

## **Schedule 17 – Performance Regime**

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## 1. Introduction

- (a) This Schedule sets out
- (i) the Charge Events; and
  - (ii) the Key Performance Indicators.

During the Operating Phase, Project Co will be required to report its performance against each of these components monthly.

- (b) The charges specified for each Charge Event will be Indexed by the CPI Annual Multiplier

### 1.2 Format of the Performance Regime

For the purpose of providing context only, the State has set out below

- (a) a summary of the format which has been used in respect of each Charge Event or Key Performance Indicator; and
- (b) a description of how each element of the Charge Event or Key Performance Indicator is intended to operate.

<b>Charge Event / KPI number</b>	Title of Charge Event or Key Performance Indicator
<b>Formula</b>	Sets out the formula which will be used to calculate the relevant Charge Event or Key Performance Indicator.  Where this formula includes 'x 100', this is to convert the result from a decimal number into a percentage (as indicated in the example set out in section 1.3) to align with the Target, Level 1 and Level 2 Performance Ranges (as the case may be) for the purposes of calculating Quality Failure Points.
<b>Charge / Calculation of Quality Failure Points</b>	Sets out the charge associated with the Charge Event or, in the case of Key Performance Indicators, the methodology for determining the applicable number of Quality Failure Points (if any) for that Key Performance Indicator for the purpose of calculating Quality Failure Abatements in accordance with Schedule 16 (Payment Schedule).
<b>Definitions</b>	Sets out definitions which are relevant to the Charge Event or Key Performance Indicator
<b>Counting rules</b>	Sets out the rules which will be used to determine Project Co's performance in respect of the Charge Event or Key Performance Indicator. Examples used in the counting rules may be used as an aid to interpretation.
<b>Reporting requirements of Project Co</b>	Sets out Project Co's non-exhaustive reporting obligations in respect of the relevant Charge Event or Key Performance Indicator.
<b>Reporting Period</b>	Sets out the period in which Project Co is required to report in respect of the relevant Charge Event or Key Performance Indicator.

### 1.3 Calculation of Quality Failure Points - example

For the purpose of aiding interpretation, the State has set out below an example of the calculation of Quality Failure Points where percentage thresholds apply.

#### Example: KPI 1: Current Case Plans

The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.

KPI 1	Performance Range	Quality Failure Points
Target		
Level 1		
Level 2		

The formula is as follows:

$$(\text{Number of Eligible Inmates with a Current Case Plan}) / (\text{Number of Eligible Inmates}) \times 100$$

Assume that for Month n:

- (a) The number of Eligible Inmates with a Current Case Plan is equal to 225; and
- (b) The number of Eligible Inmates is equal to 300.

The KPI result is 75% (i.e.  $225/300 \times 100$ ) which represents 75 failures (i.e. 300 less 225). In this case, [REDACTED] The Quality Failure Points are calculated to be [REDACTED] based on the methodology set out below:

	Failures in this Range <sup>1</sup>	Applicable Failures in this Range	Calculated Quality Failure Points
Target			
Level 1			
Level 2			
Total			

<sup>1</sup> Calculated by reference to the KPI denominator – 300 in this example

### 1.4 Definitions

In this Schedule, unless the context otherwise requires:

**Assault** means:

- (a) physical violence that results in physical injury but does not require admission to hospital or any off Site medical centre that serves as an equivalent of a hospital;
- (b) indecent assault; or
- (c) deliberate transfer (e.g. spitting) of blood or other bodily fluids which is not captured within the definition of Serious Assault or Significant Assault.

**Cellular Accommodation** means accommodation of the type described in Schedule 3, Part C, Section 1, clause 6.3.2.

**Custodial Patients** means all Inmates.

**Daily Average Inmate Population** is calculated in accordance with the following formula:

Total number of Inmates at the Correctional Complex as at midnight of each day of the reporting period

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Total number of days in the reporting period

**JHeHS** means the Justice Health electronic Health Service.

**OIMS** means the CSNSW Offender Integrated Management System

**Open Custody** means any Correctional Centre classified by the State as minimum security.

**PAS** means the Patient Administration System.

**Non-Inmate** includes any person at the Correctional Complex who is not an Inmate including Staff, Official Visitors, Associates, and Visitors

**Residential Accommodation** means accommodation of the type described in Schedule 3 Part C, Section 1, clause 6.3.3

**Secure Custody** means any Correctional Centre classified by the State as maximum security or medium security.

**Serious Assault** means physical violence that results in physical injury requiring:

- (a) immediate transfer to hospital or any off site medical centre that serves as an equivalent of a hospital for the Inmates; and
- (b) medical treatment as an inpatient (regardless of whether this treatment is received in the emergency department or otherwise).

