)**

### **2.28.1 General principle**

The purpose of the Force Majeure provisions is to give Project Co (and the State) relief from default and Liability in respect of a limited category of events that:

- are catastrophic;
- are generally outside of the control of either party; and
- prevent Project Co (or the State) from performing all or a material part of its obligations under the Project Deed.





## **2.28.2 Relevant definition – Force Majeure Events**

Force Majeure Events are defined in the Harmonised PPP Project Deeds.

In the SIPD, if a Utility is not available for use in the Project Area during the Operational Phase, due to an interruption that occurs upstream of the point of connection of a Utility for the Operational Phase Area to the Utility provider's network, this is a Force Majeure Event, unless Project Co is required to have back-up supplies and redundancies for the relevant Utility, such as power generators.

This is because the interruption in supply is clearly outside Project Co's control and will often impact the ability to provide Services, as well as impacting the Functions. The concept is not as relevant to Linear Infrastructure Availability PPP Projects, where the elongated nature of the asset means that Utility interruptions do not have the same whole-of-site impact.

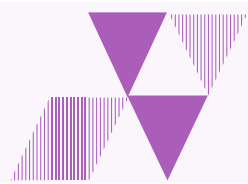
## **2.28.3 Relief and compensation**

As neither party is likely to be in a better position than the other to manage either the occurrence or the effects of the Force Majeure Event, and the events may continue for a long period of time, those events are treated differently to other Relief Events. The entitlement to relief and compensation in the Harmonised PPP Project Deeds generally reflects the common law principle in respect of Force Majeure Events that the loss lies where it falls.

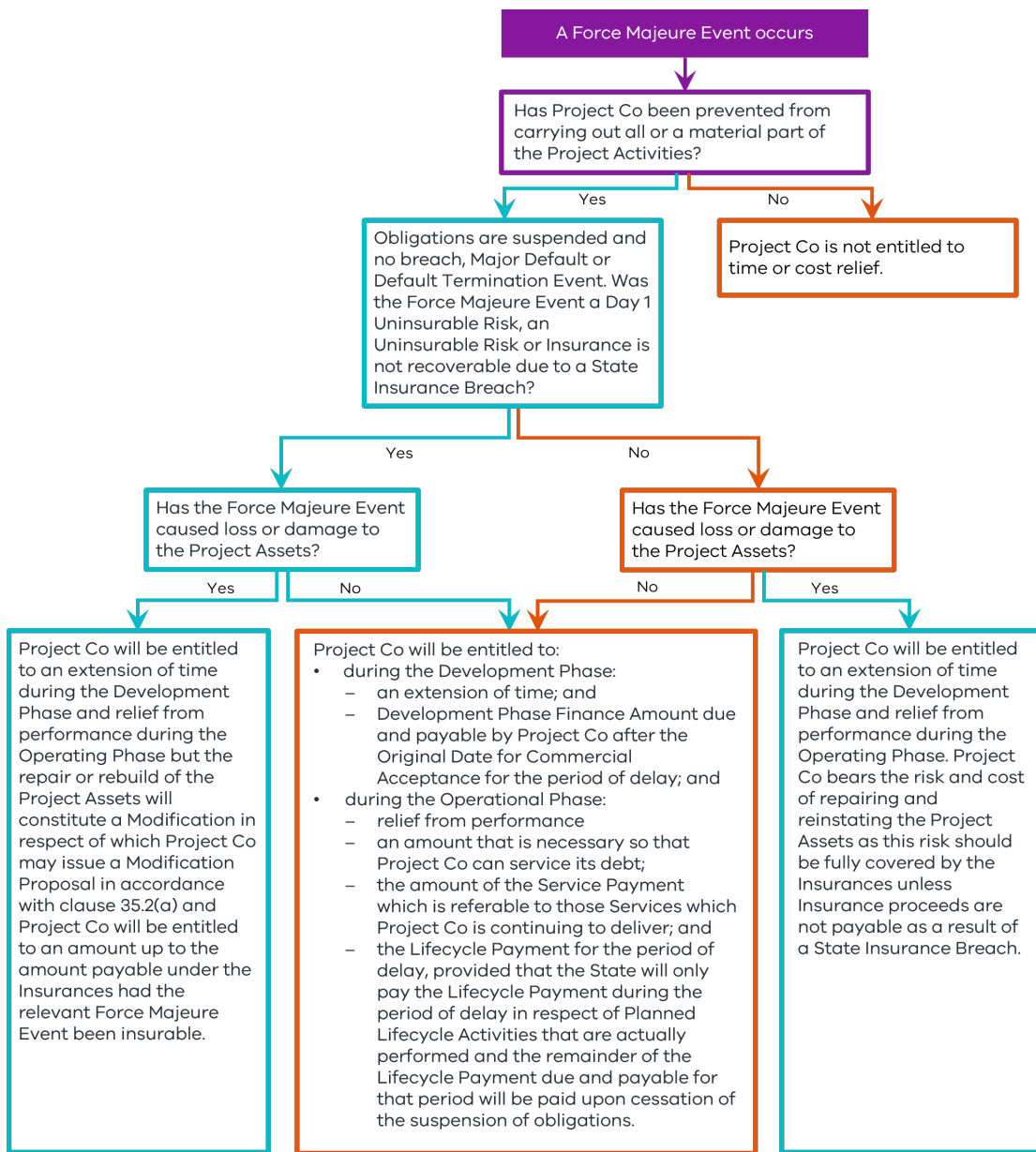
Provided the Conditions Precedent to Project Co's entitlement are satisfied (see sections 2.27.6 and 2.39), to the extent that Project Co is prevented from carrying out all or a material part of the Development Activities, or performing the Services, as a result of a Force Majeure Event, Project Co's obligations to perform those Development Activities or Services (as applicable) will be suspended for the period of the Force Majeure Event.

For Project Co to be entitled to relief from, or compensation for, a Force Majeure Event, the event must prevent Project Co from carrying out all or a material part of the Project Activities in accordance with the State Project Documents. Where Project Co is delayed by a Force Majeure Event, and this delay prevents Project Co from achieving Commercial Acceptance by the Date for Commercial Acceptance, then the 'prevention' requirement for the Force Majeure Event will be satisfied.

Figure 16 sets out Project Co's entitlements to relief and compensation for Force Majeure Events.



**Figure 16 – Entitlements to relief and compensation for Force Majeure Events**



### 2.28.4 Insured Risks

If the relevant Force Majeure Event is required to be covered by the Insurances, as part of an Insured Risk, Project Co will not be entitled to claim compensation from the State for that Force Majeure Event, unless Project Co can demonstrate that the compensation is not covered by the proceeds of such Insurance, due to a State Insurance Breach (clause 43.10(b) (*Limitation on State Liability to Project Co for Relief Events*)). See section 2.53.3.



### 2.28.5 Reduction in relief

Project Co and the Project Co Associates must take all reasonable steps, which a prudent, competent and experienced Contractor would have taken, to minimise the effects, consequence and duration of the Force Majeure Event.

As with all Relief Events, the State's Liability to Project Co in connection with a Force Majeure Event will be reduced, to the extent that Project Co causes or contributes to the Force Majeure Event, or fails to minimise the effects, consequence and duration of the Force Majeure Event (clause 43.10(a) (*Limitation on State Liability to Project Co for Relief Events*)).

### 2.28.6 Termination for a Force Majeure Event

If a Force Majeure Event:

- has caused Major Loss or Damage and the State directs Project Co not to repair or rebuild the Project Assets, the State must terminate the Project Deed for a Force Majeure Event as if the Major Loss or Damage was a Force Majeure Termination Event; or
- otherwise prevents Project Co or the State from carrying out all or a material part of their respective obligations for a period exceeding 180 consecutive days, either party may exercise the right to terminate the Project Deed for a Force Majeure Termination Event.

The State may also terminate the Project Deed for a Force Majeure Termination Event if the State directs a suspension exceeding 180 consecutive days due to a Project Co Act or Omission, which is not a breach of a Project Document or a fraudulent, negligent, reckless, unlawful or malicious act or omission (clause 38.1(d)(ii) (*State right to suspend*)).

In the above termination scenarios, Project Co will be entitled to the Termination Payment in respect of a Force Majeure Termination Event. See section 3.4 for more information on Termination Payments.

### 2.28.7 Project specific amendments

The definition of Force Majeure Events will require consideration on a project specific basis. The principles that should be applied include that:

- all Force Majeure Events should align with the general principle set out above;
- tropical cyclones have been considered by the State and excluded from the definition on the basis that, by definition, these events do not occur in Victoria or NSW (as applicable). However, the reference to high winds in paragraph (a)(ii) has been included to address the extent that the State considers it appropriate to give relief for 'cyclonic' winds, which is a position that should be maintained; and



- the definition is limited to events that occur at, or in the direct vicinity of, the Project Area. Taking into account project specific considerations, in very limited circumstances, the State may agree to extend the Force Majeure Regime to other parts of the Site (including outside of Victoria or NSW or Australia (as applicable)).

## 2.29 Defects (clause 27)

### 2.29.1 General principle

The definition of Defects excludes damage. There is a separate regime in the Project Deed for damage, which reflects the fact that damage is typically an Insured Risk, while Defects are not (see section 2.52).

In summary, the Defects regime consists of:

- Defects or likely Defects (meaning any aspect of the Project Assets or the Returned Assets that will, or is likely to, result in a Defect) in the Works or Maintained Assets during the Term, or a Returned Asset during the relevant Returned Asset DLP, which Project Co must identify and notify to the State and the Independent Reviewer;
- Defects in the Works during the Development Phase that must be rectified promptly, unless they are:
  - accepted or rectified by the State; and
  - Remaining Works or Returned Works Outstanding Items, in which case, they must be rectified within the periods specified in the Remaining Works Schedule or the Returned Works Outstanding Items List and, in any case, by Final Acceptance;
- Defects that become apparent in the Returned Assets during the Returned Assets DLP, which must be rectified in accordance with times determined by the Independent Reviewer, and must be no later than by the end of the relevant Returned Asset DLP;
- a retention regime for Defects in the Returned Assets discovered during the Returned Asset DLP, which the State does not accept or rectify, and that are not rectified by the required dates determined by the Independent Reviewer. The retention amounts are returned to Project Co, once the Defects are rectified, unless the State accepts or elects to rectify the Defect. In this case, the retention amounts are retained by the State;
- Defects that become apparent in the Maintained Assets after Commercial Acceptance, which are the subject of the performance regime in the Services Specification; and



- a regime for acceptance of Defects by the State. Detailed information must be provided to the State before a Defect is accepted or rectified by the State. The State then determines the amendments that should be made to the Project Deed to reflect the State's acceptance or rectification of the Defect. Any acceptance of Defects must be recorded by Project Co in a register, including all relevant information, and submitted to the State for review, in accordance with the Review Procedures. It is critical that a disciplined and well-documented approach is adopted in respect of State acceptance or rectification of Defects, to ensure that the FFP Warranty and other rights the State may have against Project Co for poor performance are not undermined.

The approach to Defects during the various stages of the Project is set out in more detail in Annexure 4.

## **2.29.2 Project specific amendments**

The components of the Defects regime that will be considered by the State on a project specific basis include that:

- where the Project is fully outsourced and, as a consequence, Project Co bears the impact of Defects in the Project Asset, the State may limit the Defects that are the subject of the specific Defect rectification obligation;
- the Harmonised PPP Project Deeds provide that the Returned Asset DLP will be 24 months from the Date of Commercial Acceptance. This may not be appropriate for Returned Assets handed back well before Commercial Acceptance, or for Returned Assets handed back after Commercial Acceptance; and
- the Defect regime assumes that rectification, and the commercial incentives for rectification, of Defects in Maintained Assets will be addressed in the Services Specification and the Abatement Regime. The Abatement Regime will need to be calibrated to address a range of Defects and their impacts. Where this is not feasible and Project Co is not rectifying the Defect in accordance with the Project Deed, the State may include in the Project Deed a mechanism for withholding payment until the Defect is rectified. However, this needs to work consistently with any concurrent Abatement Regime and must not give rise to double recovery.

The Project Deed may also include a more detailed regime for managing and accepting non-conformances. These are typically design non-conformances that, if progressed, will result in Defects, which are not practicable for Project Co to rectify. Any such regime should work consistently with the terms of the Project Deed, in respect of Defects.



## 2.30 Operational Phase Obligations (clause 28)

### 2.30.1 General principle

Project Co must perform the Services so the Maintained Assets are in a condition that satisfies the FFP Warranty (refer to section 2.6).

### 2.30.2 Project specific amendments

Project specific obligations in respect of availability and use may be required for road projects. Any such requirements will also need to be coordinated with the land provisions in clause 13 (*Land*) where applicable.

## 2.31 Operational Phase Licence (clause 28.1)

### 2.31.1 General principle

The Harmonised PPP Project Deeds provide that prior to the Operational Commencement Date, the State must grant a licence to Project Co of the Operational Phase Area during the Operational Phase (**Operational Phase Licence**), which must commence on the Operational Commencement Date.

The Operational Phase Licence will be in the form set out in the PSDR or the Site Access and Tenure Schedule. If the terms of the licence are very simple, with all the rights and obligations of the parties in respect of occupation being set out elsewhere in the Project Deed, the State may include the licence terms within the Project Deed.

Not later than 20 Business Days prior to the expected Date of Commercial Acceptance, Project Co must:

- prepare and deliver the Operational Phase Licence to the State substantially complete (except for the commencement date and any particulars the State is authorised to complete); and
- deliver a certificate from a licensed surveyor that certifies that the Works as constructed are wholly located within the areas identified for the Operational Phase Area.

For Victorian projects only, see section 2.22 in relation to application of the MTPF Act. A licence issued under the MTPF Act cannot exceed the period of the approved project.

### 2.31.2 Project specific amendments

The land and access provisions for the Operational Phase, including the basis on which tenure will be granted, must be considered on a project specific basis.

If the land is Reserved Crown Land, there are limits on the duration of the licence. The maximum licence term is 10 years or 21 years in limited circumstances. If a longer period is required, then project specific legislation will be needed.



## 2.32 Innovation and continuous improvement (clause 28.3)

The Harmonised PPP Project Deeds include an innovation and continuous improvement regime. The purpose of the regime is to provide a framework to ensure that the Services and the Project Assets are providing a suitable and cost effective solution that enables technical efficiencies and developments to be incorporated into the Project, so it does not become outdated as a result of the length of the Contract Term.

The key features of the regime are that:

- together, Project Co and the State will conduct a Project Efficiency Review every five years;
- Project Co must produce a Project Improvement Report;
- the State may appoint an independent technical advisor to produce an independent report, which will be at the State's cost, unless Project Co failed to provide a Project Improvement Report, in accordance with the Project Deed;
- Project Co must cooperate with the independent technical advisor and attend any meetings; and
- the State may, at any time, issue to Project Co a Modification Request or a Modification Order, or exercise its rights in relation to an Augmentation, in relation to any improvements identified in accordance with the process. In this case, the Modification regime or the Augmentation Process Schedule (as applicable) will apply.

## 2.33 Planned Lifecycle Activities and Deferral of Lifecycle (clause 28.4)

### 2.33.1 General principle

The State recognises that Project Co may defer Planned Lifecycle Activities, provided that this does not impact the use or quality of the Maintained Assets, or whether the Maintained Assets satisfy the FFP Warranty. The deferral of Planned Lifecycle Activities does not defer payment by the State for those Planned Lifecycle Activities, as this is locked in at Contract Close.

For these reasons, it is important that the State effectively monitors any such deferrals. The State recognises there may also be circumstances where Project Co accelerates Planned Lifecycle Activities (for example, to meet the FFP Warranty).

Lifecycle activities are intended to be managed through the Asset Management Plan. Therefore, any deferral or acceleration of Planned Lifecycle Activities will be done by way of amendment to the Asset Management Plan.

If Project Co proposes to defer or accelerate any Planned Lifecycle Activities, it must identify in the Asset Management Plan submitted for review in accordance with the Review Procedures:



- the details of each proposed deferral or acceleration;
- the period of time of deferral or acceleration; and
- whether any deferral or acceleration would effectively entitle the State to reject the Asset Management Plan.

The State may reject any Asset Management Plan and, therefore, deferral or acceleration of Planned Lifecycle Activities:

- in accordance with the Review Procedures;
- if Project Co's proposed deferral of Planned Lifecycle Activities would, if approved, result in the relevant Planned Lifecycle Activities being deferred by a period (measured in Operating Years) equal to or greater than 30 per cent of the period of the relevant replacement or refurbishment cycle, as shown:
  - in the Asset Management Plan, current as at Commercial Acceptance; or
  - if the item that is the subject of the Planned Lifecycle Activities was not included in the Asset Management Plan, current as at Commercial Acceptance, or has since been replaced or refurbished, in the Asset Management Plan in which the relevant item and the replacement cycle for the relevant item was last shown,  
(the 30 Per Cent Rule); or
- if the State is of the view, acting reasonably, that:
  - Project Co will no longer be able to satisfy the FFP Warranty, as a result of such deferral or acceleration; or
  - deferral of the Planned Lifecycle Activities is proposed to occur during the five years prior to the Final Expiry Date.

The 30 Per Cent Rule puts a limit on the deferral of Planned Lifecycle Activities for certain Maintained Assets, even though those Maintained Assets may otherwise meet the requirements of the Project Deed, including that the Maintained Asset satisfies the FFP Warranty.

This is to avoid disputes between the parties as to whether those Project Assets continue to meet the Fit For Purpose requirements of the Project Deed when they have passed their anticipated replacement dates. Typically, the Maintained Assets that will be subject to this regime will be soft furnishings and assets with significant User interface, where the condition of the Maintained Asset prior to replacement is more open to conjecture.

Notwithstanding any deferral or acceleration of Planned Lifecycle Activities, the payment profile for the Service Payment will not change.

As a general rule, the State, at the Project Deed level, will not require a 'sinking fund' (where lifecycle payments are placed into a retention account until the earlier of the lifecycle work being undertaken or the Expiry Date) for lifecycle payments that have been paid by the State to Project Co (via Service Payments), where Planned Lifecycle Activities have been deferred.





The State is sufficiently protected in respect of asset condition by the Handover regime, the Abatement Regime and its broad rights of set-off under the Harmonised PPP Project Deeds, and therefore a sinking fund is unlikely to provide value for money. However, the State acknowledges that Project Co may require a sinking fund between Project Co and the Services Contractor, particularly where payments for Planned Lifecycle Activities are made prior to the relevant work being undertaken.

As a consequence of the right of Project Co to defer Planned Lifecycle Activities based on the information contained in the Asset Management Plan, it is critical that procuring agencies carefully review each version of the Asset Management Plan to ensure that lifecycles are realistic.

### **2.33.2 Project specific amendments**

The Planned Lifecycle Activities that will be subject to the 30 Per Cent Rule will be considered on a project specific basis, including the nature of the Project Asset and the relevant maintenance obligations.

The definition of Planned Lifecycle Activities requires updating on a project specific basis.

## **2.34 Obsolescence (clause 28.5)**

### **2.34.1 General principle**

Where a part of a Maintained Asset is, or will become, Obsolete, the Harmonised PPP Project Deeds require Project Co to put a Plan in place to manage that Obsolescence to ensure it does not impact the performance of the Maintained Assets during the Term and for a period after the Final Expiry Date. If Project Co cannot properly manage the Obsolescence, then the relevant Obsolete part must be replaced.

### **2.34.2 Project specific amendments**

The period of time after the Final Expiry Date before a Maintained Asset can be Obsolete is to be considered on a project specific basis.

Procuring agencies should note that the regime may only be applied to those Maintained Assets that are typically subject to continuing improvement (such as replacement parts for rolling stock) and should amend the Harmonised PPP Project Deeds accordingly.



## **2.35 Warranted Life (clause 28.6)**

### **2.35.1 General principle**

Project Co has a contractual obligation to obtain and maintain a warranty from the manufacturer or supplier that a Warranted Asset will be Fit For Purpose for that part of its Warranted Life that continues beyond the relevant Date of Returned Works Acceptance or the Expiry Date (as applicable). This is provided that the relevant Warranted Asset is operated and maintained in accordance with Standards specified in the clause.

The warranty must be on the best available commercial terms, including (as a minimum) for any relevant Warranted Life specified in the PSDR, and capable of assignment to the State or Project Successor. Project Co must obtain each Warranted Life Warranty as soon as reasonably practicable, and must include copies of each Warranted Life Warranty in the Handover Management Sub-Plan, identifying each of the Warranted Assets for which it has obtained, or has not yet obtained, a Warranted Life Warranty.

### **2.35.2 Warranted Life and Handover**

During the Term, the State will rely on the benefit of the FFP Warranties set out in clause 5.5 of the Harmonised PPP Project Deeds for the Maintained Assets (see section 2.6), rather than the Warranted Life Warranties. It is not the State's intention to have the direct contractual benefit of the Warranted Life Warranties during the Term, other than in respect of a Returned Asset after the Returned Asset DLP.

At Handover, Project Co must procure that the Warranted Life Warranties are assigned or novated to the State, free from any encumbrance.

The definition of Handover Condition also requires Warranted Assets to be Fit For Purpose for the period of their Warranted Life occurring after the Date of Returned Works Acceptance or Expiry Date (as the case may be). This means that at the Date of Returned Works Acceptance or Expiry Date (as the case may be), the Warranted Assets should be in a condition they would be expected to be in to meet their Warranted Life, or that the State is compensated where this is not the case (see section 2.55.6 for more detail on the Handover regime).

### **2.35.3 Project specific amendments**

The State's intention is that the Warranted Life regime will only apply to certain assets in relation to which the State requires a Warranted Life beyond the Expiry Date. The State will identify those assets and the required Warranted Life in the PSDR on a project specific basis, taking into account the nature of the asset and the ability of the market to provide such warranty.



## **2.36 Equipment during the Operational Phase (clause 29)**

### **2.36.1 General principle**

When Project Co replaces Equipment during the Operational Phase, it must meet the Standards specified in clause 29.2(c). Importantly, Project Co is required to ensure that the replacement Equipment is, at the time of replacement, at the same standard as the Equipment it is replacing, at the time the replaced Equipment was procured.

For example, if the relevant Equipment was a state-of-the-art computer monitor at Commercial Acceptance, its replacement must similarly be a state-of-the-art computer monitor at the time of replacement. Replacement of the computer monitor with the same brand and model may not meet this requirement.

The State recognises that Project Co may not be able to price the cost of replacement Equipment that meets the required standard. Therefore, it will pay Project Co as a Change Compensation Event, where it requires Project Co to procure replacement Equipment that has a Whole of Life Cost (as determined in accordance with clause 29.2 of the Project Deed), which exceeds the original Whole of Life Cost (Consumer Price Index (CPI) Indexed) of that replaced Equipment by more than 10 per cent.

### **2.36.2 Project specific amendments**

Project Co is required to maintain the Included Equipment during the Operational Phase. While Included Equipment will be determined on a project specific basis, it should include Equipment that Project Co selects and procures to ensure an effective, whole of life risk transfer to Project Co in respect of that Equipment.

As with the regime for Equipment during the Development Phase, the Equipment regime during the Operational Phase is only included in the SIPD. Circumstances in which an Equipment regime should also be used for a Linear Infrastructure Availability PPP Project are considered in section 2.24.1.

## **2.37 Reviewable Services (clause 30)**

### **2.37.1 General principle**

A Reviewable Services regime reduces the extent of Project Co's exposure to changes in the costs of delivery over time, and the State will propose such a regime where it offers value for money. A Reviewable Services regime provides an opportunity for the State to capture productivity and innovation in delivery of Services that emerge in the market over time.

The process for the review of Reviewable Services in the SIPD is set out in Annexure 5.



Reviewable Services will be determined on a project specific basis. However, they should only include Services where:

- the nature of the service requirement by the Operator is likely to change over the Term;
- the Service is heavily labour-based;
- outside of an Availability PPP Project, the Services are not typically delivered under long-term contracts; and
- the Whole of Life Cost and risk allocation is not compromised by the review of the Services.

Typical Reviewable Services include cleaning, catering, pest control, logistics and portering. 'Hard' facilities maintenance services, such as building maintenance, are typically non-reviewable, because they are closely tied to the specific nature of the Project Assets and Project Co will bear the related cost risks over the Term.

Where relevant Services are also included in a Linear Infrastructure Availability PPP Project (for example, cleaning of train stations), the Reviewable Services regime from the SIPD should be used as a drafting guide.

The Reviewable Service process provides for:

- a period of exclusive negotiation between the State and Project Co, and the relevant Reviewable Services Subcontractor for the relevant Reviewable Services over the next Reviewable Services Term; and
- retendering of the Services by Project Co, if no agreement is reached during the exclusive negotiations.

Respondents are required to prepare a Reviewable Services Schedule as part of their Proposals, which includes a detailed breakdown of the Reviewable Services pricing. The Successful Respondent's Reviewable Services Schedule will be incorporated into the Project Deed. This is updated for each Reviewable Services Term to ensure that the State is able to properly compare the Reviewable Services pricing submitted as part of the Reviewable Services process against the original prices on which the Services Contractor was engaged.

### **2.37.2 Project specific amendments**

The Reviewable Services will be determined on a project specific basis. The definition of Reviewable Services Date is based on a 25 year Operational Phase in the Harmonised PPP Project Deeds and will need amending on a project specific basis.



## **2.38 Minor Works (clause 31)**

### **2.38.1 General principle**

The Operator of the Maintained Asset may often require occasional works to be performed in respect of the asset that, because of their ad hoc and varying nature, are not included in the PSDR. This may include, for example, changes in room fit-out and installation of Equipment owned by the State.

The SIPD includes a streamlined process for the procurement and management of these Minor Works. The Minor Works process may also be included in a LIPD, where similar types of ad hoc Services are required.

The Minor Works process is set out in Annexure 6.

### **2.38.2 Project specific amendments**

If used, the threshold for Minor Works on Maintained Assets during the Operational Phase is to be determined on a project specific basis.

The Harmonised PPP Project Deeds include sample drafting for guidance where the State elects to include a Minor Works Schedule, setting out the price for performance of certain Minor Works. The sample clause sets out the process for the State to accept or reject the proposed Minor Works Schedule, and the process for updating that schedule from time to time. Performance of Minor Works must be in accordance with the Approved Minor Works Schedule.

## **2.39 Intervening Events and Compensable Intervening Events (clause 32)**

### **2.39.1 Intervening Events and Compensable Intervening Events**

Intervening Events and Compensable Intervening Events are defined in the Harmonised PPP Project Deeds.

The Intervening Events (other than the Compensable Intervening Events and Force Majeure Events) listed in the Harmonised PPP Project Deeds have been selected on the basis that the risk of the Event is better borne by the State. This is because the State is in a better position than Project Co to mitigate or manage the consequences of the risk, even if the risk of the Event is not necessarily within the State's control.

The State expects Project Co to accept the risk that it is providing the Services in an operational environment and, therefore, will not be entitled to relief for negligence of the State or a State Associate. Accordingly, State negligence is not an Intervening Event in the Harmonised PPP Project Deeds.

Refer to section 2.28 for a discussion on Intervening Events that are Force Majeure Events.



## 2.39.2 Relief and compensation

### 2.39.2.1 General principle

Project Co's obligations to perform Services will be suspended for the period of the Intervening Event if an Intervening Event occurs during the Operational Phase, and Project Co:

- has submitted a Change Notice within the timeframe specified in clause 32.1(b), in accordance with the Change Compensation Principles;
- can demonstrate that it has actually been, or will be prevented from, performing the Services by the relevant Intervening Event; and
- along with the relevant Change Notice, submits to the State such information reasonably required by the State to enable the State to determine Project Co's entitlement to relief.

For a discussion of the concept of 'prevention' see section 2.28.3.

For the period during which some or all of Project Co's obligations are suspended for an Intervening Event, the Service Payment will be abated for any suspended Services, in accordance with the Payment Schedule.

