**Sample Document**

**Priority & Co-ordination Deed**

|  |  |
| --- | --- |
| **What is this sample document usually called?** | Priority & Co-Ordination Deed or Priority Deed. |
| **What group of documents does it belong to?** | Secured Transaction Documents.See *What other documents are closely related to it?* below. |
| **Who will sign it?** | State of Victoria (acting through a named Government Department) (the **State**).Bond Security Trustee.Issuer of the Social Impact Bonds (**Bonds**), which is likely to be the Proponent. |
| **When is it used?** | **Secured Transactions** for any funding model that requires the State to take security, and where it is also agreed with Bond investors that security is to be given to them, over particular property. |
| **What does it do?** | Regulates priorities and enforcement of rights between the interests created under the First Security Deed and Second Security Deed and provides other agreements for co-ordination. |
| **What areas does it cover?** | * Agreement of the ranking of priorities between the security interests.
* Regulating operation of secured bank accounts and exercise of termination rights under the Implementation Agreement.
* It also provides a form of the Account Bank Agreement.
 |
| **What drafting options does it include?** | Standard provisions for a **Secured Transaction** that are to apply generally.**SPE Proponent Transaction Provisions** where a special purpose entity is the grantor of the security.Drafting instructions are included in the sample document to assist in drafting for the inclusion (or removal) of these and other optional features. |
| **What other documents are closely related to it?** | * First Security Deed – grants a security interest over particular property to the benefit of the State.
* Second Security Deed – establishes a security trust deed and grants a security interest over particular property for the benefit of Bond investors.
 |
| **What should we do before we use this sample document?** | This sample document contains general provisions and other information only and does not take into account the objectives, needs or financial arrangements of any particular transaction. Before using this sample document, you should:* carefully consider and make your own assessment of whether it is appropriate for the SIB arrangement or other transaction that you are considering;
* perform your own independent investigation and analysis of the suitability and appropriateness of this sample document for any SIB arrangement or other transaction that you are considering;
* consult your own legal, tax and other professional advisers as part of your assessment of this sample document and its suitability for your transaction; and
* satisfy yourself that cross references in the sample document to other provisions of the sample document, or to any provisions or the names of other documents, are correct.
 |
| **Why is this sample document available?** | This sample document is intended to provide a guide for, and to streamline the development of, the documentation (and specific provisions) that is used for an SIB arrangement. This sample document can be freely used for such a purpose. Use of this sample document may help to make the legal process more efficient and reduce costs. The State is not making the use of the sample document mandatory but the State would expect to take into account in any evaluation of a proposed SIB arrangement the non-use of the sample document and the reasons for the non-use, any material departures from the sample document and the reasons for the departures and the possible implications for time, cost and efficiency. The acceptance of the final form of this document by the State will be a condition precedent to the terms of the SIB arrangement. However, it may not be suitable in all circumstances and the State reserves the right to require a departure from this sample document in order to address the specifics of a particular SIB arrangement, to address then current market practice and conditions and otherwise as necessary to protect the interests of the relevant department, agency or other State body and the State. |
| **Where can I get further information?** | If you have any questions in relation to this sample document, or any specific provision or other related information, queries can be directed to socialimpactbonds@dtf.vic.gov.au.  |

**Legal matters**

This sample document has been prepared by King & Wood Mallesons at the request of, and in consultation with, the Victorian Department of Treasury and Finance (**DTF**) and its advisers. It forms part of a suite of sample transaction documents that has been developed by DTF for use in connection with SIB arrangements.

This sample document has been derived in part from the Priority and Co-ordination Deed of Queensland Treasury (**Reference Work**), prepared in consultation with Trevor Danos AM and King & Wood Mallesons, the use of which for the purposes of preparing this document is gratefully acknowledged. Users of this sample document are directed to the copyright notices and acknowledgments on its cover page.

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**Priority & Co-ordination Deed**
(State of Victoria Social Impact Bonds Pilot Project)

**[*State of Victoria acting through*** [***insert Department’s name***]**]**

**[*insert legal name and ABN of Bond Security Trustee*]**

**[*insert legal name and ABN of Organisation*]**

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Details

|  |  |
| --- | --- |
| **Parties** | **State**, **Bond Security Trustee** and **Organisation** |
| **State** | Name | [*Relevant Minister (Portfolio) and Department*]  |
|  | ABN | [*insert ABN*] |
|  | Address | [*insert address*] |
|  | Fax | [*insert fax number (including area code)*]] |
|  | Telephone | [*insert phone number (including area code)*] |
|  | Email | [*insert email address (if applicable)*] |
|  | Attention | [*insert contact*] |
| **Bond Security Trustee** | Name | [*insert legal name*] |
| ABN | [*insert ABN*] |
|  | Capacity | as trustee of [*name of Security Trust*] |
|  | Address | [*insert business address*] |
|  | Fax | [*insert fax number (including area code)*] |
|  | Telephone | [*insert phone number (including area code)*] |
|  | Email | [*insert email address (if applicable)*] |
|  | Attention | [*insert contact*] |
| **Organisation**  | Name | [*insert legal name*] |
| ABN | [*insert ABN*] |
|  | [Capacity] | [*include if applicable – for example, where the Organisation is a special purpose entity that is a trust, and the trustee is acting in that capacity (and not in its personal capacity) – otherwise delete this item*] |
|  | Address | [*insert business address*] |
|  | Fax | [*insert fax number (including area code)*] |
|  | Telephone | [*insert phone number (including area code)*] |
|  | Email | [*insert email address (if applicable)*] |
|  | Attention | [*insert contact*] |
| **Governing law** | Victoria, Australia |
| **Date of document**  | [*insert date*]  |

[[[1]](#footnote-1)] General terms

# Interpretation

## Definitions and interpretation

These meanings apply unless the contrary intention appears:

**Account Bank** means the Australian financial institution at which the Project Account is opened. The Account Bank is initially [*insert financial institution*].

**Account Bank Agreement** means a document substantially in the form set out in the Schedule (“Form of Account Bank Agreement”) and executed by the Account Bank, the State and the Organisation.

