Partnerships Victoria

Availability PPP PV Standard Project Deed – Guidance Notes

March 2018

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* + 1. Introduction
       1. Introduction

Partnerships Victoria has developed a suite of standard form project deeds for Public Private Partnership (**PPP**) projects which are delivered using an availability model (**PV Standard Project Deeds**). An availability model is a delivery model for PPP projects where the primary revenue stream or source of funding that repays the 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.

The PV Standard Project Deeds are for:

* + - Social Infrastructure Availability PPP Projects where core services are retained by the State, for example hospitals, prisons and schools (**SIPD or Social Infrastructure Project Deed**); and
    - Linear Infrastructure Availability PPP Projects, for example road and rail (**LIPD or Linear Infrastructure Project Deed**).

The PV Standard Project Deeds provide a consistent and efficient risk allocation, while recognising the need for flexibility to accommodate project specific requirements. The Victorian Government's aims in releasing the PV Standard Project Deeds are to:

* + - ensure consistency in approach across projects thereby reducing time in drafting and negotiating project documentation with a consequential cost saving for both the State and the private sector;
    - enhance contract administration;
    - allow project teams and bid teams to focus on project specific issues;
    - improve contract interpretation and enforceability; and
    - give greater certainty to bidders as to the terms on which they will be engaged by the State on Availability PPP Projects.

The PV Standard Project Deeds have been developed based on the precedent positions for Victorian Availability PPP Projects, feedback from the private sector and government stakeholders and learnings from common law jurisdictions where PPPs are a well-recognised and regularly used form of project delivery. The table below sets out the activities undertaken by Partnerships Victoria to develop the PV Standard Project Deeds.

| Activities undertaken |
| --- |
| * Initial market sounding on structuring and key issues with financial arrangers, equity participants, government stakeholders and a range of legal and commercial advisors who have extensive experience in advising government, equity participants, contractors and financiers on PPP projects. |
| * Developed drafts of the PV Standard Project Deeds and key Schedules were extensively market tested with the legal and commercial advisors and financial arrangers, each providing both oral and written feedback. |
| * DTF engaged one-on-one with various key government stakeholders in relation to key issues throughout the standardisation process. |

DTF will continue to monitor the PPP market and seek feedback from stakeholders to ensure that the risk allocation in the PV Standard Project Deeds remains consistent with best practice for Availability PPP Projects and any changes or updates within the industry.

* + - 1. Partnerships Victoria framework

The PV Standard Project Deeds form part of the Partnerships Victoria framework (see section 10 of the Partnership Victoria Requirements (November 2016)).

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

* + - 1. Purpose of PV Standard Project Deeds and Guidance Notes
         1. Project Deed templates

The PV Standard Project Deeds will be used by procuring agencies when preparing a Request for Proposal for an Availability PPP Project. Any derogation from the PV Standard Project Deeds for Availability PPP Projects will only be made with the prior approval of DTF. 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. Project Deed Guidance Notes

These Guidance Notes provide guidance on some, but not all, provisions of the PV Standard Project Deeds, including some schedules. The purpose of the Guidance Notes is to explain the rationale for the PV Standard Project Deeds' position on key issues or issues where bidders have historically raised queries or departures. The State's intention is for this to assist bidders to understand the State's position, limit departures and facilitate a more efficient procurement process for all participants.

* + - 1. Choice and use of Project Deed templates

The PV Standard Project Deeds are identical other than where the nature of the infrastructure requires a different approach. Sections 1.4.1 and 1.4.2 describe the key distinguishing features of each of the PV Standard Project Deeds. These should be taken into consideration by procurement agencies when choosing the PV Standard Project Deeds to be used on a specific project.

* + - * 1. SIPD

Key distinguishing features of the SIPD from the LIPD are:

* + - the Project Area is generally a single facility on a single site (for example, a hospital or prison), or, in the case of a bundled PPP project (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 the achievement of 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. LIPD

Key distinguishing features of the LIPD from the SIPD are:

* + - the infrastructure is typically elongated crossing multiple sites;
    - the likelihood of proximate and on site 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).

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. Hybrid projects

Certain projects are, by their nature, a hybrid of the Social Infrastructure Availability PPP Projects and Linear Infrastructure Availability PPP Projects, for example, 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 DTF regarding which of the PV Standard Project Deeds should be used as the base document.

* + - * 1. Economic Infrastructure PPP projects

There is currently no standard Project Deed available for demand based economic infrastructure PPP projects. Accordingly, 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. Project specific content

Throughout the PV Standard 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 in the PV Standard Project Deeds. Departures from the PV Standard Project Deeds which are identified in the Guidance Notes or in the PV Standard Project Deeds do not require approval from the head of Partnerships Victoria or his or her delegate. Procuring agencies may seek approval from the head of Partnerships Victoria or his or her delegate in respect of departures from provisions of the PV Standard Project Deeds which have not been identified in these Guidance Notes or in the PV Standard Project Deeds as being determined on a project specific basis, where justified for project specific reasons. Departures from the PV Standard Project Deeds will not be approved where they are sought to satisfy drafting preferences as opposed to reflecting a necessary change.

* + - * 1. Form and structure of PV Standard Project Deeds

A project deed for an Availability PPP Project which uses one of the PV Standard Project Deeds (**Project Deed**) will consist of:

* + - clauses;
    - Schedules;
    - Annexures; and
    - Attachments.

Clauses, Schedules and Annexures form part of the PV Standard Project Deeds.

Some Schedules are documents created by the State, which will generally be included in the Request for Proposal 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 PSDR and otherwise may 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 Project Deed (as stated in clause 2.2 of the PV Standard Project Deed) but 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 Project Deed for each Availability PPP Project must follow the numbering for clauses, Schedules, Annexures and Attachments set out in the PV Standard Project Deeds to ensure that, going forward, Availability PPP Projects in Victoria have 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 following drafting conventions should be applied:

* + - if a clause or subclause in the PV Standard Project Deeds, a Schedule, an Annexure or an Attachment 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 (e.g. if clause 15 of the PV Standard Project Deeds ends at clause 15.5, insert the new clause as clause 15.6. If clause 15 of the PV Standard 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 sub-headings, the new clause should be added as follows:
      * in an otherwise 'Not Used' clause (if the location is logical); or
      * as an additional clause in an appropriate location without disturbing the existing numbering (i.e. 15A, 15B etc.).
        1. Incorporation of Successful Respondent's Proposal

General principle

As part of their Proposals, Respondents will provide documents which 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. 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 its Proposal as the response to the Development Requirements and 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 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 (as outlined below) so that there can be no doubt as to 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 Development Phase Program on the basis that it is considered an unduly onerous obligation and not value for money (see section 2.26.3). The Bid Development Phase Program should therefore only be attached to the Project Deed to establish the baseline for the Development Phase Program that 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:

* + - on Linear Infrastructure Availability PPP Projects, will typically be included in the PSDR and therefore form part of the Project Deed; and
    - on Social Infrastructure Availability PPP Projects, 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, typically the Project Plans do not impose any obligations on the State and 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 Request for Proposal will be resolved with the State before execution of the Project Deed and included in updated versions of the PSDR or Project Deed.

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. Consideration will be given by the State, on a project specific basis, as to 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. Further, where the Successful Respondent has made representations in other parts of its Proposal that the State has relied upon in evaluating that Proposal, the State reserves the right to include these in the Project Deed.

* + - 1. 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, and that users 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; or
    - anything done, or omitted to be done, in reliance upon information contained in these Guidance Notes.

These Guidance Notes must not be used for the interpretation of the PV Standard Project Deeds. Nothing in these Guidance Notes limits or affects the application, interpretation or enforcement of:

* + - the terms and conditions set out in any EOI or RFP; or
    - the terms and conditions in the PV Standard Project Deeds or any Project Deed or Project Document entered into by the State.
      1. Terminology

Unless otherwise defined in these Guidance Notes, capitalised terms used in these Guidance Notes have the meanings given to them in the PV Standard Project Deeds or the glossary of terms to the Request for Proposal included in Appendix A, Volume 1 Part A of the Standard Form Request for Proposal. Any reference to a clause is a reference to a clause in the PV Standard Project Deeds.

For the purposes of these Guidance Notes:

| Defined term/Acronym | Meaning |
| --- | --- |
| **30% Rule** | Has the meaning given to that definition in section 2.33.1. |
| **Availability PPP Projects** | Has the meaning given in section 1.1. |
| **DTF** | Means the Department of Treasury and Finance. |
| **Linear Infrastructure Availability PPP Project** | Means a PV 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. |
| **MTPFA** | Has the meaning given to in section 1.7.1. |
| **Project Deed** | Has the meaning given in section 1.4.6. |
| **PSDR** | Has the meaning given in section 2.1.11. |
| **PV Standard Project Deeds** | Has the meaning given in section 1.1. |
| **Reserved Crown Land** | Means land that is reserved under the *Crown Land (Reserves) Act 1978* (Vic). |
| **Social Infrastructure Availability PPP Project** | Means a PV 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. |
| **LIPD** | Has the meaning given to that definition in section 1.1. |
| **SIPD** | Has the meaning given to that definition in section 1.1. |

* + - 1. *Major Transport Projects Facilitation Act 2009* (Vic)
         1. MTPFA Overview

The *Major Transport Projects Facilitation Act 2009* (Vic) (**MTPFA**) 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. Application of the MTPFA

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

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

* + - transport infrastructure; or
    - transport infrastructure together with non-transport infrastructure.

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

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

* + - the entire MTPFA (including planning assessment and approval); or
    - the MTPFA other than Part 3 and 8 (project delivery only).

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

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

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

The project delivery provisions of the MTPFA 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. Project Deed implications

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

* + - Traffic Management (clause 11.4) – potential traffic management implications;
    - Utilities (clause 12) – regime under Part 7 of the MTPFA 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 MTPFA;
    - 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 MTPFA.

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

* + 1. Project Deed guidance
       1. Definitions

Set out below is an explanation of some of the key defined terms included in the PV Standard Project Deeds.

Definitions should not be changed by procuring agencies simply to accommodate terminology preferences. For example, amending terms such as ‘PSDR’ to ‘PR’ or ‘PSTR’, or terms such as ‘Commercial Acceptance’ to ‘Provisional Acceptance’ or ‘Practical Completion’ causes unnecessary confusion between projects and undermines the benefits of the standard form approach. However, these Guidance Notes recognise that certain terminology may, for good reason, need to be different between Project Deeds and identifies where this may be the case.

* + - * 1. Best Operational Practices (paragraph (h))

General principle

Best Operational Practices sets out the standards which 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.

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.

* + - * 1. Consortium, Group, Holding Entity, Project Co and Project Entity

General principle

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

Diagram 1 below shows the interrelationship between the different entity definitions.

Diagram 1



* + - **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.
    - **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 and each Holding Entity.
    - **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 PV Standard Project Deeds define Holding Entity as each entity which 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 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 (e.g. 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.

Also see section 2.11 on subcontracting entities.

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.

* + - * 1. Equity Funding

General principle

One of Project Co's principal obligations under the PV Standard 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 which 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 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.

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.

* + - * 1. Maintained Assets, Moveable Assets, Hired Moveable Assets, Project Assets and Returned Assets

General principle

There are a number of categories of assets that are relevant to the Project. The tables and Diagram 2 below show the ownership of the assets (as 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).

|  |  |
| --- | --- |
| Asset ownership | |
| **State** | **Project Co** |
| **Linear** | |
| * Fixtures * Moveable Assets (other than Hired Moveable Assets) being:   + Maintained Assets that are not affixed to and not intended to be affixed to the Operational Phase Site; and   + all other chattels:     - 1. 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; or       2. which are included in the Asset Information System. | * Temporary Works * Hired Moveable Assets * Services Equipment |
| **Social** | |
| * Fixtures * Moveable Assets (other than Hired Moveable Assets) being:   + Maintained Assets and all other Equipment and Plant, that is not affixed to and not intended to be affixed to the Operational Phase Site;   + all other chattels:     - 1. 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); or       2. which are included in the Asset Information System. | * Temporary Works * Hired Moveable Assets * Services Equipment |

Diagram 2



Project specific amendments

Each of the asset definitions will need to be considered on a project specific basis to ensure that it captures all the relevant assets. Clause 20.3 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 in respect of certain Maintained Assets that the parties may locate outside of an Operational Phase Area.

* + - * 1. Management Services

While the PV Standard Project Deeds include a definition for and references to the 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.

* + - * 1. Operations and Functions

General principle

‘Operations’ is used in the Standard Form Deed – Linear Infrastructure and ‘Functions’ is used in the Standard Form Deed – Social Infrastructure to describe the core operations that will be undertaken in respect of the Project Assets. By way of example, core operations might include, amongst 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.

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 in respect of interfaces with the Operator are often limited to the Functions expressly identified in the Project Deed.

* + - * 1. 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 that 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 PV Standard Project Deeds to control changes in ownership of these parent companies to ensure 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 for the purposes of acknowledging the State's security rights in respect of the Project and the Parent Company Guarantee.

* + - * 1. 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 provides the parameters for the State's entitlement to repayment of a portion of Prolongation Costs paid to Project Co by the State where Commercial Acceptance is achieved prior to the Date for Commercial Acceptance but after the Original Date for Commercial Acceptance (refer to section 2.25.4.3). It is also 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 Social Infrastructure Availability PPP Projects the State also has no obligation to certify Commercial Acceptance prior to the Original Date for Commercial Acceptance (see section 2.25.4.1 below for a more detailed discussion of this).

* + - * 1. Performance Bond

The State does not require Project Co to provide Performance Bonds in favour of the State and does not require Project Co to obtain Performance Bonds from any of its Subcontractors. However, 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 2.22.

All Performance Bonds provided by Key Subcontractors for the amounts specified in the Contract Particulars must be bank guarantees issued by an Australian licensed financial institution with the Required Rating and payable on demand by presentation at the issuer's office in Melbourne. The Performance Bond must recognise the State as a beneficiary if the State exercises its step-in rights under the Project Deed.

If Project Co requires its Subcontractors to provide Performance Bonds in excess of the amount specified in the Contract Particulars, the State does not require this additional bonding to be provided by way of a bank guarantee issued by a financial institution, although this may be a matter of evaluation in considering the appropriateness of the security package put forward by Project Co as part of its Proposal.

* + - * 1. Project Documents

General principle

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

Diagram 3 and notes below explain the content and interrelation between the different document sets.