Notwithstanding the previous sentence, Serious Assault is deemed to include:

- (c) any instance of sexual intercourse without consent;
- (d) deliberate transfer (e.g. spitting) of blood or other bodily fluids or matter that results in infection or the transmittal of disease; or
- (e) any deliberate incident of skin being punctured with a syringe (i.e. "a needle stick injury")

**Services Specification** means the Services Requirements.

**Significant Assault** means the deliberate transfer of blood or other bodily fluids or matter that has the potential to cause infection or transmit disease where the transfer has occurred by

- (a) spitting or transferring by another means the relevant blood or other bodily fluid or matter into a person's face or on an unhealed (e.g. open) wound; or
- (b) biting

**Substantiated** means:

- (a) there is evidence that a Serious Assault, Significant Assault or Assault (as the case may be) took place because at least one of the following circumstances applies:
  - (i) there is at least one witness to the Serious Assault, Significant Assault or Assault (as the case may be) or there is other evidence of the Serious Assault, Significant Assault or Assault (as the case may be) (such as CCTV footage); or
  - (ii) the victim claims that a Serious Assault, Significant Assault or an Assault (as the case may be) has occurred and there is no obvious reason to doubt this claim; or
- (b) the victim has a visible injury and claims that a Serious Assault, Significant Assault or Assault (as the case may be) has occurred and there is sufficient circumstantial or other evidence to conclude that a Serious Assault, Significant Assault or an Assault (as the case may be) is the most likely cause of the injury on the balance of probabilities.

## 1.5 OIMS

Unless this Schedule or the Output Specification expressly provides otherwise all information, data or reports which are to be submitted by Project Co in accordance with this Schedule are to be entered in OIMS.

## 2. Charge Events

### 2.1 Charge Event 1 – Unnatural Deaths

<b>Charge Event 1</b>	<b>Unnatural Deaths</b>
<b>Formula</b>	<b>Number of Unnatural Deaths</b>
<b>Charge</b>	Each Unnatural Death results in a charge of [REDACTED]
<b>Definitions</b>	<p><b>Unnatural Death</b> means a death of an Inmate:</p> <ul style="list-style-type: none"> <li>in the Correctional Complex or when escorting an Inmate, which the State Coroner or the Commissioner determines is the result of an Unnatural Cause; or</li> <li>in Correctional Centre Custody, which the State Coroner or the Commissioner determines is the result of an Unnatural Cause.</li> </ul> <p><b>Correctional Centre Custody</b> means in the Correctional Complex, or outside the Correctional Complex during participation in a temporary leave program or when the Inmate is being (or is required to be) escorted by Project Co or its Associates.</p> <p><b>Unnatural Cause</b> includes homicide, suicide, accidental cause or drug overdose.</p>
<b>Counting Rules</b>	<p>Count the number of Unnatural Deaths in the reporting period.</p> <p>If there is an Unnatural Death in, or on route to a hospital or any off Site medical centre that serves as an equivalent of a hospital for the Inmates (whether the Inmate is or is not in the legal or physical custody of Project Co or its Associates at the time), and the Unnatural Death was caused by something that occurred in Correctional Centre Custody or in the Correctional Complex, the Unnatural Death is to be counted.</p> <p>Where more than one Unnatural Death occurs during the one incident or event, the death of each individual will be recorded as an individual death.</p>
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>Compliance with the Output Specification.</li> <li>A summary of the Unnatural Death, including its cause, its discovery and the response by Project Co or its Associates.</li> <li>Project Co's intended action to enhance the levels of safety and security to prevent future Unnatural Deaths of a similar nature from occurring (including having regard to any report or recommendations of the Commissioner). If none, a detailed rationale supporting this decision is required.</li> <li>A report from the General Manager of the Correctional Centre regarding the Unnatural Death.</li> </ul>
<b>Reporting Period</b>	Monthly