**Authorised Officer** means:

in the case of the State, any person nominated by the State as an Authorised Officer of that party for the purposes of this document; and

in the case of the Bond Security Trustee and the Organisation:

[[[2]](#footnote-2)] [a director or company secretary of that company, or an officer or employee of that company whose title contains the word “treasurer”, “director”, “chief”, “head”, “president”, “manager” or “counsel” or a person performing the functions of any of them;] or

any person nominated by that party as an Authorised Officer of that party for the purposes of the Transaction Document.

**Bond Security Secured Money** has the meaning given to the term “Secured Money” in the Second Security Deed.

**Bond Security Trustee** means the person so described in the Details.

**Bond Transaction Documents** means:

this document;

the Second Security Deed;

the terms and conditions of issue of the Bonds; and

the document entitled “SIB Deed Poll (State of Victoria Social Impact Bonds Pilot Project)” executed or to be executed by the Organisation in connection with the Bonds.

**Bonds** means social benefit bonds issued by the Organisation in connection with the SIB arrangement described in the Implementation Agreement.

**Business Day** means a day (not being a Saturday, Sunday or public holiday in that place) on which banks are open for general banking business in Melbourne.

**Collateral** means all assets, property, rights and undertaking which the Organisation acquires or to which the Organisation becomes entitled and which are subject to the First Security Deed and/or the Second Security Deed.

**Corporations Act** means the Corporations Act 2001 (Cth).

**Costs**includes costs, charges and expenses, including those incurred in connection with advisers.

**Details** means the section of this document headed “Details”.

**Encumbrance** means any:

security interest as defined in section 12(1) or section 12(2) of the PPSA; or

security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power or title retention or flawed deposit arrangement; or

right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off; or

right that a person (other than the owner) has to remove something from land (known as a profit à prendre), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or

third party right or interest or any right arising as a consequence of the enforcement of a judgment,

or any agreement to create any of them or allow them to exist.

**First Security Deed** means the document entitled “First Security Deed (State of Victoria Social Impact Bonds Pilot Project)” dated [*insert date*] between the Organisation and the State.

**Implementation Agreement** means the document entitled “Implementation Deed of Agreement” dated [*insert date*] between the Organisation and the State (including the Operations Manual that forms part of that document).

**Machinery of Government Change** means a transfer of responsibility, function or operations, in whole or in part, from a Victorian Government department or agency or Victorian Government Body to another Victorian Government department or agency or Victorian Government Body.

**Organisation** means the person so described in the Details.

**PPSA** means the Personal Property Securities Act 2009 (Cth) and includes any regulations made at any time under that Act.

**Project Account** has the meaning given in the First Security Deed.

“**Victorian Government Body**” means any of:

(a) a body corporate or an unincorporated body established or constituted for a public purpose by legislation of the Victorian Parliament, or an instrument made under that legislation (including a local authority);

(b) a body established by the State of Victoria through the Governor or a Minister; or

(c) an incorporated or unincorporated body over which the State of Victoria exercises control.

**Receiver**includes a receiver or receiver and manager.

**Related Entity** has the meaning it has in the Corporations Act.

**Remaining Standing Charge** means the amount of the Remaining Standing Charge at any time owing by the Organisation to the State under Schedule [2] (“Payment Schedule”) of the Implementation Agreement and in accordance with the Implementation Agreement (including all amounts of interest included therein and/or accrued thereon in accordance with clause [7.2] (“Late payments”) of the Implementation Agreement).

**Second Security Deed** means the document entitled “Second Security Deed (State of Victoria Social Impact Bonds Pilot Project)” dated [*insert date*] between the Organisation and the Bond Security Trustee.

**Secured Amounts** means the total, at any time of:

all the State Secured Money; and

all the Bond Security Secured Money.

**Secured Party** means either the State or the Bond Security Trustee, as the context admits.

**Security** means the First Security Deed and/or the Second Security Deed, as the context admits.

**Security Trust** means the trust constituted in accordance with the Second Security Deed.

**Security Trust Fund** means:

the amount held by the Bond Security Trustee under clause [3.1] (“Declaration of Security Trust”) of the Second Security Deed; and

any other property which the Bond Security Trustee receives, has vested in it or otherwise acquires to hold in respect of the Security Trust, including the Second Security Deed; and

any property which represents the proceeds of sale of any such property or proceeds of enforcement of the Second Security Deed.

**State** means the person so described in the Details.

**State Secured Money** has the meaning given to the term “Secured Money” in the First Security Deed.

**Taxes** means taxes, levies, imposts, charges and duties (including stamp and transaction duties) imposed by any authority together with any related interest, penalties, fines and expenses in connection with them, except if imposed on, or calculated having regard to, the overall net income of the State, the Bond Security Trustee or the Organisation, as the case may be.

**Wilful Default** means, in respect of the Organisation or the Bond Security Trustee, any intentional failure to comply with or intentional breach by the Organisation or the Bond Security Trustee (as applicable) of any of its obligations under this document, other than a failure or breach:

which arose as a result of a breach by another party to this document or any other person to fulfil its obligations under this document or by any other act or omission of a party to this document or any other person; or

which is in accordance with a lawful court order or direction or required by law; or

which is in accordance with an instruction or direction given to it by any person (including another party to this document) in circumstances where that person is entitled to do so by this document or at law.

[***Option 2 Provisions (SPE Proponent Transactions).*** *Where a special purpose entity is included in the transaction structure:*

1. *If used in clause 13 (“Organisation limitation of liability”), the following definitions are for inclusion with the above (in alphabetical order) and modification as appropriate:*

**Service Provider** means [*insert legal name and ABN*], in its capacity as the “Service Provider” under the Services Subcontract.

**Services Subcontract** means the “Services Subcontract” dated [*insert date*] between the Organisation and the Service Provider.

1. *Where the special purpose entity is a trust, the definition of “****Collateral****” is to be replaced in full by the following:*

**Collateral** means, in relation to the Trust, all the Organisation’s assets, property, rights and undertaking which are the subject of the Trust that the Organisation acquires or to which the Organisation becomes entitled and which are subject to the First Security Deed and/or the Second Security Deed.