Diagram 3



* + - **Project Documents**: this definition is intended to capture all of the documents relevant to the Project including Subcontracts between Project Co and its Key Subcontractors, Parent Guarantees from Key Subcontractors, 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).
    - **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.

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 which 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 as 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.
  + - * 1. Project Scope and Delivery Requirements (PSDR)

General principle

As discussed in section (a)(i)1.4.7.1 above, the PSDR is 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.

Project specific amendments

The Delivery Requirements define the scope of the Project. Accordingly, 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 the review of the PSDR for clarity, enforceability and consistency with the other parts of the Project Deed prior to release of the RFP.

* + - * 1. Required Rating

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.

* + - * 1. Services

General principle

These are the Services that are provided by Project Co during the Operational Phase. For Social Infrastructure Availability PPP Projects, 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.

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.

* + - * 1. Services Equipment

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 items such 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. Further, 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.

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.

Accordingly, the procuring agency should ensure that the Asset Management Plan as at Contract Close 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.

* + - * 1. Site, Project Area, Development Phase Site, Operational Phase Site, Development Phase Area and Operational Phase Area

General principle

There are a number of definitions with respect to physical areas, sites or locations relevant to the Project.

Diagram 4 below shows the interrelationship between the different definitions.

Diagram 4



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.

Project specific amendments

That part of the Development Phase Area which is the subject of the Development Phase Licence and the Operational Phase Area which is the subject of the Operational Phase Licence will be determined on a project specific basis. For example, typically that part of the Development Phase Area the subject of the Development Phase Licence will cover the area on which the Maintained Assets and Returned Works are to be constructed 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.

* + - * 1. 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.

* + - 1. General rules of interpretation (clause 2)
         1. Project Deed

The document is executed by the parties as a deed. Under Victorian Law, the limitation period within which an action can be brought for breach of a deed is 15 years from the date of the breach, compared to the period of time 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)). The time from which a limitation period runs varies with the nature of the Claim (e.g. breach of contract, breach of warranty and negligence) and the Liability for loss (e.g. Liability for general damages or for losses on an indemnity basis).

Respondents should also be aware of other statutory limitation periods in Victoria that may limit the period of time 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. Shortlisted Respondents should seek legal advice on the implications of section 134 of the Building Act in the context of each particular project.

* + - * 1. Order of precedence (clause 2.3)

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.

Project specific amendments

The order of priority of schedules will be completed 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.

* + - * 1. Inconsistencies between State Project Documents (clause 2.4)

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

* + - the Finance Direct Deed;
    - the Project Deed; and
    - the remaining State Project Documents.

The Finance Direct Deed takes precedence over the Project Deed as it places limitations on certain of the State's 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 to resolve inconsistencies, ambiguities or discrepancies within and between the State Project Documents other than the Finance Direct Deed or the Project Deed.

* + - 1. Indexation (clause 2.17)
         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, i.e. 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 which will apply if an Index ceases to be published by the relevant independent source.

* + - * 1. 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.

* + - 1. Conditions Precedent (clause 3)
         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.

* + - * 1. Failure to satisfy Conditions Precedent

The PV Standard Project Deeds provide that, in the event that the Conditions Precedent are not satisfied (or 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 PV Standard 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 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 Precedents which 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. Alternatively, where this is not possible, a Performance Bond for the satisfaction of the Conditions Precedent that Project Co is required to meet can be provided.

* + - * 1. Project specific amendments

Conditions Precedents are to be determined on a project specific basis. By way of guidance, they 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 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, if it is, determining which party benefits from the Condition Precedent. For example, requirements that could take a long period of 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 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 to ensure that the clauses listed are still relevant and to ensure that any additional terms that have been included in the Project Deed on a project specific basis that 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 to be included in the Model Output Schedule.

* + - 1. Term (clause 4)
         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,

unless the Project is terminated early, in which case the Term will end on the Expiry Date.

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 and will be adjusted in accordance with the date on which Financial Close is actually achieved in accordance with the Financial Close Adjustment Protocols. The actual Development Phase is then the period between Financial Close and the Date of Commercial Acceptance and may therefore 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 2.25.4.3) or after the Original Date for Commercial Acceptance. The Date for Commercial Acceptance may be extended for Extension Events under the Project Deed (see section 2.5.1.2 for further discussion). 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 is not entitled to an extension to the Date for Commercial Acceptance under the Project Deed.

This is shown in Diagram 5 below.

Diagram 5



Operational Phase

The length of the Operational Phase is initially determined by the State on a project specific basis and included in the RFP taking into account 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 PV Standard Project Deeds the proposed Operational Phase is 25 years, being the period between the Original Date for Commercial Acceptance and the Final Expiry Date. As the Final Expiry Date is defined as the 25th anniversary of the earlier of the Date for Commercial Acceptance and the Date of Commercial Acceptance, the Final Expiry Date is extended for the same period as the Date for Commercial Acceptance is extended for Extension Events under the Project Deed in order to 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 Diagram 6 below.

Diagram 6



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 only adjusted for Change Compensation Events under the Change Compensation Principles. For example, if the Service Payment is intended to be made monthly over 25 years and is for a monthly amount of $5 million, 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 Diagram 7 below:

Diagram 7



Commercialrationale 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 following reasons:

* + - 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 simple to enforce as the number of Service Payments are simply reduced.

That said, the greatest incentive to achieve Commercial Acceptance by the Date for Commercial Acceptance 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 PV Standard 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 such 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 also 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.

Time Related Definitions

Set out in Diagram 8 below is an explanation of how certain terms align with the different phases of the Project.

Diagram 8



* + - * 1. 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.
      1. Fit For Purpose warranty (clause 5.5)
         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.
      * 1. Operation of Fit For Purpose warranty

Fit For Purpose is defined to mean fit for its 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 applies to each different class of assets as follows:

* + - **Maintained Assets (other than Remaining Works)**: on and from the Date of Commercial Acceptance, by reference to the purposes, functions and uses which 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 which 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 which 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 which 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 particular requirements that are clearly assuming that the Project Assets will be used for a particular purpose without specifying the use itself. It is critical, in order for the FFP Warranty to operate effectively, 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 of the PV Standard 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 and 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 of the PV Standard Project Deeds for Liability 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 and the indirect and consequential loss exclusions in clause 43.11 of the PV Standard Project Deeds. Liability for warranties are also limited by the various statutory limitation periods referred to in section (a)(i)2.2.1.

The State appreciates that a repeating warranty for the Maintained Assets can be a challenge for the construction market but the 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 (e.g. scaffolding, temporary by passes etc.) 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.

* + - * 1. 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 2.34 for discussion on the Warranted Life regime.

* + - * 1. 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.

* + - 1. All risks – Project Documents (clause 5.6)
         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.

* + - * 1. Operation of All risks clause

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

#### 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 save that if there are provisions in the Project Deed which 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 notwithstanding that, but 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.

#### 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; or
    - 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 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 that 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.

#### 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.

#### Principle 4

Project Co accepts all risk in connection with the PSDR and warrants 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.

The successful Respondent has been selected in part because of its expertise in delivering the type of infrastructure 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.

* + - 1. Approvals (clause 6)
         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.

* + - * 1. Relevant definitions – State Approval Event

A State Approval Event is defined as:

* + - legal action being taken in connection with a State Approval;
    - any review or revocation of, or change to, a State Approval; or
    - any review or revocation of, or change to, an Approval (other than a State Approval) as a result of the circumstances specified above,

but does not include:

* + - any event that is due to a Project Co Act or Omission; or
    - legal action being taken or change to:
      * any further or secondary Approval that relates to or that forms part of a State Approval; or
      * a State Approval or further or secondary Approval due to:
        + a Project Co Act or Omission;
        + 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); or
        + a failure by Project Co or any Project Co Associate to comply with any Law.
        1. Compensation and relief

A change to an Approval, other than a State Approval, is a General Change in Law and subject to the relief and compensation regime for General Changes in Law. See section 2.44 for the Change in Law regime. The effect of this is that Project Co will be entitled to compensation for changes to 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.

* + - * 1. 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 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 timing of Contract Close.

Other events that will not constitute a State Approval Event will be considered and included on a project specific basis and will be identified by the State taking into account the specific nature of the State Approvals for each project.

* + - 1. Parties and personnel (clause 7)
         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 PV Standard 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 the exercise of an Authority's statutory powers.

* + - * 1. Other Representatives (clause 7.4)

In addition to specific provision for a 'Project Co Representative', the PV Standard 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 and 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.

* + - * 1. Project specific amendments (clauses 7.4 to 7.10)

There are a number of matters dealt with in clause 7 in the PV Standard Project Deeds that will be considered on a project specific basis:

* + - **Other Representatives**: The 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 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;
      * OH&S 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 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.
    - **Project Control Group**: The members of the Project Control Group will include:
      * the State Representative;
      * the Project Co Representative;
      * the Design Development Coordinator; and
      * the Project Director of the D&C Contractor (during the Development Phase) and Services Contractor (during the Operational Phase).

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 the management and monitoring of the Project.

* + - **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 PV Standard Project Deeds provide that the State Representative will be the chair for the Project Control Group and Senior Representatives Group. However, the State will consider whether an independent chair is more appropriate for specific projects, which 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.
    - **Stakeholder and community engagement**: The provisions in clause 7.10 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.
      1. Independent Reviewer (clause 8)
         1. Procurement and Appointment Process

The Independent Reviewer performs an integral role during the Development Phase, in particular 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 (a)(i)2.25.4.1). 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 the entity/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 which 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.

* + - * 1. 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 the carrying out of the 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 PV Standard Project Deeds, the Independent Reviewer Deed of Appointment also acknowledges the paramountcy and independence of the role of the Independent Reviewer under the Project Deed.

* + - * 1. 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 not otherwise required by the Project Deed or the Independent Reviewer Deed of Appointment, in which case the party requesting the report is responsible for the relevant costs (clause 8.1(d) LIPD and 8.1(j) SIPD).

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

* + - * 1. 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; and
    - where there is an express provision otherwise in the Project Deed, including determinations:
      * of extensions of time by the Independent Reviewer (clause 26.21);
      * of the Independent Reviewer in relation to the review of progress (clause 26.4);
      * of the Independent Reviewer in relation to Defects (clause 27.8); and
      * of extensions of time by the Independent Reviewer in relation to a Modification (clause 35.8).

This approach is taken for a number of reasons including:

* + - the Independent Reviewer is by nature an independent party appointed by both parties, and is experienced and professional with a thorough understanding of the Project; and
    - in order for the Independent Reviewer to be able to properly perform its role and for the Project to proceed efficiently.
      * 1. 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. Also, the State prefers to have other independent parties having roles in the project (such as the Financier's 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 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 paramountcy 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.

* + - * 1. Term

The Independent Reviewer is generally appointed until Final Acceptance or to the end of the final Defects Liability Period 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 5 qualified candidates by the State from which Project Co is required to nominate 3 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 PV Standard Project Deeds include an interpretation provision which 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.

* + - * 1. Project specific amendments

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

* + - a process which is run by the State during the procurement for the Project prior to a joint appointment prior to Financial Close;
    - the appointment of a party identified by Project Co in its tender, following Contract Close; or
    - 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 determined will depend on the size and nature of the Project, the experience required by the Independent Reviewer entity/ joint venture to perform the role and the number of suitable candidates for the role.

The timing of appointment and role of the Independent Reviewer is to be considered on a project specific basis.

* + - 1. Subcontracting and third party arrangements (clause 9)
         1. General principle

The State's intention is to ensure that it has full visibility of contractual arrangements and access to documentation in connection with the Project, and appropriate rights in respect of those arrangements. There are two key principles that underlie the subcontracting provisions in the PV Standard Project Deeds:

* + - 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
    - notwithstanding the above, there are certain minimal levels of control that the State requires over subcontracting arrangements given the criticality of some Subcontracts 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.
      * 1. Relevant definitions

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

Diagram 9 below shows the interrelation between the different subcontract definitions.

Diagram 9



**Key Subcontractors** are critical to the success of the Project. The State will have a Subcontractor Direct Deed with each of the Key Subcontractors to ensure 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 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.

* + - * 1. Subcontracting requirements

Subcontracting requirements are contained in clause 9 and throughout the PV Standard Project Deed. In summary, the provisions primarily focus on the following matters:

* + - 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 2.11.4 for further discussion);
    - payments of amounts owed to Subcontractors, including addressing matters dealt with under the Security of Payment Act;
    - Subcontractor claims and disputes;
    - probity requirements;
    - the application of government policy and Law to Subcontracts and Subcontractors, include work, health and safety matters; and
    - end of term arrangements.

The following provisions apply exclusively to Key Subcontractors:

|  |  |
| --- | --- |
| **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(b) – Subcontracting requirements** | Project Co is required to ensure that its Key Subcontractors must not engage any Subcontractor, unless the State within 15 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 Subcontractor. |
| **Clause 9.2(c) – 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(c)(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 (termination for convenience), 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 Terminations Payment Schedule and is capped. |
| **Clause 16.1(d) – Work Health and Safety** | Project Co must ensure that its Key Subcontractors comply with obligations under the PV Standard Project Deeds relating to work health and safety. |
| **Clause 35.3 – Modification Proposal Quote** | 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. |
| **Clause 54.4 – Other Information** | 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) which would prejudice the ability of Project Co to perform its obligations under the Project Documents. |
| **Clause 63.11 – Moratorium Legislation** | Project Co is required to procure that each Key Subcontractor waives any right or remedy it may have under any Law which comes into effect after the date of the Project Deed if the exercise of such right or remedy would:   * + - 1. lessen any obligation or Liability of Project Co; or       2. prejudicially affect the rights, powers or remedies of the State,   under a State Project Document to which it is a party. |
| **Clause 63.12 – PPSA** | Project Co must ensure that each Key Subcontractor complies with the requirements of the PV Standard 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. |

* + - * 1. Subcontractor Termination Amount (clause 9.3(g))

General principle

In the event of termination of the Project Deed by the State for convenience, the State will be liable to Project Co for, amongst other things, amounts reasonably and properly incurred by Project Co and payable to the Key Subcontractors, subject to the restrictions set out in clause 9.3(g) of the PV Standard Project Deeds. Clause 9.3(g) reflects the following principles:

* + - 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; and
    - 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.

The State will not pay termination amounts to Key Subcontractors other than where the State terminates the Project Deed for convenience.