However, any such Abatement will not constitute a breach of the Abatement thresholds for the purposes of the relevant Major Default or Default Termination Event definitions, where the Intervening Event is:

- the consequence of a breach of a Direct Interface Deed by a Direct Interface Party, (on the basis that Project Co's entitlement to compensation will be addressed under the relevant Direct Interface Deed);
- a Force Majeure Event (refer to section 2.29.2 for discussion on relief and compensation for an Intervening Event that is a Force Majeure Event); or
- an Insured Risk (that is not a Force Majeure Event) for which Project Co is unable to recover insurance proceeds, as a result of a State Insurance Breach (on the basis that the State will only take risk on the Insurances responding and the sufficiency of Insurance coverage for a State Insurance Breach).

For all other Intervening Events, for the period during which Project Co's obligations are suspended in connection with the Intervening Event, the Service Payment will not be subject to Abatement, and the State will continue to pay Project Co the unabated Service Payment, less any costs not incurred by Project Co as a result of the suspension.



If the Intervening Event is a Compensable Intervening Event, Project Co will, in addition to payment of the unabated Service Payment (if applicable), be entitled to compensation that is calculated in accordance with Item 6, Table 1 of the Change Compensation Principles (refer to section 2.29 for a discussion on Intervening Events that are Force Majeure Events).

Project Co's right to relief arising from an Intervening Event does not affect the State's step-in rights (see section 2.48).

#### **2.39.2.2 Reduction in relief**

Project Co and Project Co Associates must take all reasonable steps, which a prudent, competent and experienced contractor would have taken to minimise the effects, consequence and duration of the Intervening Event.

As with all Relief Events, the State's Liability to Project Co in connection with an Intervening Event will be reduced, to the extent that Project Co causes or contributes to the Intervening Event, or fails to minimise the effects, consequence and duration of the Intervening Event.

#### **2.39.2.3 Alternative arrangements**

If an Intervening Event occurs, the State may require Project Co to perform a Work Around. In this case, Project Co will be entitled to compensation calculated in accordance with Item 8, Table 1 of the Change Compensation Principles.

#### **2.39.2.4 Unilateral right**

The Harmonised PPP Project Deeds include a discretionary right for the State to unilaterally grant relief to Project Co for an Intervening Event that has occurred during the Operational Phase. However, the State is not required to exercise this discretion for the benefit of Project Co.



## **2.40 State Contribution on Commercial Acceptance, Development Phase Capital Contribution and Conditional Debt Pay Down Amount (clause 33)**

### **2.40.1 General principle**

The State has the option to include an obligation in the Project Deed for the State to make one or more payments to Project Co, including:

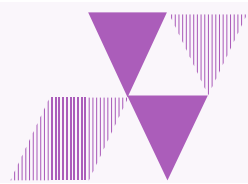
- the State Contribution;
- Development Phase Capital Contributions in exchange for Project Co progressively undertaking the Development Activities. To qualify for this payment, Project Co must also satisfy a number of Conditions Precedent related to that payment including providing the required documentary evidence; and
- the CDPD Amount, but only if Project Co satisfies the CDPD Conditions prior to the expiry of the CDPD Period.

Each of these payments and clause 33 will only be included, to the extent that the State determines it is applicable to the relevant Project. The State may elect to make a State Contribution, Development Phase Capital Contribution or a CDPD Amount for a variety of reasons. These include where there are liquidity constraints, or where the State requires Project Costs to be reduced by reducing the level of private capital at risk during the Operational Phase.

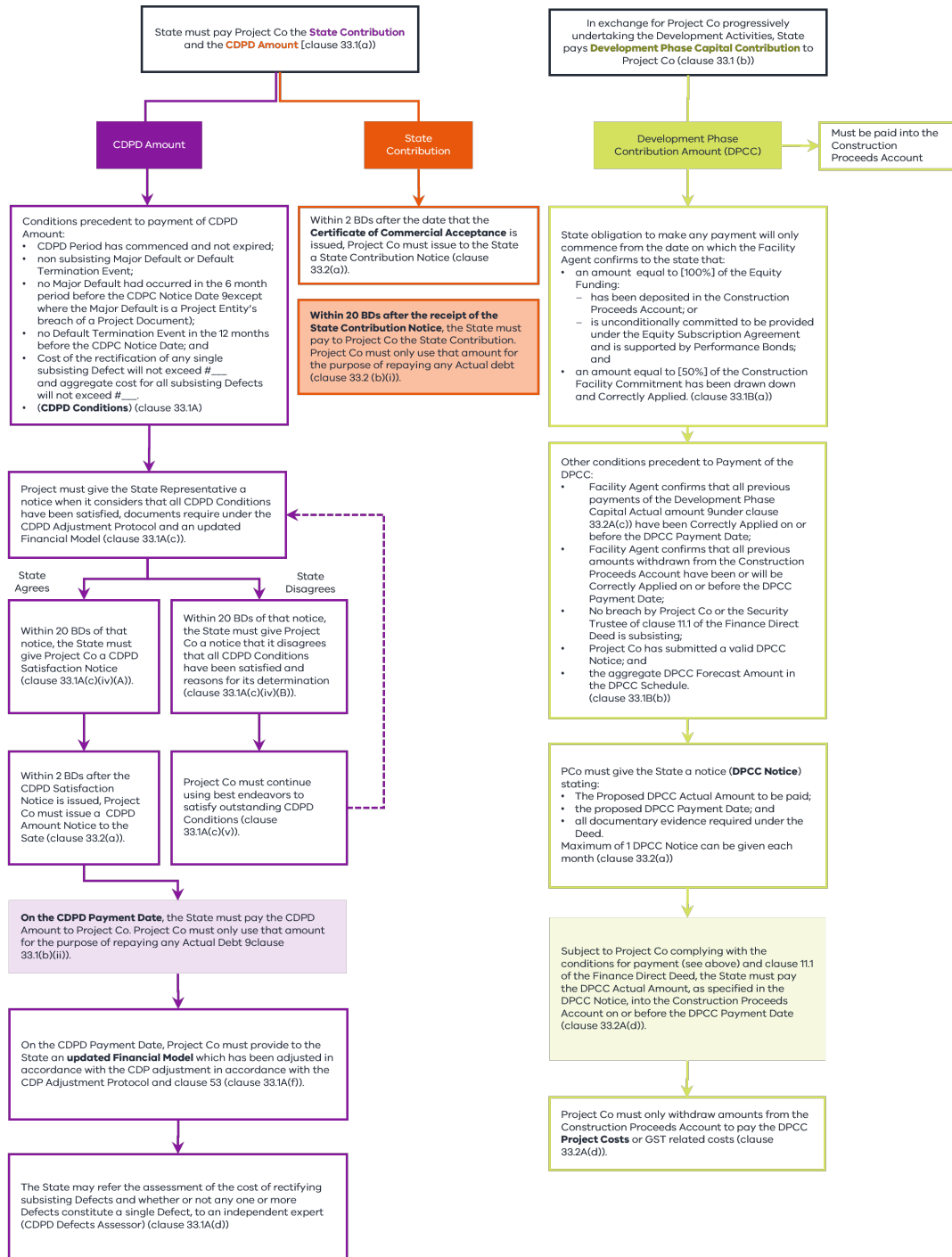
It is important to maintain sufficient private sector capital at risk to incentivise Project Co to comply with its obligations.

Figure 17 summarises the Conditions Precedent to payment of the State Contribution, CDPD Amount and Development Phase Capital Contributions, with the timing of those payments marked by highlighted textboxes.





**Figure 17 – Conditions Precedent for payment of State Contribution, the CDPD Amount and the Development Phase Capital Contributions**





## 2.40.2 State Contribution

Where the State elects to make a State Contribution, the preference is to do so in a single lump sum, shortly after Commercial Acceptance is achieved. This ensures that the State Contribution is only made after the Development Phase has been completed, in accordance with the Project Deed, so that the State is not accepting any construction or delivery risk.

The State's usual requirement, mandated in the Finance Direct Deed, is that the full amount of any lump sum State Contribution must be applied to repay debt funding immediately on receipt. Depending on the size of the State Contribution, the debt-to-equity gearing ratio may be significantly changed by this. Thereafter, the State may permit the debt to equity ratio to be regearing, provided this is strictly in accordance with the Financial Close Financial Model agreed by the State.

In some cases, the capital requirement for a Project may be so large (for example, major tunnelling or road network projects) that the State considers it appropriate and cost effective to make State Contributions during the Development Phase in the form of either an additional one or two material payments, or regular smaller payments throughout the Development Phase.

To mitigate the construction risk to which the State becomes exposed as a result of making those payments, the State will impose project specific conditions on the amount of debt funding and Equity Funding that must be contributed before the State makes any such State Contributions.

The State will also require all such State Contributions to be contributed pro rata with additional debt and/or Equity Funding. State Contributions during the Development Phase will depend on Project Co achieving specified delivery milestones (which are certified by the Financiers' independent verifier, prior to payment of the contributions).

As a consequence of the State mandating that any lump sum State Contribution must be applied to repay debt funding (and the debt funding structure reflects this lump sum payment), the State typically accepts that the State's rights of set-off do not apply to a State Contribution.

## 2.40.3 Project specific amendments

The requirements for payment of any State Contribution and its components (lump sum after Commercial Acceptance and/or ongoing during the Development Phase), may be included on a project specific basis.

Where the State makes both a lump sum and an ongoing contribution to a Project, the lump sum will be defined as the State Contribution, and the ongoing contribution will be defined as the Development Phase Capital Contribution.



It will be necessary to consider all Harmonised PPP Project Deeds references to State Contribution and Development Phase Capital Contribution in this context. This will determine whether amendments are required to the Harmonised PPP Project Deeds standard drafting, in relation to each of the State Contribution and the Development Phase Capital Contribution.

#### **2.40.4 Conditional Debt Pay Down Amount**

After a proven period of operation (to be determined according to the specified CDPD Period) and subject to the satisfaction of asset performance conditions, a lump sum payment amount will be applied to pay down a portion of Project Co's debt.

It is recognised that a CDPD improves the value for money of a project, as it reduces the cost of privately financed debt by substituting a portion of such debt with State funding. As it occurs during the Operational Phase and only once the prescribed CDPD Conditions are met (typically after a steady state of operations has been achieved), the project is de-risked and there is limited risk transferred back to the State.

The CDPD Conditions include:

- the CDPD Period commencing and not expiring;
- no subsisting Major Default or Default Termination Event;
- that no Major Default (other than a Major Default occurring under paragraph (q) of that definition) has occurred in the six-month period immediately prior to the CDPD Notice Date;
- that not more than one Major Default (other than a Major Default occurring under paragraph (q) of that definition) has occurred in the 18-month period immediately prior to the CDPD Notice Date;
- no Default Termination Event having occurred in the 12-month period immediately prior to the CDPD Notice Date; and
- costs of rectification of any single subsisting Defect and the aggregate cost of rectification of all subsisting Defects, not exceeding specified amounts (to be determined on a project specific basis).

The State may waive one or more of the CDPD Conditions (with or without conditions) in its absolute discretion, by giving written notice to Project Co.

In NSW, the general position is for the CDPD Amount to equal 50 per cent of outstanding debt (up to the amount in the Base Case Financial Model), and to be payable between two and four years after the completion.



## 2.40.5 Project specific amendments

The CDPD Period is to be decided on a project specific basis, being a proven period of operation of a specified period of time after Commercial Acceptance.

The CDPD Conditions can be amended on a project specific basis.

## 2.40.6 Development Phase Capital Contribution

The Development Phase Capital Contributions (DPCC) are capital contributions paid by the State on a progressive basis during the Development Phase. DPCC can be included at the State's discretion, where the State is of the view that periodic capital contributions paid to Project Co during delivery, on satisfaction of the minimum debt and equity contributed requirements, is a value-for-money proposition (taking into account the overall cost of the Project and availability of funding).

Subject to satisfaction of the Conditions Precedent for payment (including clause 33.1B(a) and (b) (*Conditions for payment of Development Phase Capital Contribution*)) and Project Co's and the Security Trustee's compliance with clause 11.1 of the Finance Direct Deed, the State must pay the Development Phase Capital Contribution Actual Amount into the Construction Proceeds Account on or before the Development Phase Capital Contribution Payment Date (being the date that is the later of seven Business Days after receipt by the State of a valid Development Phase Capital Contribution Notice and the payment date specified in that notice).

Project Co must ensure that the Development Phase Capital Contributions are only applied to pay the DPCC Project Costs (which are Project Costs excluding funding of any debt service reserve account, any principal, interest, repayment and other fees, charges or break costs under the Finance Documents (other than as provided for in the Financial Model) and excluding Distributions) and Goods and Services Tax (GST) related to those DPCC Project Costs.

The Harmonised PPP Project Deeds assume that the payments of the DPCC will be paid as and when, and in the amount, required. Draw downs are based on a fixed schedule, so that payments of the DPCC will correspond with the withdrawals from the Construction Proceeds Account. To the extent that the project teams elect to adopt a different approach, clause 33.2A will need to be amended.

## 2.41 Abatement (clauses 32.6 and 34.2)

### 2.41.1 Defined terms

Typically, Project Deeds will contain a specification for the delivery of Services during the Operational Phase. As these specifications are project specific, they have not been included in the Harmonised Form Project Deeds, but it is assumed that they will typically be included in the PSDR or as a Schedule to the Project Deed.



The Harmonised Form Project Deeds are drafted on the basis that Service Payments are abated for Performance Failures that consist of:

- a failure of Project Co to provide the Services in accordance with the Services specification (Service Failures); and
- the unavailability of the Maintained Assets at any point in time (Availability Failures),

(together Performance Failures).

The Harmonised PPP Project Deeds use the generic concepts of Performance Failures, Service Failures and Availability Failures to describe these potential Abatement events. However, the State recognises that these will be developed on a project specific basis, and that other terms may be used to describe the performance and Abatement Regime.

### **2.41.2 Abatement as sole remedy (clause 34.2)**

Subject to the exceptions discussed below, Abatement of the Service Payments, in accordance with the Payment Schedule, will be the only financial Liability that Project Co will incur to the State for a Performance Failure.

However, the principle above does not limit or affect any other right or remedy of the State under any State Project Document or at Law, including:

- Project Co's Liability for any cost or expenses incurred by the State in engaging a party to rectify a Defect;
- the State's rights in respect of the event that caused or contributed to the Performance Failure (as opposed to the Performance Failure itself);
- the State's rights under damage, Major Default and termination provisions;
- any entitlement of the State to recover any liabilities suffered or incurred by the State, as a consequence of exercising its rights to step in; and
- any liability that Project Co may have under the Project Deed (including reasonably foreseeable economic loss) suffered or incurred by the State as a result of any:
  - fraudulent, reckless, unlawful or malicious act or omission; or
  - Wilful Misconduct by Project Co, to the extent that the State has not been fully compensated for that Liability by the Abatement of the Service Payment.

The rationale underpinning these exceptions is to preserve the State's rights in relation to Project Co's Liabilities under the Project Deed for losses that have not been included in the Abatement calculations. For instance, if a Performance Failure gives rise to a Default Termination Event, the State expressly preserves its right to terminate and claim the Termination Payment for a Default Termination Event.



Project Co gives acknowledgements in relation to the application, operation and enforceability of the Abatement Regime.

The State may unilaterally waive any Abatement (in whole or in part).

### **2.41.3 Project specific amendments**

Agencies administering a Project Deed should only consider waiving Abatements in exceptional circumstances, for example, where there are extenuating circumstances that have given rise to the Performance Failure.

Major Default Performance Failures and Default Termination Performance Failures are events where Project Co has incurred Abatements (whether or not the State actually makes some or all of those Abatements) to a specified level within a period of time, which trigger a Major Default or Default Termination Event (as the case may be).

In determining the relevant Abatement thresholds that constitute a Major Default or Default Termination Event, procuring agencies must consider the point at which the number or nature of Performance Failures are such that Project Co is considered to have significantly underperformed over a period of time.

Abatement thresholds for Major Default Performance Failures and Default Termination Performance Failures are generally specified as Abatement amounting to more than a nominated percentage of the total Service Payment for a quarter, which is repeated over a number of consecutive quarters. The thresholds for Major Default Performance Failures and Default Termination Performance Failures are to be defined on a project specific basis.

See section 2.39 for discussion on the impact of Intervening Events on Abatement.

## **2.42 Service Payments (clause 34.4)**

### **2.42.1 General principle**

For value-for-money reasons, the State's preferred position is that Service Payments will be made monthly, and in arrears, during the Operational Phase. This is reflected in the Harmonised PPP Project Deeds.

### **2.42.2 Project specific amendments**

Procuring agencies should consider this on a project specific basis, as there may be projects for which monthly payments are not appropriate, given the complexity of the invoicing regime. In this case, the State will instead provide for quarterly or other periodic payments in the Project Deed released with the RFP. Procuring agencies should take into account the increase in the Service Payment amount, if a quarterly payment profile is adopted.



## 2.43 Floating Rate Component (clause 34.8)

### 2.43.1 General principle

Project Co is generally required to hedge the base interest rate risk on its original debt financing from Financial Close until the first Refinancing, after which the State takes back (for the remainder of the Contract Term) the risk of interest rate movements. The State may choose to leave the residual exposure unhedged, or it can manage the interest rate risk, either by entering into interest rate swaps itself, or by requiring Project Co to do so on the State's behalf.

The Floating Rate Component is paid in addition to the Service Payment. It is not subject to Abatement, but may be subject to set-off by the State, where it is an amount payable by Project Co.

The Floating Rate Component is calculated in accordance with the Payment Schedule for each Interest Period from the first Refinancing. For each Interest Period, the calculation will produce a Floating Rate Component amount that is a positive or a negative number, depending on which way interest rates have moved, relative to the base interest rate agreed in the Model Output Schedule in the Financial Model.

Should the State require Project Co to hedge the interest rate exposure beyond the first Refinancing, the Floating Rate Component will be a fixed payment each Interest Period, which comprises the difference between the hedged rate and the base interest rate.

Alternatively, where the State hedges the interest rate exposure via the Treasury Corporation of Victoria, the State manages the Floating Rate Component payments to Project Co by entering into a back-to-back interest rate swap with the Treasury Corporation of Victoria (outside of the Project Deed).

Clause 34.8 sets out the mechanics that will apply for each Interest Period, and for each Floating Rate Component calculated. This provides that:

- if the Floating Rate Component is negative, the State must invoice, and Project Co must pay, that amount on or before the last day of the applicable Interest Period; or
- if the Floating Rate Component is positive, Project Co must invoice, and the State must pay, that amount on or before the last day of the applicable Interest Period.



## 2.43.2 Project specific amendments

On a project specific basis, the value for money able to be obtained by the State from a longer period of fully hedged debt financing will need to be considered. Circumstances where the State may elect to retain the requirement for fully hedged debt financing after the first Refinancing may include where Project Co offers an alternative longer term hedging solution in its Proposal, or the costs of placing long-term hedging with the financial markets becomes less expensive in the future.

## 2.44 Modifications (clause 35)

### 2.44.1 Introduction

A Modification is broadly defined to include:

- During the Development Phase, any change to the Works, Design Requirements or the way the Development Activities are carried out from that set out in the relevant Project Plan;
- during the Operational Phase, a change to the Maintained Assets; or
- after Contract Close, a change to the Operational Phase Requirements or the Services.

Certain specific events contemplated in the Project Deed can also be Modifications.

Modifications exclude:

- where any change is required to ensure that the Project Assets, Development Activities or Services are otherwise in accordance with the requirements of the Project Deed;
- Minor Works (for which there is a simplified regime to facilitate low-cost changes); and
- Augmentations.

An Augmentation will generally be defined as a change to the Project Assets, Design Requirements, Operational Phase Requirements or Project Activities, with a total cost likely to exceed \$80 million (CPI Indexed), which the State determines should be delivered according to the Augmentation Process. The definition of Augmentation may be amended on a project specific basis.

While an Augmentation will typically be a significant change to, or augmentation of, the Project, which the State considers may be too complex for delivery under the Modification framework of the Project Deed, the State always retains the option to deliver the change as a Modification.





## 2.44.2 State Initiated Modifications

### 2.44.2.1 General principle

At any time during the Term, the State may direct Project Co to undertake a Modification in connection with the Project. This may be done by issuing a Modification Order or requesting Project Co to provide a Modification Proposal. Such a Modification may include a decrease, omission, deletion or removal of any part of the Project Activities, provided that the State may not omit all or substantially all of the Development Activities or the Services.

If Project Co undertakes a State Initiated Modification, it will be entitled to be compensated for its costs properly and reasonably incurred in undertaking the Modification, as calculated in accordance with the Change Compensation Principles.

The additional events that will be treated as a State Initiated Modification, and where clause 35 of the Harmonised PPP Project Deeds and the Change Compensation Principles will apply, include:

- a State Approval Event (see section 2.10.2);
- a Contamination Compensation Event (see section 2.15.6);
- a Compensable Change in Mandatory Requirements (see section 2.45.2);
- where loss or damage to the Project Assets occurs and the State directs Project Co to repair or rebuild the Project Assets, but only where:
  - the loss or damage to the Project Assets was caused by a Day 1 Uninsurable Risk or an Uninsurable Risk;
  - Project Co is unable to recover insurance proceeds under an Insurance to repair or rebuild the Project Assets, as a result of a State Insurance Breach (see section 2.53.3 for further information on State Insurance Breach); or
  - the State directs that repair or reinstatement to different specifications to those of the Project Assets that suffered the loss or damage; or
- where loss or damage to the Project Assets occurs, the State does not direct Project Co to repair or rebuild the Project Assets and omits that part of the Project Assets from the Project.

To ensure that any State Initiated Modification is managed efficiently, after Project Co has submitted a Modification Proposal, the parties must meet to discuss the Modification Proposal and may agree on how certain issues in respect of the Modification are managed.



#### **2.44.2.2 Notification of Modification (clause 35.11)**

At any time, if Project Co considers that an approval, consent, direction, requirement, determination, request, claim, notice, agreement, demand or the like (a direction) by the State constitutes or involves a Modification, it may give notice to the State to that effect.

The State must respond to the notice and either:

- confirm that the direction by the State is in fact a Modification and issue a Modification Order;
- withdraw the direction by the State; or
- inform Project Co that it does not consider the direction by the State to be a Modification.

#### **2.44.2.3 Mandatory Modifications (clause 35.6)**

In general, the State may elect whether or not Project Co proceeds with implementing a State Initiated Modification.

However, the State must direct that Project Co proceeds with implementing a Modification if:

- a State Approval Event occurs;
- a Compensable Change in Mandatory Requirements occurs and Project Co would be in breach of Law if it did not comply with such change;
- loss or damage to the Project Assets occurs and the State directs Project Co to repair or rebuild the Project Assets, but only where:
  - the loss or damage to the Project Assets was caused by a Day 1 Uninsurable Risk or an Uninsurable Risk; or
  - Project Co is unable to recover insurance proceeds under an Insurance to repair or rebuild the Project Assets, as a result of a State Insurance Breach;
- loss or damage to the Project Assets occurs, the State does not direct Project Co to repair or rebuild the Project Assets, and omits that part of the Project Assets from the Project; or
- to the extent the State directs Project Co to Remediate the Contamination, or the Contamination is the subject of a Contamination Notice, and such Remediation is not otherwise required under the Remediation obligations set out in the Harmonised PPP Project Deed.

#### **2.44.2.4 Extensions of time and relief from performance for Modifications**

Project Co may claim an extension of time to a Date for Acceptance in connection with a State Initiated Modification. If the Conditions Precedent to Project Co's entitlement to an extension of time under clause 35.8(d) (*Extension of time for Modification*) are satisfied, the extension of time to the relevant Date for Acceptance will be as agreed by the State and Project Co.



This is as part of the Modification process and failing such agreement, either:

- As determined by the Independent Reviewer; or
- as determined by the State (acting reasonably) and subject to review by the Independent Reviewer, where it issues a Modification Order without receiving a Modification Proposal.

The Concurrent Delay principle set out in clause 26.14(a) (*Concurrent Delays*) applies to State Initiated Modifications on the basis that, prior to the Harmonised PPP Project Deeds, these were Extension Events to which the Concurrent Delay provisions in clause 26.14 would have applied. This is because the approach to risk sharing for Concurrent Delay set out in section 2.27.9 reflects a fair and common-sense approach to causation.

A Modification will not entitle Project Co to claim relief under the Intervening Event regime, as the State requires Project Co to continue to undertake the Services, in accordance with the Project Deed. However, as part of the Modification process, the State may agree that Project Co is relieved from certain obligations and this will be addressed as part of the Modification Proposal and Modification Order.

#### **2.44.2.5 Entitlement to payment for preparation of Modification Proposal**

If the State has requested that Project Co provide a Modification Proposal, in respect of a State Initiated Modification, Project Co will be entitled to claim and be paid the third-party consultant fees properly and reasonably incurred by it or a Key Subcontractor in preparing the Modification Proposal. This is up to a capped amount, as agreed or determined in accordance with Item 9 of Table 1 of the Change Compensation Principles (clause 35.3 (*Modification Proposal Quote*)) of the Harmonised PPP Project Deed.

If, following receipt of a Modification Proposal, the State decides:

- to proceed with the State Initiated Modification, the State will pay Project Co such third-party consultant fees, as part of the amount paid by the State to Project Co in connection with the Modification; or
- not to proceed with the State Initiated Modification, the State will pay Project Co such third-party consultant fees, as calculated in accordance with the Change Compensation Principles.

#### **2.44.3 Project Co Initiated Modifications**

Project Co may, at any time, propose a Modification. If that Modification is approved by the State, Project Co must implement the Modification at its own cost and risk. It will not be entitled to make any Claim against the State in connection with such Modification, including in respect of an extension of time or relief from performance.

The State will share in any total net saving arising from the Modification (as calculated in accordance with the Change Compensation Principles Schedule), in a proportion as agreed by the parties, and failing such agreement, the State will be entitled to 50 per cent of the saving.



## 2.44.4 Minor Modifications

### 2.44.4.1 General principle

The Minor Modification regime is intended to:

- better facilitate and more efficiently give effect to Minor Modifications; and
- ease the administrative burden on Project Co and the State in the implementation of Minor Modifications.

Any Minor Modification is a Change Compensation Event and the Change Compensation Principles will apply, for the purposes of determining payment for the Minor Modification. No Change Notice or Change Response is required to be issued for the Minor Modification.

Project Co or the State may propose a Minor Modification. The receiving party must either:

- accept the Minor Modification Proposal;
- reject the Minor Modification Proposal; or
- provide reasonable amendments to the Minor Modification Proposal.

Project Co and the State may agree to accumulate Minor Modifications on a monthly basis (or such other period as is agreed by the parties), by recording the proposed Minor Modifications by agreement on a register.

In respect of any Minor Modification, Project Co will not be entitled to make any Claim for:

- an extension of time to a Date for Acceptance or additional recurrent costs that may be incurred in performing the Services, as a consequence of a Minor Modification; or
- any impact the Minor Modification may have on the FFP Warranty.

If the State considers that the Minor Modification process is not meeting its intended purposes, the State may suspend the Minor Modification process. If the State issues a notice to Project Co to this effect, all Minor Modifications thereafter will be managed in accordance with the Modification regime, unless and until the State recommences the Minor Modification process by notice to Project Co.

### 2.44.4.2 Project specific amendments

The threshold for Minor Modifications on Works and Maintained Assets is to be completed on a project specific basis.



## **2.44.5 Pre-Agreed Modifications**

### **2.44.5.1 General principle**

The State and the Successful Respondent may, prior to entering into the Project Deed, agree the description, cost (including impact on the Service Payment) and impact on the State Project Documents of a Modification (which may or may not be implemented during the Term). For example, the State could require Respondents to price a Modification for an additional hospital wing, with a three-year period for the State to exercise the option.

### **2.44.5.2 Project specific amendments**

Where the above occurs, a clause dealing with such 'Pre-Agreed Modifications' and a corresponding schedule will be included in the Project Deed.