1. *Where the special purpose entity is a trust, the following definitions are for inclusion with the above (in alphabetical order) and modification as appropriate:*

**Assets** means, in relation to the Trust, all the Organisation’s assets, property, rights and undertaking which are the subject of the Trust:

of whatever kind and wherever situated; and

whether present or future.

**Trust** means the trust created under the Trust Deed.

**Trust Deed** means the document entitled “Charitable Trust Deed (State of Victoria Social Impact Bonds Pilot Project)” dated [*insert date*] executed by (among others) the Organisation.

1. *Where the special purpose entity is managed by a third-party (in the case of a trust, a person other than the trustee), the following definition is for inclusion with the above (in alphabetical order) and modification as appropriate:*

**Manager** means the manager of the Organisation, initially [*insert name and ABN*].

*End of Option 2 Provisions (delete if transaction structure does not involve a special purpose entity).*]

## General interpretation

Headings are for convenience only and do not affect interpretation. Unless the contrary intention appears in this document, the following applies:

### the singular includes the plural and vice versa;

### a reference to a document or an agreement (including this document) includes the document or agreement as varied, novated, supplemented, extended, replaced or restated;

### the meaning of general words is not limited by specific examples introduced by “**including**”, “**for example**” or “**such as**” or similar expressions;

### a reference to a particular person includes the person’s executors, administrators, successors, substitutes (including persons taking by novation) and assigns;

### the word “person” includes an individual, a body corporate, a partnership,a joint venture, an unincorporated association and an authority or any other entity or organisation;

### a reference to a time of day is a reference to Melbourne time;

### a reference to “**dollars**”, “**$**” or “**A$**” is a reference to the currency of Australia;

### a reference to the word “**law**” includes common law, principles of equity and legislation (including regulations);

### a reference to any legislation includes regulations under it and any consolidations, amendments, re-enactments or replacements of any of them;

### a reference to the word “**regulations**” includes instruments of a legislative character under legislation (such as regulations, rules, by-laws, ordinances and proclamations);

### an agreement, representation or warranty in favour of 2 or more persons is for the benefit of them jointly and each of them individually;

### a reference to a group of persons is a reference to any 2 or more of them jointly and to each of them individually;

### a reference to any thing (including an amount) is a reference to the whole and each part of it;

### a reference to accounting standards is a reference to accounting standards, principles and practices generally accepted in the relevant place, consistently applied;

### a reference to an accounting term in an accounting context is a reference to that term as it is used in relevant accounting standards;

### a reference to “**property**” or “**asset**” includes any present or future, real or personal, tangible or intangible property, asset or undertaking and any right, interest or benefit under or arising from it;

### a reference to “**control**” includes control as defined in the PPSA; and

### a reference to “**possession**” includes possession as defined in the PPSA.

## Capacity – Security Trustee

In this document, except where expressly provided to the contrary, a reference to:

### the Bond Security Trustee is a reference to the Bond Security Trustee in its capacity as trustee of the Security Trust, and in no other capacity; and

### the undertaking, assets, business, money or any other thing of or in relation to the Bond Security Trustee is a reference to such undertaking, assets, business, money or other thing of or in relation to the Bond Security Trustee only in its capacity as trustee of the Security Trust only, and in no other capacity.

[***Option 2 Provisions (SPE Proponent Transactions).***

1. *Where the Organisation is a special purpose entity that is a trust, insert:*

## Capacity – Organisation

In this document, except where expressly provided to the contrary, a reference to:

### the Organisation is a reference to the Organisation in its capacity as trustee of the Trust, and in no other capacity; and

### the undertaking, assets, business, money or any other thing of or in relation to the Organisation is a reference to such undertaking, assets, business, money or other thing of or in relation to the Organisation only in its capacity as trustee of the Trust only, and in no other capacity.

1. *Where the special purpose entity is managed by a third-party (in the case of a trust, a person other than the trustee), insert:*

## Organisation may act through Manager

### The Organisation may comply with its obligations under this document by arranging for the Manager to comply with them on its behalf.

### If a Manager acts for the Organisation:

#### the Organisation must promptly notify the Secured Parties of the appointment of the Manager; and

#### the each Secured Party is entitled, at all times for the duration of that appointment, to treat the Manager as the primary contact in relation to all matters in relation to this document and the transactions contemplated by it, and any communication by or from the Manager relating to such matters may be relied on by the Secured Party as a communication made on behalf of the Organisation and is binding on the Organisation.

*End Option 2 Provisions (delete if transaction structure does not involve a special purpose entity).*]

# Consideration

Each Secured Party and the Organisation acknowledges entering into this document, and incurring obligations and giving rights under this document, for valuable consideration.

# Priorities

## Priorities

The Secured Parties agree that, in respect of the Collateral, the payment of amounts secured at any time under either Security shall rank in the following order of priority:

### first, all amounts owing, or contingently owing, in respect of:

#### the Remaining Standing Charge; and

#### any [other] amount owing:

##### to the State under, or in connection with, the Implementation Agreement for which a corresponding amount has been received by, or duly paid to, the Organisation that is so received or paid in compensation for the amount owing to the State; and

##### under clause [16.1(b)] (“What the Organisation agrees to pay”) of the First Security Deed,

#### and secured at any time under the First Security Deed;

### second:

#### all amounts owing, or contingently owing in respect of the repayment of principal, and all amounts of interest due and payable, on the Bonds; and

#### any other amount owing to:

##### any Receiver appointed in accordance with the Second Security Deed, for its remuneration, Costs and fees in connection with it acting as receiver in accordance with the Transaction Documents;

##### the Bond Security Trustee for its Costs and other amounts due to it for its own account in connection with its role as trustee in relation to the Security Trust; and

##### the Organisation for its Costs and other amounts due to it for its own account in connection with its role as trustee of the Trust,

#### and secured under the Second Security Deed;

### third, all other amounts secured at any time under the First Security Deed, other than an amount described in clause 3.1(a); and

### fourth, all other amounts secured at any time under the Second Security Deed, other than an amount described in clause 3.1(b).

## Application

The priorities in this clause 3:

### apply to anything received (including money) from the disposal of, or other dealing with, the Collateral whether or not it occurs as a consequence of the enforcement of a Security; and

### are subject to the specific priorities set out in Clause 7 (“Application of payments”) of the Second Security Deed in respect of the application of amounts among the beneficiaries of the Security Trust.