Project specific amendments

The following parts of the PV Standard Project Deeds will require consideration on a project specific basis:

* + - the Subcontractor termination amounts payable by the State, where the State terminates the Project Deed for convenience, 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 DTF prior to Contract Close;
    - identification of the Subcontracts that will fall within each of the subcontract definitions referred to in section 2.11.2;
    - the value to be used to determine whether a Subcontract is a Significant Subcontract;
    - clause 9.2(b)(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
    - while the PV Standard 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.
      1. Industrial relations issues (clause 9.8)
         1. General principle

Subject to the compensation and relief referred to in section 2.12.2, 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.

* + - * 1. 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 2.20); or
    - is contemplated by clause 7.1 where the Authority is acting in accordance with its statutory powers (see section 2.9.1 for further discussion on the operation of clause 7.1).
      1. Site Information and Site Conditions (clauses 10, 11 and 12)
         1. General principle

Project Co is liable for all Site Conditions, other than where it is expressly stated otherwise in the PV Standard 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 as to the accuracy of the information contained in their report and the skill and care used in the preparation of the reports. 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.

* + - * 1. Interference, obstruction and nuisance

Under the PV Standard Project Deeds, Project Co has an obligation to:

* + - not interfere with traffic;
    - prevent nuisance;
    - ensure the safety of people and property;
    - minimise and prioritise 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 the above, 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.

* + - * 1. 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 PV Standard Project Deeds, the State formed the view that there is value for money in limiting Project Co's Remediation obligations so that it is not automatically required to Remediate all Contamination in or in the direct vicinity of the Project Area or Remediate the Contamination back to source.

Diagram 10 below summarises Project Co's Contamination Remediation obligations and any Contamination and the Remediation work for which Project Co will be entitled to compensation and relief under the PV Standard Project Deeds.

Diagram 10



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 2.13.5 below).

* + - * 1. Contamination Compensation Event

When a Contamination Compensation Event occurs (see Diagram 10 above):

* + - the Remediation will be treated as a State Initiated Modification;
    - relief and compensation will be provided in accordance with Item 11, 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).
      * 1. 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:

* + - 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 upon 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; or
    - where the State considers extending or reducing Project Co's Remediation obligations will provide value for money for the State.

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

The PV Standard 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)). 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.

* + - * 1. Traffic Management (clause 11.4)

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 *Road Management Act 2004* (Vic), the *Road Safety Act 1986* (Vic), the Road Safety (Road Management) Regulations 2009 (Vic) and, if the Project is a declared project for the purposes of the MTPFA, the MTPFA.

Project Co must also comply with the directions of the State and any relevant road authority under the *Road Management Act 2004* (Vic), in connection with the management of traffic.

Project specific amendments

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

Where the Project is delivered under the MTPFA, the Relevant Legislation will be defined as the MTPFA.

* + - * 1. Utilities and underground structures (clause 12)

General principle

Project Co is required to make enquiries as to 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 any potential relocation, protection or decommissioning of the Utility Infrastructure. Project Co is required to obtain the State's consent to relocate Utility Infrastructure within or outside the Project Area, or to construct or modify any Utility Infrastructure outside the Project Area.

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 (see section 2.13.7.2 for a discussion of the Utilities regime under the MTPFA).

Project specific amendments

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.

If the MTPFA applies to the Project, there is a regime under Part 7 of the MTPFA for the interface with utilities, which includes a process for negotiating utility agreements with utilities where the Project requires the relocation or otherwise impacts those utilities, and a dispute resolution process, if no agreement is reached within the timeframes specified in the MTPFA. 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.

* + - 1. Land (clause 13)
         1. General principle

A placeholder has been included in the PV Standard 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.

* + - * 1. 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.
      1. Occupations (clause 14)
         1. General principle

A placeholder has been included in the PV Standard 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.

* + - * 1. 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 that 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 Project Co has in respect of occupations; and
    - requirements applying to the occupations imposed by third party transport operators or the State.
      1. State access and Project monitoring (clause 15)
         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 the Development Activities. Consistent with occupational health and safety requirements, Project Co and, in turn, the D&C Contractor controls 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 which 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 the Services, undertake the Development Activities remaining after Commercial Acceptance and perform any other obligations required during the Operational Phase. The licence is subordinate to overriding rights of the State and its Associates to have unfettered access to the Operational Phase Area to carry out the State's Functions/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.

* + - * 1. 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)), 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 State of Victoria.

* + - * 1. State Costs for inspection, survey and audit

The State will bear its own costs of any audit, inspection or survey save for 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), 15.3(g) and 15.4(e) of the PV Standard Project Deeds).

* + - * 1. Project specific amendments

As discussed in 2.19 below, 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.

* + - 1. Principal Contractor (clause 16.2)
         1. General principle

Where the Project involves construction work (as defined in the *Occupational Health and Safety Regulations 2007* (Vic) (**Regulations**)) the owner of the land upon which the construction project (as defined in the Regulations) is to be delivered is the Principal Contractor (as defined in the Regulations) unless it engages another person to carry out that role (and have management or control of the workplace (as defined in the Regulations)). Accordingly, the State must engage a party as the Principal Contractor for the construction projects during the Development Phase and the Operational Phase at the Project Area (to have management or control of the workplace) to avoid being legally obliged to carry out that role itself.

There can only be one Principal Contractor per construction project and 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, such that they are able to discharge the duties of a Principal Contractor.

The State will typically appoint the D&C Contractor as the Principal Contractor for the Development Phase Area for the Development Phase and the Services Contractor as Principal Contractor for any construction project 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 which is managed or controlled by the Services Contractor as Principal Contractor, it is subject to the reasonable direction of the Services Contractor regarding work health and safety 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.

* + - * 1. Project specific amendments

The Principal Contractor appointment arrangements will be considered on a project specific basis to ensure that 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.

* + - 1. Quality Assurance System (clause 16.3)
         1. General principle

The PV Standard Project Deeds include a clause that requires Project Co to develop, implement and maintain a Quality Assurance System with some key features.

* + - * 1. 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.

* + - 1. Title and Ownership (including Moveable Assets) (clause 18)
         1. General principle

The table below sets out the ownership arrangements for assets under the PV Standard Project Deeds.

|  |  |
| --- | --- |
| 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** |
| Where the Moveable Asset:   * forms part of the Works, by no later than the earlier of:   + the date that the Moveable Asset is paid for; or   + the Date of Commercial Acceptance; and * is acquired during the Operational Phase, the date the Moveable Asset is paid for,   and in all other cases, no later than the Expiry Date. | The earlier of:   * where the Moveable Asset:   + forms part of the Works, the Date of Commercial Acceptance; and   + 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 * the Expiry Date. |

Title in specialised equipment used to deliver the Services should be retained by the State on the Expiry Date and 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 often now 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 PV Standard Project Deeds the State must pre-approve the hiring of the equipment and the hire arrangements must be capable of novation to the State or its nominee, and during the Term the State may (on payment of the relevant residual value) require Project Co to procure that 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.

* + - * 1. Project specific amendments

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

* + - the list of Services Equipment;
    - whether the State requires a licence to use the Hired Moveable Assets. If so, such 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).
      1. Interface requirements (clause 19.2)
         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 co-operate and co-ordinate with any Interface Parties, including an obligation to provide access to the Project Area and carry out the Project Activities so as 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 upon:

* + - the nature and location of the Interface Works, and the identity of the party carrying them out; or
    - the extent to which interface arrangements have been negotiated and documented in agreements proposed with the interface parties at Contract Close.

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

* + - * 1. 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 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, advisers, 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, advisers, 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 PV Standard 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 Associates to the State).

* + - * 1. 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 but 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 which ought reasonably have been foreseeable at the date of the Project Deed by a person in the position of Project Co exercising Best Industry Practice;
      * 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 Practice; and
      * those works are performed in a manner which 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; and
    - Site Interface Works but only to the extent that:
      * those works are not part of the works of the relevant Interface Party undertaken regularly as part of its business as usual, day to day works, services or functions which ought reasonably have been foreseeable at the date of the Project Deed by a person in the position of Project Co exercising Best Industry Practice; and
      * 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 Practice.

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. This position requires Project Co to bear the risk of ordinary, day to day works or activities of Interface Parties throughout the Term. 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 is higher than Site Interface Works. Project Co must demonstrate that any Proximate Interface Works were performed negligently, whereas this requirement does not apply to relief and compensation for Site Interface Works. The rationale for this difference is that the level of risk retained by the State should be greater where the Interface Party is working on the Site where the risk of disruption to the Works or Services is greater.

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 PV Standard Project Deeds assumes that Project Co will be able to seek recourse against the Direct Interface Party under the Direct Interface Deed, notwithstanding 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.

The differences between the various types of Interface Works are explained in the table below.

|  |  |  |  |
| --- | --- | --- | --- |
| 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 | In Project Area | In direct vicinity of 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:   * business as usual; or * reasonably foreseeable | Compensable Intervening Event and Compensable Extension Event if negligent, unless:   * business as usual; or * reasonably foreseeable |

* + - * 1. Project specific amendments

While the PV Standard Project Deeds set out an extensive interface regime that reflects the principles 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 which 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 PV Standard 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 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 as 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 prospects of impacting the Project are high.

* + - 1. Development Phase Licence (clause 20.1)
         1. General principle

The PV Standard 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 such other terms as are imposed by the State (acting reasonably).

For transport infrastructure projects, if the MTPFA 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 MTPFA 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 MTPFA:

* + - 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 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 for the carrying out of works for the purposes of an approved project (s258(1)(c)).
      * 1. 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 of the Project Deed.

* + - 1. D&C Contractor Construction Bond (clause 20.4)
         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, with the amount secured usually reflecting 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 PV Standard 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; and
    - Project Co has the right to call on the D&C Contractor Construction Bond under the D&C Contract.

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.

* + - * 1. 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 the above, 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 such right where 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.

* + - 1. Procurement and installation of Equipment (clause 21)
         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. The grouping of Equipment is determined on the basis of whether there is a difference in allocation of activities as 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 the groups identified by the State.

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

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Selection | | Procurement | | | Installation | | | Maintenance | | Ownership | |
|  | **State** | **Project Co** | **State** | | **Project Co** | **State** | | **Project Co** | **State** | **Project Co** | **State** | **Project Co** |
| Group 1 equipment |  | ✓ |  | | ✓ |  | | ✓ |  | ✓ | ✓ |  |
| Group 2 equipment | ✓ | ✓ |  | | ✓ |  | | ✓ |  | ✓ | ✓ |  |
| Group 3 equipment | ✓ |  |  | ✓  in consultation with the State | | |  | ✓ | ✓ |  | ✓ |  |

The drafting in the table above 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 SIPD provides that the Equipment List for Group 1 Equipment and Group 2 Equipment is indicative only. This is because the period of time between the date the Equipment List is created and updated (during the RFP Phase) and the time 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 inferior to or in lesser quantities than specified in the Equipment List. However, Project Co is required to procure Equipment which 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;
    - Project Co should be incentivised to accurately reflect the Equipment required for the Maintained Asset in its Proposal in order 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 in respect of which the State wants to be involved in procurement or otherwise regulate procurement and replacement.

* + - * 1. 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 the Equipment that is procured. The purpose of the Equipment List from a legal perspective is as a reference point in order to determine Equipment Modifications post 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 are fertile 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 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 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.

* + - 1. Independent Reviewer review of construction (clause 20.5 LIPD only)

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

* + - 1. Acceptance (clause 22 to clause 25)
         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 PV Standard Project Deeds allow for either a two or three stage Acceptance regime:

* A two stage Acceptance regime which consists of Commercial Acceptance and Final Acceptance. This is typically used on infrastructure where services are fully outsourced so that there is limited if anything that the State needs to do to prepare for operations.
* A three stage Acceptance regime which includes 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, clauses 22 and 23 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 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 2.26.5 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 2.26 for further discussion).

The Acceptance process is set out in Annexure 2.

* + - * 1. Technical Acceptance (clause 22)

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 ICT) 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;
    - there is significant staff training and induction required before operations can commence; or
    - there are a large number of transitional activities that need to be undertaken before the Maintained Assets are operational.

The Independent Reviewer certifies whether or not Technical Acceptance has been achieved. A Certificate of Technical Acceptance will be final and binding other than in the case of manifest error. The issue of 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.

Technical Acceptance Outstanding Items

The Independent Reviewer may determine or Project Co and the State may agree that certain Works or Development Activities which 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 Diagram 11 below.

Diagram 11



* + - * 1. Commissioning (clause 23)

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 over Project Co during this Commissioning Period. Priority access means that Project Co will need to work around the timetable and access requirements 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.

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 this point in time debt will be almost fully drawn down. Accordingly, 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 DTF.

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

* + - * 1. Commercial Acceptance (clause 24)

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 section 2.25.4.2 and 2.25.5)); 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 of the PV Standard Project Deeds provides that during the Development Phase the Independent Reviewer is required to continuously review the progress of the Works and determine whether it believes that Project Co will or will not achieve Commercial Acceptance by the Date for Commercial Acceptance (refer to section 2.26.5).

Consistent with the fact that the Maintained Assets are intended to be operating from Commercial Acceptance, the PV Standard Project Deeds assume that full Services delivery and therefore payment of each full 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 a period of time or some Services are provided prior to Commercial Acceptance.

On Linear Infrastructure Availability PPP Projects, the Independent Reviewer certifies whether or not 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 more government or Operator specific and less technical in nature (for example with 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 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 DTF agreement.

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. Accordingly it is effectively confirmation of achievement of a milestone to trigger commencement of Service Payments.

Remaining Works

The PV Standard Project Deeds include a concept of Remaining Works, being those Works which are required to achieve Final Acceptance but do not prevent the Project Assets from being operational and are therefore 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 which 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 which 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, and must be completed within a timeframe determined by the Independent Reviewer which is before the Date for Final Acceptance (see section 2.25.6), 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 Remaining Works regime as they are addressed as Returned Works Outstanding Items (see section (a)(i)2.25.5.2).
* The approach to Remaining Works is set out Diagram 12 below.

Diagram 12



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. Further, 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 that 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.

Project specific amendments

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

* + - 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 DTF);
    - 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
    - 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.
      * 1. Returned Works Acceptance (clause 24.4)

General principle

Returned Works are those parts of the Works that have been designed or constructed by Project Co during the Development Phase which 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 (e.g. footpaths, utility pits and conduits, water and sewerage reticulation and fly overs etc.).

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.

Returned Works Outstanding Items

In the PV Standard 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 DTF approval.

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

Project specific amendments

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

* + - 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 which 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 PV Standard 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.
      * 1. Final Acceptance (clause 25)

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

The Independent Reviewer certifies whether or not 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.