This sets out:

- a process for the State to direct that the Pre-Agreed Modification will be implemented;
- a detailed description and cost for each Pre-Agreed Modification;
- an election date for each Pre-Agreed Modification;
- a process for pricing any Pre-Agreed Modification, prior to and after the relevant election date;
- any impacts on the State Project Documents; and
- an obligation for Project Co to implement the Pre-Agreed Modification.

These are to be agreed on a project specific basis.

## **2.44.6 Augmentation Process**

Augmentations are excluded from the definition of Modifications.

## **2.45 Change in Law and Change in Policy (clause 36)**

### **2.45.1 Obligations regarding Change in Law and Change in Policy**

After becoming aware of any actual or likely Change in Law or Change in Policy, which may have an impact on the Project, the Project Activities or the State Project Documents, Project Co must submit a notice to the State.

Project Co must comply with any Change in Law.

Unless Project Co is legally obliged to comply with the Change in Policy or the State directs Project Co to comply with the Change in Policy, Project Co is not required to comply with a Change in Policy.



## 2.45.2 Compensable Change in Mandatory Requirements

A Compensable Change in Mandatory Requirements will occur in the circumstances set out in Table 9.

**Table 9 – Circumstances for a Compensable Change in Mandatory Requirements**

	Development Phase	Operational Phase	Item in Table 1, Change Compensation Principles
General Change in Law (Development Phase) (Note: subject to a cost or time threshold and a moratorium on Claims. See below)	✓		Item 13A
General Change in Law (Operational Phase)		✓	Item 14
Project Specific Change in Law	✓	✓	Item 10
Change in Policy where: <ul style="list-style-type: none"> <li>• Project Co is legally obliged to comply with the Change in Policy or is directed by the State to comply; or</li> <li>• the Change in Policy is a Change in Environment Protection Authority Victoria (EPA) Standard and Project Co is legally obliged to comply, or is directed by the State to comply,</li> </ul> where the Change in Policy is not a Change in Law or a Pandemic Change in Law	✓	✓	Item 10

A General Change in Law (Development Phase) is a change in law that is not a Project Specific Change in Law. Compliance with this requires a change to the Works, the Services or the Working Parameters, and either Base Costs exceeding a specified amount, or a delay in achieving Acceptance by a specified time period, per event.

The cost and time thresholds and the moratorium period of 6 months after the date of the Deed are to be determined by project teams on a project specific basis. Project Co's cost entitlements for General Changes in Law (Development Phase) are summarised in section 3.3.3.



A Compensable Change in Mandatory Requirements excludes specified changes in law or policies, such as:

- State Approval Events;
- a change in Law in relation to taxes, the applicable proportionate liability legislation of each State, and the *Federal Safety Commissioner Act 2022* (Cth) and its associated rules and regulations (as amended from time to time);
- specified changes to the *Superannuation Guarantee (Charge) Act 1992* (Cth);
- the Project Assets becoming a critical infrastructure asset or critical infrastructure sector asset under the *Security of Critical Infrastructure Act 2018* (Cth); and
- a Contamination Notice.

Certain changes in Laws or Standards will not give rise to any entitlements. These are specifically referred to as exclusions to the definition of Compensable Change in Mandatory Requirements. Changes in these excluded Laws and Standards are considered to be 'business-as-usual' risks that should be accepted by Project Co.

A Compensable Change in Mandatory Requirements also excludes a change in, amendment to, repeal of, or a requirement to obtain an Approval during the Development Phase, as this is excluded from General Change in Law (Development Phase).

Given that the Development Phase represents a relatively short period of time during the Term, Project Co can assess the likelihood, and therefore can bear the risk, of a change in Approvals occurring during the Development Phase. The State retains change in Approvals risk during the Operational Phase and this will be treated as a General Change in Law (Operational Phase).

Project Specific Changes in Law and specific scenarios of Changes in Policy (as set out in Table 9) are State-retained risks, as they are largely within the State's control.

If a Compensable Change in Mandatory Requirements occurs, the change will be treated as a State Initiated Modification, and relief and compensation will be provided in accordance with Item 10, Table 1 of the Change Compensation Principles.

If a Compensable Change in Mandatory Requirement occurs that is a General Change in Law during the Development or Operational Phase, relief and compensation will be provided in accordance with Item 13A and Item 14 respectively, of Table 1 of the Change Compensation Principles.

Project Co is also entitled to an extension of time to the Date for Acceptance, if the Compensable Change in Mandatory Requirements meets the requirements for an Extension Event. However, it will not be an Intervening Event, as the State's position is that Project Co will not, as a matter of course, be entitled to relief from its obligations during the Operational Phase. Any specific relief will need to be addressed as part of the Modification process.



## 2.46 Pandemic (clause 36A)

### 2.46.1 Introduction

Pandemic is defined as COVID-19 and any other Pandemic declared by the World Health Organization.

During the RFP process, Respondents will be required to bid back a Pandemic Management Plan (Initial Pandemic Management Plan), which will set out the baseline mitigation measures that Project Co will be required to undertake in response to existing legislation, law and directions at Contract Close for the duration of the Term. Any measures in the Pandemic Management Plan will need to take into account the expiry dates of any Pandemic Directions.

Project Co will be required to accept the risk (time and cost) of known Pandemic Directions, including other Pandemics (as declared by the World Health Organization), related impacts on the delivery and operations of the Works as at Contract Close (including prevailing government restrictions, directions, etc.).

For Pandemic Changes in Law and Pandemic Compensation Events that occur after a specified period after Financial Close (Pandemic Impact Date), the Harmonised PPP Project Deeds provide a regime for relief and compensation, subject to Project Co demonstrating that certain requirements have been satisfied.

As Pandemic Relief Events are Compensation Events, the Force Majeure Regime will not apply if a Pandemic, subject to clause 36A (*Pandemics*), continues for over 180 days.

### 2.46.2 Pandemic Change in Law (clause 36A.5)

A Pandemic Change in Law is defined as:

- a change in (including any extension, repeal, revocation or expiry of) an existing Legislation in response to a Pandemic;
- new Legislation in response to a Pandemic; or
- a new Pandemic Direction or a change to (including any extension, repeal, revocation or expiry of) an existing Pandemic Direction.

A Pandemic Change in Law is a 'Compensable Change in Law' (which is a Compensation Event), to the extent that it requires any changes to the measures contemplated by the Pandemic Management Plan.

Where there is a Pandemic Change in Law, Project Co and the State will be entitled to compensation or Savings (as applicable), in accordance with Item 21, Table 1 of the Change Compensation Principles.





### **2.46.3 Pandemic Compensation Event (clause 36A.5)**

As a result of a Pandemic that has a material impact on the Project Activities, a Pandemic Compensation Event occurs if, during the Development Phase:

- there is a full-day closure of a Subcontractor's plant or factory in Australia, or in a Key Plant and Equipment Manufacturing Country, required by law or a Pandemic Direction, that delays Project Co in achieving Acceptance by more than one day per event (Pandemic Subcontractor's Plant Closure);
- there is a full-day delay in the supply of Key Plant and Equipment, as a result of Australian quarantine restrictions or international border; or
- there is a full-day closure of the Development Phase Area, which is required by Law or a Pandemic Direction.

A Pandemic Compensation Event is treated as a Compensable Extension Event and Project Co may be entitled to an extension of time and compensation, in accordance with Item 22, Table 1 of the Change Compensation Principles.

### **2.46.4 Project specific amendments**

For NSW only, any amendments to the Pandemic regime should be checked with NSW Treasury to ensure compliance with the COVID-19 Commercial Guidelines, as approved and updated from time to time.

## **2.47 Refinancing (clause 37)**

### **2.47.1 Introduction**

PPP projects are financed by the private sector through a mix of debt provided by lenders, and equity provided by sponsors. The term 'Refinancing' refers to changes in the debt finance arrangements, derivatives, and the timing or manner of payment of the CDPD Amount.

As Refinancings have the potential to change a Project's risk allocation, as agreed at Financial Close, the State requires the right to be fully informed of any Refinancing, as well as to approve Refinancings, other than those that were part of the original Financial Close Plan (for example, the entry into derivatives or syndication contemplated at Financial Close).

The Financial Close Financial Model contains assumed credit margins and fees for the entire Term, including at Refinancing points. To the extent that credit margins and fees proposed as part of a Refinancing are lower or higher than those forecast in the Financial Close Financial Model, there will be a respective Refinancing Gain or Loss.

While there may be savings or costs accruing to or payable by the State, as a result of the base interest rate being reset as part of a Refinancing Event, it is only the difference in margins and fees that is taken into consideration when calculating a Refinancing Gain or Loss to be allocated between the State and Project Co.



The Harmonised PPP Project Deeds provide for the State to be entitled to 100 per cent of the Refinancing Gains arising from the change in the manner or timing of payments of the CDPD Amount, and to a share in 50 per cent of the benefit of any Refinancing Gains arising from any other Refinancing Event.

The Victorian provisions in the Harmonised PPP Project Deeds calculate Refinancing Gains for those other Refinancing Events, after allowing Project Co to recoup any prior Refinancing losses.

As a settled NSW principle, the NSW provisions do not permit for any Refinancing losses to be taken into account in the calculation of any Refinancing Gain.

The sharing regime is based on the principle that the State should share in gains arising from improvements in financing terms that were originally made possible by the State's long-term contractual commitment to the Project, and secured by Project Co.

Beneficial changes in financing terms are often influenced by factors external to the Project. This is considered to be different to an improvement in Project Co's equity return due to efficiency improvements in delivering the Project, which accrue to Project Co.

Generally, a 50:50 share of Refinancing Gains gives a reasonable balance between the above factors. However, where the Refinancing Gain arises from a change in the manner or timing of the CDPD Amount, it is appropriate for 100 per cent of the Refinancing Gain to be paid to the State.

### **2.47.2 General principle**

The State requires visibility of, and consent rights in respect of, any Refinancing during the Term. The concept of Refinancing is intrinsically linked to changes to, or the replacement of, the Finance Documents, which the State has reviewed and accepted prior to Financial Close.

Refinancing is broadly defined, and means:

- any Amendment, novation, supplement or replacement of any Finance Document;
- the exercise of any right, or the grant of any waiver or consent, under any Finance Document;
- 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;



- any new financing arrangements entered into by a Group Member, which has the effect of restructuring the then current financing arrangements; or
- any other step or arrangement that has an effect similar to any of the actions referred to above, and which will, or is likely to:
  - give rise to a Refinancing Gain;
  - change the type, amount, pricing, tenor, terms for payment or repayment, hedging or financial covenants of any financial accommodation connected with the Project; or
  - adversely affect any of the State’s rights, obligations or liabilities, in accordance with the State Project Documents.

Any change in the timing or manner of payment of the CDPD Amount under the Project Deed is also a Refinancing.

Refinancing does not include:

- entering into derivative transactions contemplated by the Finance Documents to be entered into on or before Financial Close;
- the syndication of debt under the Finance Documents that is contemplated at Financial Close, in accordance with the Finance Documents and the Finance Direct Deed;
- the change in control or sell down of any bonds in an arm’s length transaction at market value; or
- a prepayment of debt as a consequence of receipt of the CDPD Amount.

The Refinancing provisions also apply where a Refinancing does not give rise to a Refinancing Gain, including in a so-called ‘rescue refinance’, where the Refinancing is required because the Project is in distress and Project Co is unable to meet its ongoing debt service obligations.

However, the State does recognise that, in this situation, time can be critical, and the State therefore accepts an abridged period of advance notice for the purpose of consulting with the State, regarding Project Co’s proposed Refinancing strategy (see clause 37.2(a)(i) (*Details of Refinancing*)).

### **2.47.3 Share of savings**

Project Co must not implement any Refinancing without the State’s consent. The State is not permitted to unreasonably withhold or delay its consent (except in the case of any change to the payment of the CDPD Amount), and must give (or withhold) its consent within 20 Business Days after receiving full details of any proposed Refinancing.

If a Refinancing results in a Refinancing Gain, the State is entitled to:

- 100 per cent of the Refinancing Gain that arises from a change in the manner or timing of payment of the CDPD Amount; and



- in Victoria, 50 per cent of any other Refinancing Gain, calculated after taking into account any reductions in the Equity IRR arising from any previous Refinancings; or
- in NSW, 50 per cent of any other Refinancing Gain only, without taking into account reductions in the Equity IRR.

The State does not share in any losses suffered by Project Co or the Equity Investors as the result of a Refinancing, which does not meet the Refinancing assumptions that are bid and locked into the Financial Close Financial Model.

#### **2.47.4 Refinancing Gain**

There will be a Refinancing Gain if a relevant Refinancing results in  $A - B$  being greater than zero, where:

- $A$  = the present value of the Distributions to Equity Investors projected (using the Financial Model updated to reflect only the terms of the proposed Refinancing and in no other respect) looking forward to reflect the terms of the proposed Refinancing; or
- $B$  = the present value of the Distributions to Equity Investors projected (using the Financial Model) looking forward, without taking into account the terms of the proposed Refinancing.

The projected Distributions to Equity Investors are determined using the then current Financial Model, which in the case of 'A' reflects the terms of the proposed Refinancing. The calculation of the present values of the Distributions is achieved by using the Equity IRR to discount the forward projections.

The Equity IRR is calculated using:

- In Victoria, the Financial Close Financial Model (as opposed to the Financial Model, which may have been updated after Financial Close); or
- in NSW, the then-current Financial Model.

### **2.48 Suspension and step-in by the State (clause 38)**

#### **2.48.1 Suspension by the State**

The State must retain flexibility to be able to suspend the Project throughout the Term. The State may unilaterally direct Project Co to suspend and, after a suspension has been directed, to recommence, the carrying out of all or any part of the Project Activities.



Unless the circumstance leading to the State's decision to suspend the Project Activities:

- are caused by a breach of a Project Document by Project Co or any Project Co Associate, or a fraudulent, negligent, reckless, unlawful or malicious act or omission by Project Co or any Project Co Associates; or
- are, or are caused by, a Force Majeure Event.

A direction to suspend the Project Activities will be a Compensable Extension Event (in relation to Development Activities) and an Intervening Event (in relation to the Services). A direction to suspend during the Operational Phase is treated as an Intervening Event rather than a Compensable Intervening Event as, subject to the exceptions set out in section 2.39.2.1 above, Project Co will continue to receive the Service Payment notwithstanding that the Services are suspended and Project Co should not incur any additional costs as a result of the suspension.

If the circumstances leading to the suspension are a Force Majeure Event, a direction to suspend the Project Activities will also be a Force Majeure Event (see section 2.28.2).

An instruction to suspend the Project Activities must not exceed 180 days. Suspension in excess of 180 days will require the State to terminate the Project Deed.

Project Co's rights on termination will depend on the reason for the suspension.

## **2.48.2 Step-in event by the State**

In some circumstances, the State may wish to take over some or all of Project Co's obligations for a period, including where there is a need to discharge a statutory duty, or prevent or mitigate a serious risk to health or safety.

Step-in rights for the State are triggered when:

- a Major Default occurs (and Project Co is not complying with its obligations with respect to the Major Default, or an Emergency occurs or the State is entitled by Law to discharge a statutory power or duty);
- a State Cure Notice has been issued by the D&C Contractor or the Services Contractor, in accordance with the D&C Contractor Direct Deed or the Services Contractor Direct Deed (as the case may be);
- a Default Termination Event occurs;
- an Emergency occurs;
- the State is entitled by Law to act to discharge a statutory power or duty; or
- any Project Activities are suspended following the occurrence of an Intervening Event.

The nature and cause of the event that leads the State to exercise its rights of step-in will determine its treatment with respect to Abatement of Service Payments and responsibility for the State's Liability for the step-in.



The general principle that is applied is that:

- for step-in caused by Project Co – the Service Payments will be subject to Abatement, to the extent the Services are not being provided in accordance with the Project Deed, and Project Co will be responsible for any other Liability incurred by the State or a State Associate, in connection with the exercise of the State’s step-in rights; and
- for step-in not caused by Project Co or a Force Majeure Event – the State’s exercise of its rights will be:
  - in relation to any Development Activities, a Compensable Extension Event; or
  - in relation to any Services or other obligations under the Project Deed during the Operational Phase, an Intervening Event (as Project Co will continue to receive the Service Payment, even though the Services are suspended and Project Co should not incur any additional costs as a result of the step-in); and
- where the exercise by the State of its step-in rights is the result of a Force Majeure Event, that exercise of rights will itself be treated as a Force Majeure Event, and therefore an Extension Event or an Intervening Event (as the case may be) (refer to section 2.28.2).

## **2.49 Probity Events and Probity Investigations (clause 39)**

### **2.49.1 General principle**

The probity regime under the Harmonised PPP Project Deeds consists of:

- proactive Probity Investigations into character, integrity and honesty; and
- a regime for the notification and management of ‘Probity Events’, which is a defined term that includes a number of events, including:
  - an event that has, or may have, a material adverse effect on the character, integrity or honesty of a relevant party, on the public interest or public confidence in the Project;
  - a failure to achieve or maintain reasonable standards of ethical behaviour, or other standards of conduct that would otherwise be expected of a party involved in a state government project; or
  - a conflict of interest that has, or may have, a material adverse effect on the ability to carry out and observe obligations in connection with the Project.

The probity requirements apply to a specifically defined subset of individuals and entities involved in the Project.



## 2.49.2 Project specific amendments

The probity requirements will be considered by the State on a project specific basis, because some projects will require more onerous obligations, or for the obligations to apply to a larger subset of individuals and entities involved with the Project. For example, prison and school projects will have additional requirements (such as police checks).

## 2.50 Commercial opportunities (clause 40)

### 2.50.1 General principle

Project Co may only derive revenue or other returns from:

- Service Payments;
- State Contributions, DPCC and the CDPD Amount (if applicable);
- any other amounts expressly provided for under the State Project Documents; and
- other activities approved by the State, where such approval may be subject to any conditions the State thinks fit (including a State determined share of net revenues).

For some Availability PPP Projects, the State may permit Project Co to pursue commercial opportunities as part of the Project. If this is permitted, there may be an inflow of revenue from either third-party users of an asset or from expenditure by users of an ancillary amenity, such as a retail store within the Project Assets.

### 2.50.2 Project specific amendments

Commercial opportunities that the State will permit Project Co to pursue in respect of a Project will be determined on a project specific basis.

The procuring agency must clearly set out in the Expression of Interest and the RFP, the type of commercial opportunities Project Co will not be entitled to pursue and those that the State strongly endorses. Respondents' proposed commercial opportunities should be discussed as part of the Interactive Tender Process Workshops to ensure they meet State expectations.

If the State accepts the commercial opportunities proposed by the Successful Respondent, the Project Deed will need to include:

- access arrangements for commercial opportunity tenants;
- any approval rights the State requires in respect of commercial opportunity tenants and agreements;
- any other fetters that the State requires in respect of the commercial opportunities; and
- any revenue sharing in respect of the commercial opportunities (beyond any discount to the Service Payments already included in the Project Deed).



These will be determined on a project specific basis.

If the State accepts the commercial opportunities proposed by the Successful Respondent, the State will determine how the commercial revenue is shared.

The arrangements may include:

- an upfront discount to the total quantum of Service Payments locked in at Financial Close, based on forecast revenues; or
- sharing an agreed percentage of actual revenue during the Operational Phase, with Project Co making periodic payments to the State.

The approach pursued will depend on the nature of the commercial revenues, the allocation of demand, cost and performance risks inherent in generating such revenues, and value for money.

## **2.51 Structured financing (clause 41)**

### **2.51.1 General principle**

In addition to determining its preferred equity capital structure and debt funding structure, the private sector frequently uses structured financing, including a securitised licence structure, to derive additional economic efficiency, including tax efficiency, from its PPP delivery structure.

Provided that the private sector obtains appropriate tax rulings from the Australian Tax Office, and the applicable State Treasury agrees to the proposed drafting to give effect to the structured financing solution, the State is neutral in relation to whether a structured financing solution is used.

### **2.51.2 Structured financing solution documentation**

The use of a structured financing solution will usually require the preparation of additional documents to give effect to the solution. These documents will be drafted by the Preferred Respondent.

### **2.51.3 Project specific amendments**

The structured financing solution documentation is to be used on a project specific basis where a structured financing solution is contemplated.

## **2.52 Damage (clause 42)**

### **2.52.1 Notification**

Project Co must promptly notify the State of any loss of or damage to the Project Assets of which it becomes aware (other than Minor Damage, which Project Co is required to promptly repair).





If the loss or damage is:

- Major Loss or Damage (being loss of or damage to all or substantially all of the Project Assets), the State must notify Project Co within 60 Business Days of whether it requires Project Co to repair or reinstate the Project Assets;
- Minor Damage, Project Co must promptly repair the loss or damage; or
- all other loss or damage, the State must notify Project Co within 30 Business Days of whether it requires Project Co to repair or reinstate the Project Assets.

The period of time that the State is entitled to take to determine its approach to the loss or damage is typically a risk that the State would expect Project Co to insure, to cover any delay costs or loss of Service Payment and, as such, is not a Relief Event.

## **2.52.2 Direction to repair or reinstate**

### **2.52.2.1 Loss or damage to Project Assets**

In general, Project Co also bears the risk of loss or damage to the Project Assets during the Term, including in respect of repairing or reinstating the Project Assets, as this risk is insured. If the State directs Project Co to repair or reinstate the Project Assets, the State will also notify Project Co of the standard to which it requires Project Co to repair or reinstate the Project Assets. Project Co must submit a plan to the State for the repair or reinstatement of the Project Assets.

The only circumstances in which the State will pay Project Co for its cost of repairing or reinstating any loss or damage to the Project Assets is if:

- the loss or damage to the Project Assets was caused by a Day 1 Uninsurable Risk or an Uninsurable Risk, or the Insurance fails to respond as a result of a State Insurance Breach; or
- the State directs that the Project Assets are to be repaired or reinstated to specifications or standards that are different to the requirements of the Project Deed.

In each case, the repair or reinstatement of the Project Assets will be treated as a State Initiated Modification, and relief and compensation will be provided in accordance with Item 10, Table 1 of the Template Schedule 5, Change Compensation Principles.

The compensation payable to Project Co will be the amount Project Co would have been entitled to recover under any Insurances, if the relevant Extension Event had been insurable under the Insurances. This is provided that the aggregate costs do not exceed the amount that is equal to the insurance proceeds that would have been payable under the relevant Insurance, less any amount in respect of loss of equity return or loss of Project Co's profit.



As Uninsurable Risks and Day 1 Uninsurable Risks are beyond both parties' control, this is an appropriate risk allocation. Any extension to the Date for Acceptance as a consequence of the rebuild or repair will be addressed under the Modification Order (see section 2.44.2.4 for an explanation of Project Co's entitlement to delay costs for loss or damage caused by Day 1 Uninsurable Risks or Uninsurable Risks).

The State will otherwise indemnify Project Co for all other liabilities incurred by Project Co as a consequence of the loss or damage, up to the aforementioned cap.

If the State requires all, or any part, of the Project Assets to be repaired or reinstated to a different specification or standard, Project Co's entitlements for that 'modified' part of the reinstatement will be the difference between the cost of repair or reinstatement to the different specification or standard, and the cost of repair and reinstatement to the current standard or specification.

If the State elects not to rebuild or repair the Project Assets and the damage is Major Loss or Damage, the State must terminate the Project Deed, as if for a Force Majeure Event.

If the State elects not to rebuild the Project Asset and it is not Major Loss or Damage, and the loss or damage is due to an Uninsurable Risk or Day 1 Uninsurable Risk, then the State may omit that part of the Project Assets as a Modification.

#### **2.52.2.2 Minor Damage**

In general, Project Co also bears the risk of all Minor Damage to the Project Assets during the Term, including in respect of repairing or reinstating the Project Assets in the case of the Minor Damage.

If, by virtue of another provision of the Project Deed, the State is liable to pay Project Co for the repair or reinstatement of damage, but that damage is of such a minor nature that Project Co can repair or reinstate it through use of its usual resources and without affecting the ability of Project Co to carry out the Project Activities, then Project Co must also bear this cost, and the State will not be liable for that cost.

#### **2.52.2.3 Reactive maintenance and loss or damage**

On some projects, the Abatement Regime will include Performance Failures for failure to carry out repairs to the Maintained Assets within a specified period of time, where they have been damaged. The timing for the repair and replacement of the Maintained Assets in the Services Specification should take into account the timing set out in clause 42.2 (*Notification of damage*) and clause 42.3 (*Repairing and Reinstating*) of the Harmonised PPP Project Deeds.

#### **2.52.2.4 Project specific amendments**

The threshold amounts contained in the definition of Minor Damage will be determined by the State on a project specific basis.



## **2.52.3 Direction not to reinstate or repair**

### **2.52.3.1 Termination for Major Loss or Damage**

If the loss or damage to the Project Assets is Major Loss or Damage, the State may direct Project Co not to repair or reinstate the Project Assets, and the Project Deed will be terminated. The cause of the loss or damage will determine how the Project Deed is terminated and the consequent Termination Payment.

If the Major Loss or Damage was caused by:

- a Major Default, a breach of a Project Document by Project Co or any Project Co Associate, or a Day 1 Uninsurable Risk or an Uninsurable Risk (caused by a Major Default or a Project Co Act or Omission), this will be deemed to be a Default Termination Event;
- a Force Majeure Event, an Uninsurable Risk or a Project Co Act or Omission not captured by the bullet point above, this will be deemed to be a Force Majeure Termination Event; or
- all other events, the Project Deed will be terminated for convenience.

### **2.52.3.2 Modification for all other damage**

If the loss or damage to the Project Assets is not Major Loss or Damage or Minor Damage, but the State does not require Project Co to repair or reinstate, the State must direct a Modification to omit Project Co's obligations in connection with the relevant part of the Project Assets. This will be treated as a State Initiated Modification and relief and compensation will be provided, in accordance with Item 10, Table 1 of the Change Compensation Principles.

## **2.52.4 Insurance proceeds and deductibles**

Any Insurance proceeds received must be deposited into the Insurance Proceeds Account and applied towards the cost of reinstatement or repair, in respect of:

- loss or damage under the Contract Works Insurance (other than proceeds of the delay in start-up section of the policy);
- the Industrial Special Risks Insurance (other than proceeds of the business interruption section of the policy); and
- the Marine Transit Insurance (other than proceeds of the delay in start-up section of the policy).

See section 2.52.2 for further discussion.

Project Co is liable for the deductible or excesses that apply to a Claim made under any such Insurance policy, other than where the loss or damage was caused by certain circumstances in which the State will be liable for the relevant deductible or excess (see section 2.52.2.1 for further discussion).



## **2.53 Indemnities and limitations of liability (clause 43)**

### **2.53.1 Indemnities**

#### **2.53.1.1 General principle**

The Harmonised PPP Project Deeds set out a number of broad indemnities that Project Co must provide. This includes indemnities related to:

- property damage and personal injury or death, in connection with any act or omission of Project Co or any Project Co Associate in connection with the Project;
- a Project Co or Project Co Associate breach of State Project Documents;
- the provision and use of Project Information by Project Co;
- the disruption, damage, removal and relocation of Utility Infrastructure, to the extent 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 Contamination emanating or migrating from the Project Area that Project Co or a Project Co Associate has caused or contributed to; and
- any Claim or Liability arising in connection with any breach of representation, warranty or obligation, in relation to Intellectual Property Rights (other than in relation to any State IP).

However, Project Co's liability to indemnify is limited by the Indirect or Consequential Loss exclusion, and the limitations placed on the indemnities as set out in the Harmonised PPP Project Deeds (refer to section 2.53.2.1). The procedure in respect of third-party claims (refer to section 2.53.4), which may trigger an indemnity under the Project Documents, provides Project Co with further comfort in the assessment and management of the indemnities under the Harmonised PPP Project Deed.

#### **2.53.1.2 Project specific amendments**

Procurement agencies may consider who, in addition to the State, should be indemnified for breach, having regard to the number of State Associates involved in the Project and the arrangements that the State may have in respect of the State Associates. Consideration should also be given on a project specific basis to limiting the liability of Project Co in respect of economic loss that may be suffered by those State Associates, by way of carve outs to the Indirect or Consequential Loss exclusion for Project Co.