# Consents

## Consent of Secured Parties

Except as otherwise expressly provided in this document, the Secured Parties agree that the creation or existence of a Security is not a breach of the other Security and, to the extent that the creation or existence of a Security requires the consent of either of them, consent is given subject to the terms of this document.

## Consent of Organisation

The Organisation consents to, and acknowledges, the order of priorities set out in this document.

# Benefit of priorities

The priorities set out in this document are not affected by any act or omission by a Secured Party, the Organisation or any other person. For example, these priorities are not affected by:

### any act or omission:

#### by which the Secured Amounts owing to either Secured Party are not yet payable; or

#### varying or releasing an Encumbrance or monetary obligation; or

### a payment which may be received, or a credit which may be allowed, by a Secured Party from the Organisation or any other person in respect of the Secured Amounts; or

### a fluctuation in the amount secured by a Security from time to time; or

### a notice received by a Secured Party under a Security; or

### a notice received by a Secured Party of an Encumbrance; or

### the order of execution, registration or perfection of a Security or the terms of any Security; or

### the order in which financial accommodation is provided or liabilities (whether actual or contingent) are incurred; or

### any failure to enforce an Encumbrance, chose in action or judgment.

# Continuation of rights and remedies

Except to the extent this document expressly states otherwise, this document does not affect:

### the rights, powers and remedies of the Secured Parties in connection with the Collateral; or

### the Organisation’s obligations in connection with the Secured Amounts or any Security.

# Assignment or transfer of a Security

A Secured Party may not assign or otherwise deal with a Security unless:

### the assignment or dealing occurs in connection with the enforcement of a Security; or

### the person obtaining an interest in that Security has entered into a deed with the Organisation and the other Secured Party in which it agrees to be bound by those provisions of this document which relate to the Secured Party who is dealing with that Security, and has delivered the deed to the other Secured Party.

# Secured Parties’ rights and obligations

## Delivery of documents of title

### All documents of title in respect of the Collateral which are in the possession or control of the Bond Security Trustee must be delivered by the Bond Security Trustee to the State who agrees to hold them on its behalf and on behalf of the Bond Security Trustee until it receives all amounts for which it has priority under this document. The State agrees to then deliver all documents of title in respect of the Collateral which it holds to the Bond Security Trustee.

### Subject to clause 8.2(b) (“Notice of default and enforcement”), if the Bond Security Trustee takes action to enforce its Security, but the State does not take corresponding action, the State agrees to deliver to the Bond Security Trustee, at the request of the Bond Security Trustee, all documents of title it holds in respect of the Collateral which is the subject of the action.

### If either Secured Party takes action to enforce its Security, the Secured Parties agree between themselves to co-operate, to the extent reasonably practicable, to deliver all documents of title held by them to each other as required in order to give effect to the priorities set out in clause 3.1 (“Priorities”).

## Notice of default and enforcement

### Each Secured Party agrees to notify the other Secured Party:

#### if the Organisation is in default under its Security; and

#### before it takes any action to enforce a Security (including the appointment of a Receiver). (However, subject to clause 8.2(b), if the Secured Party reasonably considers that any delay in taking the action would adversely affect the value of the Secured Party’s Security or the Collateral, the Secured Party agrees to notify the other Secured Party of the action taken as soon as reasonably practicable after taking the action).

### The Bond Security Trustee agrees that, except for any such action taken by the Bond Security Trustee in accordance with clause 8.2(c)(ii) or 8.2(c)(iii), where the State and the Bond Security Trustee have each taken corresponding action to enforce its respective Security, the enforcement by the State of the First Security Deed shall be preferred and take priority over the enforcement by the Bond Security Trustee of the Second Security Deed.

### The Bond Security Trustee agrees that it will not take any action to enforce the Second Security Deed unless:

#### the State has first commenced action to enforce the First Security Deed (including the appointment of a Receiver); or

#### the State has become entitled to take action to enforce the First Security Deed and has not done so within 5 Business Days of that entitlement arising, provided that:

##### such entitlement of the State to take action to enforce the First Security Deed is continuing; and

##### the Bond Security Trustee is entitled to take action to enforce the Second Security Deed in accordance with its terms; or

#### the State has consented to the action in writing.

### The State agrees that if it takes any action to enforce the First Security Deed (including the appointment of a Receiver) by reference to clause [6.1(a)] (“Events of Default”) of the First Security Deed, to the extent it has not already done so, it will deliver to the Organisation a notice of termination in respect of the Implementation Agreement.

### Any failure by a Secured Party to comply with this clause 8.2 does not affect the priorities under this document.

### A Secured Party is not liable for any loss, liability or costs caused by an inadvertent failure to give any notice required to be given by it under this clause 8.2.

### Nothing in this document requires a Secured Party to enforce, or prevents a Secured Party from enforcing, any of its rights in respect of a relevant Security.

## Project Account

### Each Secured Party and the Organisation agree that, notwithstanding any provisions in the Second Security Deed, the Organisation must operate the Project Account in accordance with:

#### while any State Secured Money remains outstanding or owing (including contingently owing) to the State, clause [10] (“Project Account”) of the First Security Deed; and

#### once all State Secured Money outstanding or owing (including contingently owing) to the State has been fully and finally paid or repaid, clause [10] (“Project Account”) of the Second Security Deed.

### The Bond Security Trustee agrees that, while any State Secured Money remains outstanding or owing (including contingently owing) to the State, it shall not, without the prior consent of the State, take any action under clauses [10.3] (“Notice to Account Bank after an Event of Default”) or [10.4] (“Collection of book and other debts after an Event of Default”) of the Second Security Deed.

### If either Secured Party takes action to enforce its Security, the parties agree to co-operate, to the extent reasonably practicable, in the operation of the Project Account in the manner required to give effect to the priorities set out in clause 3.1 (“Priorities”).

## Retention or foreclosure

Each Secured Party agrees to consult with the other Secured Party (to the extent reasonably practicable) before it exercises:

### any right to retain any Collateral under Division 4 of Part 4.3 of the PPSA; or

### any right of foreclosure it may have in relation to the Collateral.

###  The parties agree that the operation of this clause 8.4 is not intended to, and does not, limit the operation of any other provision of this clause 8.