* + - 1. Time, Extension Events and Compensable Extension Events (clause 26)
         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 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 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) of the PV Standard Project Deeds).

* + - * 1. 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.

* + - * 1. Development Phase Program (clause 26.2)

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.

Accordingly, 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 of the PV Standard Project Deed; and
    - determine whether Project Co has been delayed in achieving Acceptance by a Date for Acceptance 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 upon becoming aware of any proposed or likely departure from the critical path in the Development Phase Program.

Further, Project Co must 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 PV Standard Project Deeds clarifies that neither the State nor 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 as to 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.

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.

* + - * 1. 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.

* + - * 1. Independent Reviewer's review of progress (clause 26.4)

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 and to mitigate against delays to Commercial Acceptance at the earliest possible opportunity, when the ability to successfully undertake measures to avoid the delay is at its greatest. Annexure 3 summarises the Independent Reviewer review of progress regime.

Project specific amendments

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

* + - 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 section 2.53.3 and 2.53.5 for a discussion on Cure Program and cure periods).
      * 1. Extension of time (clauses 26.5 – 26.9)

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

* + - a limited category of events which are generally within the control of the State; or
    - risks that are considered to be better managed or mitigated by the State.

Accordingly, they are events in respect of which the State retains time and cost risk.

Extension Events that are not Compensable Extension Events are neutral events such as Force Majeure Events in respect of which 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 following are conditions precedent to Project Co's entitlement to an extension of time for Extension Events:

* + - Project Co submits a Change Notice within the timeframe specified in clause 26.7 and otherwise in accordance with the Change Compensation Principles;
    - Project Co can demonstrate that:
      * it has been or will be delayed from carrying out the Development Activities by the relevant Extension Event in a manner which 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 which 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; or
    - 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, Project Co will not be entitled to claim an extension of time for the relevant Extension Event.

The PV Standard Project Deeds provide one opportunity for Project Co to re-submit 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, either party may ask the Independent Reviewer to extend the relevant Date for Acceptance by a reasonable period determined by the Independent Reviewer. The Independent Reviewer may give interim determinations of Project Co's entitlement to an extension of time notwithstanding that the effects of the relevant Extension Event are continuing.

* + - * 1. 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.

* + - * 1. 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 clauses 42.4 or 42.5 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 2.50).

Compensable Extension Events include acts or omissions of the State other than those that are Permitted Acts or contemplated by clause 7.1 where the Authority is acting in accordance with its statutory powers. Accordingly, 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)). Refer to section 2.51.3.

If the State exercises its power under clause 26.10 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, but for the exercise by the State of its power Project Co would otherwise be entitled to an extension of time to a Date for Acceptance for the Compensable Extension Event, Force Majeure Event or State Initiated Modification, Project Co will be entitled to claim compensation for that Compensable Extension Event, Force Majeure Event or State Initiated Modification in accordance with the Change Compensation Principles (refer to section 3.3).

* + - * 1. Share of Prolongation Costs (clause 26.13)

If Project Co:

* + - achieves Commercial Acceptance earlier than the Date for Commercial Acceptance but after the Original Date for Commercial Acceptance; and
    - has been compensated or is entitled to compensation in accordance with the Change Compensation Principles for a Compensable Extension Event for the period until the Date for Commercial Acceptance,

Project Co must pay the State, within 20 Business Days of the Date of Commercial Acceptance, a share (as agreed between Project Co and the State, or failing agreement, 50 per cent) of the Prolongation Costs paid or payable to Project Co for the period between the Date of Commercial Acceptance and the Date for Commercial Acceptance.

* + - * 1. 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 2.43.2.4 for further details). This limitation applies whether or not the Extension Event or State Initiated Modification occurs first in time.

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

* + - an Extension Event which 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 Development Phase Finance Interest 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.

This approach to risk sharing for Concurrent Delay reflects a fair and common sense approach to causation.

Diagram 13 below 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.

Diagram 13



* + - * 1. Acceleration (clauses 26.15 – 26.19)

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

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,

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:

* + - 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,

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).

* + - 1. Force majeure (clauses 26.11, 26.12, 32.4, 32.5, 32.9 and 42.5)
         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 which are catastrophic, 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.

* + - * 1. Relevant definition – Force Majeure Events

Force Majeure Events are defined in the PV Standard 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 in addition to 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.

* + - * 1. 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, such events are treated differently to other Relief Events. The entitlement to relief and compensation in the PV Standard 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 (refer to sections 2.26.6 and 2.38), to the extent 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 Force Majeure 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.

Diagram 14 over sets out Project Co's entitlements to relief and compensation for Force Majeure Events.

Diagram 14



* + - * 1. Insured Risks

Notwithstanding the above, 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)). Refer to section 2.51.3.

* + - * 1. 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)).

* + - * 1. 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.

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

* + - * 1. Project specific amendments

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

* + - all Force Majeure Events should align with the general principle set out above;
    - tropical cyclone has been considered by the State and excluded from the definition on the basis that, by definition, these events do not occur in Victoria. However, the reference to high winds in paragraph (a)(ii) has been included to address the extent 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 Australia). For example, this may be appropriate where a large and critical item of Equipment for the Project with a long lead time is being manufactured in a different location.
      1. Defects (clause 27)
         1. Defects

Defects

The definition of Defects excludes damage. There is a separate regime in the Project Deed for damage that reflects the fact that damage is typically an insured risk while Defects are not (see section 2.50).

In summary, the Defects Regime consists of:

* + - Defects in the Works during the Development Phase which must be rectified promptly unless they are:
      * accepted or rectified by the State; or
      * 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 which 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 which 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.

* + - * 1. Project specific amendments

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

* + - 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 obligations;
    - the PV Standard 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 which, if progressed, will result in Defects which it is not practicable for Project Co to rectify. Any such regime should work consistently with the terms of the Project Deed in respect of Defects.

* + - 1. Operational Phase Obligations (clause 28)
         1. General principle

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

* + - * 1. 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 co-ordinated with the land provisions in clause 13 where applicable.

* + - 1. Operational Phase Licence (clause 28.1)
         1. General principle

The PV Standard 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.

See section 2.21 in relation to application of the MTPFA. A licence issued under the MTPFA cannot exceed the period of the approved project.

* + - * 1. 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.

* + - 1. Innovation and continuous improvement (clause 28.3)

The PV Standard 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 which enables technical efficiencies and developments to be incorporated into the Project so that it does not become out-dated as a result of the length of the contract term. The key features of the regime are:

* + - together, Project Co and the State will conduct a Project Efficiency Review every 5 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 co-operate 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 which case the Modification regime or the Augmentation Process Schedule (as applicable) will apply.
      1. Planned Lifecycle Activities and Deferral of Lifecycle (clause 28.4)
         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 that 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. Accordingly, 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 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, the Asset Management Plan in which the relevant item and the replacement cycle for the relevant item was last shown,

(the **30% 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% Rule puts a limit on the deferral of Planned Lifecycle Activities for certain Maintained Assets, notwithstanding that 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 PV Standard Project Deeds, and therefore a sinking fund is unlikely to provide value for money. However, the State acknowledges that Project Co may require such a sinking fund as 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.

* + - * 1. Project specific amendments

The Planned Lifecycle Activities that will be subject to the 30% 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.

* + - 1. Obsolescence (clause 28.5)
         1. General principle

Where a part of a Project Asset is or will become Obsolete, the PV Standard Project Deeds require Project Co to put in place a Plan to manage that Obsolescence to ensure it does not impact the performance of the Project 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.

* + - * 1. Project specific amendments

The period of time after the Final Expiry Date before a Project 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 Project Assets which are typically subject to continuing improvement (such as replacement parts for rolling stock) and should amend the PV Standard Project Deeds accordingly.

* + - 1. Warranted Life (clause 28.6)
         1. General principle

Project Co has a contractual obligation to obtain and maintain a warranty from the manufacturer or supplier (that is capable of assignment to the State or Project Successor) 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), provided that the relevant Warranted Asset is operated and maintained in accordance with standards specified in the clause. 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 and identify each of the Warranted Assets for which it has obtained or has not yet obtained a Warranted Life Warranty.

* + - * 1. Warranted Life and Handover

During the Term, the State will rely on the benefit of the Fit For Purpose Warranties set out in clause 5.5 of the PV Standard Project Deeds for the Maintained Assets (see section 2.6 for further discussion) rather than the Warranted Life Warranties. Accordingly, it is not the State's intention that it will 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 2.53.6 for more detail on the Handover regime).

* + - * 1. 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 such 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.

* + - 1. Equipment during the Operational Phase (clause 29)
         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 and accordingly 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) that exceeds the original Whole of Life Cost of that replaced Equipment by more than 10 per cent.

* + - * 1. 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 2.23.1.

* + - 1. Reviewable Services (clause 30)
         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 which emerges 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
    - if no agreement is reached during the exclusive negotiations, retendering of the services by Project Co.

Respondents are required to prepare a Reviewable Services Schedule as part of their Proposals, which includes a detailed breakdown of the Reviewable Services pricing and the Successful Respondent's Reviewable Services Schedule will be incorporated into the Project Deed. This is updated for each Reviewable Services Term. This is 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 upon which the Services Contractor was engaged.

* + - * 1. 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 PV Standard Project Deeds and will need amending on a project specific basis.

* + - 1. Minor Works (clause 31)
         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 fitout 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 is set out in Annexure 6.

The Minor Works process may also be included in a LIPD where similar types of ad hoc services are required.

* + - * 1. 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.

* + - 1. Intervening Events and Compensable Intervening Events (clause 32)
         1. Intervening Events and Compensable Intervening Events

Intervening Events and Compensable Intervening Events are defined in the PV Standard Project Deeds.

The Intervening Events (other than the Compensable Intervening Events and Force Majeure Events) listed in the PV Standard Project Deeds have been selected on the basis that the risk of the event is better borne by the State as it is in a better position than Project Co to mitigate or manage the consequences of the risk, notwithstanding that 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 PV Standard Project Deeds.

Refer to section 2.27 for a discussion on Intervening Events which are Force Majeure Events.

* + - * 1. Relief and compensation

General principle

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 or its consequences; 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,

Project Co’s obligations to perform those Services will be suspended for the period of the Intervening Event.

For a discussion of the concept of ‘prevention’ see section 2.27.3 above.

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 (a)(i)2.28.2 for discussion on relief and compensation for an Intervening Event which is a Force Majeure Event); or
    - an Insured Risk (which is a 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 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, but 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.

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 calculated in accordance with Item 6, Table 1 of the Change Compensation Principles. Refer to section 2.28 for a discussion on Intervening Events which 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 2.46 for further discussion).

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 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.

Alternative arrangements

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

Unilateral right

The PV Standard 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.

* + - 1. State Contribution (clause 33)
         1. General principle

The State may elect to make a State Contribution to the Project for a variety of reasons, including where there are liquidity constraints or where Project costs could 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 absorb the remaining risks the private sector is taking and to incentivise performance.

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 upon 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 regeared, provided that 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 contributions or regular smaller payments throughout the Development Phase. To mitigate the construction risk that the State thereby becomes exposed to, the State will impose project specific conditions on the amount of debt funding and equity funding that must be contributed before any such State Contributions are required to be made, and will require all such State Contributions to be contributed pro rata with additional debt and/or equity funding. In addition, State Contributions during the Development Phase will be dependent upon 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.

* + - * 1. Project specific amendments

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

Where the State makes both a lump sum and an on-going contribution to a Project, the lump sum will be defined as the State Capital Contribution and the on-going contribution will be defined as the State Construction Contribution, both of which comprise the State Contribution. It will be necessary to consider all PV Standard Project Deeds references to State Contribution in this context to determine whether amendments are required to the PV Standard Project Deeds standard drafting in relation to the State Contribution.

* + - 1. Abatement (clauses 32.6 and 34.2)
         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 Standard 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 Standard Form Project Deeds are drafted on the basis that Service Payments are abated for Performance Failures consisting 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 PV Standard Form 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.

* + - * 1. 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 for a Liability (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 which 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 acknowledgments in relation to the application, operation and enforceability of the Abatement regime.

Further, the State may unilaterally waive any Abatement (in whole or in part).

* + - * 1. 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 which 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.

Refer to section 2.38 for discussion on the impact of Intervening Events on Abatement.

* + - 1. Service Payments (clause 34.4)
         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 PV Standard Project Deeds.

* + - * 1. 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 which 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.

* + - 1. Floating Rate Component (clause 34.8)
         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 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 comprising 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 (TCV), the State manages the Floating Rate Component payments to Project Co by entering into a back to back interest rate swap with TCV (outside of the Project Deed).

Clause 34.8 sets out the mechanics which 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.
      * 1. 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.

* + - 1. Modifications (clause 35)
         1. Introduction

A Modification is broadly defined to include:

* + - during the Development Phase, any change to the Works, the 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, the Development Activities or the 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 is a change to the Project Assets, the Design Requirements, the Operational Phase Requirements or the 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. See section 3.6.

While typically an Augmentation will 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.

* + - * 1. State Initiated Modifications

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 following additional events will be treated as a State Initiated Modification and clause 35 of the PV Standard Project Deeds and the Change Compensation Principles will apply:

* + - a State Approval Event (see section 2.8.2);
    - a Contamination Compensation Event (see section (a)(i)2.13.4);
    - a Compensable Change in Mandatory Requirements (see section 2.44.2);
    - 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 2.51.3 for further information on State Insurance Breach); or
      * the State directs that repair or reinstatement to different specifications to that of the Project Assets which suffered the loss or damage; or
    - 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.

Notification of Modification

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 such effect and the State must respond to such 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.

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 PV Standard Project Deed.

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(c) are satisfied, the extension of time to the relevant Date for Acceptance will be as agreed by the State and Project Co as part of the Modification process and failing such agreement:

* 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) applies to State Initiated Modifications on the basis that, prior to the PV Standard Project Deeds, these were Extension Events to which the concurrent delay provisions in clause 26.14 would have applied and because the approach to risk sharing for Concurrent Delay set out in section 2.26.10 above reflects a fair and common sense approach to causation. See section 2.26.10 above.

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.

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 up to a capped amount as agreed or determined in accordance with clause 35.3 of the PV Standard 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.

* + - * 1. Project Co Initiated Modifications

Project Co may at any time propose a Modification. If such Modification is approved by the State, Project Co must implement such Modification at its own cost and risk and 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 such saving.

* + - * 1. Minor Modifications

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 but 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.