## 2.53.2 Project Co's limitation of liability

### 2.53.2.1 General principle

Other than to the extent that Project Co or any Project Co Associate is entitled to recover an indemnified amount under the Insurances (or would have been entitled to do so, but for an Insurance Failure Event), Project Co's Liability to indemnify will be reduced to the extent that any such Liability is caused or contributed to by:

- any breach by the State of any State Project Document;
- any fraudulent, reckless, unlawful or malicious act or omission of the State and other indemnified parties;
- any Extension Event that occurs during the Development Phase;
- any Intervening Event that occurs during the Operational Phase;
- subject to a notification requirement by Project Co, Project Co complying strictly with a direction from the State or the State Representative (except to the extent the direction is to comply with a State Project Document, is permitted under a State Project Document, or was given as a result of a Project Co Act or Omission); or
- a failure by the State or a relevant indemnified party to use reasonable endeavours to mitigate the extent or consequences of the Liability.

Project Co's liability to indemnify is further reduced through the operation of the Indirect or Consequential Loss regime.

The Harmonised PPP Project Deeds provide that the State and Project Co have no liability in respect of Indirect or Consequential Loss incurred or suffered by Project Co or the State respectively, except in limited circumstances. These include:

- Liability to the extent the parties cannot limit or exclude the Liability at Law;
- Liability arising from any criminal act, fraud or Wilful Misconduct – on the basis that this type of conduct is so serious that the liability that flows from it should not be limited;
- Liability arising from any loss of or damage to third-party property or injury, illness or death of any person – on the basis that the party responsible for the loss should be expected to cover this loss and it is typically insured;
- Liability arising from any Uninsurable Risk or Day 1 Uninsurable Risk for which the State Project Documents require the State to indemnify Project Co;
- Liability that the State, each State Associate and each Interface Party would be entitled and able to recover under any Insurances, or would have been entitled, but for an Insurance Failure Event or a State Insurance Breach; and
- any payment, or any reduction in payment, made pursuant to any interest on unpaid amounts, and any payments paid by one party and refunded under the Project Documents, including under the Payment Schedule, the Change Compensation Principles and the Termination Payments Schedule.



These carve outs to the exclusion of Indirect or Consequential Loss will typically be passed through to Key Subcontractors and will be subject to the liability caps in their Key Subcontracts.

### **2.53.2.2 Project specific amendments**

The Harmonised PPP Project Deeds contemplate that the carve outs to the exclusion of Project Co's liability for Indirect or Consequential Loss may include liability the State has to third parties (including for economic loss), not caused by damage (see clause 43.11(d)(ix) of the Harmonised PPP Project Deeds).

The clause should be carefully considered on a project specific basis, considering:

- the likelihood of the risk of any such liability;
- the potential extent of that liability;
- the level of control that Project Co has in respect of the risk that might give rise to such a liability; and
- the insolvency risk that it creates for Project Co.

The carve out, if it is used, should be limited to specified parties. It may also be appropriate to consider a cap on that liability. The State may also need to disclose the terms of its agreements with the relevant third party to Shortlisted Respondents during the RFP Phase, so Project Co can make an informed assessment of its potential exposure.

The list of exceptions to the exclusion for Indirect or Consequential Loss may include additional project specific items to reflect relevant project specific payments or liabilities. An example of this is where there are known liabilities that the State has to third parties for loss of revenue, which either need to be covered by Project Co or are subject to a different regime. However, the circumstances for project specific amendment should be limited, given the insolvency risk it creates for Project Co.

### **2.53.3 State's limitation of liability**

The State's Liability to Project Co in connection with any Relief Event will be reduced to the extent that:

- the Relief Event or the consequences of the Relief Event are caused or contributed to by a Project Co Act or Omission; or
- Project Co, or any Project Co Associate, fails to take all reasonable steps, which a prudent, competent and experienced contractor, in the circumstances of Project Co or the relevant Project Co Associate exercising Best Industry Practices, would have taken to mitigate, minimise or avoid the effects, consequences or duration of the Relief Event.



To the extent that compensation in relation to a Relief Event is in respect of an Insured Risk, Project Co is not entitled to claim such compensation from the State, unless Project Co can demonstrate that the compensation is not covered by the proceeds of such Insurance, due to a State Insurance Breach.

#### **2.53.4 Management of third-party claims under the indemnities**

If a Claim is made by a third party against the State, any State Associate, any Interface Party or any Indemnified IP Person, which Project Co is required to indemnify under the Project Documents, the State must:

- notify Project Co of the alleged Claim;  
provide Project Co with the option to conduct the defence of the Claim;
- provide Project Co (at Project Co's expense) with reasonable assistance in negotiating, defending or otherwise taking action or proceedings in respect of that Claim, if Project Co chooses to do so; and
- must not settle a Claim without Project Co's involvement in and agreement to any such settlement.

There are exceptions to the State's obligations, including where:

- the Claim relates to interlocutory proceedings that have commenced on an urgent basis;
- the State reasonably considers that there is insufficient time to notify Project Co or to commence the defence of such proceedings on behalf of the State;
- the State, State Associate, Interface Party or other Indemnified IP Person (as applicable) initially defends such proceedings;
- the State considers the Claim should be conducted by the State, a State Associate, Interface Party or other Indemnified IP Person (as applicable) for public policy reasons; and
- the Claim would prevent the continued development or operation of the Project or continued conduct of the Project Activities.



## 2.54 Insurance (clause 44)

### 2.54.1 General principle

In the Harmonised PPP Project Deed, Project Co must procure and maintain the Development Phase Insurances during the Development Phase, and the Operational Phase Insurances during the Operational Phase, which are set out in the Insurance Schedule. The State's insurance requirements in the Insurance Schedule represent the minimum degree of cover that the State expects Project Co to maintain as part of its risk management strategy.

In addition to the requirements of the Insurance Schedule, Project Co is required to ensure that the Insurances comply with the requirements under clauses 44.3 and 44.4.

In particular, the terms of the Insurance must:

- be acceptable to the State (such acceptance must not be unreasonably withheld);
- not require the State, any State Associate, any Interface Party carrying out Site Interface Works or Proximate Interface Works, or any Indemnified IP Person, to exhaust the indemnities given by Project Co or any Project Co Associate to them under any State Project Document, before the insurer will consider, accept or pay proceeds, in respect of any claim under the Insurance;
- in the case of those Insurances where there is more than one Insured party, not impute to any Insured any knowledge or intention, or a state of mind, possessed or allegedly possessed by any other Insured;
- in the case of contract works (material damage) insurance and industrial special risk insurance, ensure that the interests of the Insured include the entire assets of the Project, and waive any rights of subrogation that it may have against any Insured;
- in the case of liability Insurances, under which more than one person is Insured (but excluding workers' compensation insurance, motor vehicle insurance, third-party property damage and compulsory third-party motor vehicle insurance), ensure to treat each Insured as a separate Insured, as though a separate contract of insurance had been entered into with each of the Insured, without increasing the applicable deductible, or the overall limit of, indemnity under the relevant insurance;





- except in relation to workers' compensation insurance, professional indemnity insurance, motor vehicle insurance, compulsory third-party motor vehicle insurance and those insurances that are subject to an aggregate policy limit, ensure that no reduction in limits or coverage affecting the Project or the Project Assets will be made during the period of insurance, except under the circumstances and to the extent permitted by the *Insurance Contracts Act 1984 (Cth)* or other applicable law, and with not less than 20 Business Days' prior notice to the State and Project Co; and
- if stipulated in the Insurance Schedule, be effected on a project specific basis.

### **2.54.2 Uninsurable Risks**

If any risk is insurable at the date of the Project Deed, but becomes uninsurable, either because the insurance becomes unavailable in the international insurance market, or the insurance premium payable is prohibitive, or the available terms and conditions are such that, Reputable Insurers in Australia or the United Kingdom are no longer insuring against the risk, then:

- Project Co must notify the State within five Business Days after becoming aware that the risk has become, or is likely during the Term to become, an Uninsurable Risk; or
- the State must meet with Project Co within five Business Days after receipt of Project Co's notice to discuss the risk, including whether in fact the risk is an Uninsurable Risk.

If the parties agree (or in the absence of agreement, it is determined) that a risk is an Uninsurable Risk, the parties must meet further to discuss the means by which the risk should be managed.

Unless the parties agree otherwise, each Service Payment will be adjusted by deducting the amount corresponding to the proportion of total Insurance premium that was payable by Project Co for insurance of that risk before it became an Uninsurable Risk, with a corresponding re-adjustment to each Service Payment, if a risk again ceases to be an Uninsurable Risk.

### **2.54.3 Day 1 Uninsurable Risk**

Day 1 Uninsurable Risks are expressly identified in the Harmonised PPP Project Deeds. They are those risks that have never been insured by the insurance market. As a consequence, the listed Day 1 Uninsurable Risks should be extremely limited and should only change if a new risk arises, which is not insurable. This will be very rare.



#### 2.54.4 Review of Insurance market

Project Co must review and test the insurance market vigilantly (and during the Operational Phase, no less than once every 12 months) to ascertain whether a Day 1 Uninsurable Risk or Uninsurable Risk has become an Insurable Risk.

If this is found to be the case, then Project Co must, unless otherwise directed by the State, procure the Insurance.

Where such Insurance is procured:

- between Financial Close and the Operational Commencement Date, the State must pay Project Co:
  - if the risk is not insurable under an existing Insurance, an amount equal to the premium that is payable by Project Co for insurance of such a risk (when inception and at each renewal date); or
  - if the risk is insurable under an existing Insurance, an amount equal to the increase in the premium of the existing Insurance that is required to cover insurance of such a risk; and
- after the Operational Commencement Date, the Service Payment will be increased to reflect the additional or increased premium (as applicable) payable by Project Co for insurance to cover the risk.

If a Day 1 Uninsurable Risk is a terrorist act occurring on the Project Area, then, unless the Insurance in question is one under which coverage is provided for a declared terrorist incident by operation of the *Terrorism Insurance Act 2003* (Cth), Project Co will not be required to review and test the insurance market, unless expressly requested by the State to do so. The State does not require automatic continual testing of the insurance market for such a risk, given the cost impost of this and the low probability that such a risk will ever be insured.

#### 2.54.5 Benchmarking of Insurance Component of Service Payment

The Industrial Special Risks Insurance and general liability Insurance are repriced every three years after the Operational Commencement Date. This is because the premium payable for these insurances can often fluctuate, in accordance with market conditions unrelated to the Project. It is considered to deliver better value for money to have the cost of these insurances competitively repriced, rather than requiring Project Co to fix a price for the Operational Phase.

While the period of time before benchmarking can occur may be determined on a project specific basis, a period of less than three years creates an unnecessary administrative burden for all parties. It should only be considered where fluctuations in insurance prices are so significant and regular that this is considered best value for money for the State.



Under the Project Deed, Project Co is required to consult with the State six months prior to each Insurance Review Date, regarding the amount of each sub-limit for the Industrial Special Risks Insurance, and with the State on a revised amount of each sub-limit, prior to Project Co obtaining quotations.

Three months prior to each Insurance Review Date, Project Co must obtain separate quotations from three Reputable Insurers where possible, or at least two Reputable Insurers, for annual total premium costs of obtaining the Industrial Special Risks Insurance and general liability Insurance required by the Insurance Schedule for the remainder of the Operational Phase.

The State will then select one quotation for each Benchmarked Insurance, which will form the basis of the benchmarking of the Insurance Component for the upcoming Insurance Review Date.

On each Insurance Review Date, if the Future Insurance Component of the Benchmarked Insurances is greater or less than the Insurance Component (CPI Indexed) of the Service Payment current at that time (the Existing Insurance Component), the Existing Insurance Component will be adjusted accordingly. However, in undertaking such adjustment, any increase in the cost of obtaining the Benchmarked Insurance, which is directly attributable to Project Co's or any of Project Co Associates' performance of the Services, will be disregarded.

#### **2.54.6 Project specific amendments**

The Insurance requirements and structure must be considered on a project specific basis. Subject to the nature and complexity of the Project and any customised solutions presented by Respondents, project specific considerations may include:

- the use of group policies of the Key Subcontractors;
- the need for professional indemnity insurance during the Operational Phase will depend on the nature of Services (specifically, whether it will include professional service);
- other project specific insurances which may be required by the State (such as Pollution insurance);
- Insurance Review Date for benchmarking; and
- whether the State is better placed to procure certain insurances. This will typically depend on the extent to which the State insures other assets that interface with the Project Assets. For example, on rail projects, if the State already insures other interfacing assets, such as rolling stock and the rail network, it may be preferable for the State to insure Project Assets to avoid double insurance and subrogation issues. Procuring agencies should consult the applicable State Treasury, if State-procured insurance is proposed for a project.



## **2.55 Default, Termination and end of Term obligations (clauses 45, 46 and 47)**

### **2.55.1 Defaults (clause 45.2)**

If a Project Entity breaches a State Project Document and that breach is not categorised as a Performance Failure, Major Default or Default Termination Event, then the State has the right to serve a Default Notice on Project Co to cure the default (or where it cannot be Cured, meet the State's reasonable requirements) within 20 Business Days, or such longer period as the State notifies.

If the default is not cured or, where the default cannot be cured, the reasonable requirements of the State are not met within the notified period, the default becomes a Major Default. This interim process gives the parties the ability to manage minor breaches that are not otherwise regulated by the State Project Documents, before they are elevated to Major Defaults.

### **2.55.2 Major Default Notice (clause 45.1 and 45.2)**

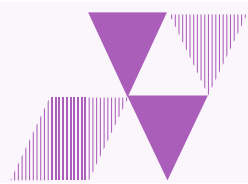
Major Defaults are events that trigger the operation of the Major Default mechanism. Subject to project specific considerations, the events that are Major Defaults are set out in the Harmonised PPP Project Deeds.

The Major Defaults that are deemed to be capable of Cure include:

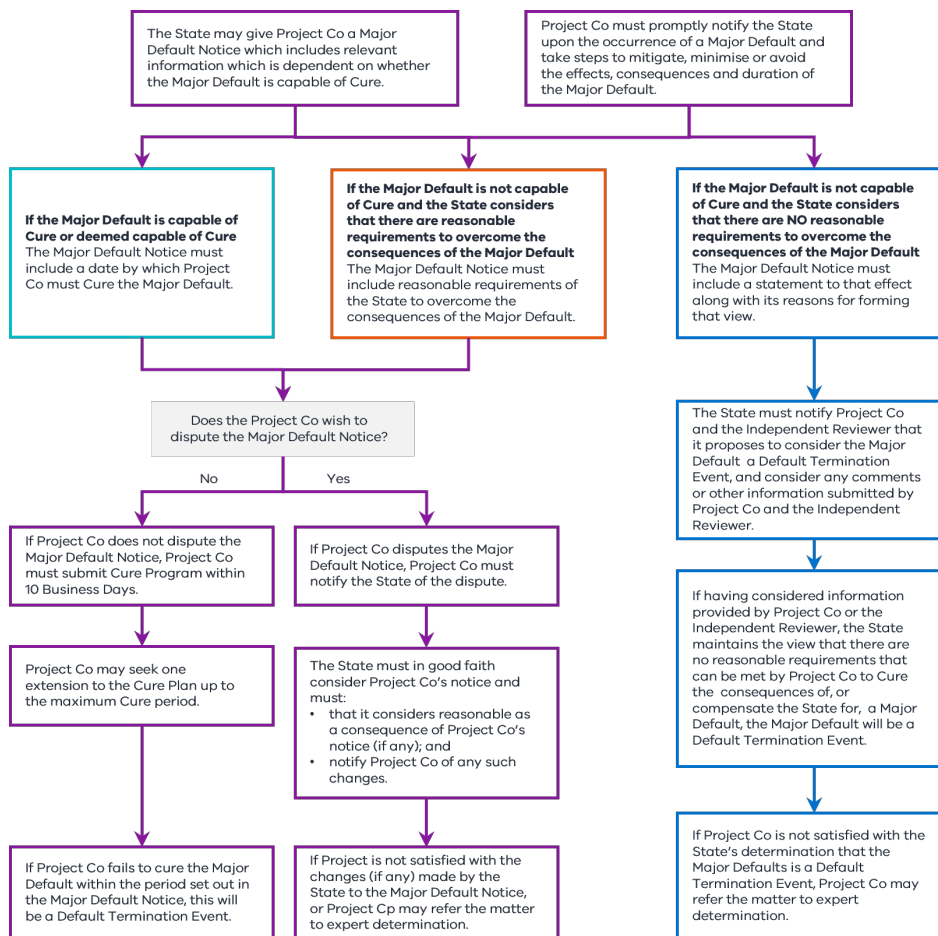
- where Project Co fails to achieve Commercial Acceptance by the Date for Commercial Acceptance;
- where Project Co fails to achieve Final Acceptance by the Date for Final Acceptance;
- (if applicable) where Project Co fails to achieve Technical Acceptance by the Date for Technical Acceptance; and
- for Victorian projects only, where Project Co breaches the Local Jobs First Requirements, the Local Industry Development Plan (LIDP), the Social Procurement Commitments or the Social Procurement Commitment Schedule, or fails to meet the Social Procurement Target.

The deeming provision puts it beyond doubt that while these events may not be capable of remedy or cure as a matter of fact, Project Co will have the benefit of the maximum cure period permitted by the State under the State Project Documents, in respect of those Major Defaults.

Figure 18 sets out the Major Default Notice regime. The regime has been modified to ensure that there are sufficient protections for Project Co to provide input in the Major Default procedure.



**Figure 18 – Major Default Notice regime**



### 2.55.3 Cure Program and cure periods (clauses 45.4 and 45.5)

#### 2.55.3.1 Cure Program

Project Co must provide a Cure Program within 10 Business Days after receiving a Major Default Notice.

Where the Major Default is a failure by Project Co to achieve Commercial Acceptance by the Date for Commercial Acceptance, and Project Co has provided a Remediation Plan in accordance with the requirements of the Independent Reviewer’s review of progress (in accordance with clause 26.4), Project Co may submit that Remediation Plan as the Cure Program for the Major Default.



### **2.55.3.2 Extension to Cure Program and Major Default Notice**

If Project Co has been diligently pursuing the Cure Program, Project Co may request that the State, and the State must, extend the Cure Program and the time stated in the Major Default Notice. Project Co is only entitled to one extension in connection with the same Major Default. Limiting the number of extensions gives certainty to the parties and avoids the risk of open-ended Cure rights.

Volume 1, Part A of the RFP sets out the maximum Cure period permitted by the State under the relevant State Project Documents, including the Finance Direct Deed, in respect of a Major Default. For most Projects, the maximum Cure period during the Development Phase is 24 months and during the Operational Phase, it is 18 months.

When determining the maximum Cure period to be included in the RFP, procuring agencies should consider a number of factors, including the length of the Development Phase, the complexity of the Project and the maturity of the market in providing the required Works or Services. The maximum Cure periods should be agreed with the applicable State Treasury.

It is for Project Co, the Financiers and the Key Subcontractors to determine the exclusive cure period (if any) that each party will have for curing a Major Default within the periods specified in Volume 1, Part A of the RFP. The maximum Cure period specified by the State in the RFP, less the exclusive Cure period required by the Financiers under the Finance Direct Deed, will be the maximum Cure period permitted for Project Co to Cure any Major Default under the Project Deed.

The maximum Cure period that Financiers require (within the periods specified in Volume 1, Part A of the RFP) will be determined by each Respondent and included in the Finance Direct Deed as part of its Proposal.

The maximum Cure periods that Project Co has under the Project Deed may be extended if Project Co is prevented from carrying out its obligations in accordance with a Cure Program, as a direct result of an Extension Event or Intervening Event.

This is provided that:

- Project Co is entitled to be granted:
  - an extension of time under clause 26.9 or 26.10; or
  - relief under clause 32.2 or 32.3; and
- Project Co demonstrates to the State's satisfaction (acting reasonably) that Project Co has diligently pursued and, to the extent reasonably possible, continues to diligently pursue the Cure Program.



The maximum Cure period and the Major Default Notice may only be extended by the amount of time for which Project Co is entitled to an extension of time or relief for performance of the obligations, in respect of the Extension Event or Intervening Event (as applicable).

If a Major Default remains uncured at the end of the maximum Cure period (including any permitted extension), this will constitute a Default Termination Event.

### **2.55.3.3 Subject to Finance Direct Deed**

The State's right to terminate the Project Deed is subject to the Finance Direct Deed, which sets out the Financiers' maximum Cure period and the Financiers' rights (independent of Project Co's rights) to Cure any Major Default or Default Termination Event.

The Finance Direct Deed provides for a similar cure regime to Project Co's under the Project Deed, including:

- Financiers providing the State with a Cure program;
- an obligation to diligently pursue any Cure program;
- the right to request a single extension of any cure period, which the State may not unreasonably refuse; and
- extensions to the Financiers' maximum Cure period in limited circumstances.

The Financiers' Cure regime is designed to limit both the number of extensions and the grounds on which an extension may be requested by the Financiers, in respect of any unremedied Major Default or Default Termination Event.

Financiers do not have an open-ended right to seek extensions or to delay the State's rights to step-in or terminate the Project Deed, and the State has the certainty that after a finite period, it will be entitled to exercise those rights.

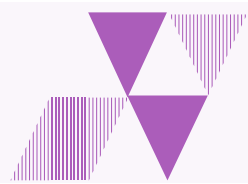
## **2.55.4 Termination (clause 46)**

### **2.55.4.1 Sole basis**

The termination clauses seek to codify the termination rights and entitlements of each party, and exclude common law rights to terminate and seek damages.

The State is only entitled to terminate, rescind or accept a repudiation of the Project Deed, in accordance with the termination rights under the Project Deed.

Other than in relation to a Force Majeure Termination Event, Project Co has no right to terminate any State Project Document.



The rationale for this is that:

- there are a very limited number of fundamental obligations that the State has under any State Project Document; and
- failure of the State to meet its obligations under a State Project Document are Change Compensation Events, and Project Co's rights to sue the State for damages for breach of the State Project Documents are excluded, only in limited and specified circumstances.

#### 2.55.4.2 Termination events

Table 10 shows the events and triggers that result in termination of Harmonised PPP Project Deeds.

**Table 10 – Termination events and triggers**

Event	Trigger
Termination for Convenience	The State may, at any time, unilaterally elect to terminate the Project Deed for convenience.
Force Majeure Termination Event	<ul style="list-style-type: none"> <li>• the occurrence of a Force Majeure Termination Event (refer to section 2.28.6); or</li> <li>• a suspension directed by the State exceeding 180 consecutive days due to a Project Co Act or Omission, which is not a breach of the Project Documents or a fraudulent, negligent, reckless, unlawful or malicious act or omission.</li> </ul>
Default Termination Event	If: <ul style="list-style-type: none"> <li>• a Major Default has not been remedied in accordance with the Project Deed;</li> <li>• a Default Termination Event occurs; or</li> <li>• a suspension directed by the State exceeding 180 consecutive days is caused by a breach of the Project Document by Project Co or any Project Co Associate, or a fraudulent, negligent, reckless, unlawful or malicious act or omission.</li> </ul>

The Default Termination Events are events that are sufficiently fundamental to trigger automatic rights for the State to terminate the Project Deed. Subject to project specific considerations, the definition of Default Termination Events is set out in the Harmonised PPP Project Deeds.





It includes:

- total or substantial abandonment of all or any material (in scope or effect) that is part of the Project Activities. The abandonment must be of a substantial portion of the Project Activities, or have a material effect on the Project Activities, and an abandonment of an inconsequential part of the Project Activities will not trigger a Default Termination Event;
- an Insolvency Event occurring in relation to any Group Member;
- Insolvency Events occurring in relation to the D&C Contractor or its Parent Guarantor (up to the expiry of the DLP in the D&C Contract), or any other Consortium Member, and that party has not been replaced with the State's consent within a specified period;
- breach of the assignment and disposal requirements of the Project Deed;
- breach of the Share Capital Dealing requirements of the Project Deed;
- unremedied Major Default (whether capable or not capable of Cure);
- breach of project specific Abatement thresholds under the Payment Schedule;
- a finance event of default, to ensure the State has appropriate rights in an insolvency scenario, given the legislative landscape;
- for NSW PPP projects, Project Co or any Subcontractor being convicted of a Modern Slavery Offence, either:
  - before execution of the Project Deed, and Project Co fails to disclose to the State; or
  - during the term, and Project Co is unable to demonstrate to the State that Project Co has taken all reasonable steps to address the Modern Slavery Offence; and
- any other project specific Default Termination Event specified in a Project Deed.

#### **2.55.4.3 Termination Payments**

The basis for the calculation of the Termination Payment will be determined by the reason for the termination, as summarised in section 3.4. If the Termination Payment is a negative amount, Project Co must pay that amount to the State.

#### **2.55.4.4 Novation to the State (clause 46.7)**

Where the Project Deed has been terminated and Project Co has any Actual Debt outstanding, the State may elect to assume some or all of that Actual Debt and/or the amount under a Hedge Agreement that must be paid to or received from a Finance Party under the Hedge Agreements applicable to the amount of Actual Debt (Hedge Amounts) (in each case, at the State's discretion).



If the State so elects:

- Project Co must do all things required by the State to enable the State to assume some or all of the Actual Debt and/or Hedge Amounts (as applicable); and
- the amount of the Termination Payment, which the State would otherwise be obliged to pay, will be reduced by:
  - the amount of any Liability for Actual Debt and Hedge Amounts assumed by the State; and
  - 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 State assuming some or all of the Actual Debt and/or Hedge Amount.

Actual Debt is defined as being the aggregate indebtedness of Group Members under the Finance Documents, excluding any indebtedness that is in the nature of, or identified in the Financial Model as being, Equity Funding. Project Co must ensure it is permitted to comply with its obligations under clause 46.7 (*Novation of liabilities to the State*) of the Project Deed and clause 9.4 (*State Assumption of Actual Debt*) of the Finance Direct Deed.

## **2.55.5 Project specific amendments**

The nature and number of the Major Defaults and Default Termination Events may be subject to project specific considerations, including:

- the nature of the funding and financing structure;
- the length and complexity of the Development Activities;
- whether the core services have been outsourced to Project Co; and
- the commencement date for the reviews by the Handover Reviewer.

## **2.55.6 Handover Condition (clause 47.3)**

### **2.55.6.1 General principle**

By the Expiry Date, Project Co must:

- have handed the Project Assets and the Project Area over to the State or any Project Successor; and
- ensure that any Returned Asset, or any part of a Returned Asset that is a Warranted Asset, is in a condition that complies with the Handover Condition.

Table 11 sets out the Handover Condition requirements for the Project Assets and the Project Area at various points during the Term and the Returned Assets at the Expiry Date.