## Distributions

The Secured Parties agree to co-operate with each other in the distribution of the proceeds of:

### enforcement of each Security; or

### the sale of, or dealing with, the Collateral,

to ensure the distribution is in accordance with the priorities set out in this document.

## Apportionment

If a Security becomes enforceable and the Secured Amounts are comprised of separate amounts owing on different accounts, then, in relation to a Security held by a Secured Party, the Secured Party may determine the manner in which it will apportion the priorities conferred on it by this document between those respective amounts owing (but subject to and consistently with the terms of that Security).

## Marshalling

A Secured Party need not resort to any Encumbrance it holds for the payment of amounts secured under a Security held by it before the Secured Party resorts to any other Encumbrance it holds for the payment of the same amounts.

## Excess receipts - contingencies

If a Secured Party receives an amount as part of its entitlement under this document on account of an amount which may become due for payment by the Secured Party to a third party and the rights of the third party to claim on the Secured Party ends without a claim for the full amount received having been made, then:

### if the other Secured Party has priority for payment under this document, the Secured Party agrees to pay to the other Secured Party an amount equal to that amount (or such lesser amount as is required if the other Secured Party’s priority is for an amount less than the amount which the Secured Party would otherwise be obliged to pay to the other Secured Party); or

### if the Secured Party has priority for payment under this document, it agrees to apply in or towards payment of the amount for which it has priority under this document, an amount equal to that amount (or such lesser amount as is required if the Secured Party’s priority is for an amount less than the amount which the Secured Party would otherwise be obliged to apply).

# Agreement and co-operation

## Organisation’s agreement and co-operation

The Organisation agrees:

### to co-operate in the implementation of this document; and

### that if a Secured Party makes a payment to the other Secured Party in accordance with this document on the disposal of, or other dealing with, the Collateral (whether or not on enforcement of a Security), then the Secured Party who receives the payment will be taken to have received the payment from the Organisation; and

### that the Secured Parties may, as between themselves, share such information as they may receive in connection with each respective Security.

## Account Bank Agreement

### The Organisation agrees that it shall enter into, and shall use its best endeavours to procure that the Account Bank enters into, an Account Bank Agreement as soon as reasonably practicable from the date of this document.

### [***Option 2: SPE Proponent Transactions*.** *Include:*

## Termination of the Implementation Agreement

### The State agrees that, if at any time it has become entitled to terminate the Implementation Agreement by reference to a default event under clause [14.2] of the Implementation Agreement that refers to circumstances that are within the control of the Service Provider (and without limiting, in any way, any other rights of the State under, or in connection with, any default caused or that refers to circumstances that are within the control of the Organisation or any other person): **[**[[3]](#footnote-3)**]**

#### it will not waive any such termination right without the prior written consent of the Organisation and the Bond Security Trustee (such consent not to be reasonably withheld or delayed); and

#### if it does not exercise any such termination right within 10 Business Days of the earlier to occur of:

##### the date on which the State notifies the Organisation in writing; or

##### the date on which the Organisation notifies the State in writing,

##### that the State has become entitled to exercise that termination right, it will, upon receipt of a written direction from the Organisation and the Bond Security Trustee to do so, promptly take such steps as are necessary to exercise that termination right,

### and the Organisation and the Bond Security Trustee each agree to consult with the State (to the extent reasonably practicable) before providing any direction to the State for the purposes of clause 9.3(a)(ii).

### For the avoidance of doubt, but without limiting any obligations of the State under any other document, nothing in this clause 9.3(a) imposes any obligation on the State to give a notice of the type described in clause 9.3(a)(ii)(A).

### For the avoidance of doubt, but without limiting any obligations of the Organisation under any other document, nothing in this clause 9.3(a) imposes any obligation on the Organisation to give a notice of the type described in clause 9.3(a)(ii)(B).

### The State and the Organisation agree between themselves that if the Services Subcontract is duly terminated pursuant to clause [15.1] (“Consequences and Response to an Intervening Event”) of the Services Subcontract (including that notice of that termination has been provided to the State), the conditions for termination under clause [15.2] (“Extended Intervening Event”) of the Implementation Agreement will be deemed to have been satisfied and the Implementation Agreement will terminate with immediate effect on the same date without further formality. For the avoidance of doubt, any termination of the Implementation Agreement by reference to this clause 9.3(b) will be deemed to have occurred under, and in accordance with, clause [15.1] (“Consequences and Response to an Intervening Event”) of the Implementation Agreement.]

### *End of Option 2 Provisions (delete if transaction structure does not involve a special purpose entity.*]

# Costs

The Organisation agrees to pay or reimburse each Secured Party on demand for:

### the Secured Party’s costs, charges and expenses (including those incurred in connection with advisers and any legal costs on a full indemnity basis) in connection with exercising, enforcing or preserving rights, powers or remedies (or considering doing so) in connection with this document; and

### stamp duty, registration and similar Taxes or fees paid or payable in connection with this document or a payment or receipt or any other transaction contemplated by this document (including any fines and penalties in connection with any of these amounts).

# Further steps

The Organisation and each Secured Party agree to do anything (such as obtaining consents, signing and producing documents, producing receipts and getting documents completed and signed), which any other party asks and considers necessary to:

### give effect to this document; or

### ensure that any Encumbrance created by this document is enforceable, perfected (including where possible by control in addition to registration) and otherwise effective; or

### enable a Secured Party to apply for any registration, or give any notification in connection with any Security to reflect the priorities set out in this document or on in connection with any Encumbrance created by this document so that it has the priority required by the Secured Party; or

### enable a Secured Party to exercise the Secured Party’s rights in connection with the Collateral; or

### bind the parties to this document.

# Notices and other communications

## Form - all communications

All notices, certificates, consents, approvals, waivers and other communications in connection with this document must be in writing, signed by an Authorised Officer of the sender and marked for the attention of the person identified in this document or, if the recipient has notified otherwise, marked for attention in the way last notified.