Project specific amendments

The threshold for Minor Modifications on Works and Maintained Assets is to be completed on a project specific basis.

* + - * 1. Pre-Agreed Modifications

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 3 year period for the State to exercise the option.

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 that 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 Modifications 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,

to be agreed on a project specific basis.

* + - * 1. Augmentation Process

Augmentations are excluded from the definition of Modifications. See section 3.6 for details of the Augmentation process.

* + - 1. Change in Law and Change in Policy (clause 36)
         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.

* + - * 1. Compensable Change in Mandatory Requirements

A Compensable Change in Mandatory Requirements will occur in the circumstances set out below.

|  | **Development Phase** | **Operational Phase** |
| --- | --- | --- |
| **General Change in Law** | x | ✓ |
| **Project Specific Change in Law** | ✓ | ✓ |
| **Change in Policy** where:   * Project Co is legally obliged to comply with the Change in Policy; or * Project Co is not legally obliged to comply with the Change in Policy but the State has otherwise directed Project Co to comply with the Change in Policy. | ✓ | ✓ |

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 General Change in Law occurring during the Development Phase. The State retains General Change in Law risk during the Operational Phase.

Project Specific Changes in Law and Changes in Policy 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 14, 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 and any specific relief will need to be addressed as part of the Modification process.

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.

* + - 1. Refinancing (clause 37)
         1. Introduction

Partnerships Victoria projects are financed by Project Co through a mix of debt provided by lenders and equity provided by sponsors. The term ‘Refinancing’ refers to changes in the debt finance arrangements.

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 which were part of the original Financial Close plan (e.g. 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. Whilst 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 which is taken into consideration when calculating a Refinancing Gain or loss to be allocated between the State and Project Co.

The PV Standard Project Deeds provide for the State to share in 50 per cent of Refinancing Gains, after allowing Project Co to recoup any prior Refinancing losses. 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. Further, 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 a State Contribution, it is appropriate for 100 per cent of the Refinancing Gain to be paid to the State.

* + - * 1. General principle

The State requires visibility of, and consent rights in respect of, any Refinancing during the Term. The concept of Refinancing is linked intrinsically 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 which is 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 State Contribution 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 or subscription of any debt in accordance with the Finance Documents that is contemplated at Financial Close;
    - 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 State Contribution.

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.

* + - * 1. 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 State Contribution), and must give (or withhold) its consent within 20 Business Days of 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 which arises from a change in the manner or timing of payment of the State Contribution; and
    - 50 per cent of any other Refinancing Gain, calculated after taking into account any reductions in the Equity IRR arising from any previous Refinancings.

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.

* + - * 1. 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 looking forward to reflect the terms of the proposed Refinancing; and
    - B = the present value of the Distributions to Equity Investors projected 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 the Financial Close Financial Model (not the Financial Model as it may have been updated after Financial Close).

* + - 1. Suspension and Step-In by the State (clause 38)
         1. Suspension by the State

The State must retain flexibility to be able to suspend the Project throughout the Term. Accordingly, 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 or contributed by a Project Co Act or Omission; 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 (a)(i)2.38.2.1 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 (refer to section 2.27.2).

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.

* + - * 1. Step-In 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, 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:

* + - 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
    - 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;
      * 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 notwithstanding 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 2.27.2).
      1. Probity Events and Probity Investigations (clause 39)
         1. General principle

The probity regime under the PV Standard Project Deeds consists of:

* + - proactive Probity Investigations as to 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 which 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.

* + - * 1. 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 (e.g. police checks).

* + - 1. Commercial Opportunities (clause 40)
         1. General principle

Project Co may only derive revenue or other returns from:

* + - Service Payments;
    - State Contributions (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.

* + - * 1. 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 EOI 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 ITP 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.

* + - 1. Structured Financing (clause 41)
         1. General principle

In addition to determining its preferred equity capital structure and debt funding structure, the private sector also 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 DTF 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.

* + - * 1. 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.

* + - * 1. Project specific amendments

The above is to be used on a project specific basis where a structured financing solution is contemplated.

* + - 1. Damage (clause 42)
         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 whether or not it requires Project Co to repair or reinstate the Project Assets;
    - Minor Damage, Project Co must promptly repair such loss or damage; or
    - all other loss or damage, the State must notify Project Co within 30 Business Days whether or not 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.

* + - * 1. Direction to repair or reinstate

Loss or damage to Project Assets

In general, Project Co 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 and 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 different specifications or standards that are different to the then current specifications or standards.

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 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, 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 2.43.2.4 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.

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.

In addition, 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.

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 and 42.3 of the PV Standard Project Deeds.

Project specific amendments

The threshold amounts contained in the definition of Minor Damage will be determined by the State on a project specific basis.

* + - * 1. Direction not to reinstate or repair

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 or a Project Co Act or Omission, this will be deemed to be a Default Termination Event;
    - a Force Majeure Event, or an Uninsurable Risk, this will be deemed to be a Force Majeure Termination Event; or
    - all other events, the Project Deed will be terminated for convenience.

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 may direct a Modification to omit Project Co’s obligations in connection with the relevant part of the Project Assets which 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.

* + - * 1. Insurance Proceeds and deductibles

Any Insurance proceeds received 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),

must be deposited into the Insurance Proceeds Account and applied towards the cost of reinstatement or repair (refer to section 2.50.2 for further discussion).

Project Co is liable for the deductible or excesses which 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 (refer to section 2.50.2.1 for further discussion).

* + - 1. Indemnities and Limitations of Liability (clause 43)
         1. Indemnities

General principle

The PV Standard Project Deeds set out a number of broad indemnities which Project Co must provide, including indemnities in relation 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;
    - 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 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 and Project Co or a Project Co Associate has caused or contributed to such Contamination emanating or migrating from the Project Area; 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 PV Standard Project Deeds (refer to section 2.51.2.1). Further, the procedure in respect of third party claims (refer to section 2.51.4) 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 PV Standard Project Deed.

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.

* + - * 1. Project Co's limitation of Liability

General principle

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 but only if Project Co is entitled to an extension to the Date for Acceptance as a consequence of the Extension Event;
    - any Intervening Event that occurs during the Operational Phase but only if Project Co is entitled to relief from performance of the Services as a consequence of the Intervening Event;
    - 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,

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 is further reduced through the operation of the Indirect or Consequential Loss regime.

The PV Standard Project Deeds provide that the State and Project Co respectively have no liability in respect of Indirect or Consequential Loss incurred or suffered by Project Co or the State respectively, except in limited circumstances which include:

* + - 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; and
    - any payment, or any reduction in payment, made pursuant to 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 accordingly be subject to the liability caps in their Key Subcontracts.

Project specific amendments

The PV Standard 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 PV Standard Project Deeds). The clause should be carefully considered on a project specific basis, having regard to the likelihood of the risk of any such liability, the potential extent of that liability, the level of control 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, for example where there are known Liabilities that the State has to third parties for loss of revenue that either need to be covered by Project Co or subject to a different regime. However, the circumstances for project specific amendment should be limited given the insolvency risk it creates for Project Co.

* + - * 1. 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.

Further, 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.

* + - * 1. 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.
      1. Insurance (clause 44)
         1. General principle

In the PV Standard Project Deed, Project Co must procure and maintain:

* + - during the Development Phase, the Development Phase Insurances; and
    - during the Operational Phase, the Operational Phase Insurances,

which are set out in the Insurance Schedule. The State’s insurance requirements in the Insurance Schedule represent the minimum degree of cover which 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 Insurances under which the State or any State Associate are also Insured, ensure that the interests of the Insured include the entire assets of the Project and waives any rights of subrogation which it may have against any Insured;
    - in the case of liability Insurances, ensure to treat each Insured as a separate Insured as though a separate contract of insurance had been entered into with each of the Insureds, without increasing the applicable deductible or the overall limit of indemnity under the relevant Insurance;
    - except in relation to workers' compensation insurance and compulsory third party motor vehicle insurance, 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.
      * 1. 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 5 Business Days after becoming aware that the risk has become, or is likely during the Term to become an Uninsurable Risk; and
    - the State must meet with Project Co within 5 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, then 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.

* + - * 1. Day 1 Uninsurable Risk

Day 1 Uninsurable Risks are expressly identified in the PV Standard 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.

* + - * 1. 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 incepted 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.

* + - * 1. 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. Accordingly, 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 and 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.

Three months prior to each Insurance Review Date, Project Co must obtain separate quotations from three 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, save that in undertaking any such adjustment, any increase or decrease 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.

* + - * 1. 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 DTF if State procured insurance is proposed for a project.
      1. Default, Termination and end of Term obligations (clauses 45, 46 and 47)
         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.

* + - * 1. Major Default Notice (clause 45.1 and 45.2)

Major Defaults are events which trigger the operation of the Major Default mechanism. Subject to project specific considerations, the events which are Major Defaults are set out in the PV Standard Project Deeds.

The following Major Defaults are deemed to be capable of Cure:

* + - 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;
    - where Project Co breaches the Local Content Requirements, the LIDP, the Major Projects Skills Guarantee or the Major Projects Skills Guarantee Compliance Plan.

The deeming provision puts it beyond doubt that notwithstanding that 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.

Diagram 15 below 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.

Diagram 15



* + - * 1. Cure Program and cure periods (clauses 45.4 and 45.5)

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.

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 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 DTF.

It is for the 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 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 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.

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. Accordingly, 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.

* + - * 1. Termination (clause 46)

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 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.

Termination events

The PV Standard Project Deeds can be terminated as a result of:

| Event | Trigger |
| --- | --- |
| **Termination for convenience** | The State may, at any time, unilaterally elect to terminate the Project Deed for convenience. |
| **Force Majeure Termination Event** | The occurrence of a Force Majeure Termination Event (refer to section 2.27.6). |
| **Default Termination Event** | If:   * a Major Default has not been remedied in accordance with the Project Deed; or * a Default Termination Event occurs. |

The Default Termination Events are events which are sufficiently fundamental as 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 PV Standard Project Deeds and includes the following:

* + - total or substantial abandonment of all or any part of the Project Activities;
    - 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 defects liability period 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 (whether or not Project Co is actually Abated);
    - a finance event of default, to ensure the State has appropriate rights in an insolvency scenario given the legislative landscape; and
    - any other project specific Default Termination Event specified in a Project Deed.

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.

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 (including taking novations of some or all of the hedging agreements under the Finance Documents). If the State so elects:

* + - Project Co must ensure that such rights and Liabilities are novated to the State; 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 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 novation.

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. Accordingly, all of the Finance Documents must be capable of novation to the State, so that the State can exercise its rights under clause 46.7. This will include in some circumstances novation of Finance Documents which relate to assets rather than Liabilities (for example derivatives or swaps that are ‘in the money’ when the Project Deed has been terminated) as they will serve to reduce the face value of other indebtedness.

* + - * 1. 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.
      * 1. Handover Condition (clause 47.3)

General principle

By the Expiry Date, Project Co must:

* + - have handed over to the State or any Project Successor, the Project Assets and the Project Area; and
    - ensure that any Returned Asset or any part of a Returned Asset that is a Warranted Asset is,
    - in a condition which complies with the Handover Condition.

The table below 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.

| When Handover occurs | Handover Condition |
| --- | --- |
| **Project Assets and Project Area** | |
| 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 | 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 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 * such that 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:   + in accordance with Best Operational Practices;   + 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;   + in accordance with the Asset Management Plan; and   + in accordance with all Laws and Standards. |
| **Returned Assets** | |
| At the Expiry Date | 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 provided that the Returned Asset is operated and maintained following the relevant Date of Returned Works Acceptance for that Returned Asset:   * in accordance with Best Operational Practices; * 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 * in accordance with all Laws and Standards. |

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);
    - 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 Encumbrance;
    - 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.

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 PV Standard 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).

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,

the State may exercise its rights of step in to complete any Final Refurbishment Works and all costs incurred by the State in doing so will be a debt due and payable by Project Co to the State.

Project Specific

Which Maintained Assets and Returned Assets 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.

* + - 1. Dispute resolution (clauses 48, 49 and 50)

The PV Standard Project Deeds provide for a stepped dispute resolution process that generally requires parties to resolve disputes through negotiation, before referring disputes to expert determination or arbitration. This is considered to be more efficient and cost-effective rather than taking legal action in the first instance.

Diagram 16 over sets out the dispute resolution process set out in the PV Standard Project Deeds.

Diagram 16



* + - 1. Assignment and Change in Control (clause 52)
         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 which have invested in Project Co, whether directly or indirectly, and have Control over Project Co.

For this reason, Project Co is required to ensure that after Financial Close, no Group Member:

* + - changes the equity capital arrangements or holdings in any Project Entity;
    - 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
    - changes any trustee or manager of any Group Member,

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.

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; or
      * has or have an interest or duty which conflicts or may conflict in a material way with the interests of the State; 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 by a person that:
        + has an interest or duty which conflicts or may conflict in a material way with the interests of the State; or
        + does not have a sufficient level of financial, managerial and technical capacity to deliver the Project;
      * 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.
        1. 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 so 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, which 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. Accordingly, 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 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.

* + - * 1. 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 2 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.

* + - * 1. 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 which does not proceed.

* + - 1. 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 any of the following Model Variation Events:

* + - a Refinancing;
    - permanent adjustment to the Service Payment (for example, following a Reviewable Services process);
    - Augmentations; or
    - other events if agreed between the State and Project Co.

Throughout the PV Standard Project Deeds, references to the Financial Model means the Financial Close Financial Model, as it may be updated for any Model Variation Event.

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 would have unintended consequences (refer to section 3.2)

* + - 1. 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 pre-investor tax equity internal rate of return 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.

* + - 1. Project Co Material and Information Management System (IMS) (clause 54.5)
         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 utilise 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).
      * 1. 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.

* + - 1. Confidential Information and disclosure by the State (clauses 55.1, 55.2 and Schedule 11)
         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.

* + - * 1. Commercially Sensitive Information

The Victorian Government is committed to openness and transparency. Consistent with these principles, the Confidential Information provisions in the PV Standard 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 Auditor-General 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.
      * 1. Project specific amendments

The Commercially Sensitive Information will be agreed by the parties on a project specific basis and 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 PV Standard 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.

* + - 1. Commonwealth Requirements (clause 57)
         1. General principle

The Commonwealth funding conditions for Projects are generally project specific, however, as a minimum the Commonwealth will make the provision of funding for Commonwealth Funded Building Work conditional on compliance with both the WHS Accreditation Scheme and Building Code 2016 by all Building Industry Participants and Building Contractors who deliver Building Work on a Project.