**Table 11 – Handover Condition requirements for the Project Assets and the Project Area**

When Handover occurs	Handover Condition
<b>Project Assets and Project Area</b>	
Prior to the Date of Commercial Acceptance	A condition that the Project Assets and the Project Area would be in if Project Co had complied with all of its obligations in connection with the Project, in accordance with the requirements of the Project Deed, having regard to the time and circumstances of the termination. For example, if the Expiry Date occurs during the Development Phase, Works will not need to be completed, but the Development Phase Site will need to be clean and made safe.
On or after the Date of Commercial Acceptance	<p>A condition that the Project Assets and the Project Area would be in:</p> <ul style="list-style-type: none"> <li>• if Project Co had complied with all of its obligations in connection with the Project under, or reasonably inferred from, the Project Deed at the time of Handover, and having regard to the time and circumstances of the termination; and</li> <li>• if any Project Asset or any part of the Project Assets is a Warranted Asset, or otherwise has a residual life specified in the PSDR, that Project Asset, or the relevant part of the Project Asset, will be Fit For Purpose (without any major maintenance or refurbishment works) for its Warranted Life, or specified residual life that continues beyond the Expiry Date, provided that the Project Asset or any relevant part of the Project Asset will be operated and maintained after the Expiry Date: <ul style="list-style-type: none"> <li>– in accordance with Best Operational Practices;</li> <li>– such that any damage to the relevant Project Asset or component of the relevant Project Asset occurring after the Expiry Date (as applicable) is promptly rectified in accordance with Best Industry Practices;</li> <li>– in accordance with the Asset Management Plan; and</li> <li>– in accordance with all Laws and Standards.</li> </ul> </li> </ul>
<b>Returned Assets</b>	
At the Expiry Date	<p>For any Returned Asset or any part of a Returned Asset that is a Warranted Asset, Project Co must ensure that the Returned Asset or the relevant part of the Returned Asset is Fit For Purpose (without any major maintenance or refurbishment works) for its Warranted Life. This is provided that the Returned Asset is operated and maintained, following the relevant Date of Returned Works Acceptance for that Returned Asset:</p> <ul style="list-style-type: none"> <li>• in accordance with Best Operational Practices;</li> <li>• such that any damage to the relevant Returned Asset or any part of the relevant Returned Asset occurring after the Date of Returned Works Acceptance for that Returned Asset is promptly rectified, in accordance with Best Industry Practices; and</li> <li>• in accordance with all Laws and Standards.</li> </ul>



### **2.55.6.2 Handover obligations**

By the Expiry Date or, if the Expiry Date is prior to the Final Expiry Date and the State determines such requirements cannot be met by the Expiry Date, as soon as practicable after the Expiry Date, Project Co must:

- deliver to the State everything that is required under the Handover Management Sub-Plan;
- transfer (or procure the transfer) to the State all rights, title and interest, in and to the Project Assets, and associated additional plant, machinery and equipment (other than the Services Equipment) and Moveable Assets;
- procure that all warranties and guarantees, in respect of the Project Assets and Returned Assets (including the Warranted Life Warranties), or Services undertaken in respect of the Project Assets that remain in force at the Expiry Date are assigned to the State or its nominee free from any Security Interest;
- update (as applicable) and deliver to the State all Project Co Material not previously delivered to the State;
- deposit in the Insurance Proceeds Account any insurance proceeds Project Co has received from any Insurances for the repair, reinstatement or replacement of the Project Assets to the extent not already repaired, reinstated or replaced, and assign to the State any rights available to Project Co under the Insurances, in respect of the repair, reinstatement and replacement of the Project Assets;
- provide to the State all software, hardware, equipment, materials and documentation necessary or desirable, in order for the State or the Project Successor to fully operate and maintain the Maintained Assets, and otherwise perform the Services; and
- do all acts and things necessary to enable the State or any Project Successor to have transferred to it, or to obtain, all existing Approvals necessary to continue to carry out the activities similar to the Project Activities after the Expiry Date.

### **2.55.6.3 Final Refurbishment Works**

The State and Project Co will appoint an independent party, the Handover Reviewer, to review the Maintained Assets towards the end of the Term, and determine whether they will meet the Handover Condition.

The Harmonised PPP Project Deeds provide that the review will commence:

- if the Expiry Date is the Final Expiry Date, 24 months prior to the Final Expiry Date. However, timing should be determined on a project specific basis, with 24 months being the minimum period; and
- if the Expiry Date is earlier than the Final Expiry Date, within such shorter period before the Expiry Date as is reasonably required by the State.



The Handover Reviewer will determine the Final Refurbishment Works to be undertaken to meet the Handover Condition and the cost of such work.

Where the aggregate of the remaining Service Payments is equal to, or less than, the 120 per cent of the estimated total cost of the remaining Final Refurbishment Works, Project Co must provide security to the State for the difference. Security can be in the form of deductions from the Service Payments paid into an escrow account or a Handover Bond (where the remaining Service Payments are insufficient, Project Co must provide a Handover Bond).

The State may exercise its rights of step-in to complete any Final Refurbishment Works. All costs incurred by the State in doing this will be a debt due and payable by Project Co to the State, if Project Co fails to complete the Final Refurbishment Works:

- to the satisfaction of the Handover Reviewer; or
- within a timeframe specified by the Handover Reviewer.

#### **2.55.6.4 Project specific amendments**

The Maintained Assets and Returned Assets that should have a Warranted Life, the length of any Warranted Life after the Expiry Date, and the date on which the Handover review commences, may be determined on a project specific basis.

## **2.56 Dispute resolution (clauses 48, 48A, 48B, 49 and 50)**

The Harmonised PPP Project Deeds provide for a stepped dispute resolution process that generally requires parties to resolve disputes through negotiation by the DRT first, when required by the Harmonised PPP Project Deed, or when the parties otherwise agree that the Dispute will be referred to the DRT.

If the Dispute remains unsolved, it will be referred to negotiation by senior representatives and then to expert determination and/or arbitration. The process of referring Disputes to the DRT and to senior representatives first is considered to be more efficient and cost-effective than taking legal action in the first instance.

The DRT comprises the DRT Representatives, being:

- the State Representative;
- the Project Co Representative;
- a nominated senior representative of each party and the D&C Contractor (during the Development Phase) or the Services Contractor (during the Operational Phase); and
- a nominated representative of each party, best and properly placed to speak to the facts or circumstances of the dispute.



The inclusion of senior representatives from the D&C Contractor and the Services Contractor ensures that linked claims can be discussed and resolved efficiently, with all the relevant parties together in the one room.

The DRT may resolve the Dispute through good faith negotiations, or agree to any resolution procedure that it considers suitable to resolve the Dispute (Bespoke Resolution Procedure).

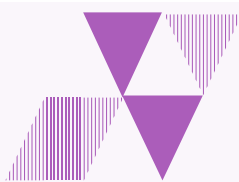
For example, a Bespoke Resolution Procedure may involve:

- seeking joint technical advice from an independent third party, such as a quantity surveyor;
- agreeing to a timetable for a party to provide further factual evidence for relief claimed; or
- referring the Dispute directly to expert determination or arbitration.

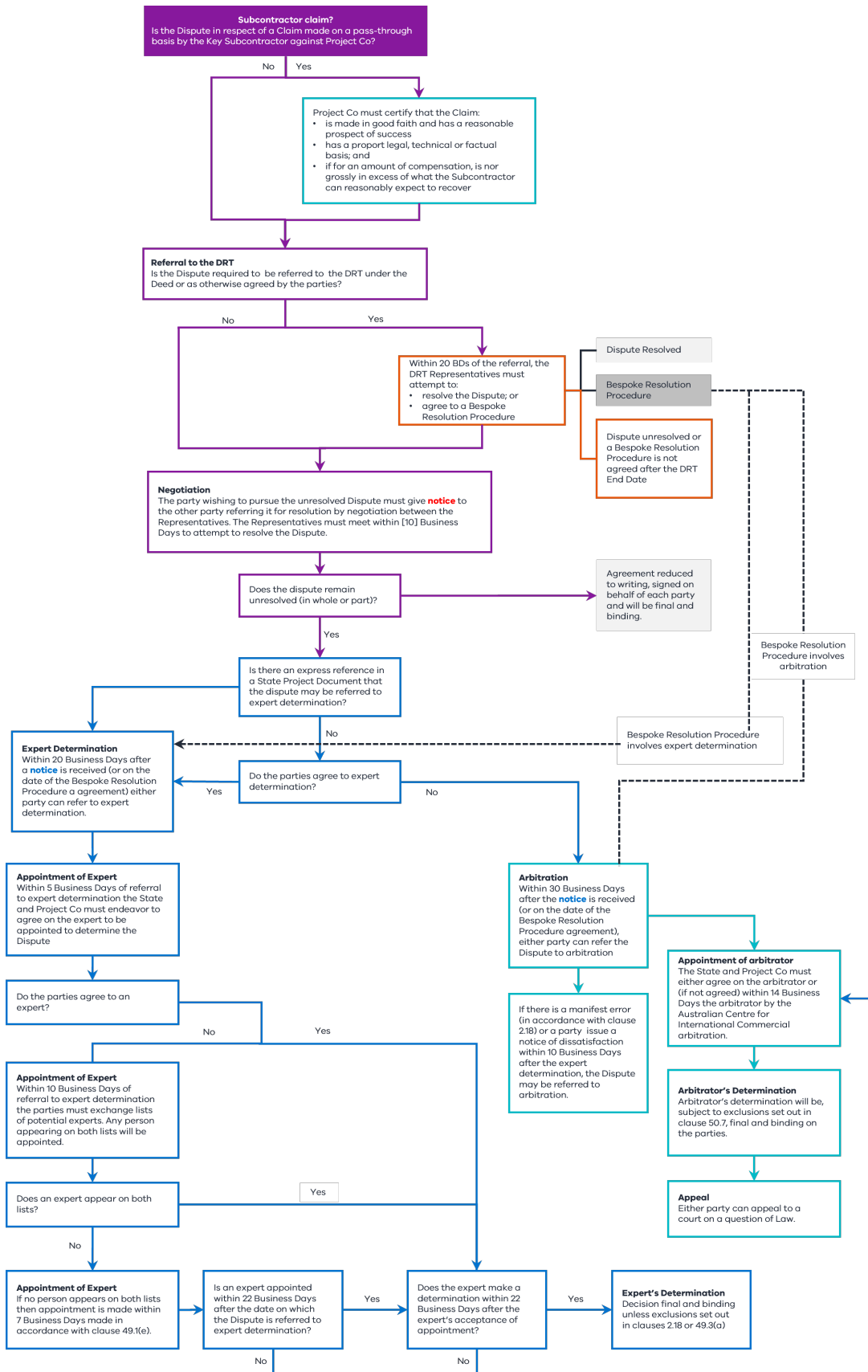
The DRT's decision to resolve the Dispute or agree to a Bespoke Resolution Procedure must be in writing and signed by each DRT Representative.

If the Dispute is unable to be resolved by the DRT and a party wishes to pursue the Dispute, or if a Dispute is not required to be referred to the DRT in the first instance, it must be referred to senior negotiation between the CEO or Managing Directors (or equivalent) of the State and Project Co. After that, it may be referred to expert determination and/or arbitration.

Figure 19 sets out the Dispute resolution process set out in the Harmonised PPP Project Deeds.



**Figure 19 – Dispute resolution process**





## 2.57 Assignment and Change in Control (clause 52)

### 2.57.1 General principle

The State places significant emphasis on the reputation, experience and financial viability of the Equity Investors in any Project. It also evaluates the corporate structures of Respondents, and at Financial Close, the ownership structure for the Project is locked into place, as set out in the Ownership Schedule.

The Ownership Schedule must identify Project Co, any other Project Entities, all Holding Entities between Project Co (and other Project Entities) and the original Equity Investors, including Designated Investors.

The State requires ongoing controls in relation to the Equity Investors and intervening Holding Entities that have invested in Project Co, whether directly or indirectly, and have Control over Project Co.

For this reason, unless the State gives its prior consent to such a Share Capital Dealing, the change is a Permitted Share Capital Dealing or is an on-market acquisition to which the State subsequently provides consent, Project Co is required to ensure that after Financial Close, no Group Member:

- changes the equity capital arrangements or holdings in any Project Entity, the Trustee or the Trust;
- allows any changes to the equity capital arrangements or holdings of or in a Holding Entity;
- permits a Change in Control of a Consortium Member or a Change in Management; or
- changes any trustee or manager of any Group Member.

Where the State's consent is required, it may only withhold its consent to a Share Capital Dealing on specific grounds, where it is of the opinion (acting reasonably) that:

- a proposed new Equity Investor or Equity Investors (or any person that directly or indirectly Controls that new Equity Investor or Equity Investors):
  - is or are not Solvent and reputable;
  - has or have an interest or duty which conflicts or may conflict in a material way with the interests of the State; or
  - is or are an unsuitable Entity, having regard to the activities or business of that Entity, and its compatibility with the obligations of Project Co under the Project Documents; or





- the proposed Share Capital Dealing:
  - is against the public interest;
  - would adversely affect the ability or capability of a Project Entity to perform its obligations under any Project Document;
  - could lead to a Probity Event; or
  - would, in respect of a Change in Control of a Consortium Member (who is not an Equity Investor) result in the Consortium Member being Controlled, or a Change in Management resulting in Project Co or the Project being managed by a person that:
    - is not Solvent and reputable;
    - has an interest or duty, which conflicts or may conflict in a material way with the interests of the State;
    - is an unsuitable Entity, having regard to the activities or business of that Entity, and its compatibility with the obligations of the relevant Consortium Member under the Project Documents; or
    - does not have the necessary financial, commercial, managerial and technical capacity expertise or experience, and contractual and financing arrangements with third parties in place, to deliver the Project;or
  - would have a material adverse effect on the Project; or
  - 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; or
- the proposed Share Capital Dealing is to take effect before the CDPD Conditions being Satisfied (if applicable), or if there is no CDPD Amount, the date which is two years after Final Acceptance.

### **2.57.2 Permitted Share Capital Dealings**

As noted above, State consent is not required for Permitted Share Capital Dealings. Permitted Share Capital Dealings are identified categories of Share Capital Dealings that are pre-agreed by the State and Project Co at Financial Close. The categories of dealings will be specific to the Successful Respondent's equity capital structure and Equity Investors, and will be based on the Permitted Share Capital Dealing Schedule bid by the Successful Respondent as part of its Proposal.

The State will generally only accept a limited number of Permitted Share Capital Dealings that do not result in a Change in Control or ultimate equity investments. Typically, the categories will therefore be limited to internal restructures or issues of shares/units that do not affect the ultimate ownership structure.

Although State consent is not required for Permitted Share Capital Dealings, Project Co must provide prior notice of any such proposed dealings. This enables the State to confirm that it agrees with Project Co's assessment that the relevant Share Capital Dealing is indeed a Permitted Share Capital Dealing.



The State recognises that Share Capital Dealings constituted by on-market acquisitions of listed shares or units may be outside the control of the Consortium Members. Where such an acquisition would otherwise require the State's prior consent, the State agrees that Project Co may seek the consent immediately after the acquisition.

If the State:

- provides conditional consent to the Share Capital Dealing, Project Co must procure the Additional or Replacement Security in the time required by the State; or
- does not consent to the Share Capital Dealing, Project Co will have an additional 60 Business Days to procure that the person acquiring Control ceases to do so.

The State recognises that, in practical terms, Project Co may not have any legal or commercial basis to require a third-party acquirer to reverse its acquisition. In such circumstances, the 60 Business Day period effectively operates as an additional cure period to remedy or overcome the consequences of a default.

If Project Co cannot achieve an outcome satisfactory to the State during this period, the usual default and termination provisions will apply. The State considers the additional remedy period to be a reasonable balance between the risk to Project Co of a default arising due to circumstances outside its control, and the fact that the State cannot accept a position whereby Project Co is controlled by persons that are unacceptable to the State.

The fact that such acquisition is not approved by the State and can lead to a Default Termination Event will serve as a commercial disincentive for parties to acquire Project Co, where there is a real risk of such ex post facto consent being obtained.

### **2.57.3 Designated Investors**

Certain Equity Investors (Designated Investors) may be considered by the State to be sufficiently critical to Project Co's ownership structure (and its ability to meet its obligations through the construction and initial operating period) that they are required to maintain at least their initial ownership level for a specific period.

This period is typically up to two years after the Date of Final Acceptance, although the State may require or accept a longer or shorter period, depending on the circumstances of the Project and the Equity Investors.

The obligation on a Designated Investor to maintain its initial ownership level for the specified period applies, notwithstanding anything else, specifically the Permitted Share Capital Dealings and the limitations on the State's right to withhold consent. A Designated Investor cannot reduce its holding in Project Co during the specified period without State consent, and such consent may be given or withheld in the State's absolute discretion.



#### **2.57.4 State's costs**

Project Co must pay the State's reasonable costs incurred in considering or consenting to a proposed Share Capital Dealing. This includes both where Project Co seeks the State's consent, and where the State considers a Permitted Share Capital Dealing that Project Co has proposed as not requiring any consent, together with any proposed Share Capital Dealing that does not proceed.

### **2.58 Financial Model (clause 53)**

At Financial Close, the audited Financial Close Financial Model for the Project will be determined and will constitute the financial baseline for the Project.

Thereafter, the Financial Close Financial Model can only be varied on the occurrence of Model Variation Events that include:

- a Refinancing;
- permanent adjustment to the Service Payment for Change Compensation Events, payment of the Development Phase Finance Amount, on payment of the CDPD Amount, in accordance with the CDPD Adjustment Protocol or following a Reviewable Services process;
- Augmentations; or
- other events, if agreed between the State and Project Co.

Throughout the Harmonised PPP Project Deeds, references to the Financial Model means the Financial Close Financial Model, as it may be updated for any Model Variation Event.

When a Model Variation Event occurs, Project Co is required to submit a proposal of the variation to the State, within 15 Business Days after the Model Variation Event, and provide the State with access to electronic copies of the proposed varied Financial Model, with supporting documents that include:

- a log of all changes made to the Financial Model;
- all supporting calculations;
- a draft certificate from an auditor acceptable to the State confirming that an independent audit of a number of matters, including the proposed varied Financial Model, has been completed, and that the calculations and data are correct, consistent with supporting Project Documents and in accordance with Australian taxation laws and standards; and
- any other information reasonably requested by the State.

The Review Procedures should permit the State to reject a variation to the Financial Model in circumstances where the State considers (acting reasonably) that the updated Financial Model is not correct or would have unintended consequences.



## **2.59 Disclosure of actual equity returns (clause 54.4)**

The State requires Project Co to provide information in accordance with clause 54.4, which includes details of the actual nominal and pre-investor tax Equity IRR, once in each Operating Year throughout the Term. This information is required to assist the State in monitoring the actual financial position of the Project, and any associated risks and exposures.

## **2.60 Project Co Material and Information Management System (IMS) (clause 54.5)**

### **2.60.1 General principle**

Project Co is required to implement and maintain the IMS for all Project Co Material and Project Information that:

- is in accordance with the requirements set out in the PSDR;
- is safe and secure, and compatible with the State's document management systems, as advised by the State;
- enables the State and any State Associate to quickly and easily retrieve, review and use the Project Co Material;
- tracks the distribution of all Project Co Material and Project Information to any Project Co Associate; and
- is in accordance with the standards in the *Public Records Act 1973* (Vic) and the *State Records Act 1998* (NSW), as applicable.

### **2.60.2 Project specific amendments**

The IMS is used where the State requires Project Co to establish an electronic system for managing Project Co Material which is accessible by the State. This will be included on a project specific basis as required.

## **2.61 Confidential Information and disclosure by the State (clauses 55.1, 55.2 and Schedule 11)**

### **2.61.1 General principle**

The State will be entitled to publish and disclose Project Documents and Confidential Information, subject to limited exceptions for Commercially Sensitive Information.



## 2.61.2 Commercially Sensitive Information

The Victorian and NSW Governments are committed to openness and transparency. Consistent with these principles, the Confidential Information provisions in the Harmonised PPP Project Deeds expressly provide for the disclosure of information in connection with the Project by the State (including Confidential Information) and only limit (subject to exceptions) State disclosure to a limited category of information (Commercially Sensitive Information).

The Commercially Sensitive Information is defined as the Finance Documents (other than the Finance Direct Deed) and information listed in the Commercially Sensitive Information Schedule.

The key exceptions, where the State may disclose Commercially Sensitive Information, include disclosure:

- in accordance with Laws, to satisfy the disclosure requirements of the Victorian or NSW Auditor-General (as applicable), or of Parliamentary accountability, in the course of the official duties of the responsible Minister, the Treasurer or the Attorney-General or otherwise, in accordance with policies of the State or any Authority;
- reasonably necessary for the enforcement of criminal law;
- to the State's solicitors, auditors, insurers or advisors;
- to the ombudsman or for a purpose in relation to the protection of public revenue;
- required to be made available to a court in the course of proceedings to which the State or a State Associate is a party; or
- where the Commercially Sensitive Information is generally available to the public, or is in the possession of the State without restriction in relation to disclosure, before the date of receipt from Project Co.

## 2.61.3 Project specific amendments

The Commercially Sensitive Information will be agreed by the parties on a project specific basis. The State will be guided by the *Freedom of Information Act 1982 (Vic)* when considering any information proposed to be included in the Commercially Sensitive Information Schedule.

Clauses 55.1(a)(iv), 55.1(b) and 55.1(c) in the Harmonised PPP Project Deeds will be reviewed and amended on a project specific basis to ensure all relevant Victorian Government departments and agencies are included in the provisions.



## **2.62 Disclosure by the State under the *Government Information (Public Access) Act 2009 (NSW) (clause 55.6)***

All NSW PPP projects must comply with disclosure requirements, as set out in the Government Information (Public Access) Act 2009 (NSW) (GIPA Act) and the Premier's Memorandum M2007-01 Public Disclosure of Information Arising from NSW Government Tenders and Contracts.

## **2.63 Commonwealth Requirements (clause 57)**

### **2.63.1 General principle**

The Commonwealth funding conditions for Projects are generally project specific. As a minimum, however, the Commonwealth will make the provision of funding for Commonwealth Funded Building Work, conditional on compliance with both the Work Health and Safety (WHS) Accreditation Scheme and the *Federal Safety Commissioner Act 2022 (Cth) (FSC Act)*.

The Commonwealth funding conditions will apply to a Project where the value of the Commonwealth's contribution to the Project that includes Building Work is a least \$5 million and represents at least 50 per cent of the construction project value, or the Commonwealth's contribution to the Project that includes Building Work is at least \$10 million, irrespective of the proportion of the total construction project value.

### **2.63.2 WHS Accreditation Scheme (clause 57.2)**

Where the Commonwealth funding conditions apply, the D&C Contractor is required to be accredited under the WHS Accreditation Scheme, which is administered by the Federal Safety Commissioner. Reliance on the accreditation of Subcontractors is not permitted (and Subcontractors are not required to be accredited).

### **2.63.3 Impact of Future Commonwealth Funding (clause 57.3)**

For any Building Work that becomes Commonwealth Funded Building Work after the date of this deed or any subsequent Subcontract, Project Co must:

- ensure that all Project Co Associates take reasonable steps to comply with the WHS Accreditation Scheme; and
- ensure that all Subcontracts for Building Work requires the Subcontractor to take reasonable steps to comply with the FSC Act.



## 2.64 Relevant State Policies (clause 58)

The State policy requirements previously contained in the operative provisions of the Victorian and NSW PPP templates have been scheduled in the Harmonised PPP Project Deeds for ease of use and adaption between jurisdictions. Project Co must comply with the State policy requirements under Schedule 21 (*Relevant State Policies*) (see section 3.8).

## 2.65 Data and cyber security (clause 59)

Under the data and cyber security provisions, Project Co must comply with the *Security of Critical Infrastructure Act 2018* (Cth) and provides notice to the State of any Cyber Security Incidents (as defined in the *Security of Critical Infrastructure Act 2018* (Cth)), including the impact on Project Assets, confidential data or information, Project Co's ability to perform its obligations under the Deed, or the quality of the Project Activities.

If a Cyber Security Incident has a significant impact, Project Co must provide additional information to the State, including details of the incident and status updates regarding the incident and management of the incident.

Project Co must also comply with the State's directions on managing the incident, obtain the State's consent before notifying any third party about the incident, and notify the incident to anyone required by the State (for example, the Australian Signals Directorate).

Where the State, Project Co or any Project Co Associate is a Relevant Entity or a Reporting Entity under the Security of Critical Infrastructure Laws, Project Co must comply and ensure Project Co Associates comply with their respective obligations. They must also assist the State in complying with the State's obligations under the Security of Critical Infrastructure Laws, including complying with any 'critical infrastructure risk management program' or 'incident response plan' (as defined in the Security of Critical Infrastructure Laws).

## 2.66 Financial reporting (clause 60)

The financial reporting regime is only applicable in NSW. Project Co must comply with its financial reporting obligations under Schedule 28 (*Financial Reporting Schedule*) (see section 3.12).



## 2.67 Notices and bar to claims (clause 62)

The State requires certainty in relation to the time period within which Project Co can prosecute Claims against the State.

A number of time bars for different types of Claims are set out in the Harmonised PPP Project Deeds (for example, in clauses 26.7 (*Change Notice*) and 32.1 (*Intervening Events entitling Change Notice*), and section 10 of the Change Compensation Principles).

Where there is no express and specific time bar for the making of a claim identified in clause 62.2(b) (Prescribed notices), there is a catch all in clause 62.2(c).

## 2.68 Electronic execution (clause 63.10)

The Harmonised PPP Project Deeds allow for electronic execution in counterparts, in addition to wet ink execution. Any executed counterpart exchanged via email or through an electronic platform, such as DocuSign, will be deemed to have satisfied the identification requirement for valid electronic execution (clause 63.10(a) (*Counterparts*)).

# 3. Project Deed Schedules, Annexures and Attachments

## 3.1 Template Schedules comprising the Harmonised PPP Project Deed

The schedules listed in this section 3, summarise the template schedules that have been harmonised as part of the Harmonised PPP Project Deed.

In the absence of a harmonised template schedule, project teams may wish to use schedules from previous template PPP Project Deeds (in Victoria, the Partnerships Victoria Standard Form Project Deed, and in NSW, the NSW Treasury Toolbox Project Deed). For example, project teams may wish to use template Schedule 18 (*Intellectual Property Schedule*) and Schedule 23 (*Augmentation Process Schedule*) from the Partnerships Victoria Standard Form Project Deed.

Project teams should consult with the applicable State Treasury on the preferred approach before doing this.





## **3.2 Conditions Precedent Schedule (Schedule 2)**

The Conditions Precedent Schedule sets out a list of Conditions Precedent that each party must satisfy by the relevant Condition Precedent Deadline (unless waived). Failure to do this will entitle the State to terminate the Project Deed.

Project teams should consider on a case by case basis to consider if any bespoke Conditions Precedent are required, such as obtaining:

- any bespoke intellectual property rights;
- any particular Approvals;
- Foreign Investment Review Board Approvals in respect of Key Subcontractors (if required).

## **3.3 Change Compensation Principles (Schedule 5)**

### **3.3.1 General principle**

The purpose of the Change Compensation Principles is to set out:

- Project Co's or the State's entitlement to compensation for a Change Compensation Event; and
- procedural requirements in connection with Project Co making a Claim for compensation under the Change Compensation Principles.

The Change Compensation Principles do not apply to Augmentations, unless expressly stated in the Augmentation Process Schedule.

### **3.3.2 Change Compensation Events**

Change Compensation Events are those events for which either Project Co or the State are entitled to compensation, as calculated in accordance with the Change Compensation Principles.

Table 1 of the Change Compensation Principles sets out the Change Compensation Events and the entitlements to compensation for each of those events.

### **3.3.3 Entitlement to compensation**

The Change Compensation Principles set out the calculations for determining the amount of compensation payable for a Change Compensation Event during the Development Phase (section 3 of the Change Compensation Principles), and during the Operational Phase (section 4 of the Change Compensation Principles).



The overriding principles in calculating compensation payable for a Change Compensation Event are that:

- the State is receiving value for money;
- all information relating to the compensation is prepared and provided by Project Co to the State on an open-book basis, to ensure the compensation amount is fair and reasonable, and calculated in a manner that is transparent;
- Project Co is only entitled to compensation for those costs that it properly and reasonably incurs, and that are directly attributable to the relevant Change Compensation Event, but not for any Indirect or Consequential Loss; and
- if the Change Compensation Event is an Insured Risk, Project Co must make a Claim under the Insurances in connection with that Change Compensation Event. Project Co will only be entitled to compensation from the State in respect of an Insured Risk, if Project Co can demonstrate that the compensation it would otherwise be entitled to, in accordance with the Change Compensation Principles, is not covered by the proceeds of such Insurance, due to a State Insurance Breach (see section 2.53.3).

The formulae in sections 3.2 and 4.2 of the Change Compensation Principles set out each component of the calculation for the compensation payable for Development Phase and Operational Phase Change Compensation Events, respectively. A component will only be included in the calculation for a Change Compensation Event if the component is identified as being payable for that Change Compensation Event in Table 1.