## Form - communications sent by email

Communications sent by email need not be marked for attention in the way stated in clause 12.1 (“Form - all communications”). However, the email must state the first and last name of the sender.

### Communications sent by email are taken to be in writing and signed by the named sender.

## Delivery

Communications must be:

### left at the address of the intended recipient set out or referred to in the Details; or

### sent by prepaid ordinary post (airmail, if appropriate) to the address of the intended recipient set out or referred to in the Details; or

### sent by fax to the fax number of the intended recipient set out or referred to in the Details; or

### sent by email to the address of the intended recipient set out or referred to in the Details; or

### given in any other way permitted by law.

However, if the intended recipient has notified a changed address or fax number, then communications must be to that address or number.

## When effective

Communications take effect from the time they are received or taken to be received (whichever happens first) unless a later time is specified.

## When taken to be received

Communications are taken to be received:

### if sent by post, 3 days after posting (or 7 days after posting if sent from one country to another); or

### if sent by fax, at the time shown in the transmission report as the time that the whole fax was sent; or

### if sent by email:

#### when the sender receives an automated message confirming delivery; or

#### 4 hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered,

whichever happens first.

* 1. **Receipt outside business hours**

Despite clauses 12.4 (“When effective”) and 12.5 (“When taken to be received”), if communications are received or taken to be received after 5.00 pm in the place of receipt or on a non-Business Day, they are taken to be received at 9.00 am on the next Business Day and take effect from that time unless a later time is specified in them.

[***Option 2 Provisions (SPE Proponent Transaction).*** *Insert*:

#  Organisation limitation of liability

[*The following sets out an example limitation of liability provision for use where the special purpose entity is a trust. Whilst it is recognised that an individual third-party trustee may have a preference for its own form of these provisions, regard should be had to the principles that are included below.*]

## Limitation of Organisation’s liability

### The Organisation enters into this document only in its capacity as trustee of the Trust and in no other capacity. Notwithstanding any other provisions of this document (other than the below paragraphs of this clause 13.1), a liability arising under or in connection with this document is limited to and can be enforced against the Organisation only to the extent to which it can be satisfied out of the Assets out of which the Organisation is actually indemnified for the liability. This limitation of the Organisation’s liability applies despite any other provision of this document (other than the below paragraphs of this clause 13.1) and extends to all liabilities and obligations of the Organisation in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this document.

### The parties other than the Organisation may not sue the Organisation in any capacity other than as trustee of the Trust, including seeking the appointment of a receiver (except in relation to the Assets), a liquidator, an administrator or any similar person to the Organisation or proving in any liquidation, administration or arrangement of or affecting the Organisation (except in relation to the Assets).

### The provisions of this clause 13 shall not apply to any obligation or liability of the Organisation to the extent that it is not satisfied because under this document or by operation of law there is a reduction in the extent of the Organisation’s indemnification out of the Assets as a result of the Organisation’s fraud, negligence or Wilful Default in relation to the Trust.

### No act or omission of the Organisation (including any related failure to satisfy its obligations or breach of representation or warranty or undertaking under this document) will be considered fraud, negligence or Wilful Default of the Organisation for the purpose of clause 13.1(c) to the extent to which the act or omission was caused or contributed to by any failure by another party to this document or any other person to fulfil its obligations under this document (as applicable) or by any other act or omission of another party to this document or any other person (other than the Organisation).

### No attorney, agent, receiver or receiver and manager appointed in accordance with this document has authority to act on behalf of the Organisation in a way which exposes the Organisation to any personal liability and no act or omission of any such person will be considered fraud, negligence or Wilful Default of the Organisation for the purpose of clause 13.1(c).

### The Organisation is not obliged to do or refrain from doing anything under this document (including incur any liability) unless the Organisation’s liability is limited in the same manner as set out in this clause 13.1.

## Liability must be limited and must be indemnified

The Organisation is not obliged to do or not do anything in connection with this document (including enter into any transaction or incur any liability) unless:

### the Organisation’s liability is limited in a manner which is consistent with clause 13.1 (“Limitation of Organisation’s liability”); and

### it is indemnified against any liability or loss arising from, and any Costs properly incurred in connection with, doing or not doing that thing in a manner which is consistent with its rights of indemnity under the Trust Deed.

For the avoidance of doubt, the Organisation is not obliged to use its own funds in performing its obligations this document or the Implementation Agreement other than in the circumstances set out in clause 13.1(c) (“Limitation of Organisation’s liability”).

## Exoneration

Neither the Organisation nor any of its directors, officers, employees, agents or attorneys will be taken to be fraudulent, negligent or in Wilful Default for the purposes of clause 13.1(c) (“Limitation of Organisation’s liability”) because:

### any person other than the Organisation does not comply with its obligations under this document;

### of the financial condition of any person other than the Organisation;

### any statement, representation or warranty of any person other than the Organisation in this document is incorrect or misleading;

### of the lack of effectiveness, genuineness, validity, enforceability, admissibility in evidence or sufficiency of this document or any document signed or delivered in connection with this document;

### of acting, or not acting (unless it has been instructed in accordance with this document to act), in accordance with instructions of:

#### any person (including another party to this document) permitted to give instructions or directions to the Organisation under this document; or

#### any person to whom a person described in clause 13.3(e)(i) has delegated any of its rights or obligations that permit it to give instructions or directions to the Organisation under this document, as notified to the Organisation,

#### (or, in either case, instructions or directions that the Organisation reasonably believes to be genuine and to have been given by an appropriate officer of any such person)

#### For the avoidance of doubt:

##### for the purpose of clause 13.3(e)(i), the Organisation will be able to rely on a direction from the relevant person even if it has received notice of delegation by the person of any of its rights or obligations;

##### for the purpose of clause 13.3(e)(ii), the Organisation is not required to investigate the scope of any such delegation or whether the delegate giving the instructions is entitled to give such instruction to the Organisation under the terms of its delegation;

### of acting, or not acting (unless it has been instructed in accordance with this document to act) in good faith in reliance on:

#### any communication or document that the Organisation believes to be genuine and correct and to have been signed or sent by the appropriate person;

#### as to legal, accounting, taxation or other professional matters, on opinions and statements of any legal, accounting, taxation or other professional advisers used by it or any other person pursuant to this document or the Implementation Agreement;

#### on the contents of any statements, representation or warranties made or given by any other person pursuant to this document, or instructions or directions from any person permitted to give such instructions or directions under this document or the Implementation Agreement; or

#### on any calculations made by any other person pursuant to this document or the Implementation Agreement (including without limitation any calculation in connection with the Assets of the Trust);

### it is prevented or hindered from doing something by law or order;

### of any payment made by it in good faith to a fiscal authority in connection with Taxes (including Taxes assessed on the income of the Trust) or other charges in respect of the Trust even if the payment need not have been made; or

### of a failure by the Organisation to check any calculation, information, document, form or list supplied or purported to be supplied to it by any other person pursuant to this document or the Implementation Agreement.