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 $5,000,000 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 $10,000,000, irrespective of the proportion of the total construction project value.

‘Building Work’ is defined in the section 6 of the *Building Act 2016 (Cth)*.

* + - * 1. 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).

* + - * 1. Building Code 2016 (clause 57.3)

Where the Commonwealth funding conditions apply, Project Co and its Subcontractors who are ‘Building Contractors’ or ‘Building Industry Participants’ under the *Building Act 2016 (Cth)* will be required to comply with the Building Code 2016. The Building Code 2016 was established via the *Building Act 2016 (Cth)* and commenced operation on 2 December 2016.

Building Contractors and Building Industry Participants (i.e. Project Co and its Subcontractors) become subject to the Building Code 2016 from the first time they submit an expression of interest or tender for Commonwealth Funded Building Work and become ‘code covered entities’.

Subject to certain limited exemptions (which largely expire on 30 August 2017), Project Co and its Subcontractors must comply with the Building Code 2016 and not be subject to an Exclusion Sanction.

In general terms the purpose of the Building Code 2016 is to set out the Commonwealth Government’s expected standards of conduct for all Building Industry Participants (including Building Contractors) that seek to be, or are, involved in Commonwealth Funded Building Work.

Building Code 2016 compliance is monitored by the Australian Building and Construction Commission.

* + - 1. Victorian Requirements
         1. Local Jobs First – VIPP (clause 58)

General principle

The Local Jobs First – Victorian Industry Participation Policy (**VIPP**) seeks to maximise opportunities for Australian, New Zealand and Victorian suppliers to compete for government business on the basis of best value for money over the life of the goods or services. The VIPP is implemented by Victorian Government departments and agencies to help drive local industry development.

The VIPP applies to government procurement activities, construction activities, major projects, major events, Public Private Partnerships and investment support, business development and community infrastructure grants above the threshold values of $3 million or more in metropolitan Melbourne and $1 million or more in Regional Victoria. The VIPP also applies to strategic projects, which are projects with a total project value of $50 million or more, excluding maintenance and operational costs. Strategic projects are subject to mandated minimum Local Content Requirements and other conditions to help drive additional economic activity and jobs.

Clause 58 of the PV Standard Project Deeds is based on the VIPP model clauses prepared by the Victorian Government Solicitor’s Office current as at June 2017 with amendments to extend the obligations into the Operational Phase. Clause 58 should be updated to align with any amendment to the VIPP or the VIPP model clauses.

Project specific amendments

Procuring agencies should consult with the Department of Economic Development, Jobs, Transport and Resources and the Industry Capability Network to determine the Local Content Requirements.

Procuring agencies should also determine on a project specific basis:

* + - Reporting requirements – each agency is required to report back to the Responsible Minister for VIPP on their compliance with VIPP, to inform the preparation of the VIPP Annual Report. The PV Standard Project Deeds require reports on compliance to be provided:
      * during the Development Phase:
        + annually within 20 Business Days after the end of each Financial Year; and
        + upon:

the earlier of Commercial Acceptance and 1 Month after the Date for Commercial Acceptance; and

Final Acceptance; and

* + - * during the Operational Phase, annually within 20 Business Days after the end of each Financial Year.
    - Consequences for non-compliance – The VIPP guidelines provide that an agency may determine whether or not consequences will apply if successful bidders do not deliver the Local Content (ANZ) outcomes committed to in their LIDP. In the PV Standard Project Deeds, a failure to comply with the LIDP will result in liquidated damages payable at the Date of Commercial Acceptance (the formula for calculating the liquidated damages should be set out in the Payment Schedule) and a Major Default if the failure is not cured within 20 Business Days. However, procuring agencies are to determine on a project specific basis whether and what consequences should apply if Project Co fails to deliver the local content outcomes committed to in its LIDP.
      * 1. Major Projects Skills Guarantee (clause 59)

General principle

The Victorian Government is committed to creating job opportunities and promoting a strong and sustained vocational training culture through the employment of Apprentices, Trainees and Engineering Cadets within the Victorian building and construction industry.

To implement this commitment, the Victorian Government, through its Major Projects Skills Guarantee, will use the awarding of Victorian Government building, construction, infrastructure, civil engineering and other capital projects to stimulate job opportunities and to enhance vocational training in these sectors.

Under the Major Projects Skills Guarantee, all principal contactors awarded contracts for Victorian Government funded building, construction, infrastructure, civil engineering and other capital projects which have a pre-tender estimated value at or over $20 million must utilise Victorian registered Apprentices, Victorian registered Trainees or Engineering Cadets for at least 10 per cent of the total estimated labour hours during the Development Phase. The Major Projects Skills Guarantee will also apply to Public Private Partnership project contracts valued over the $20 million threshold.

Clause 59 of the PV Standard Project Deeds is based on the Major Projects Skills Guarantee Clauses prepared by the Victorian Government Solicitor’s Office (**MPSG clauses**). The MPSG Clauses only apply during the Development Phase. Clause 59 should be updated to align with any amendment to the Major Projects Skills Guarantee or the MPSG Clauses.

Project specific amendments

Procuring agencies should determine on a project specific basis:

* + - Reporting requirements – The Major Project Skills Guarantee Explanatory Guide provides that reporting intervals should be specified in the Major Projects Skills Guarantee Compliance Plan and should include certain mandatory reporting requirements. The PV Standard Project Deeds require reports on compliance to be provided:
      * as specified in the Major Projects Skills Guarantee Compliance Plan and otherwise at a frequency of not less than quarterly until Commercial Acceptance;
      * 12 Months after Financial Close; and
      * at Commercial Acceptance.
    - Consequences for non-compliance – The Major Project Skills Guarantee Explanatory Guide provides that compliance arrangements for the Major Project Skills Guarantee are to be specified in contracts and a failure to comply with the Major Project Skills Guarantee will constitute a breach of contract. The PV Standard Project Deeds provide that a failure by Project Co to comply with the Major Projects Skills Guarantee Compliance Plan will result in liquidated damages being payable at the Date of Commercial Acceptance (the formula for calculating the liquidated damages should be set out in the Payment Schedule) and a Major Default if the failure is not cured within 20 Business Days. However, procuring agencies are to determine on a project specific basis whether and what consequences should apply if Project Co fails to comply with the Major Project Skills Guarantee.

The PV Standard Project Deeds clauses have been included based on the MPSG Clauses and accordingly only apply to the Works, notwithstanding the Major Project Skills Guarantee Explanatory Guide provides that the value of the Services must be included as part of the overall value of the Project Deed and in the calculation of the deemed estimated overall project labour hours and the minimum 10 per cent requirement. Procuring agencies should consult with the Department of Economic Development, Jobs, Transport and Resources to determine on a project specific basis whether the Major Project Skills Guarantee will apply to the Services and if so, include appropriate amendments, including the timing of reports and the consequences of a failure to comply.

* + - * 1. Other State Policies (clause 60)

Procuring agencies must consider the application of relevant and current State policies on a project specific basis.

* + - 1. Notices and bar to claims (clause 62)

The State requires certainty in relation to 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 PV Standard Project Deeds (for example in clauses 26.7 and 32.1 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), there is a catch all in clause 62.2(c).

* + 1. Project Deed Schedules, Annexures and Attachments
       1. Payment Schedule (Schedule 3)
          1. General principles

Set out below is a summary of the guiding principles in establishing a payment mechanism for all Availability PPP Projects.

The role of the payment mechanism is to put into financial effect the allocation of risk and responsibility in the Project Deed and provide the incentives for Project Co to deliver Services in a way that achieves value for money.

The basic principles underpinning any payment mechanism used for an Availability PPP Project in Victoria is that the periodic Service Payments made by the State:

* + - are for the delivery of Services, being the outputs specified in the Services Specification;
    - commence when the Project Assets are available for use and the Services can be performed (i.e. from the Date of Commercial Acceptance);
    - are ‘unitary’ Service Payments which consolidate the various components of asset and service delivery; and
    - are made to the extent that the Services are provided and the Project Assets are available for use – the Service Payment will be Abated where the Project Assets are not available for use or the Services are not performed in accordance with the standards set out in the services specification in the PSDR.

The components of a typical Service Payment are shown in Diagram 17 and discussed below.

Diagram 17



* + - * 1. Composition of Service Payment

The Service Payment is typically made up of:

* + - an availability fee;
    - an operating fee (if any); and
    - pass-through costs (if any).

Each of these components of the Services Payment is discussed below.

* + - * 1. Availability fee

The State’s preference is for the availability fee to be the primary component of the Service Payment. It remunerates Project Co for the costs and risks of providing Project Assets which are always available and ready for use in accordance with the services specification in the PSDR and related performance measures. The availability fee puts into effect the State’s retention of demand risks – while the costs recovered through availability fees are a matter for bidding, they should typically be the costs of construction (including raising finance) and the fixed costs of maintaining fitness for purpose of the Project Assets (including Project Co costs and lifecycle costs).

The scope of availability is specific to an asset and will differ across projects. Conceptually, availability is a combination of physical function, access and amenity (or quality of experience for users). An Availability Failure occurs where these requirements are not met. Both the concept of availability and Availability Failures are project-specific and will be described in the Payment Schedule and services specification in the PSDR.

The availability fee may comprise sub-components alongside a base fee, for example, a lifecycle maintenance payment. These sub-components are typically separated from the base fee when there is a need to differentiate or separately address either:

* + - the commencement of a component of the availability fee;
    - the indexation of a component of the availability fee;
    - the abatement of a component of the availability fee;
    - the extent of price risk borne by the State for a component of the availability fee; or
    - for transparency of the value of a component of the availability fee.

The Payment Schedule will identify all sub-components of the availability fee and describe the conditions for payment of them.

Lifecycle Payment

Availability PPP Projects typically require Project Co to perform lifecycle services which involves the periodic replacement and refurbishment of elements of the Project Assets (such as the building fabric, linear surfaces, plant and technical services). This aspect of asset management is integral to continuous access to, and amenity from, the Project Assets. Separately identifying the lifecycle service within the availability fee will support the State’s contract management of asset management plans.

Minor Works

Where a Minor Works regime is contemplated (refer to section 2.37), the availability fee will include a sub-component for Minor Works during the Operational Phase. Minor Works are typically limited in their scope and cost, but can arise frequently so there is value from ease of administering them. The State’s approach, as set out in the SIPD, is to include a provisional sum for Minor Works for each Operating Year (the Minor Works Limit). The Minor Works Limit is progressively paid to Project Co each Operating Year as part of the Service Payment.

At the end of each Operating Year, where the Minor Works Limit for an Operating Year has not been fully expended on Minor Works during that Operating Year, the State can either roll the balance into the Minor Works Limit for the subsequent Operating Year, or claim reimbursement of the balance from Project Co.

* + - * 1. Operating fee

For some Availability PPP Projects, the Services as defined in the services specification in the PSDR may distinguish between providing availability for use as a service component and providing related outputs as a separate service component. For example, on a water desalination plant project, the availability of Project Assets for water treatment may be separated from the production of treated water. These ‘fixed and variable’ arrangements suit circumstances where the State values the opportunity to pay Project Co separately for availability and for outputs, particularly where there is uncertainty about the variability of the State’s requirements over time for specific outputs.

Reviewable Services

Where a Reviewable Services regime is contemplated (see section 2.36), the operating fee may be split into reviewable and non-reviewable components. The Reviewable Services regime, as set out in the SIPD, provides for periodic review (at intervals of between 5-10 years depending on the nature of the Reviewable Services) of the pricing for each Reviewable Service, to ensure alignment of each Reviewable Services component with prevailing market rates.

* + - * 1. Pass-through costs and risk sharing

Separately, there may be components of the cost of providing services for which it is value for money for the State to bear or share price or volume risk over time.

The State may propose to bear or share price risks where prices are determined by third party suppliers to Project Co and where either:

* + - price changes demonstrate high levels of uncertainty and volatility; or
    - price changes cannot be controlled by Project Co’s technical solution or approach to service delivery. For example, the risk of price change for Insurances and the risk of price change for Utilities supply.

Similarly, the State may propose to bear or share volume risks where Project Co has negligible or limited ability to control the quantum or type of usage. For example, the State has typically retained volume risk in relation to Utilities where a party other than Project Co, operates the Project Assets. The State retains volume risk by adjusting the pass-through cost component of the Service Payment. By contrast, the State may transfer volume risk for fully outsourced Availability PPP Projects where Project Co is the operator (refer to section 2.13.7 for more details on Utilities risk sharing).

The Project Deed will describe the extent to which a risk is shared by the State, including review points or thresholds at which these risks could be efficiently transferred to a larger extent to the private party. Consequently, the Payment Schedule may include a component for ‘pass-through’ costs and Project Co will be reimbursed by the State as these specified costs are incurred.

Pass-through costs are separately identified in the payment mechanism to clearly isolate them from other margins or risk pricing. The State’s intention is to limit pass-through arrangements to circumstances where it provides value for money and where costs can be clearly identified, recorded, and measured.

* + - * 1. Indexation

The State will propose the indexation of the components of the Service Payment with the intention of achieving best value where controls for price risks are ineffective. Indexation recognises that economy-wide price risks often impact on the costs of providing Services despite skilful management of service delivery. Indexation will typically use published indices which are relevant to changes to the underlying costs of providing Services.

* + - * 1. Incentive payments

For some Availability PPP Projects, the State may propose incentive payments which are contingent on Project Co achieving specified outcomes. These outcomes would be in addition to the availability of the Project Asset and the delivery of required outputs. For example, a payment-by-results arrangement for improving rates of recidivism in a fully outsourced prison PPP project.

Incentive payments should be closely linked to measurable and demonstrable outcomes – achieving those outcomes indicate realisation of tangible benefits to a wider network of users or to the wider community, and for which the State is willing to pay. They will need to be determined on a project specific basis and agreed with DTF.

* + - * 1. Payment deductions

The State’s guiding principle for deductions is to abate Service Payments to the extent Project Co fails to perform the Services in accordance with the service specification in the PSDR. The value of the Abatement will generally be sized to reflect the State’s or users’ loss of amenity arising from the under-performance. Care must be taken when sizing abatements to ensure that they are sufficient to motivate rectification or replacement within the required timeframes and otherwise good performance but are not so onerous as to lead to unnecessary disputes.