Respondents are required to include in their Proposal maximum fixed percentages for Agreed Margins for Change Compensation Events that occur during the Development Phase and the Operational Phase, which have not been hard coded in Table 2 or Table 3 respectively. These bid Agreed Margins will be evaluated.

The Project Co Margin has been hard coded as nil for Change Compensation Events with a cost of less than \$5 million. This is on the basis that Project Co's business-as-usual functions include managing unexpected events and changes in respect of the Project, and should be appropriately resourced to manage such Change Compensation Events. The Agreed Margins will be used in calculating the amount payable for a Change Compensation Event.



Monetary thresholds apply for the calculation of compensation payable per General Change in Law (Development Phase), to ensure that Project Co does not submit minor claims:

- where the amount payable that is calculated under section 3.2 of the Change Compensation Principles is less than a certain monetary threshold (to be determined by agencies on a project specific basis and included in section 3.5 of the Change Compensation Principles), the amount payable by the State to Project Co has been hard coded as nil; and
- where the amount payable that is calculated under section 3.2 of the Change Compensation Principles is above a certain monetary threshold identified in section 3.5, the actual amount payable by the State to Project Co will be that amount, less a specified amount (to be determined on a project specific basis and included in Table 2A of the Change Compensation Principles).

### **3.3.4 Development Phase Finance Amount**

If a Force Majeure Event, a Compensable Extension Event, a State Concurrent Event, a Pandemic Change in Law or a Pandemic Compensation Event results in a delay in achieving Commercial Acceptance, and Table 1 identifies that a Development Phase Finance Amount is payable, the State will pay Project Co an amount equal to the scheduled principal and interest due and payable by Project Co under the Finance Documents, for that period of delay (Development Phase Finance Amount).

The payment of principal and interest keeps Project Co whole, with respect to its obligations to Financiers, and mitigates the need for Project Co to amend and extend the debt financing facility (resulting in Project Co paying additional fees and costs).

If the payment of a Development Phase Finance Amount results in the Equity IRR (as set out in the Financial Model and amended to account for the payment of the Development Phase Finance Amount) exceeding the Equity IRR in the Financial Close Financial Model, the payment of that Development Phase Finance Amount will be deemed to be a Model Variation Event.

As a consequence, Project Co must update the Financial Close Financial Model, in accordance with clause 53.3 (*Varying the Financial Model*), to adjust the Service Payments to ensure there is no increase to the Equity IRR. On a project specific basis, project teams may consider alternative mechanisms to ensure there are no increases to the Equity IRR.



### **3.3.5 Procedural requirements**

#### **3.3.5.1 Change Notice and Change Response**

If Project Co is entitled or required to submit a Change Notice to the State, including in respect of a Change Compensation Event, Project Co must submit that Change Notice in accordance with the requirements set out in the Change Compensation Principles. The form of Change Notice that must be submitted is set out in Annexure A of the Change Compensation Principles.

It is a Condition Precedent to compensation that the Change Notice (and any updated Change Notice, if applicable) is submitted within the timeframes set out in the Change Compensation Principles (see section 2.67).

To ensure that any Change Compensation Event is managed efficiently, after a Change Notice has been submitted, the parties must meet to discuss the Change Notice, and may agree on how certain issues in respect of the Change Compensation Event, including updating Change Notices and issuing of Change Responses, are managed.

The Reviewing Party (being the party that is required to respond to a Change Notice, which in most cases will be the State or the Independent Reviewer) must issue a Change Response to the other party, in accordance with the requirements of the Change Compensation Principles (or clause 35 (*Modifications*), if the subject of the Change Notice and Change Response is a State Initiated Modification).

#### **3.3.5.2 Tendering**

To ensure fairness and value for money, other than for a Change Compensation Event that consists of capital works during the Development Phase of a Social Infrastructure Availability PPP Project, Project Co is required to carry out a tender process for the works or services (as applicable), in respect of a Change Compensation Event, if the cost of a Change Compensation Event is likely to exceed \$100,000 (CPI Indexed) in the State's reasonable opinion, or if the State notifies Project Co that it requires a tender process.

Project Co is not required to tender capital works during the Development Phase for Social Infrastructure Availability PPP Projects. This is because the typically constrained nature of the Site and Principal Contractor requirements makes it impractical to have more than one D&C Contractor on the Site at the same time.

This clause may be amended on a project specific basis on Linear Infrastructure Availability PPP Projects, where the only feasible solution is to engage the incumbent Key Subcontractor to carry out the relevant work. An example would be where, during the Development Phase, the work that is the subject of the Change Compensation Event has very significant interfaces with the Works, so that the engagement of another Contractor would result in a retransfer of significant time and cost risk to the State.



## **3.4 Termination Payments Schedule (Schedule 6)**

### **3.4.1 Grounds for termination**

The State may terminate the Project Deed prior to the Final Expiry Date:

- for a Force Majeure Termination Event;
- for convenience; or
- if a Default Termination Event occurs.

Project Co is only entitled to terminate the Project Deed for a Force Majeure Termination Event.

### **3.4.2 Liability for Termination Payments**

If the Project Deed is terminated prior to the Final Expiry Date, a Termination Payment is generally payable by the State. The Termination Payments Schedule assumes that the Project Assets are transferred to the State on termination.

The applicable Termination Payment is calculated by applying the relevant Termination Payment formula in the Termination Payments Schedule.

Termination for Convenience Payments or Force Majeure Termination Payments will be payable by the State.

Default Termination Payments will be payable by the State (if the Project has a positive value) or by Project Co (if the Project has a negative value).

### **3.4.3 Structure of Termination Payment formulae**

The Termination Payments Schedule sets out a formula for calculating each Termination Payment.

Each Termination Payment formula is structured so that:

- component 'A' is the starting point for calculating each Termination Payment; and
- the same letter is used in each formula for the equivalent component across the formulae (for example, component 'H(i)' for Insurance proceeds). There may be differences in the scope of a component, based on the formula in which the component is used.

### **3.4.4 Default Termination Payments**

#### **3.4.4.1 Calculation methodology**

The Default Termination Payment is intended to return to Project Co the value of the Project that the State is taking back, less any liabilities that Project Co may have to the State.



The value of the Project and the Default Termination Payment can be calculated either by:

- the State conducting a competitive retender process to obtain the highest compliant tender price for the Project (where there is a Liquid Market); or
- an independent expert appointed by the parties (where there is no Liquid Market, or the State elects not to conduct a competitive retender).

#### **3.4.4.2 Liquid Market**

A Liquid Market requires at least two contractors (in addition to any party controlled by the Financiers) in the prevailing market being prepared to competitively tender for the undertaking of, or acquisition of, projects that are the same or of a similar type to the Project being terminated.

#### **3.4.4.3 Valuing the Project on Default Termination**

For the purposes of valuing the Project under either the competitive retender process, or by an independent expert appointed to calculate the Fair Market Value of the Project, the assumptions that apply include:

- an incoming purchaser assumes the same rights and obligations as Project Co had under the original Project Documents;
- defaults that may have been subsisting prior to termination will be disregarded; and
- any costs that the incoming purchaser may incur in assuming the role of Project Co will be allowed.

The Default Termination Payment calculation then (among other things):

- deducts Tender Costs and the State's reasonable forecast internal and external costs of tendering a form of contract(s) for the Project Activities;
- deducts liabilities of Project Co to the State;
- deducts additional costs reasonably incurred by the State as a direct result of the Default Termination Event;
- deducts the absolute value of the Post Termination Quarterly Amounts (if the aggregate of all Post Termination Quarterly Amounts is negative);
- deducts the gains that have accrued or will accrue to Project Co as a result of the termination of any Project Document;
- deducts the insurance proceeds, amounts held in bank accounts and other amounts payable to Project Co by third parties;
- adds any amounts owing by the State to Project Co under the Project Documents;
- deducts third-party amounts paid to Project Co at any time during the period between the Expiry Date and the Compensation Date; and
- deducts costs incurred by the State engaging the independent expert to administer the Termination Payment Schedule.



In calculating the fair market value under an independent expert determination, the forecast cashflows should be discounted at a discount rate, which reflects the risk of the underlying cashflow (that is, the real pre-tax Project IRR reflected in the Financial Model). However, since underlying rates in the market, such as the real yields on Commonwealth bonds, vary over time, the discount rate calculation acknowledges the effect of changes to the underlying risk-free rate.

If a Liquid Market existed and the Project was retendered, a hypothetical bidder would take into account current market yields on risk-free investments in choosing what discount rate to apply to the Project.

#### **3.4.4.4 Payments to Financiers and Equity Investors**

Neither method of calculating the Default Termination Payment protects the payment of Project Debt. The Financiers will bear the risk of Project Co's default under the Project Deed, to the extent that the value of the Project at termination is less than the amount of actual Project Debt.

There is also no specific payment to Equity Investors, given that termination arises from Project Co's default.

#### **3.4.4.5 Negative Default Termination Payment**

If the value of Project Co's Liabilities to the State, together with the costs of the State on Handover of the Project (for example, reinstatement or rectification costs) are greater than the value of the Project that is handed back to the State at termination, the Default Termination Payment will be a negative amount that is payable by Project Co to the State. This is intended to protect the State's exposure to the costs of reinstating or rectifying the Project, which could be significant.

### **3.4.5 Force Majeure Termination Payment**

#### **3.4.5.1 Calculation methodology**

The key components of the Force Majeure Termination Payment are:

- an amount equal to Project Debt; minus
- liabilities of Project Co to the State under the Project Documents; plus/minus
- costs incurred or gains realised on termination of Finance Documents (including close out of derivatives); minus
- insurance proceeds, amounts held in bank accounts and other amounts payable to Project Co by third parties; plus
- amounts owing by the State to Project Co under the Project Documents (including amounts of any Floating Rate Component, or Service Payments and Capital Payments owed, but not paid to Project Co, as at the Expiry Date); plus



- any Subcontractor Termination Amounts that the State owes to Project Co, subject to the bid profit percentages contained in the Financial Close Financial Model (see clause 9.3(g)(iii) to (vii) (*Specific requirements for Key Subcontracts, Significant Subcontracts and Management Service Contract*)) (also see section 2.13.4); minus
- any third-party amounts paid to Project Co during the period between the Expiry Date and the Compensation Date; minus
- debt amounts that were intended to be refinanced by equity, or subordinated debt treated as equity.

### **3.4.5.2 Payments to Financiers and Equity Investors**

The Force Majeure Termination Payment for a Force Majeure Termination Event includes payment of Project Debt, but no specific payment to Equity Investors. This is consistent with the fundamental principle that on the occurrence of a Force Majeure Event, losses 'lie where they fall'. In the case of the Equity Investors, the consequence of this principle means they are not compensated for loss of profit or equity returns forgone, where the Project is terminated early as a consequence of an external event, which is of sufficient severity to constitute a Force Majeure Termination Event.

### **3.4.5.3 Special circumstances**

If a Default Termination Payment (calculated by an independent expert) would result in a greater Termination Payment than the Force Majeure Termination Payment, then Project Co will be entitled to that greater amount. This reflects the principle that Project Co should not be worse off in a neutral circumstance than it would have been in a default situation.

If there is a Default Termination Event subsisting at the time of termination for a Force Majeure Termination Event, the Termination Payment will be calculated on the basis of a Default Termination Payment. This reflects the principle that Project Co should not be able to achieve a better outcome in circumstances of a subsisting Default Termination Event, through using a termination for a concurrent Force Majeure Event.





## 3.4.6 Termination for Convenience Payment

### 3.4.6.1 Calculation methodology

The Termination for Convenience Payment is the greater of two amounts determined by two calculations. The purpose of having two calculations is to place a floor under the amount to which Project Co is entitled on Termination for Convenience. That floor focuses on protecting Financiers by including Project Debt (as adjusted by break gains/costs).

However, the floor is increased by amounts that the State owes Project Co under the State Project Documents, because the State should not be relieved of those liabilities, merely because of the Termination for Convenience. It is reduced by amounts received by Project Co under certain insurances and separately, from other third parties, because those amounts are able to be used to repay the Financiers.

The key components of the Termination for Convenience Payment are:

- an amount equal to Project Debt; plus
- a payment to Equity Investors (see section 3.4.6.3); minus
- liabilities of Project Co to the State under the Project Documents; plus/minus
- costs incurred or gains realised on termination of Finance Documents (including close out of derivatives); minus
- insurance proceeds, amounts held in bank accounts and other amounts payable to Project Co by third parties; plus
- amounts owing by the State to Project Co under the Project Documents (including amounts of any Floating Rate Component or Service Payments, and Capital Payments owed, but not paid to Project Co, as at the Expiry Date); plus
- redundancy payments for Project Co employees; plus
- Subcontractor Termination Amounts that the State owes to Project Co, subject to the bid profit percentages contained in the Financial Close Financial Model (see clause 9.3(g)(iii) to (vii) (*Specific requirements for Key Subcontracts*, section 2.13.4); minus
- any third-party amounts paid to Project Co during the period between the Expiry Date and the Compensation Date.



### 3.4.6.2 Payments to Financiers and Equity Investors

The Termination for Convenience Payment includes the payment of Project Debt and a separate payment to Equity Investors. This is in recognition that the State has exercised its discretion to terminate the Project Deed, for reasons unconnected with Project Co's performance or the occurrence of a Force Majeure Event (or Major Loss or Damage), of such magnitude that the Project is to be brought to an end.

### 3.4.6.3 Calculation of payment to Equity Investors

The payment to Equity Investors on Termination for Convenience is component 'B' of the formula. The drafting of this component is intended to:

- set clear expectations for the compensation payable on Termination for Convenience (prior to Commercial Acceptance) at the beginning of the Project Deed;
- reflect the risk profile of Equity Investors, particularly during the early stages of a project; and
- recognise that Equity Investors can reinvest to mitigate the impact of termination and receive future returns.

Where Termination for Convenience occurs on or after the Date for Commercial Acceptance, the methodology for calculating the payment to Equity Investors is a cashflow-based valuation of the future returns to equity, determined by an independent expert at the time of termination.

This methodology is commonly used for valuing equity investments, and enables the payment to be calculated in a way that places the Equity Investors in a substantially similar position, in respect of equity returns, to that which would have applied if the Project had continued for the Term.

Where Termination for Convenience occurs prior to the Date for Commercial Acceptance, component 'B' will similarly be a cashflow-based valuation of the future returns to equity, although bid upfront by Respondents, as part of their RFP documentation and hard coded in the Project Deed for each six-month period of the Development Phase. The amount payable will be subject to review and adjustment at the time of termination by an independent expert (on the same basis as the determination post-Commercial Acceptance), to ensure the amount does not exceed a market return.

Component 'B' will compensate Equity Investors for the net present value of future equity cashflows applicable to the terminated Contract Term, calculated as at the relevant six-month period during the Development Phase in which the termination occurs, with Respondents competitively bidding the discount rate applicable to each six-month period from Financial Close to Commercial Acceptance.



By hard-coding the basis for assessing fair market value of forgone equity cashflows at defined points during the Development Phase, both the State and Project Co are clear about the consequences of a Termination for Convenience during the Development Phase, subject to confirmation by an independent expert at the time of termination.

For Termination for Convenience prior to the Date for Commercial Acceptance, Respondents are to bid a discount rate applicable to each six-month period from Financial Close to Commercial Acceptance, using the methodology that:

- Respondents must discount the total equity cashflows over the balance of the term of the Project at a discount rate, equivalent to market rates of return to equity for projects with a similar risk profile to the relevant Project, and having regard to the target rate of return to equity;
- Respondents may reduce the applicable discount rates on a straight-line basis over the Development Phase, in order to reflect the diminishing risks faced by equity as the Development Phase progresses, while having regard to the overall complexity, risk profile and Development Phase program of the Project;
- the discount rate applicable to the first six-month period following Financial Close should reflect the target equity rate of return; and
- the discount rate applicable to the last six-month period before the Date for Commercial Acceptance should have regard to the market equity rate of return for projects that are about to achieve commercial acceptance (noting this may include an appropriate risk premium above rates of return typically observed in steady state secondary market transactions).

The State will evaluate:

- the discount rate applicable to the first six-month period following Financial Close; and
- the approach to, and magnitude of, change in the discount rate during the Development Phase.

Respondents will be required to provide a written rationale for the calculation, which explains how the discount rate applicable to the first six-month period following Financial Close is determined. It will also include the approach, magnitude and degree of decline in the discount rate applicable to subsequent periods, for example, by reference to the risk profile and complexity of the Project, and key construction milestones in the Development Phase Program.



### 3.4.7 Treatment of Capital Payment in Termination Payments

The Project Deed sets out the terms on which Capital Payments will be paid by the State (see section 2.40). On termination of the Project Deed, any future obligation of the State to pay any Capital Payment will cease (on the basis that the required conditions for that payment to become due and payable will not be satisfied).

To the extent that any Capital Payment has already become due and payable at the time the Project Deed is terminated, but has not been paid by the State, this is an amount owing by the State to Project Co.

The Termination Payments Schedule provides for this to be treated by:

- **Default Termination Payment** – the Capital Payment can be taken into account, either as part of the value of the New Contract (as determined under the competitive retender process or calculated by the independent expert), or as an amount owing by the State to Project Co, but not both; and
- **Force Majeure Termination Payment and Termination for Convenience Payment** – if the termination occurs after the Financial Model identifies the State Contribution and/or the CDPD Amount as owing, but before the date that the State is required to pay the State Contribution and/or CDPD Amount according to the Project Deed, then the State Contribution and/or CDPD Amount is included in the Project Debt component of the Termination Payment as at the Expiry Date. This prevents the value of the Project Debt component being reduced by the modelled application of a Capital Payment, which is due and payable to Project Co, but has not been paid by the State. Project Co will receive the benefit of the Capital Payment due and payable, as part of the Project Debt component of the Termination Payment.

If a Project Deed also provides for ongoing (milestone-based) Capital Payments during the Development Phase, such as DPCC, the appropriate treatment of these under the Termination Payments Schedule will need to be considered on a project specific basis. In particular, to the extent that Capital Payments are required by the State and/or modelled to be applied to directly pay the D&C Contractor, rather than to reduce Project Debt, the appropriate treatment of those amounts in the calculation for a Force Majeure Termination Payment or a Termination for Convenience Payment will need to be considered.



### 3.5 Expert Determination Agreement (Schedule 8)

Schedule 8 provides a template Expert Determination Agreement, which the State, Project Co and the appointed expert must enter into within seven Business Days of the expert providing notice that it is available to act as the expert, in respect of the Dispute.

### 3.6 Schedule of Certificates and Notices (Schedule 9)

On a project specific basis, the Schedule of Certificates and Notices should be amended, as appropriate, to include or remove notices or certificates (including those specified under the PSDR).

### 3.7 Insurance Schedule (Schedule 10)

On a project specific basis, the Insurance Schedule should be amended, as appropriate, and in consultation with insurance advisors. For example, project teams should consider requiring Project Co to procure Marine Transit (Advance Consequential Loss) Insurance in instances where a loss during an overseas shipment could have a material impact on the completion date of the Project.

### 3.8 Relevant State Policies Schedule (Schedule 21)

#### 3.8.1 General principle

Schedule 21 contains Part A and Part B – Part A is for use in Victorian projects only and Part B is for use in NSW projects only.

Project Co must comply with the Relevant State Policies (clause 58 (*Relevant State Policies*)), including the State policies in Table 12.

**Table 12 – Relevant State Policies**

Part A – Victorian provisions	Part B – NSW provisions
<ul style="list-style-type: none"> <li>• Supplier Code of Conduct</li> </ul>	<ul style="list-style-type: none"> <li>• Aboriginal Procurement Policy</li> </ul>
<ul style="list-style-type: none"> <li>• Local Jobs First Policy</li> </ul>	<ul style="list-style-type: none"> <li>• NSW Code and Guidelines</li> </ul>
<ul style="list-style-type: none"> <li>• Fair Jobs Code</li> </ul>	<ul style="list-style-type: none"> <li>• requirements in relation to the Modern Slavery Laws</li> </ul>
<ul style="list-style-type: none"> <li>• Social Procurement Framework</li> </ul>	
<ul style="list-style-type: none"> <li>• Aboriginal Participation Requirements</li> </ul>	
<ul style="list-style-type: none"> <li>• requirements in relation to the Modern Slavery Legislation</li> </ul>	
<ul style="list-style-type: none"> <li>• Digital Asset Policy</li> </ul>	
<ul style="list-style-type: none"> <li>• Tip Truck Owner Driver Policy</li> </ul>	
<ul style="list-style-type: none"> <li>• Protective Data Security Standards</li> </ul>	
<ul style="list-style-type: none"> <li>• Freedom of Information Act</li> </ul>	
<ul style="list-style-type: none"> <li>• requirements in relation to prohibited cladding products</li> </ul>	



### 3.8.2 Other State policies

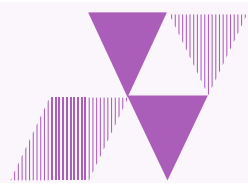
Procuring agencies must consider the application of State policies on a project specific basis, given the nature, project value and funding requirements of the Project. This schedule may also require amending where new model clauses or policies have been published. For example, section 2 of Part A (Local Jobs First Policy) is based on the model clauses published on 23 December 2022, and will need to be updated to reflect any changes.

## 3.9 Design Development Process Schedule (Schedule 24)

### 3.9.1 General principle

The Design Development Process Schedule adopts endorsed principles as a baseline, which include:

- Subject to any programming constraints or deal specific requirements, there are three Design Stages.
- The 'Primary Reviewer' and 'Secondary Reviewer' are responsible for reviewing the Design Documentation. While the Secondary Reviewer has rights to review the Design Documentation, and provide comments and conditions to the Primary Reviewer, the Primary Reviewer is ultimately responsible for preparing the Response to Project Co, and providing any comments and conditions (including those provided by the Secondary Reviewer). In selecting whether the State or the Independent Reviewer should be the Primary Reviewer or the Secondary Reviewer, agencies should consider whether project teams have sufficient in-house experience and expertise. They should also consider:
  - whether the State or the Independent Reviewer will lead the user group process. If the Independent Reviewer is to be the Primary Reviewer, suggest that the Independent Reviewer will need to be heavily involved (and this may have cost consequences);
  - costs associated with the Independent Reviewer being the Primary Reviewer;
  - that the State is the assessor of whether Commercial Acceptance has been achieved; and
  - whether the State or a third party will be an Operator of the Project Assets during the Operational Phase.
- The Independent Reviewer and the State may give comments and conditions on the Design Documentation, which must be addressed.
- On a case by case basis, agencies may consider giving the Independent Reviewer and the State the right to give 'observations', which Project Co may have regard to, but is not required to address.
- Project Co may proceed at risk to the next Design Stage if there are outstanding comments/conditions.
- Project Co cannot proceed to construction if there are outstanding comments.



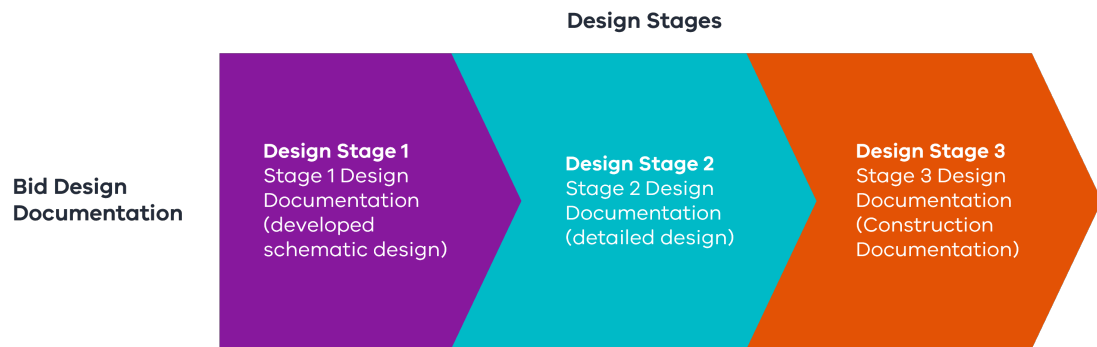
### 3.9.2 Project specific amendments

The design development process is highly variable across different projects, given the range of design complexity and sensitivity. For example, it may be necessary to amend the Design Development Process Schedule for hospital projects, to prevent Project Co from proceeding at risk where there are outstanding Comments.

Project teams may consider other project specific amendments to ensure the unique requirements and challenges of hospital projects are taken into account in the final design to comply with all necessary regulations and standards, operational requirements, integration with medical equipment and patient experience.

Figure 20 and Figure 21 provide a summary of the Design Development Process.

**Figure 20 – Design stages and related design documentation**



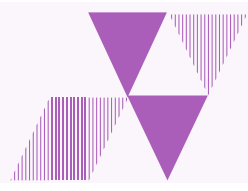
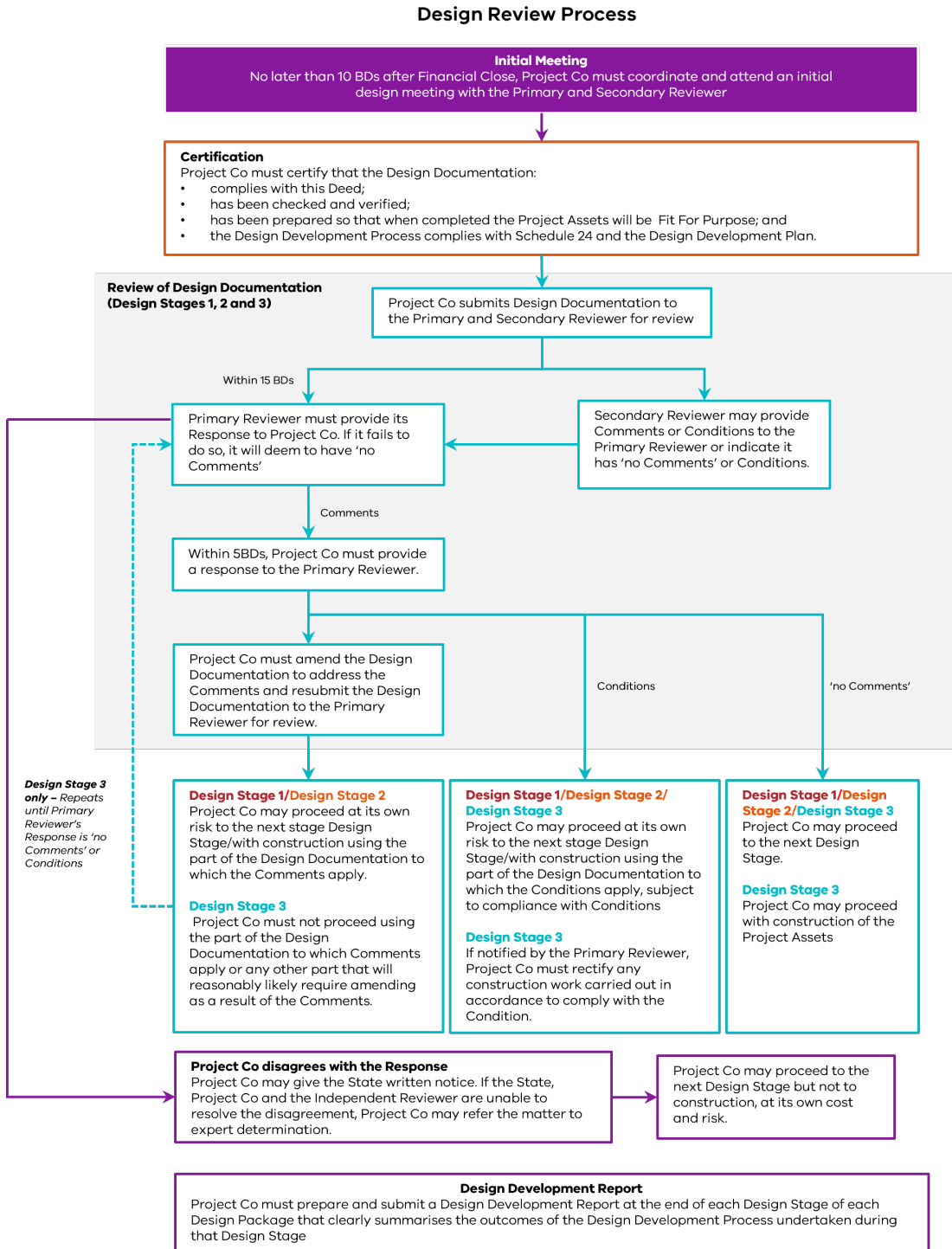


Figure 21 – Design Development Process







## 3.10 OHS/WHS Schedule (Schedule 25)

### 3.10.1 General principle

The Occupational Health and Safety/Work Health and Safety (OHS/WHS) Schedule contains the relevant occupational, work, health and safety obligations extracted from the previous Victorian and NSW template PPP project deeds. As with Schedule 21 (*Relevant State Policies*), these provisions have been scheduled for ease of use of the Harmonised PPP Project Deeds between jurisdictions.