## No supervision

Except as expressly set out in this document, the Organisation has no obligation to supervise, monitor or investigate the performance of any other person.

## Payment obligations not affected by limitation of liability

The limitation of the Organisation’s liability under clause 13.1 (“Limitation of Organisation’s liability”) is to be disregarded for the purposes of determining whether an event of default has occurred in respect of either Security because of a failure by the Organisation to pay an amount payable by it under this document or in interpreting the definition of Secured Amounts (including any related terms).

## Cleared funds

The Organisation is only taken to be in receipt of funds in relation to the Trust to the extent that those funds are cleared funds. Without limiting any other provision of this document, the Organisation will not be taken to be fraudulent, negligent or in Wilful Default for the purpose of clause 13.1(c) (“Limitation of Organisation’s liability”) as a result of a failure to make any payments in accordance with this document due to it not being in receipt of cleared funds at the time of payment. For the avoidance of doubt, such amounts will continue to be due and payable in accordance with this document.

### *End of Option 2 Provisions (delete if transaction structure does not involve a special purpose entity).*]

# Bond Security Trustee limitation of liability

[*The following sets out an example limitation of liability provision for use by a Bond Security Trustee. Whilst it is recognised that an individual third-party trustee may have a preference for its own form of these provisions, regard should be had to the principles that are included below.*]

## Bond Security Trustee limitation of liability

Notwithstanding any other provision of this document or the Second Security Deed, the Bond Security Trustee will have no liability under or in connection with this document or the Second Security Deed (whether to the State, the Organisation or any other person) other than to the extent to which the liability is able to be satisfied out of the Security Trust Fund from which the Bond Security Trustee is actually indemnified for the liability. This limitation will not apply to a liability of the Bond Security Trustee to the extent that it is not satisfied because, under this document or any other document or by operation by law, there is a reduction in the extent of the Bond Security Trustee’s indemnification as a result of the Bond Security Trustee’s fraud, negligence or Wilful Default. Nothing in this clause 14 or any similar provision in any other document limits or adversely affects the powers of the Bond Security Trustee, any receiver or attorney in respect of the Second Security Deed, or the Security Trust Fund.

## Liability must be limited and must be indemnified

The Bond Security Trustee is not obliged to do or not do anything in connection with this document (including enter into any transaction or incur any liability) unless:

### the Bond Security Trustee’s liability is limited in a manner which is consistent with [clause 14.1 (“Bond Security Trustee limitation of liability”)]; and

### it is indemnified to its satisfaction (acting reasonably) against any liability or loss arising from, and any Costs properly incurred in connection with, doing or not doing that thing in a manner which is consistent with its rights of indemnity under the Second Security Deed.

### For the avoidance of doubt, the Bond Security Trustee is not obliged to use its own funds in performing obligations under this document or the Second Security Deed.

## Exoneration

Neither the Bond Security Trustee nor any of its directors, officers, employees, agents or attorneys will be taken to be fraudulent, negligent or in Wilful Default for the purpose of clause 14.1 (“Bond Security Trustee limitation of liability”) because:

### any person other than the Bond Security Trustee does not comply with its obligations under this document or the Second Security Deed; or

### of the financial condition of any person other than the Bond Security Trustee; or

### any statement, representation or warranty of any person other than the Bond Security Trustee in this document or the Second Security Deed is incorrect or misleading; or

### of the lack of effectiveness, genuineness, validity, enforceability, admissibility in evidence or sufficiency of this document or the Second Security Deed or any document signed or delivered in connection with this document or the Second Security Deed; or

### of acting, or not acting, in each case in accordance with instructions any other person (including another party to this document) permitted to give instructions or directions to the Bond Security Trustee under this document or the Second Security Deed; or

### of acting, or not acting (unless it has been instructed in accordance with this document or the Second Security Deed to act) in good faith in reliance on:

#### any communication or document that the Bond Security Trustee believes to be genuine and correct and to have been signed or sent by the appropriate person;

#### as to legal, accounting, taxation or other professional matters, on opinions and statements of any legal, accounting or other professional advisers used by it or any other party to this document or the Second Security Deed; or

#### on the contents of any statements, representation or warranties made or given by any party other than the Bond Security Trustee pursuant to this document; or

### of giving priority to the State in accordance with clause 3 (“Priorities”).

# General

## Prompt performance

If this document specifies when a party agrees to perform an obligation, the party agrees to perform it by the time specified. Each party agrees to perform all of its other obligations promptly. Time is of the essence in this document in respect of an obligation of the Organisation to pay money.

## Consents

### The Bond Security Trustee agrees that any consent, approval or consent given by the State in connection with this document may be subject to conditions specified in that consent, approval or waiver.

### Each party agrees to comply with all conditions in any consent, approval or waiver given in connection with this document.

## Certificates

The State may give to Organisation or the Bond Security Trustee a certificate about an amount payable or other matter in connection with this document. The certificate is sufficient evidence of the amount or matter, unless it is proved to be incorrect.

## Exercising rights

### Each Secured Party may exercise a right, power or remedy or give or refuse its consent, approval or waiver in connection with this document in its absolute discretion (including by imposing conditions).

### If a Secured Party does not exercise a right, power or remedy in connection with this document fully or at a given time, the Secured Party may still exercise it later.

### A Secured Party is not liable for any loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising, a right, power or remedy.