The Payment Schedule and services specification in the PSDR will provide for clear definition and measurement of performance to create clear triggers for applying any deductions, including rectification periods and temporary fix provisions. The State’s intention is to establish arrangements which are simple to implement and minimise administration.

Service Payments will typically be deducted for:

* + - Availability Failures, meaning unavailability of part of the Project Assets; and
    - Service Failures, meaning failure to meet other defined performance measures including KPIs as set out in the Services Specification.

Deductions for Availability Failures, will, in a worst case, reduce the availability fee (or a subset of it) to zero. Deductions for Service Failures will typically be calculated using points or dollar amounts linked to particular performance measures. Abatements may ramp-up where under-performance is frequent or prolonged, and contractual default mechanisms will be triggered where specified abatement thresholds are breached (see section (a)(i)2.40.3 for more detail).

The PV Standard Project Deeds require Project Co to acknowledge the application, operation and enforceability of the Abatement regime and that the Abatements reflect a genuine pre-estimate of the diminution in value to the State (and users) in connection with the relevant under-performance and has been agreed by the parties to protect the legitimate interests of the State in performance of the Services by Project Co.

* + - * 1. Floating Rate Component

For Availability PPP Projects in Victoria, the State will generally propose to bear changes in base interest rate risks at the time the interest rate hedging that forms part of the original debt funding will expire (refer to section 2.42). This risk allocation is implemented through reimbursement by, or supplementation to, Project Co given its actual interest costs compared with rate assumptions at Financial Close. The Payment Schedule will set out the method for calculating the Floating Rate Component payable, noting this is payable separately to the Service Payment because it must match the timing of debt service commitments. The State will continue to fully transfer the risk of changes to credit margins and other elements of the debt financing following Financial Close.

#### Changes resulting from a Refinancing

The Payment Schedule also provides a mechanism for the State and Project Co to negotiate in circumstances (usually a refinancing) where a change to Project Co’s debt profile is proposed. The Floating Rate Component section of the Payment Schedule recognises that whilst the State takes the risk on movements in the Base Case Interest Rate, it should not accept the additional base interest rate risk which results from the private party proposing to increase the quantum of debt as part of a refinancing. Should the State agree to an increase in Project Co's debt profile, it will need to be proportionately compensated for the incremental risk. This mechanism benefits both parties in circumstances where some of the gains from a refinancing proposal (which will typically be shared between the State and Project Co) result from the private party increasing the amount of debt in the structure. The compensation can be made either:

* + - with an upfront payment where the base interest rate remains unchanged in the base case financial model, and the compensation is based on (a) the difference in the original Base Case Interest Rate and the interest rates as determined by the swap curve of the additional debt, *plus* (b) costs associated with entering into a hedge (either by Project Co or the State); or
    - by a change in the Base Case Interest Rate in the base case financial model where there is no upfront payment (compensation is effectively received over time), and the Base Case Interest Rate is amended to reflect a 'weighted' average interest rate, that includes (a) the interest rates determined by the swap curve with respect to the additional debt, *plus* (b) costs associated with entering into a hedge (either by Project Co or the State).

This ensures that for the additional debt the State has no liability to pay where interest rates are higher than the original Base Case Interest Rate. Compensation can also be made through a combination of both an upfront payment and a change in base interest rate, but generally one of the two above approaches would be chosen.

In the event the Base Case Interest Rate is to remain constant in the base case financial model, the upfront payment provided for in the Floating Rate Component section of the Payment Schedule is calculated as the difference in net present cost of the Floating Rate Component before and after the refinancing (in order to keep the State whole with respect to base interest rate risk associated with an increased debt profile). If the refinanced facility is to be hedged by the private party, the net present cost of the Floating Rate Component is calculated using standard swap market conventions (including a 'market' swap margin), whereas for State-implemented hedging, a TCV/State determined swap margin will be applicable. It is important to note that the methodology will also be based on standard swap market conventions including a TCV/State determined swap margin where the decision is made not to hedge the refinanced facility. This is because the only practical way to estimate the magnitude of additional base interest rate risk to be borne by the State is to adopt a revised swap curve at the time of the refinancing, as if the State was intending to hedge the additional debt. Note where ongoing Floating Rate Component payments are made between the parties, these will be with respect to the total debt (original plus additional).

* + - * 1. Commercial revenue

Commercial or third-party revenues which may be earned by Project Co are typically outside the scope of the Service Payment, though in some cases revenue share arrangements are included in the Payment Schedule. Refer to section 2.48 for more details on commercial opportunity.

* + - 1. Review Procedures (Schedule 4)

The Review Procedures will only apply to plans, reports, updated Financial Models and other documents that are subject to review in accordance with the Review Procedures, but do not apply to the Design Documentation. The Design Documentation is subject to the Design Development Process set out in the Design Appendix in the PSDR.

The Review Procedures will set out the general basis on which all such documents can be reviewed and commented upon. If there are additional bases on which a Reviewing Party should be entitled to comment on a document, these need to be expressly included in the Review Procedures in respect of that document. For example, in relation to reviewing variations to the Financial Model as a result of a Model Variation Event, the Review Procedures must 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 that impact on the Project.

* + - 1. Change Compensation Principles (Schedule 5)
         1. General principle

The purpose of the Change Compensation Principles is to set out:

* + - Project Co 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.

* + - * 1. 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.

* + - * 1. Entitlement to compensation

The Change Compensation Principles sets out the calculations for determining the amount of compensation payable for a Development Phase Change Compensation Event (section 3) and a Operational Phase Change Compensation Event (section 4).

The overriding principles in calculating compensation payable for a Change Compensation Event are:

* + - 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 and 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 2.51.3)

The formulae in sections 3.2 and 4.2 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 that have not been hard coded in Table 2 or Table 3 respectively and 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 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.

For financing delay costs, the Change Compensation Principles assume that repayment of principal will be able to be deferred if Commercial Acceptance is delayed but, that as a consequence, interest will be capitalised and for Compensable Extension Events and Force Majeure Events, the State will be liable to pay this capitalised interest. The State may consider other formulations in which repayment of the principal is not deferred where an alternative formulation provides demonstrable value for money and the proposed formulation allows the State to recover the net present cost of the principal paid as early as possible after Commercial Acceptance (or through reduced service payments).

* + - * 1. Procedural Requirements

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 2.62).

To ensure that any Change Compensation Event is managed efficiently, once 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 Project Co in accordance with the requirements of the Change Compensation Principles (or clause 35 if the subject of the Change Notice and Change Response is a State Initiated Modification).

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 as 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. For example where during the Development Phase the work the subject of the Change Compensation Event has very significant interfaces with the Works so that the engagement of another Contactor would result in a retransfer of significant time and cost risk to the State.

* + - 1. Termination Payments Schedule (Schedule 6)
         1. Grounds for termination

The State may terminate the Project Deed prior to the Final Expiry Date:

* + - for a Force Majeure Termination Event, where there is a Force Majeure Termination Event (or the State directs Project Co not to repair or reinstate the Project Assets in the case of Major Loss or Damage);
    - 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.

* + - * 1. Liability for Termination Payments

If the Project Deed is terminated prior to the Final Expiry Date, a Termination Payment is generally payable. 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).

* + - * 1. 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;
    - 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.
      * 1. Default Termination Payments

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 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).

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 which are the same or of a similar type to the Project being terminated.

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 following assumptions apply:

* + - 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:

* + - adds any amounts owing by the State to Project Co under the Project Documents; and
    - deducts Liabilities of Project Co to the State together with amounts payable to Project Co by third parties.

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, i.e. 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.

Payments to Financiers and Equity Investors

Neither method of calculating the Default Termination Payment protects the payment of all 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.

Negative Default Termination Payment

If the value of Project Co's Liabilities to the State, together with the costs of the State upon Handover of the Project (e.g. reinstatement or rectification costs) are greater than the value of the Project which 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.

* + - * 1. Force Majeure Termination Payment

Calculation methodology

The key components of the Force Majeure Termination Payment are:

* an amount equal to Project Debt; plus
* amounts owing by the State to Project Co under the Project Documents; plus/minus
* costs incurred or gains realised on termination of Finance Documents (including close out of derivatives); minus
* liabilities of Project Co to the State under the Project Documents; minus
* insurance proceeds, amounts held in bank accounts and other amounts payable to Project Co by third parties; minus
* debt amounts that were intended to be refinanced by equity.

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 upon 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 that 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.

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 utilising a termination for a concurrent Force Majeure Event.

* + - * 1. Termination for Convenience Payment

Calculation methodology

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 below); plus
* redundancy payments for Project Co employees; plus
* Subcontractor Termination Amounts payable under Key Subcontracts (see section (a)(i)2.11.4); plus
* amounts owing by the State to Project Co under the Project Documents; plus/minus
* costs incurred or gains realised on termination of Finance Documents (including close out of derivatives); minus
* liabilities of Project Co to the State under the Project Documents; minus
* insurance proceeds, amounts held in bank accounts and other amounts payable to Project Co by third parties.

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.

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 upon 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, albeit bid upfront by Respondents as part of their Request for Proposal documentation and hard-coded in the Project Deed for each six month period of the Development Phase.

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 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.

Clear guidance is provided to Respondents in the Request for Proposal template regarding the methodology Respondents should use to determine the discount rate applicable to each six month period prior to Commercial Acceptance, as follows:

* + - 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;
    - in bidding the fixed compensation to equity value for each six month period, Respondents may choose to reduce the applicable discount rates over the Development Phase, in order to reflect the diminishing risks faced by equity as the Development Phase progresses, whilst having regard to the overall complexity, risk profile and Development Phase program of the Project.

The State will evaluate:

* + - the discount rate applicable to the first six month period following Financial Close (the Initial Discount Rate), and
    - the methodology 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 Initial Discount Rate is determined, and the method, frequency 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.

* + - * 1. Treatment of State Contributions in Termination Payments

The Project Deed sets out the terms on which any State Contribution will be paid by the State (see section 2.39). On termination of the Project Deed, any future obligation of the State to pay any State Contribution 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 State Contribution 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 and the Termination Payments Schedule provides for this to be treated as follows:

* + - **Default Termination Payment**: the State Contribution 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**: the State Contribution is not counted as an amount owing by the State to Project Co, but when calculating the Project Debt component of the Termination Payment as at the Expiry Date, the impact of any modelled payment of the State Contribution on the amount of debt forecast to be owing on the Expiry Date is disregarded. This prevents the value of the Project Debt component being reduced by the modelled application of a State Contribution which is due and payable to Project Co but has not been paid by the State. Accordingly, Project Co will receive the benefit of the State Contribution due and payable as part of the Project Debt component of the Termination Payment.

If a Project Deed also provides for ongoing (milestone-based) State Contributions during the Development Phase, 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 State Contributions 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.

* + - 1. Intellectual Property Schedule (Schedule 18)
         1. General principle

The State must be able to use and enjoy any Intellectual Property Rights and Moral Rights in connection with the Project, whether during or after expiry of the Term.

Project Co is responsible for the costs of Intellectual Property Rights and Moral Rights required by the Project (including costs resulting from infringements, other than in respect of any Intellectual Property Rights contributed by the State to the Project).

Project Co must provide comprehensive warranties to the State to support the State’s use and enjoyment of the Intellectual Property Rights and Moral Rights (other than in relation to any State IP).

Project Co must indemnify the State and other Indemnified IP Persons, from and against any Claim or Liability arising in connection with any breach of representation, warranty or obligation relating to Intellectual Property Rights (other than in relation to any State IP). These indemnities are set out in clause 43.5 of the PV Standard Project Deeds and not in the Intellectual Property Schedule.

* + - * 1. Intellectual Property Rights and ownership

The Intellectual Property Schedule separates Intellectual Property Rights for the Project into two categories, Developed Intellectual Property and Licensed Intellectual Property, which will determine whether the Intellectual Property Rights are owned by the State or licensed by Project Co to the State.

Developed Intellectual Property

Developed Intellectual Property is all Intellectual Property Rights created, developed or produced for the purposes of the Project by or on behalf of Project Co or a Project Co Associate (but excluding certain Intellectual Property Rights such as the State IP). All Developed Intellectual Property must be owned by the State (or a nominee of the State). The State will grant Project Co a licence to use the Developed Intellectual Property for the purposes of performing its obligations under the State Project Documents for the duration of the Term.

Licensed Intellectual Property

The State’s preference is that it owns all Intellectual Property Rights in connection with the Project but acknowledges that this is not possible or appropriate with respect to certain categories of Intellectual Property Rights, particularly with respect to Background IP (being Intellectual Property Rights in connection with the Project but developed by or on behalf of Project Co or a Project Co Associate for purposes other than the Project). Such categories of Intellectual Property Rights will constitute Licensed Intellectual Property and will be the subject of a broad licence from Project Co to the State rather than being owned by the State. The Intellectual Property Schedule allows the Respondents to bid back the Intellectual Property Rights which will be Licensed Intellectual Property in the following categories, provided that the Respondent provides justification why the relevant Intellectual Property Rights should be licensed to the State rather than owned by the State:

* + - Non Project Specific IP – other than Background IP, this should be limited to certain commercially sensitive Developed Intellectual Property which is core to a Project Co Associate's business;
    - Project Co Data – this should be limited to data which is not required for the operation of the Project Assets and there is a legitimate need for Project Co or a Project Co Associate to own such data; or
    - Escrow Material – this should be limited to highly commercially sensitive Intellectual Property Rights and must not be required for the day-to-day operation of the Project Assets, for example source code for certain proprietary software. If the State agrees that certain Intellectual Property Rights are Escrow Material, this Escrow Material will be licensed to the State only if an Escrow Release Event occurs.

Moral Rights

In addition to obtaining all copyright and patent consents required for the Project, the private party will be required to obtain, for the benefit of the State, the consent of the authors of all copyrighted works of which use is made for the purposes of the Project.

Third Party Software

The State acknowledges that it is not always possible for Project Co to assign or licence Third Party Software to the State. If Project Co is unable to licence, or obtain a licence, of any Third Party Software to the State, Project Co must consult with the State and do all things reasonably necessary to obtain such rights or arrangements for the benefit of the State and the State Associates.

State IP

The State will provide a licence to Project Co in respect of those Intellectual Property Rights contributed by the State or a State Associate to the Project which Project Co is either required or entitled to use for the Project.

* + - 1. Augmentation Process Schedule (Schedule 23)

The Augmentation Process Schedule regulates how an Augmentation will be initiated and further developed before it is actually implemented.

An Augmentation is a change to the Project Assets, the Design Requirements, the Operational Phase Requirements or the 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. While typically an Augmentation will 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.