Part A contains the obligations applicable to Victorian projects and Part B contains the obligations applicable to NSW projects.

### 3.10.2 Principal Contractor

In Victoria and NSW, the State is typically the 'principal contractor' for a construction project under the applicable legislation:

- In Victoria, the owner of the land will be the Principal Contractor (as defined in the *Occupational Health and Safety Regulations 2007* (Vic) (Regulations)) for construction work, unless the owner engages another person to carry out that role (and have management or control of the workplace (as defined in the Regulations)).
- In NSW, a person commissioning a construction project will be the 'principal contractor' for that project.

The State must appoint another party as the Principal Contractor to avoid being legally obliged to carry out that role itself.

There can only be one Principal Contractor per construction project. A Principal Contractor appointment will only be effective if the entity the State seeks to appoint is able to have sufficient management or control of a workplace to enable them to discharge the duties of a Principal Contractor.

The State will typically appoint:

- the D&C Contractor as the Principal Contractor at the Development Phase Area during the Development Phase; and
- the Services Contractor as Principal Contractor for any construction work carried out during the Operational Phase at the Operational Phase Area (other than for the rectification of Defects and the undertaking of any Works by the D&C Contractor during the Operational Phase, when the D&C Contractor or, if it is not the D&C Contractor, the party undertaking the work, will be engaged as the Principal Contractor in respect of those construction projects).



Where the D&C Contractor or the Services Contractor (as relevant) is the Principal Contractor, the appointment provisions must be included in the relevant Subcontractor Direct Deed.

Where a builder performs work on a workplace that is managed or controlled by the Services Contractor as Principal Contractor, it is subject to the reasonable direction of the Services Contractor regarding WHS matters (and vice versa).

However, where a builder undertakes a specific and significant construction project on the Operational Phase Area, the State may separately appoint that builder as Principal Contractor for that construction work, relieving the Services Contractor from that role.

### **3.10.3 Project specific amendments**

The Principal Contractor appointment arrangements will be considered on a project specific basis. This ensures they reflect the timing and relevant sites/workplace for Principal Contractor appointments, in accordance with the D&C Contractor Direct Deed, Services Contractor Direct Deed and the Successful Respondent's consortium structure.

## **3.11 Executive Review Group Terms of Reference Schedule (Schedule 26)**

The Executive Review Group comprises Executive Review Group Members, being representatives of:

- the State;
- the D&C Contractor;
- Project Co;
- the Services Contractor; and
- an Independent Member (on an invitation basis only).

The purpose of the Executive Review Group is to provide a forum for expeditious discussion, consultation, and pragmatic resolution (as applicable) of opportunities and issues relating to the Project. The role and function of the Executive Review Group may be amended on a project specific basis.

On a project specific basis, project teams may consider amending the frequency and timing of Executive Review Group Meetings, the duration of the Executive Review Group, the Functions of the Executive Review Group and whether an Independent Member should be a member of the Executive Review Group.



### 3.12 Financial Reporting Schedule (Schedule 28)

Schedule 28 is specific to NSW. It provides a financial reporting regime that ensures the State has a level of assurance and oversight that Project Co is actively monitoring the financial capacity of the D&C Contractor, any Parent Guarantor of the D&C Contractor or any Designated Significant Subcontractor (listed in Annexure 1 to Schedule 28).

On a project specific basis, the State may consider expanding the financial reporting regime to include the Services Contractor and/or the Parent Guarantor of the Services Guarantor.

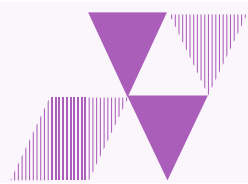
The key principles of the financial reporting regime are that:

- Project Co must notify the State of any restructure event, as soon as reasonably practicable;
- Project Co must notify the State of any Financial Reporting Events or Financial Capacity Events, as soon as Project Co becomes aware of such events;
- following the occurrence of a Financial Capacity Event, Project Co and the D&C Contractor must meet with the State within five Business Days of the date of notice to discuss the Financial Capacity Event and:
  - the D&C Contractor must also procure the attendance of any of its Parent Guarantors and any Designated Significant Subcontract specified by the State; and
  - the parties at the meeting must agree to a Financial Mitigation Plan, which Project Co must comply with until the State Representative agrees that the Financial Capacity Event has been adequately mitigated and/or no longer subsists; and
- if a D&C Contract is novated to the State, the State is entitled to terminate the Project Deed under the corresponding Financial Reporting Schedule of the D&C Contractor Direct Deed (as amended by clause 8.5 of the D&C Contractor Direct Deed), if a Restructure Event occurs or the D&C Contractor fails to demonstrate to the State that the remaining or replacement entities containing the D&C Contractor or the Parent Guarantor of the D&C Contractor are of sufficient commercial and financial standing to meet their obligations under the Project Deed or the relevant Parent Company Guarantee.



**Table 13 – Key definitions in Schedule 28 (Financial Reporting Schedule)**

<b>Term</b>	<b>Definition</b>
<b>Financial Capacity Event</b>	Any fact, matter or thing which, in the opinion of the State (acting reasonably), has or may have a material adverse effect on the financial standing of the D&C Contractor (or any entity that comprises the D&C Contractor), any Parent Guarantor of the D&C Contractor or any Designated Significant Subcontractor
<b>Financial Reporting Event</b>	<p>As applicable to each of the D&amp;C Contractor (or any entity that comprises the D&amp;C Contractor), any Parent Guarantor of the D&amp;C Contractor, or any Designated Significant Subcontractor, any event that includes:</p> <ul style="list-style-type: none"> <li>• a downgrade in credit rating;</li> <li>• a significant loss suffered or incurred on a Project or under a contract;</li> <li>• a significant fine or financial penalty;</li> <li>• a profit warning to a stock exchange or the making of any public announcement regarding a material deterioration in financial position or prospects;</li> <li>• a public investigation into improper financial accounting and reporting, or suspected fraud;</li> <li>• a material refinancing;</li> <li>• a failure to pay a Significant Subcontractor (other than for the reason of a bona fide dispute);</li> <li>• any financial indebtedness becoming due as a result of an event of default;</li> <li>• its external auditor expressing a qualified or adverse opinion, a disclaimer of opinion or that a material uncertainty exists, in relation to a going concern;</li> <li>• a net share price decrease of more than 25 per cent in the six months since the last Financial Assessment; or</li> <li>• a material breach of a covenant to a lender or lenders.</li> </ul> <p>This is provided that, in the case of a Listed Entity, the relevant event has been Publicly Notified or is Reportable Information.</p>
<b>Restructure Event</b>	<p>Where there is one or more asset transfer or corporate restructure that:</p> <ul style="list-style-type: none"> <li>• results in the D&amp;C Contractor (or any entity that comprises the D&amp;C Contractor) or any Parent Guarantor of the D&amp;C Contractor having a materially diminished financial capacity; or</li> <li>• adversely affects the ability of the D&amp;C Contractor (or any entity that comprises the D&amp;C Contractor) or any Parent Guarantor of the D&amp;C Contractor to meet its obligations under the relevant Parent Guarantee or this Deed (as relevant).</li> </ul>



### 3.13 Conditional Debt Pay Down Adjustment Protocol (Schedule 29)

The purpose of the CDPD Adjustment Protocol is to update the Financial Model and Model Output Schedule on payment of the CDPD Amount (where applicable), in accordance with clause 33 (*State Contribution on Commercial Acceptance, Development Phase Capital Contribution and CDPD Amount*) and clause 53 (*Financial Model*).

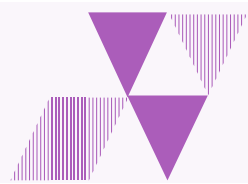
The CDPD Adjustment Protocol will be developed by project teams on a project specific basis, and should capture the mechanical process of updating the Financial Model for a given set of inputs and for resolving the model.

### 3.14 Development of schedules, Annexures and Attachments

Only some schedules have been included in the Harmonised PPP Project Deeds. Table 14 identifies the key information for development of the remaining schedules, Annexures and Attachments, including the author (State or Respondent), timing and source of the document.

**Table 14 – Key information for development of remaining schedules**

Document	Development
Contract Particulars (Schedule 1)	Framework to be prepared by the State prior to release of the RFP. Components to be provided by the Respondent in their Proposal (in accordance with Part 1B of the RFP)
Conditions Precedent Schedule (Schedule 2)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Payment Schedule (Schedule 3)	To be prepared by the State and released as part of the RFP
Review Procedures (Schedule 4)	To be prepared by the State and released as part of the RFP
Change Compensation Principles Schedule (Schedule 5)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Termination Payment Schedule (Schedule 6)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Form of Subcontractor Direct Deed (Schedule 7)	To be prepared by the State and released as part of the RFP (based on the D&C Contractor Direct Deed and PPP precedent)
Expert Determination Agreement (Schedule 8)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Schedule of Certificates and Notices (Schedule 9)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Insurance Schedule (Schedule 10)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed). To be completed by the Respondent as part of its Proposal



Document	Development
Commercially Sensitive Information Schedule (Schedule 11)	To be provided by the Respondent as part of its Proposal
Finance Documents Schedule (Schedule 12)	<ul style="list-style-type: none"> <li>To be provided by the Respondent as part of its Proposal</li> <li>To be finalised and agreed by the parties during the Negotiation and Completion Phase, based on its Proposal</li> </ul>
Equity Documents Schedule (Schedule 13)	<ul style="list-style-type: none"> <li>To be provided by the Respondent as part of its Proposal</li> <li>To be finalised and agreed by the parties during the Negotiation and Completion Phase, based on its Proposal</li> </ul>
Ownership Schedule (Schedule 14)	Equity structure to be provided by the Respondent as part of its Proposal (see section 5.1.1 of RFP, Part 1B for Victorian Projects only)
Permitted Share Capital Dealing Schedule (Schedule 15)	To be provided by the Respondent as part of its Proposal (see section 5.1.1 of RFP, Part 1B for Victorian Projects only)
Indexes Schedule (Schedule 16)	To be prepared by the State and released as part of the RFP (based on PPP precedent)
Financial Close Adjustment Protocol (Schedule 17)	<ul style="list-style-type: none"> <li>To be provided by the Respondent as part of its Proposal (see section 5.5.1 of RFP, Part C for Victorian Projects only)</li> <li>To be finalised and agreed by the parties during the Negotiation and Completion Phase</li> </ul>
Intellectual Property Schedule (Schedule 18)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Remaining Works Schedule (Schedule 19)	<ul style="list-style-type: none"> <li>To be provided by the Respondent as part of its Proposal</li> <li>To be finalised and agreed by the parties during the Negotiation and Completion Phase. May include Works that will become Maintained Assets, and/or Works that will be Returned Assets</li> </ul>
Social Procurement Commitment Schedule (Schedule 20)	<ul style="list-style-type: none"> <li>For use in Victoria only</li> <li>To be provided by the Respondent as part of its Proposal</li> </ul>
Relevant State Policies Schedule (Schedule 21)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Site Access and Tenure Schedule (Schedule 22)	To be prepared by the State and released with the RFP (to be prepared on a project specific basis)
Augmentation Process Schedule (Schedule 23)	To be prepared by the State and released with the RFP (based on PPP precedent)
Design Development Process Schedule (Schedule 24)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
OHS / WHS Schedule (Schedule 25)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
Executive Review Group Terms of Reference (Schedule 26)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)



Document	Development
Development Phase Capital Contribution Schedule (Schedule 27)	To be prepared by the State and released with the RFP
Financial Reporting Schedule (Schedule 28)	<ul style="list-style-type: none"> <li>• For use in NSW only</li> <li>• To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)</li> </ul>
CDPD Adjustment Protocol (Schedule 29)	To be prepared by the State and released with the RFP (based on the Harmonised PPP Project Deed)
PSDR (Annexure 1)	<ul style="list-style-type: none"> <li>• The Delivery Requirements will be prepared by the State and released with the RFP (Volume 3, Part B)</li> <li>• Departures to be provided by Respondents in the form of mark-up of the PSDR (comprising the technical specification and Services specification), as part of the Proposal. The parties will resolve acceptance of departures prior to execution of the Project Deed, and make any amendments to the Delivery Requirements accordingly</li> <li>• The Project Scope forms part of the Respondent's Proposal. Those parts of the Proposal that form the Project Scope will be agreed by the parties and included in Annexure 1 before execution of the Project Deed</li> </ul>
Project Information (Attachment 1)	<ul style="list-style-type: none"> <li>• Attachment (in the form of a list) to be compiled by the State on a project specific basis during the Negotiation and Completion Phase</li> <li>• Where a data room is used during the RFP Phase, the Project Information should include a list of all Project Information in the data room</li> </ul>
State Approvals (Attachment 2)	Attachment (in the form of a list) to be compiled by the State on a project specific basis and released with the RFP
Bid Development Phase Program	To be inserted from the Successful Respondent's Proposal
Bid Project Plans	To be inserted from the Successful Respondent's Proposal



## 4. Project Scope and Delivery Requirements

The PSDR will be developed on a project specific basis. The Delivery Requirements must include the general and specific items that are referred to in the Harmonised PPP Project Deeds. These items are set out in Table 15.

**Table 15 – Items that must be included in the PSDR**

Item	Project Deed reference	Guidance note
As-Built Records	Definition of As-Built Records, definition of Project Co Material	The As-Built Records are the as-built information required to be provided in relation to the Works that form part of the Project Material (and dealt with extensively in the Harmonised PPP Project Deed). The as-built information that is required to be provided by Project Co must be detailed in the PSDR.
Asset Information System	Definition of Asset Information System, definition of Moveable Assets, clauses 18.3 and 47.2(d)	The Harmonised PPP Project Deeds provide for the inclusion of the Moveable Asset register in the Asset Information System and the transfer of the Asset Information System to the State. However, the Harmonised PPP Project Deeds assume that the PSDR sets out the description of the Asset Information System and includes any requirements of that system.
Development Phase Area	Definition of Development Phase Area, clauses 11.1(b)(vi) and 20.1	The Development Phase Area must be described in the PSDR.
Development Phase Reports	Definition of Development Phase Reports, clause 17.2 and others	The PSDR must set out a list of the Development Phase Reports required to be provided by Project Co, and the process and timing for submission of Development Phase Reports. The Monthly Development Phase Progress Report should be included in the list.
Handover Management Sub-Plan	Definition of Handover Management Sub-Plan, clauses 28.6(c) and 47.4(a)	The list of Project Plans in the PSDR should include the Asset Management Plan and the Handover Management Sub-Plan, as a sub-plan to the Asset Management Plan.
Information Management System (IMS)	Definition of IMS, clause 54.5	Where relevant, the PSDR should include a description of, and the requirements for, the IMS.
Operational Phase Area	Definition of Operational Phase Area, clauses 28.1(c) and 28.1(i)	The Operational Phase Area must be detailed in the PSDR.
Operational Phase Plans	Definition of Operational Phase Plans, clauses 32.7(a)(ii)A, 47.7(b)(i) and 47.8(a)	The Operational Phase Plans must be identified in the relevant Appendix of the PSDR.

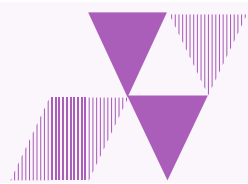




Item	Project Deed reference	Guidance note
Operational Phase Reports	Definition of Operational Phase Reports, clauses 2.8, 7.6(b)(ii), 15.5 and 17.2	Requirements for the Operational Phase Reports must be identified in the PSDR. The Operational Phase Reports must include the Asset Management Report and the Monthly Operational Phase Performance Report, which are referred to in the Project Deed.
Pandemic Management Plan	Definition of Project Management Plan	The Pandemic Management Plan must be detailed in the PSDR.
Project Plan	Definition of Project Plan and others	<p>Details of the Project Plans required to be provided by Project Co, the requirements of all Project Plans and when they will be submitted and updated must be set out in the PSDR.</p> <p>At a minimum, the Project Plans, which are referred to in the Harmonised PPP Project Deeds and need to be listed in the PSDR and provided by Project Co, include the:</p> <ul style="list-style-type: none"> <li>• Environmental Management Plan (for each of the Development Phase and Operational Phase);</li> <li>• Construction Management Plan;</li> <li>• Asset Management Plan;</li> <li>• Communications and Community Relations Plan (for each of the Development Phase and Operational Phase); and</li> <li>• WHS Management Plan.</li> </ul>
Reference Documents	Definition of Reference Documents, definition of Standards	The Reference Documents that set out Standards with which Project Co must comply must be identified in the PSDR.
Warranted Life	Definition of Warranted Life and Warranted Asset, clauses 28.6, 47.3(b)(ii) and 47.4	The PSDR must contain a list of Project Assets that will be Warranted Assets (see clause 28.6). The PSDR must set out the Warranted Life for each of the Warranted Assets.
Working Group	Definition of Working Group, clauses 7.8 and 7.9	The Harmonised PPP Project Deeds provide for Working Groups to be established. The Harmonised PPP Project Deeds require Project Co to establish additional Working Groups or liaison groups, which must be identified in the PSDR.
Inconsistency between Project Requirements	Clause 2.4	The PSDR must set out the regime to resolve inconsistencies, ambiguities or discrepancies between the documents that constitute the 'Project Requirements'.
Other Representatives' roles	Clause 7.4(e)	Each Other Representative that Project Co is required to appoint for the Project will have their role, Functions and obligations set out in the relevant appendices of the PSDR.



Item	Project Deed reference	Guidance note
Monthly Development Phase Progress Report and Monthly Operational Phase Performance Report	Clause 7.7(d)	Project Co will be required to prepare, and give to each member of the Project Control Group and the Independent Reviewer, a Monthly Development Phase Progress Report and a Monthly Operational Phase Performance Report. The PSDR must set and contain a process and requirements for these reports.
Quality Assurance System	Clause 16.2	The PSDR must set out requirements for the Quality Assurance System that Project Co must develop, implement and maintain during the Term.
Project Plans and Reports, and Notices	Clause 17	<p>The Harmonised PPP Project Deeds provide for the preparation, updating and submission of Project Plans and Reports, and Notices.</p> <p>The PSDR must include a process and requirements for:</p> <ul style="list-style-type: none"> <li>in relation to Bid Project Plans, Project Co to update them and a date by which this must be done; and</li> <li>where the Project Plans are not Bid Project Plans, Project Co to prepare and update them.</li> </ul> <p>The PSDR must also contain provisions identifying when those Project Plans must be provided to the Independent Reviewer.</p> <p>The PSDR must contain a process and requirements for Project Co to prepare and submit the Development Phase Reports and the Operational Phase Reports.</p>
Asset Information System	Definition of Asset Information System, clauses 18.3 and 47.2(d)	The PSDR must set out the requirements for the Asset Information System, including the details for Project Co's obligation to provide the Asset Information System to the State.
Commercial Acceptance Tests	Clause 24.1	The PSDR must contain a process and requirements for Project Co to develop, conduct and satisfy all tests, in order to determine Commercial Acceptance.
Returned Works Acceptance	Clause 24.4	The PSDR must contain a process and requirements for Project Co to carry out all tests, in order to determine Returned Works Acceptance.
Final Acceptance Tests	Clause 25.1(a)	The PSDR must contain a process and requirements for Project Co to develop, conduct and satisfy all tests, in order to determine Final Acceptance.
Development Phase Program process and requirements	Clause 26.2	The PSDR must contain a process and requirements for submission and amendment of the Bid Development Phase Program to become the Development Phase Program.



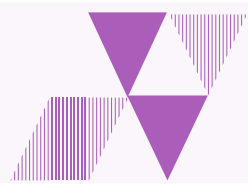
Item	Project Deed reference	Guidance note
Defects List	Clause 27.2	The PSDR must contain a process and requirements for Project Co to maintain and update a list of all Defects.
Project Co name and branding	Clause 51.5	The PSDR must set out the manner in which Project Co is permitted to display its, or any of its Associates', livery, name/corporate image or brand on the Works, Project Assets or the Project Area.
Project Co Material	Clause 54.5	The PSDR must contain a process and requirements for Project Co to implement and maintain the IMS for all Project Co Material and Project Information.

## 5. Project Documents

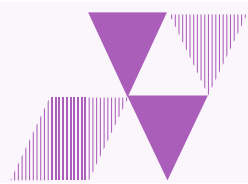
The Harmonised PPP Project Deeds have been prepared on the assumption that a standard set of Project Documents will be put in place for Availability PPP Projects. Table 16 identifies the documents referred to in the Harmonised PPP Project Deeds, including a short description and the development process. See section 2.4 for a discussion of execution of Project Documents, as a Condition Precedent to Financial Close.

**Table 16 – Harmonised PPP Project Deed documents**

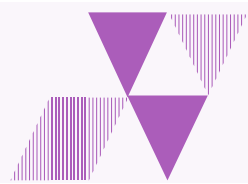
Document	Parties	Description	Development
D&C Contract	<ul style="list-style-type: none"> <li>Project Co</li> <li>D&amp;C Contractor</li> </ul>	Design and construction delivery contract between Project Co and the D&C Contractor	<p>Executed Term sheet or draft contract is to be prepared and provided by Respondents as part of the Proposal.</p> <p>If a Term sheet is provided as part of the Proposal, a draft contract is to be prepared and provided by the Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal.</p>



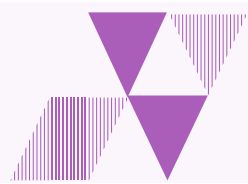
Document	Parties	Description	Development
D&C Contractor and Services Contractor Interface Deed	<ul style="list-style-type: none"> <li>Project Co</li> <li>D&amp;C Contractor</li> <li>Services Contractor</li> </ul>	Sets out interface arrangements and risk allocation between the D&C Contractor and the Services Contractor	<p>Inclusion is subject to the Successful Respondent's Proposal.</p> <p>Executed Term sheet or draft contract is to be prepared and provided by the Respondent as part of the Proposal.</p> <p>If a Term sheet provided as part of Proposal, a draft contract is to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal.</p>
D&C Contractor Construction Bond	<ul style="list-style-type: none"> <li>Bond issuer</li> <li>Project Co</li> </ul>	Performance Bond provided by the D&C Contractor in favour of Project Co, pursuant to the D&C Contract	Inclusion is subject to the Successful Respondent's Proposal and security package. If applicable, a proposed form of bond and value (including step down in value) is to be prepared and provided by the Respondent as part of its Proposal.
D&C Contractor Direct Deed	<ul style="list-style-type: none"> <li>State</li> <li>Project Co</li> <li>D&amp;C Contractor</li> <li>Parent Guarantor of the D&amp;C Contractor</li> </ul>	Allows, among other things, for step-in by the State or State nominee, or novation of the D&C Contract to the State or State nominee, in the event of default by Project Co	This is to be prepared by the State, based on recent PPP precedent and released in Volume 3 of the RFP.
Direct Interface Deeds	<ul style="list-style-type: none"> <li>Project Co</li> <li>Direct Interface Parties</li> </ul>	An agreement under which Project Co has recourse against a Direct Interface Party in respect of acts or omissions of the Direct Interface Party in carrying out the Direct Interface Works	<p>The RFP will identify whether Direct Interface Deeds will be required and the phase of the procurement process that Term sheets and draft documents will be provided by the Respondent.</p> <p>This is to be prepared by the Respondent.</p>



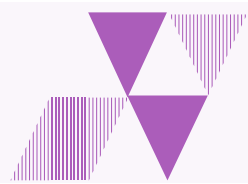
Document	Parties	Description	Development
Equity Documents	<ul style="list-style-type: none"> <li>• Various</li> </ul>	Documents that govern the terms and conditions associated with the provision of private sector equity finance to Project Co, including an Equity Subscription Agreement	<p>Executed equity commitment letter and Term sheets to be prepared and provided by the Respondent as part of the Proposal.</p> <p>Equity Documents to be prepared and provided by the Successful Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal.</p>
Expert Determination Agreement	<ul style="list-style-type: none"> <li>• State</li> <li>• Project Co</li> <li>• Expert</li> </ul>	Agreement jointly appointing the independent expert, governing the expert determination process and the terms that the expert will be subject to	<p>Schedule 8 of Project Deed.</p> <p>Negotiated with the independent expert and executed during the Term, when the independent expert is appointed.</p>
Finance Direct Deed	<ul style="list-style-type: none"> <li>• State</li> <li>• Project Co</li> <li>• Facility Agent</li> <li>• Security Trustee</li> <li>• Other Project Entities (if applicable)</li> </ul>	Sets out, among other things, the respective rights and obligations of the State, and each of the Security Trustee and the Facility Agent (each acting on behalf of the Financiers), in the event of default by Project Co under the Project Deed and certain defaults by Project Co under its Finance Documents	This is to be prepared by the State, based on recent PPP precedent and released in Volume 3 of the RFP.
Finance Documents	<ul style="list-style-type: none"> <li>• Various</li> </ul>	Documents that govern the terms and conditions associated with the provision of private sector debt finance to Project Co, including Funding Documents, Security Documents, Security Trust Deed (establishing the Security Trustee as trustee of the security for the Financiers) and Consent Deeds between Security Trustee and each of the D&C Contractor and Services Contractor (allowing the Security Trustee to step in and rectify defaults by Project Co under the D&C/Services Contract, before termination by the D&C/Services Contractor, as appropriate)	<p>Executed debt commitment letter and debt Term sheet are to be prepared and provided by the Respondent as part of its Proposal.</p> <p>Finance Documents are to be prepared and provided by the Preferred Respondent during the Negotiation and Completion Phase, based on information provided by the Respondent in its Proposal.</p>



Document	Parties	Description	Development
Independent Reviewer Deed of Appointment	<ul style="list-style-type: none"> <li>State</li> <li>Project Co</li> <li>Independent Reviewer</li> </ul>	<p>Sets out the terms and conditions for the appointment of the Independent Reviewer by the State and Project Co, pursuant to and for the purposes of the Project Deed. It will include details of the scope of work to be undertaken by the Independent Reviewer. The Independent Reviewer will be appointed for a period covering the Development Phase and any DLP</p>	<p>This is to be prepared by the State, based on recent PPP precedent and released in Volume 3 of the RFP.</p>
Management Services Contract	<ul style="list-style-type: none"> <li>Project Co</li> <li>Management Services Contractor</li> </ul>	<p>Contract under which the Management Services Contractor undertakes Management Services for Project Co, in respect of the Project</p>	<p>Inclusion is subject to the Successful Respondent's Proposal and contracting structure. If a Management Services Contractor is proposed, an executed Term sheet is to be prepared and provided by Respondent as part of its Proposal.</p> <p>If a Term sheet is provided as part of the Proposal, a draft contract is to be prepared and provided by the Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal.</p>
Parent Guarantees	<ul style="list-style-type: none"> <li>Parent Guarantors</li> <li>Project Co</li> <li>D&amp;C Contractor/ Services Contractor</li> </ul>	<p>Separate guarantees in favour of Project Co provided by:</p> <ul style="list-style-type: none"> <li>the Parent Guarantor/s of the D&amp;C Contractor, in connection with the obligations of the D&amp;C Contractor under the D&amp;C Contract; and</li> <li>the Parent Guarantor/s of the Services Contractor, in connection with the obligations of the Services Contractor under the Services Contract</li> </ul>	<p>Draft documents are to be prepared and provided by the Respondent as part of its Proposal.</p>



Document	Parties	Description	Development
Services Contract	<ul style="list-style-type: none"> <li>• Project Co</li> <li>• Services Contractor</li> </ul>	Services delivery contract between Project Co and the Services Contractor	<p>Executed Term sheet or draft contract is to be prepared and provided by the Respondent as part of its Proposal (see section 5.1.1 of RFP, Part 1B).</p> <p>If a Term sheet is provided as part of the Proposal, a draft contract is to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal.</p>
Services Contractor Direct Deed	<ul style="list-style-type: none"> <li>• State</li> <li>• Project Co</li> <li>• Services Contractor</li> <li>• Parent Guarantor of the Services Contractor</li> </ul>	Allows, among other things, for step-in by the State or State nominee, or novation of the Services Contract to the State or State nominee, in the event of default by Project Co	This is to be prepared by the State, based on recent PPP precedent and released in Volume 3 of the RFP.
Services Contractor Performance Bond	<ul style="list-style-type: none"> <li>• Issuing party</li> </ul>	Performance Bond provided by the Services Contractor in favour of Project Co	Inclusion is subject to the Successful Respondent's Proposal and security package. If applicable, a proposed form of bond and value (including step down in value) is to be prepared and provided by the Respondent as part of its Proposal.
Significant Subcontracts	<ul style="list-style-type: none"> <li>• D&amp;C Contractor/ Services Contractor</li> <li>• Significant Subcontractors</li> </ul>	Subcontract for all or part of the Project Activities between either the D&C Contractor or the Services Contractor, and a Significant Subcontractor	<p>Inclusion is subject to the Successful Respondent's Proposal and subcontracting structure.</p> <p>This is to be prepared and provided by Respondents during the Negotiation and Completion Phase or the Term, based on information provided by the Preferred Respondent in its Proposal.</p>

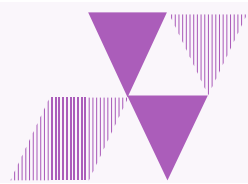


Document	Parties	Description	Development
State Security	<ul style="list-style-type: none"> <li>State</li> <li>Project Co</li> <li>Other Project Entities (if applicable)</li> </ul>	Provides the State with a Security Interest over all of Project Co's assets and undertakings, as security for performance of Project Co's obligations under the State Project Documents. It sits together with the security required by the Financiers, and will accordingly be extended to include security from any separate borrower under the Finance Documents, if the borrower is not Project Co	This is to be prepared by the State, based on recent PPP precedent and released in Volume 3 of the RFP.
Other Subcontractor Direct Deed	<ul style="list-style-type: none"> <li>State/Project Co</li> <li>D&amp;C Contractor/ Services Contractor</li> <li>Significant Subcontractor/Key Subcontractor</li> </ul>	Allows, among other things, for step-in by the State or State nominee, or novation of the Subcontract to the State or State nominee, in the event of default by the D&C Contractor or Services Contractor (as the case may be)	<p>Inclusion is subject to the State's assessment of the Successful Respondent's Proposal.</p> <p>This is to be prepared by the State during the Negotiation and Completion Phase, based on Schedule 7, and including amendments required by the State due to assessment of the Successful Respondent's Proposal.</p>
Sub-Independent Reviewer Deed of Appointment	<ul style="list-style-type: none"> <li>Project Co</li> <li>D&amp;C Contractor</li> <li>Independent Reviewer as the Sub-Independent Reviewer</li> </ul>	Sets out the terms and conditions for the appointment of the Sub-Independent Reviewer by Project Co and the D&C Contractor, pursuant to and for the purposes of the D&C Contract. It will include details of the scope of work to be undertaken by the Sub-Independent Reviewer	This is to be prepared and provided by Successful Respondents during the Negotiation and Completion Phase.