## Conflict of interest

A Secured Party may exercise its rights, powers and remedies under this document even if this involves a conflict of interest or duty or the Secured Party has a personal interest in their exercise.

## Remedies cumulative

The rights, powers and remedies of a Secured Party in connection with this document are in addition to other rights, powers and remedies given by law independently of this document.

## Other Encumbrances or judgments

This document does not merge with or adversely affect, and is not adversely affected by, any of the following:

### any Encumbrance or other right, power or remedy to which a Secured Party is entitled; or

### a judgment which a Secured Party obtains against the Organisation in connection with the Secured Money.

Each Secured Party may still exercise its rights, powers or remedies under this document as well as under the judgment, other Encumbrance or the right, power or remedy.

## Rights and obligations are unaffected

A Secured Party’s rights, powers and remedies and the Organisation’s obligations in connection with this document are not affected by anything which might otherwise affect them at law.

## Inconsistent law

To the extent permitted by law, this document prevails to the extent it is inconsistent with any law.

## Supervening law

Any present or future law which operates to vary the obligations of the Organisation or a Secured Party in connection with this document with the result that a Secured Party’s rights, powers or remedies are adversely affected (including by way of delay or postponement) is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.

## Variation and waiver

### A provision of this document, or right created under it, may not be varied or waived except in writing signed by the party or parties to be bound.

### A variation of the definition of Bond Transaction Documents may only be made with the written consent of the State.

## Confidentiality

Each party agrees not to disclose information provided by any other party that is not publicly available (including the existence or contents of this document) except:

### to any person in connection with an exercise of rights or a dealing with rights or obligations under this document (including preparatory steps such as negotiating with any potential transferee of a Secured Party’s rights or other person who is considering contracting with a Secured Party in connection with this document); or

### to officers, employees, agents, contractors, legal and other advisers and auditors of the Organisation or a Secured Party; or

### to any party to this document or any Related Entity of them (in the case of the State, as though it were a body corporate), provided the recipient agrees to act consistently with this clause 15.12; or

### with the consent of the party who provided the information (such consent not to be unreasonably withheld); or

### any disclosure the disclosing party reasonably believes is required by any law or stock exchange (except this paragraph does not permit a person to disclose any information under section 275(4) of the PPSA unless section 275(7) of the PPSA applies); or

### any other disclosure permitted or required under and in accordance with clause 8 (“Secured Parties’ rights and obligations”) of this document or with the Implementation Agreement.

Each party consents to disclosures made in accordance with this clause 15.12.

## Counterparts

This document may consist of a number of copies, each signed by one or more parties to it. If so, the signed copies are treated as making up the one document. This document will be binding on a party upon that party’s execution notwithstanding that any other party has not executed this document.

## Governing law

This document is governed by the law in force in Victoria. Each party submits to the non-exclusive jurisdiction of the courts of that place.

## Serving documents

Without preventing any other method of service, any document in an action involving this document may be served on a party by being delivered to or left at that party’s address for notices in accordance with clause 12 (“Notices and other communications”).

## Machinery of Government Change

If there is a Machinery of Government Change, the Department may assign or transfer this document or any of the benefits or obligations under this document to a Victorian Government department or agency or Victorian Government Body without the consent of the Organisation or the Bond Security Trustee.

**EXECUTED** as a deed

Schedule – Form of Account Bank Agreement

To: [*Insert name and address of Account Bank*]

(“**Account Bank**”)

**[*Legal name of Organisation*] (**“**Organisation**”**)
First Security Deed (**State of Victoria Social Impact Bonds Pilot Project**) dated [*insert date*] (**“**First Security Deed**”**) and Second Security Deed (**State of Victoria Social Impact Bonds Pilot Project**) dated [*insert date*] (**“**Second Security Deed**”**)**

We refer to the following account (“**Project Account**”) established and maintained by the Organisation with you:

| **A/c description** | **BSB** | **Account No.** |
| --- | --- | --- |
| [*insert account name*] | [*insert BSB*] | [*insert Account No.*] |

[*Form to be completed in consultation with the Account Bank and inserted in this Schedule.*]

[*Whilst it is recognised that each individual Account Bank may have a preference for its own form, the following matters should be provided for:*

### The Account Bank to agree and confirm that in respect of the Project Account (including any balance in the Project Account):

#### it does not have a security interest in, and undertakes not to create, claim, exercise any rights under or enforce any security interest in, the Project Account (including any balance in the Project Account). A security interest includes a security interest under the Personal Property Securities Act 2009 (Cth) or any other security interest for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust or title retention or flawed deposit arrangement;

#### it will not exercise any right that the Account Bank may otherwise have:

##### to set off (whether under contract or by operation of law) any credit balance in the Project Account against amounts that the Organisation or any other person might owe the Account Bank or to deduct fees or charges (in respect of the Project Account) from the Project Account;

##### to combine any balance in the Project Account with any other amount in any other account(s) held with the Account Bank; and

#### it has not, as at the date of this document, received any notice that any third party has or will have any right in the Account or any balance in the Account.

### The Account Bank to agree that to the extent this document and the terms of contract governing the Project Account (including as such terms are amended after the date of this document) are inconsistent, the terms of this document prevail.

### The Account Bank to acknowledge that any of its rights in, and to, the Project Account are subject and subordinate to the rights of the Secured Parties in, and to, the Project Account.]

Signing page

**State**

[*Execution block*]

|  |  |  |
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**Bond Security Trustee**

[*Execution block*]

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**Organisation**

[*Execution block*]

|  |  |  |
| --- | --- | --- |
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1. [***Drafting Note****: in these General Terms, all cross-references to names, terms and provisions in other documents, and cross-references to provisions in this document should be carefully checked and confirmed.*] [↑](#footnote-ref-1)
2. [***Drafting Note****: paragraph (b)(i) of the definition of “Authorised Officer” to be revised / adapted as required for relevant titles of appropriate officers from the Bond Security Trustee and Organisation*.] [↑](#footnote-ref-2)
3. [***Drafting Note****: the provisions of the Implementation Agreement to be cross-referred to here are the “For Cause” termination provisions that relate to matters within the control (including by conduct or omission) of the Service Provider*.] [↑](#footnote-ref-3)