The purpose of the Augmentation Process Schedule is to provide clear guidance of the State's expectation as to how an Augmentation Process will be run and guidance as to the content of the deed that will be negotiated by the parties and will govern that process.

The Augmentation Process Schedule is divided into 2 parts. Part 1 sets out the process for initiating an Augmentation and the administration of the Augmentation Process. An Augmentation may be proposed by either the State or Project Co. If Project Co wants to submit an Initial Augmentation Proposal without being invited to do so, it must first advise and consult with the State. Project Co is then required to provide an Initial Augmentation Proposal at its own cost, which is sufficiently detailed for the State to be able to make an informed decision as to whether to proceed to negotiate an Augmentation Process Deed.

The Augmentation Process Schedule sets out the required contents of an Augmentation Proposal. The Augmentation Process Schedule acknowledges that a party other than Project Co may be the party that leads the Augmentation and enters into the Augmentation Process Deed.

The State may require Project Co and/or the Proponents to enter into a short form Probity and Process Deed at an early stage in the Augmentation Process to ensure confidentiality and other process requirements. The pro-forma of the Probity and Process Deed is included at Appendix 1 to the Augmentation Process Schedule.

If the State decides to further progress an Augmentation, the Proponent will enter into an Augmentation Process Deed which will set out the parties' rights and obligations in respect of the development of a fully detailed Augmentation Proposal. Part 2 of the Augmentation Process Schedule sets out the principles on which the Augmentation Process Deed will be prepared. These include the principles for, amongst other things, payment during the Augmentation Process, Milestones, pricing and funding for the Augmentation, contractual models, tender processes, termination of the Augmentation Process, intellectual property rights, preparation of the State Brief for the Augmentation and preparation of the detailed Augmentation Proposal. The process culminates in the evaluation of the Final Augmentation Proposal by the State.

The State may seek to pay for an Augmentation without debt financing. If this is the case, the State will typically make progress payments directly to Project Co during construction. Where this is the case, additional rights may need to be included in the Augmentation Process Deed to protect payments by the State in a Project Co or Subcontractor insolvency situation. These could include:

* + - progress payments being made into a trust account and then distributed to Project Co and subcontractors from the trust account by a trustee; and
    - a ‘cost to complete’ test i.e. where Project Co is unlikely to complete the works for the remaining money available.

Diagram 18 below shows how the Augmentation Process operates.

Diagram 18



* + - 1. Project Scope and Delivery Requirements (Schedule 24)

See section 5 below.

* + - 1. Development of Schedules, Annexures and Attachments

Only some Schedules have been included in the PV Standard Project Deeds. The table below identifies key information for development of the remaining Schedules, Annexures and Attachments, including the author (State or Respondent), timing and source of the document.

| Document | Development |
| --- | --- |
| Contract Particulars (Schedule 1) | Framework to be prepared by the State prior to release of RFP. Components to be provided by 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 as part of the RFP. |
| 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 PV Standard Project Deed). |
| Termination Payment Schedule (Schedule 6) | To be prepared by the State and released with the RFP (based on the PV Standard 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 Victorian PPP precedent). |
| Expert Determination Agreement (Schedule 8) | To be prepared by the State and released as part of the RFP (based on Victorian PPP precedent). |
| Schedule of Certificates and Notices (Schedule 9) | To be prepared by the State and released as part of the RFP (based on Victorian PPP precedent and project specific requirements). |
| Insurance Schedule (Schedule 10) | To be prepared by the State and released as part of the RFP (based on Victorian PPP precedent and project specific requirements).To be completed by Respondent as part of its Proposal. |
| Commercially Sensitive Information Schedule (Schedule 11) | To be provided by Respondent as part of its Proposal. |
| Finance Documents Schedule (Schedule 12) | To be provided by Respondent as part of its Proposal.  To be finalised and agreed by the parties during the Negotiation and Completion Phase based on its Proposal. |
| Equity Documents Schedule (Schedule 13) | To be provided by Respondent as part of its Proposal.  To be finalised and agreed by the parties during the Negotiation and Completion Phase based on its Proposal. |
| Ownership Schedule (Schedule 14) | Equity structure to be provided by Respondent as part of its Proposal. ***[See section 5.1.1 of RFP Part 1B.]*** |
| Permitted Share Capital Dealing Schedule (Schedule 15) | To be provided by Respondent as part of its Proposal. ***[See section 5.1.1 of RFP Part 1B.]*** |
| Indexes Schedule (Schedule 16) | To be prepared by the State and released as part of the RFP (based on Victorian PPP precedent). |
| Financial Close Adjustment Protocol (Schedule 17) | To be provided by Respondent as part of its Proposal. ***[See section 5.5.1 of RFP Part C.]***  To be finalised and agreed by the parties during the Negotiation and Completion Phase. |
| Intellectual Property Schedule (Schedule 18) | To be prepared by the State and released with the RFP (based on the PV Standard Project Deed). |
| Remaining Works Schedule (Schedule 19) | To be provided by Respondent as part of its Proposal.  To be finalised and agreed by the parties during the Negotiation and Completion Phase. May include Works which will become Maintained Assets and/or Works which will be Returned Assets. |
| VIPP Schedule (Schedule 20) | LIDP to be provided by Respondent as part of its Proposal. |
| Major Projects Skills Guarantee Compliance Plan (Schedule 21) | To be provided by Respondent as part of its Proposal. |
| 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 the PV Standard Project Deed). |
| Project Scope and Delivery Requirements (Annexure 1) | The Delivery Requirements will be prepared by the State and released with the RFP (Volume 3, Part B)  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 Proposal. The parties will resolve acceptance of departures prior to execution of the Project Deed and make any amendments to the Delivery Requirements accordingly.  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. |
| Project Information (Attachment 1) | ***Attachment (in the form of a list) to be compiled by the State on a project specific basis during the Negotiation and Completion Phase.***  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 |
| 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 Successful Respondent's Proposal.*** |
| Bid Project Plans | ***To be inserted from Successful Respondent's Proposal.*** |

* + 1. 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 PV Standard Project Deeds. The items that are referred to in the PV Standard Project Deeds that must be included in the PSDR are set out in the table below:

| 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 PV Standard 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 PV Standard 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 PV Standard Project Deeds assume that the PSDR sets out the description of the Asset Information System and includes any requirements of that system. |
| Design Appendix | Definitions, clause 20.2 | The Design Appendix is an appendix to the PSDR that must set out the Design Development Process. |
| Development Phase Area | Definitions, 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 or IMS | Definition of Information Management System and clause 54.5 | Where relevant, the PSDR should include a description of and the requirements for the IMS. |
| Operational Phase Area | Definitions, 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. |
| Operational Phase Reports | Definitions 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. |
| Project Plan | Definition of Project Plan and others | 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.  At a minimum, the following Project Plans, that are referred to in the PV Standard Project Deeds need to be listed in the PSDR and provided by Project Co:   * Environmental Management Plan (for each of the Development Phase and Operational Phase); * Construction Management Plan; * Asset Management Plan; * Communications and Community Relations Plan (for each of the Development Phase and Operational Phase); and * WHS Management Plan. |
| Reference Documents | Definition of Reference Documents, definition of Standards | The Reference Documents which set out Standards with which Project Co must comply must be identified in the PSDR. |
| Warranted Life | Definition of Warranted Life, 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 PV Standard Project Deeds provide for Working Groups to be established. The PV Standard Project Deeds require Project Co to establish additional Working Groups or liaison groups which must be identified in the PSDR. |
| Inconsistency between the 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 Representative's role | 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. |
| 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 contain a process and requirements for these reports. |
| Quality Assurance System | Clause 16.3 | 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 | The PV Standard Project Deeds provide for the preparation, updating and submission of Project Plans and Reports and Notices.  The PSDR must include a process and requirements for:   * in relation to Bid Project Plans, Project Co to update them and a date by which this must be done; and * where the Project Plans are not Bid Project Plans, Project Co to prepare and update them.   The PSDR must also contain provisions identifying when those Project Plans must be provided to the Independent Reviewer.  The PSDR must contain a process and requirements for Project Co to prepare and submit the Development Phase Reports and the Operational Phase Reports. |
| 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. |
| 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. |
| Warranted Assets | Clause 28.6 | The PSDR must contain the list of Warranted Assets in relation to which Project Co must obtain and maintain a warranty in accordance with clause 28.6. |
| 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, on 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. |

* + 1. Project Documents

The PV Standard Project Deeds have been prepared on the assumption that a standard set of Project Documents will be put in place for Availability PPP Projects. Set out below is a table identifying the documents referred to in the PV Standard Project Deeds, including a short description and the development process. See section 2.4 above for a discussion of execution of Project Documents as a condition precedent to Financial Close.

| Document | Parties | Description | Development |
| --- | --- | --- | --- |
| D&C Contract | * Project Co * D&C Contractor | Design and construction delivery contract between Project Co and the D&C Contractor. | Executed term sheet or draft contract to be prepared and provided by Respondents as part of Proposal.  If term sheet provided as part of Proposal, draft contract to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal. |
| D&C Contractor and Services Contractor Interface Deed | * Project Co * D&C Contractor * Services Contractor | Sets out interface arrangements and risk allocation between the D&C Contractor and the Services Contractor. | Inclusion subject to Successful Respondent's Proposal.  Executed term sheet or draft contract to be prepared and provided by Respondent as part of Proposal.  If term sheet provided as part of Proposal, draft contract to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal. |
| D&C Contractor Construction Bond | * Bond issuer * Project Co | Performance Bond provided by the D&C Contractor in favour of Project Co pursuant to the D&C Contract. | Inclusion subject to Successful Respondent's Proposal and security package. If applicable, proposed form of bond and value (including step down in value) to be prepared and provided by the Respondent as part of its Proposal. |
| D&C Contractor Direct Deed | * State * Project Co * D&C Contractor * Parent Guarantor of the D&C Contractor | Allows, amongst 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. | To be prepared by the State based on recent Victorian PPP precedent and released in Volume 3 of the RFP. |
| Direct Interface Deeds | * Project Co * Direct Interface Parties | 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. | The RFP will identify whether Direct Interface Deeds will be required and the phase of the procurement process that terms sheets and draft documents will be provided by the Respondent.  To be prepared by the Respondent. |
| Equity Documents | * Various | Documents that govern the terms and conditions associated with the provision of private sector equity finance to Project Co, including Equity Subscription Agreement. | Executed equity commitment letter and terms sheets to be prepared and provided by Respondent as part of Proposal.  Equity Documents to be prepared and provided by Successful Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal. |
| Expert Determination Agreement | * State * Project Co * Expert | Agreement jointly appointing the independent expert, governing the expert determination process and the terms that the expert will be subject to. | Schedule 8 of Project Deed  Negotiated with Independent Expert and executed during Term when Independent Expert appointed. |
| Finance Direct Deed | * State * Project Co * Facility Agent * Security Trustee * Other Project Entities (if applicable) | Sets out, amongst 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. | To be prepared by the State based on recent Victorian PPP precedent and released in Volume 3 of the RFP. |
| Finance Documents | * Various | 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). | Executed debt commitment letter and debt terms sheet to be prepared and provided by Respondent as part of Proposal.  Finance Documents to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided by the Respondent in its Proposal. |
| Independent Reviewer Deed of Appointment | * State * Project Co * Independent Reviewer | 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 Defects Liability Period. | To be prepared by the State based on recent Victorian PPP precedent and released in Volume 3 of the RFP. |
| Management Services Contract | * Project Co * Management Services Contractor | Contract under which the Management Services Contractor undertakes Management Services for Project Co in respect of the Project. | Inclusion subject to Successful Respondent's Proposal and contracting structure. If a Management Services Contractor is proposed, executed term sheet to be prepared and provided by Respondent as part of Proposal.  If term sheet provided as part of Proposal, draft contract to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal. |
| Parent Guarantees | * Parent Guarantors * Project Co * D&C Contractor/ Services Contractor | Separate guarantees in favour of Project Co provided by: - the Parent Guarantor/s of the D&C Contractor in connection with the obligations of the D&C Contractor under the D&C Contract; and - the Parent Guarantor/s of the Services Contractor in connection with the obligations of the Services Contractor under the Services Contract. | Draft documents to be prepared and provided by Respondent as part of Proposal. |
| Services Contract | * Project Co * Services Contractor | Services delivery contract between Project Co and the Services Contractor. | Executed term sheet or draft contract to be prepared and provided by Respondent as part of Proposal. *(See section 5.1.1 of RFP Part 1B).*  If term sheet provided as part of Proposal, draft contract to be prepared and provided by Preferred Respondent during the Negotiation and Completion Phase, based on information provided in its Proposal. |
| Services Contractor Direct Deed | * State * Project Co * Services Contractor * Parent Guarantor of the Services Contractor | Allows, amongst 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. | To be prepared by the State based on recent Victorian PPP precedent and released in Volume 3 of the RFP. |
| Services Contractor Performance Bond | * Issuing party | Performance Bond provided by the Services Contractor in favour of Project Co. | Inclusion subject to Successful Respondent's Proposal and security package. If applicable, proposed form of bond and value (including step down in value) to be prepared and provided by Respondent as part of its Proposal. |
| Significant Subcontracts | * D&C Contractor/ Services Contractor * Significant Subcontractors | Subcontract for all or part of the Project Activities between either the D&C Contractor or the Services Contractor and a Significant Subcontractor. | Inclusion subject to Successful Respondent's Proposal and subcontracting structure.  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. |
| State Security | * State * Project Co * Other Project Entities (if applicable) | 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. | To be prepared by the State based on recent Victorian PPP precedent and released in Volume 3 of the RFP. |
| Other Subcontractor Direct Deed | * State/Project Co * D&C Contractor/ Services Contractor * Significant Subcontractor/ Key Subcontractor | Allows, amongst 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). | Inclusion subject to State's assessment of the Successful Respondent's Proposal.  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 Successful Respondent's Proposal. |
| Sub-Independent Reviewer Deed of Appointment | * Project Co * D&C Contractor * Independent Reviewer as the Sub-Independent Reviewer | 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. | To be prepared and provided by Successful Respondents during 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 PV SIPDs (with the numbering maintained and shown as 'Not Used').

# Annexure 1 – Returned Works Outstanding Items



# Annexure 2 – Acceptance



# Annexure 3 – Independent Reviewer Look Forward Test



# Annexure 4 – Defects



# Annexure 5 – Reviewable Services



# Annexure 6 – Minor Works