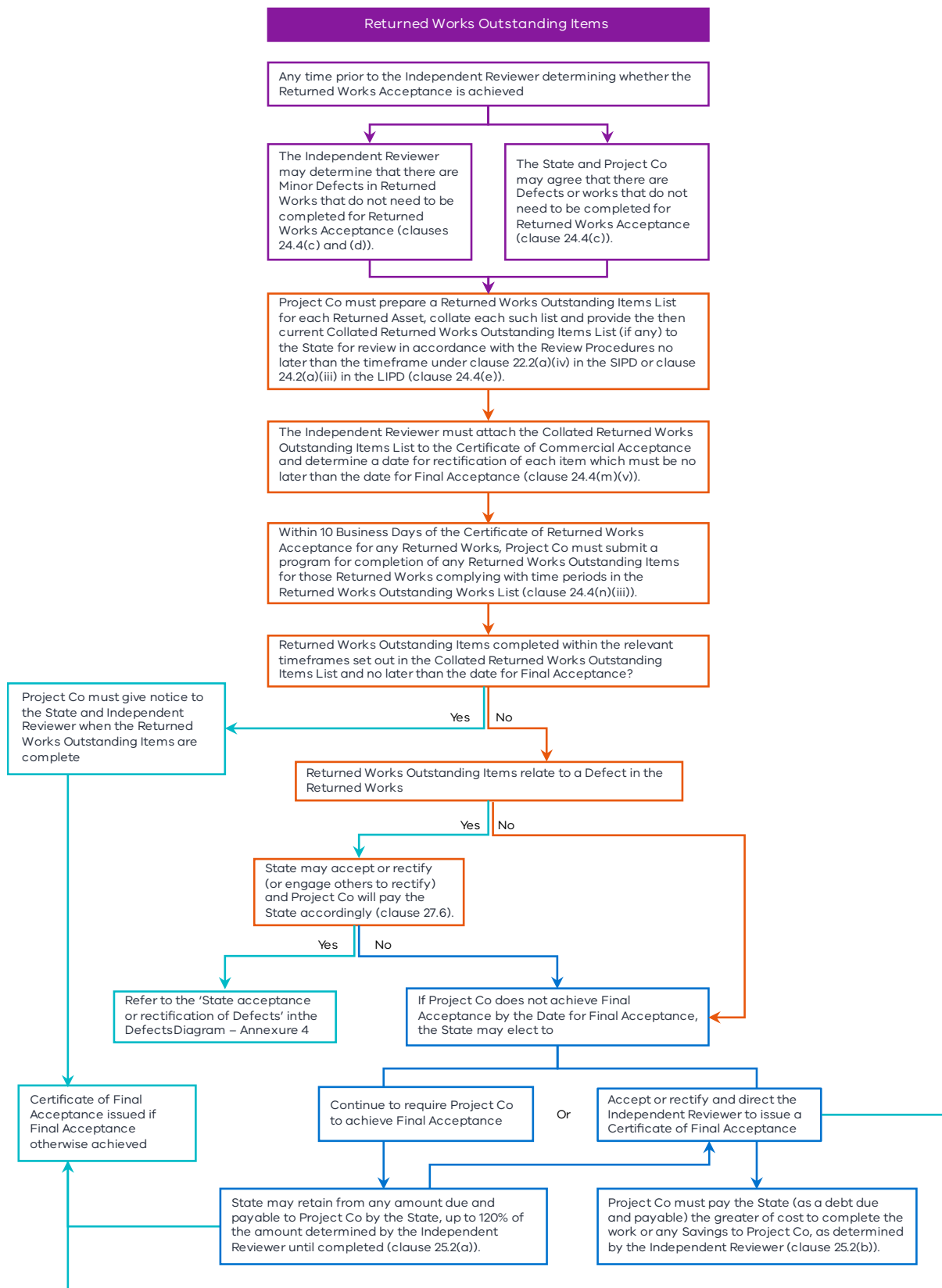
Where a document is subject to the Preferred Respondent's Proposal, if such documents are not relevant, reference to it must be deleted from the SIPDs (with the numbering maintained and shown as 'Not Used').

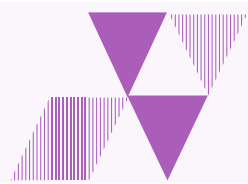
Annexure 7 summarises the interrelation between the key Project Documents and its relevant parties.



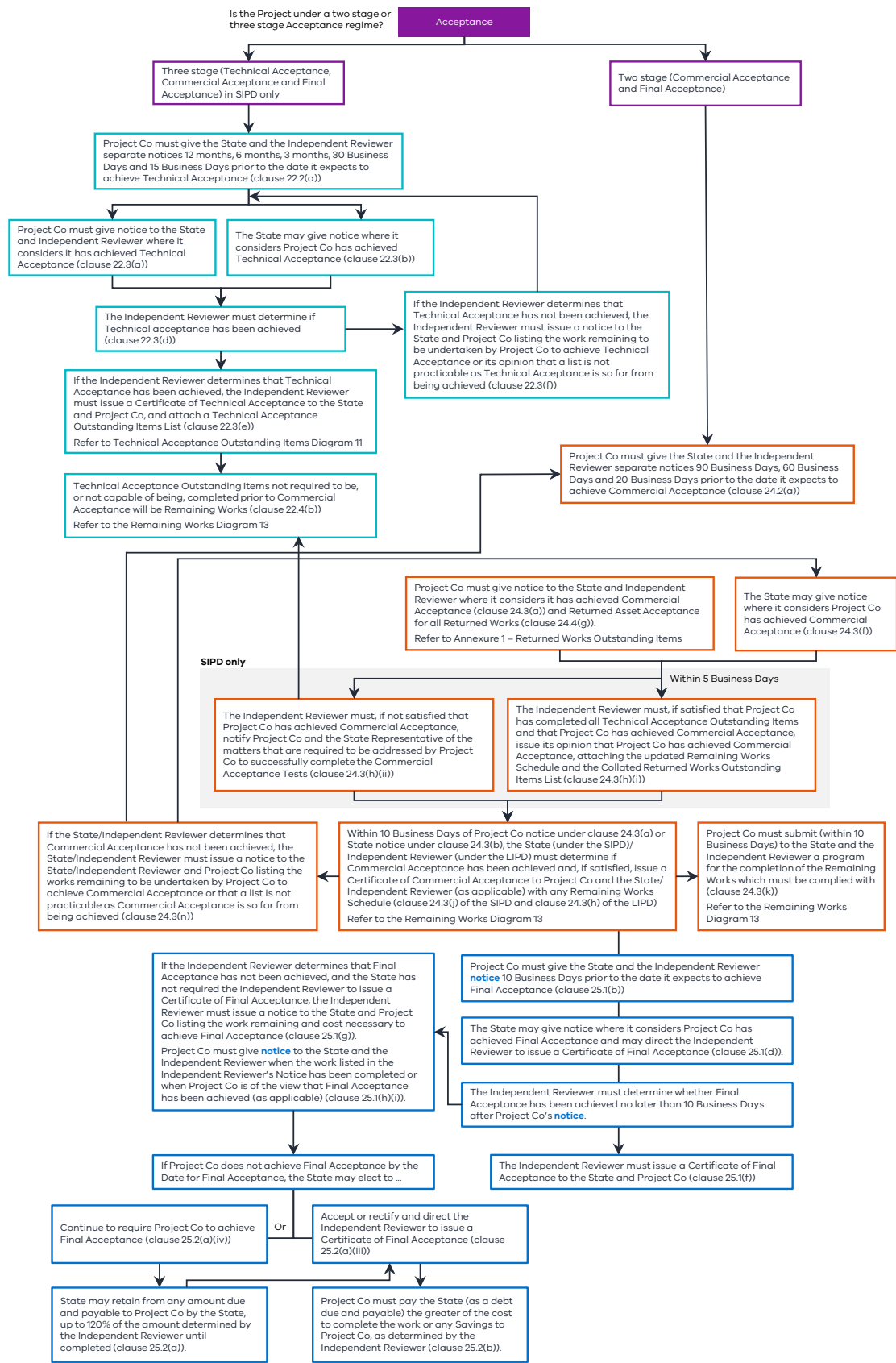


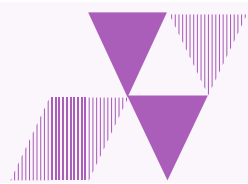
# Annexure 1 – Returned Works Outstanding Items



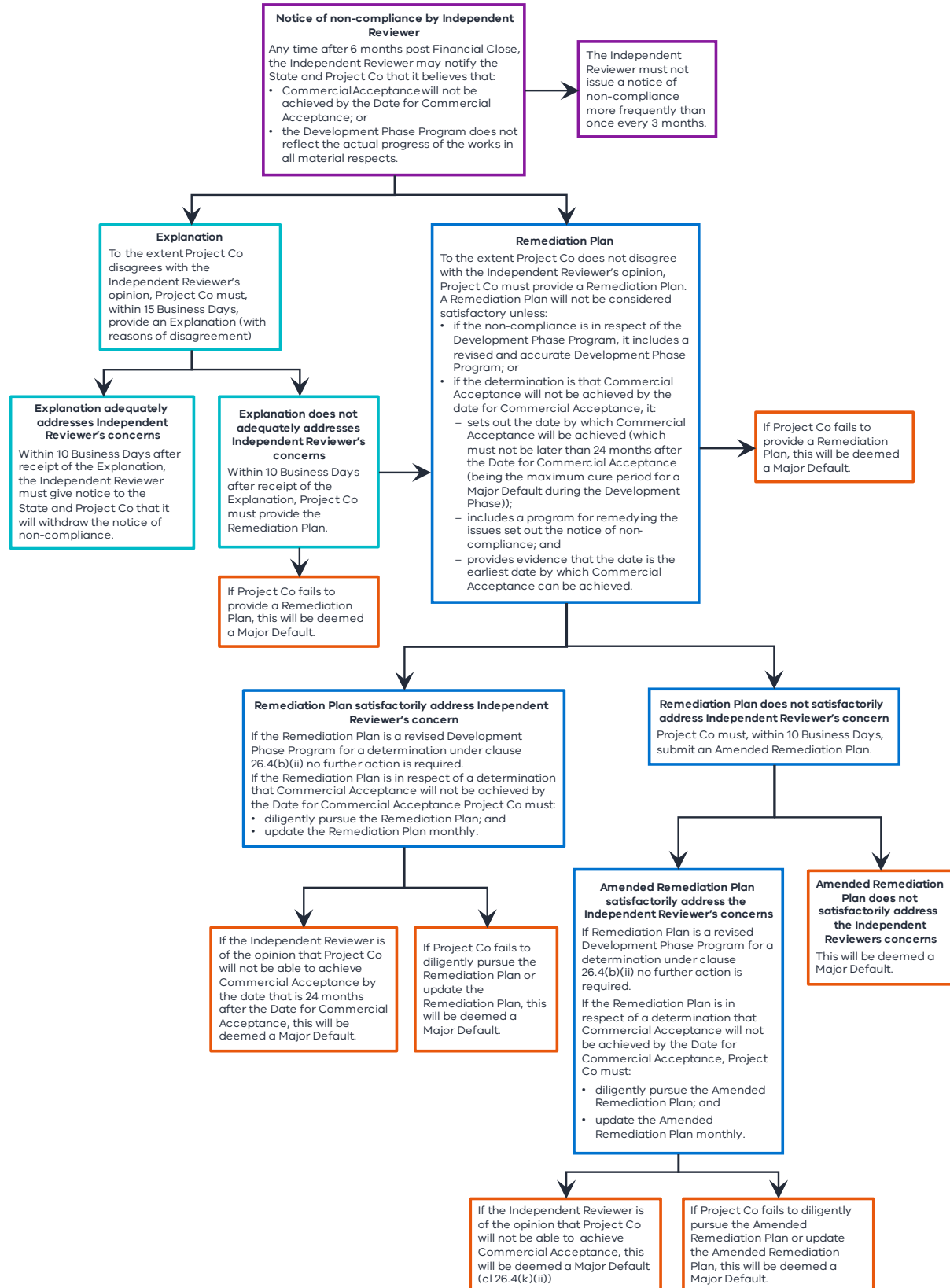


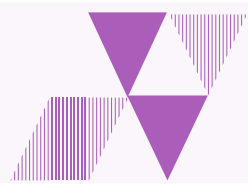
# Annexure 2– Acceptance



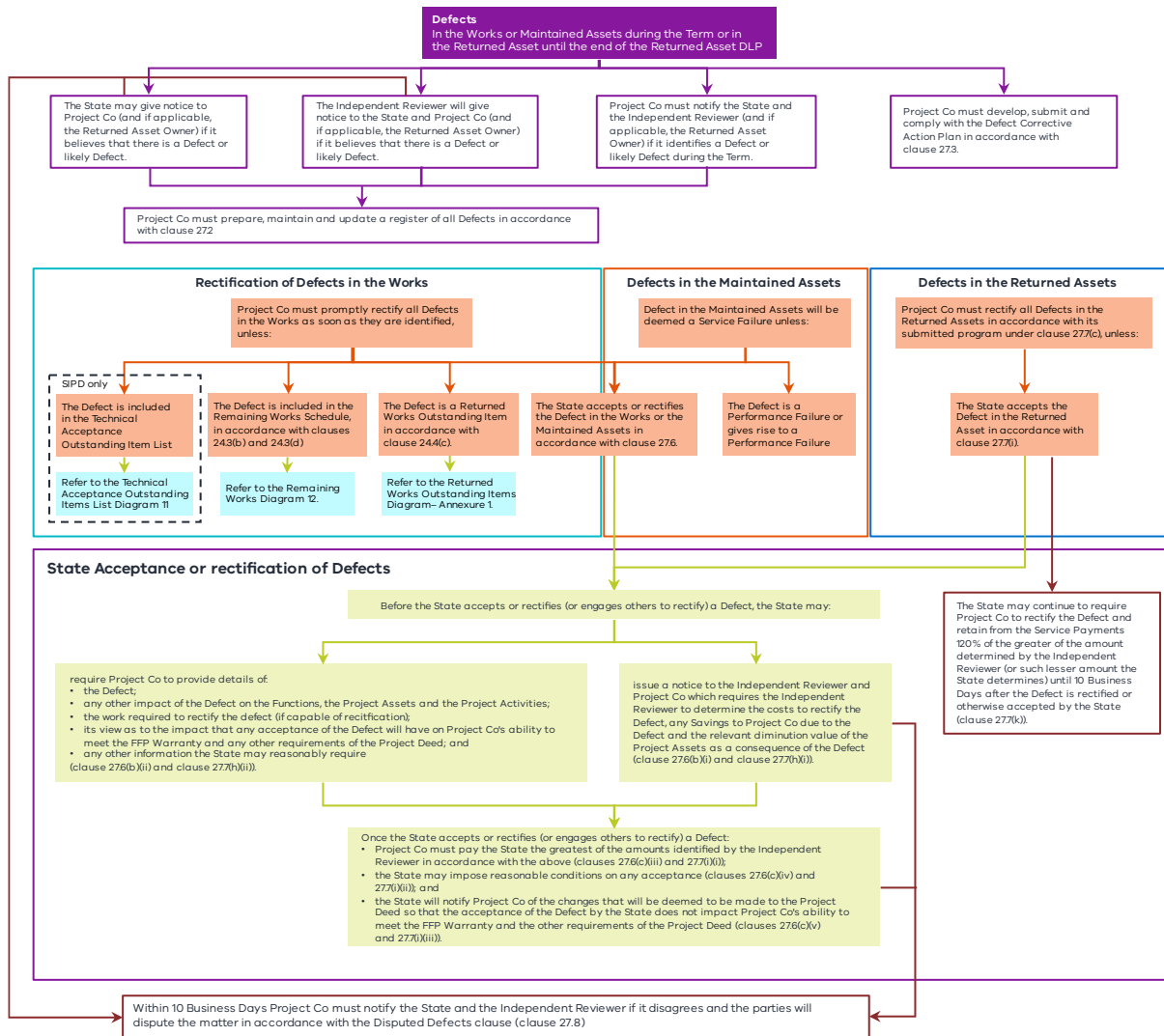


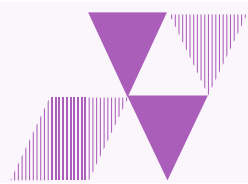
# Annexure 3 – Independent Reviewer Look Forward Test





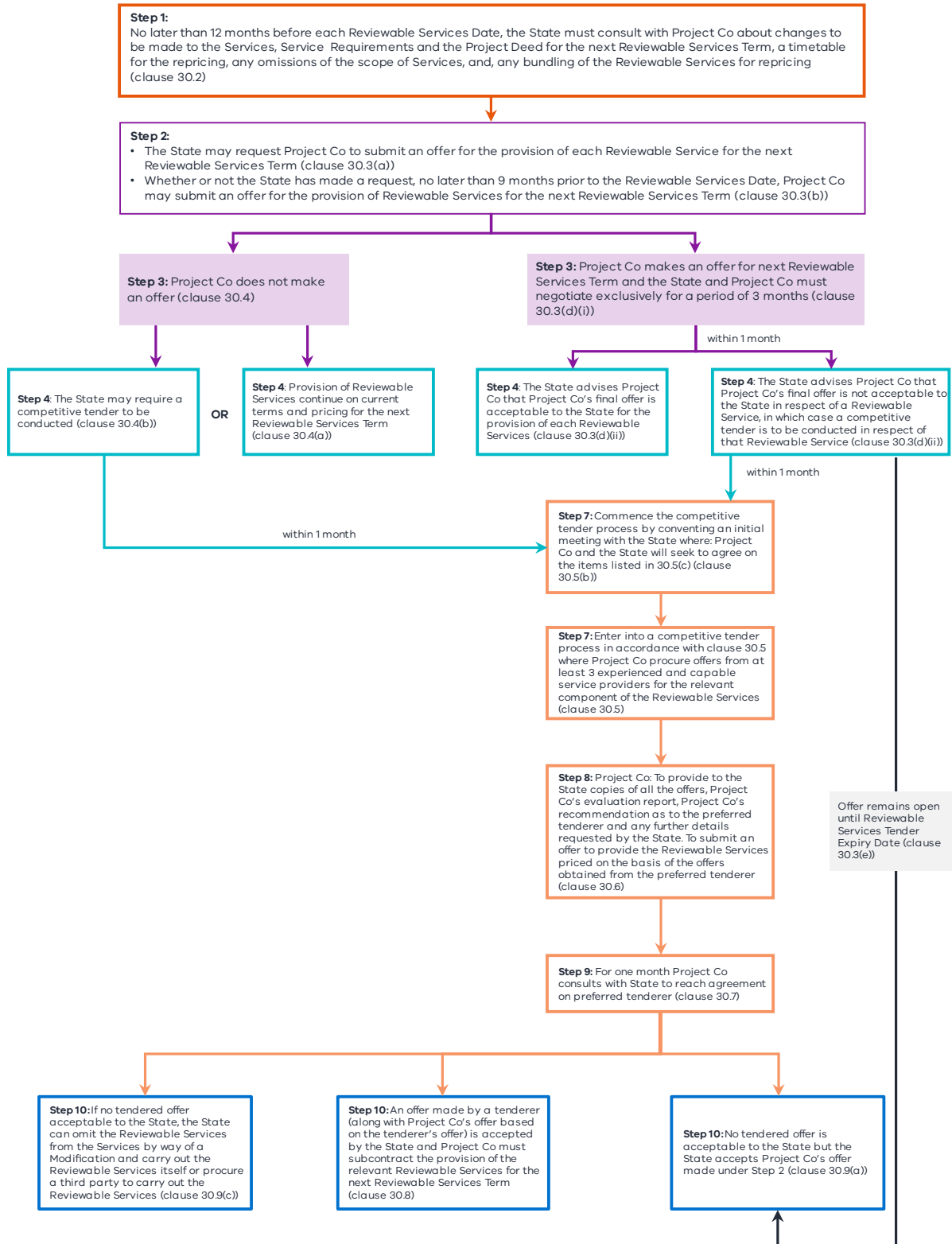
# Annexure 4 – Defects

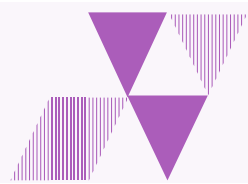




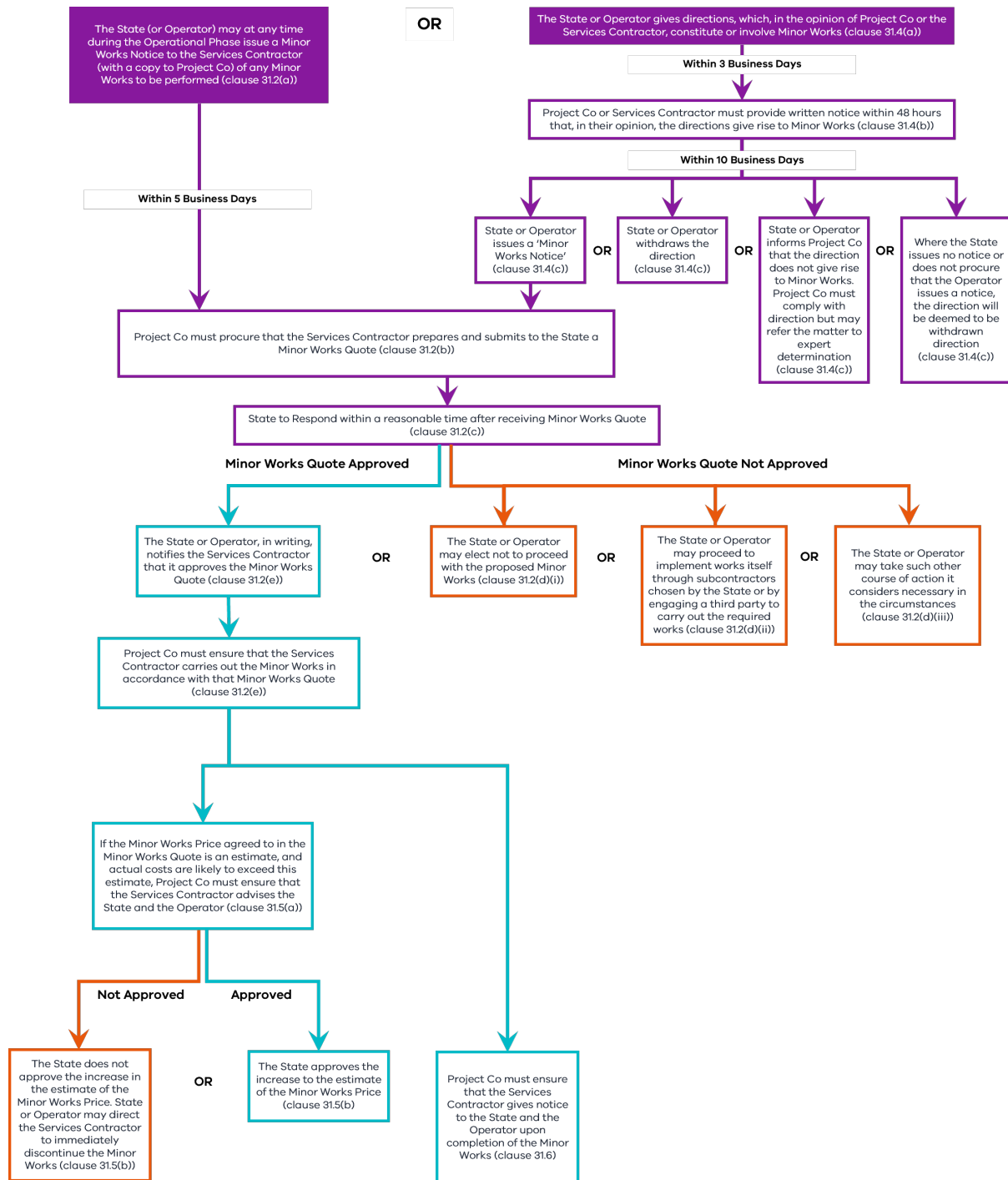
# Annexure 5 – Reviewable Services

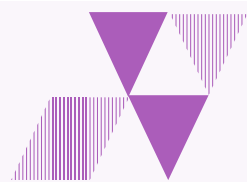
## Repricing Reviewable Services





# Annexure 6 – Minor Works





# Annexure 7 – Roadmap of Project Documents