## 2.2 Charge Event 2 - Escapes

<b>Charge Event 2</b>	<b>Escapes</b>
<b>Formulae</b>	<p><b>Number of Escapes from Secure Custody</b></p> <p><b>Number of Escapes from Open Custody</b></p>
<b>Charge</b>	<p>Each Escape from Secure Custody results in a charge of [REDACTED]</p> <p>Each Escape from Open Custody results in a charge of [REDACTED]</p>
<b>Definitions</b>	<p><b>Escape</b> means the departure (regardless of duration), without lawful authority, of an Inmate.</p> <ul style="list-style-type: none"> <li>from the perimeter or declared boundary of a Correctional Centre, regardless of whether or not there was a breach of a physical barrier; or</li> <li>from any approved locations when outside of the perimeter or declared boundary of a Correctional Centre when the Inmate is being (or is required to be) escorted by Project Co or its Associates</li> </ul>
<b>Counting Rules</b>	<p>Count the number of each type of Escape during the reporting period. If two or more Inmates Escape at the same time or together, then this is counted as two or more Escapes (as the case may be)</p> <p>If an Inmate Escapes, the Escape is classified as an Escape from Open Custody or Secure Custody depending on the security level of the area of the Correctional Centre at which the Inmate was held immediately prior to the Escape except for Escapes by female Inmates which are always to be classified as Escapes from Secure Custody. For example, where a male Inmate with an individual security classification of Minimum Security is held in the Secure Custody area of the Correctional Centre prior to Escape, that Escape is to be counted as a Secure Custody Escape. Where a female Inmate is held in an Open Custody area of the Correctional Complex prior to Escape, the Escape is to be counted as an Escape from Secure Custody.</p> <p>If an Inmate Escapes whilst being escorted by Project Co or its Associates, the Escape is classified as an Escape from Open Custody or Secure Custody depending on the security level of the area of the Correctional Centre at which the Inmate was held immediately prior to the commencement of the escort by Project Co or its Associates except for Escapes by female Inmates which are always to be classified as Escapes from Secure Custody.</p>
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>Compliance with the Output Specification.</li> <li>Summary of the Escape, the events preceding the Escape, detection and the response by Project Co or its Associates.</li> <li>Project Co or its Associates' intended actions to enhance the levels of safety and security to prevent future Escapes from occurring. If none, the rationale for this decision</li> <li>A report from the General Manager of the Correctional Centre regarding the Escape.</li> </ul>
<b>Reporting Period</b>	Monthly

## 2.3 Charge Event 3 - Major Disruption to Correctional Operations

<b>Charge Event 3</b>	<b>Major Disruption to the operation of the Correctional Complex</b>
<b>Formula</b>	<b>Number of Major Disruptions to the operation of the Correctional Complex</b>
<b>Charge</b>	Each Major Disruption results in a charge of ████████ per day
<b>Definitions</b>	<p><b>Major Disruption</b> means an incident involving defiance or disorder by one or more Inmates which results in</p> <p>(a) a loss of effective control by Project Co or its Associates (whether or not by physical or electronic failure or otherwise) of any part of a Correctional Centre or Correctional Complex (such as an accommodation area, common area, recreational area, work area or yard, rather than a cell), or the effective control of an Inmate while that Inmate is on temporary leave or is being (or required to be) escorted by Project Co or its Associates;</p> <p>(b) the taking of a hostage (whether an Inmate or Non-Inmate);</p> <p>(c) a riot in the Correctional Complex; or</p> <p>(d) the State lawfully intervening to restore good order or security to any part of the Correctional Centre or Correctional Complex (such as an accommodation area, common area, recreational area, work area or yard, rather than a cell), or any other location while an Inmate is on temporary leave or being (or is required to be) escorted by Project Co or its Associates.</p>
<b>Counting Rules</b>	<p>Count any incident of Major Disruption that occurred during the reporting period. Count the number of consecutive 24 hour periods for which a Major Disruption subsisted, rounded up to the nearest whole 24 hour period.</p> <p>Count the number of incidents, not the number of Inmates involved in the incident. For example, if three Inmates assume control of the roof of one of the Correctional Centres from Thursday afternoon until Saturday morning, count one incident for two days.</p>
<b>Reporting Requirements by Project Co</b>	<ul style="list-style-type: none"> <li>• Complete Incident Report Module requirements (as set out in the Output Specification).</li> <li>• Date and time of incident.</li> <li>• Location of incident.</li> <li>• Events preceding the incident.</li> <li>• Inmates, Non-Inmates or any other person involved in the incident.</li> <li>• Details of any injuries to Inmates, Non-Inmates or any other person.</li> <li>• Details of any hostages involved.</li> <li>• Attempted interventions to resolve incident.</li> <li>• Details on how the incident was resolved.</li> <li>• Damage to the Correctional Complex or any other location where the incident occurred.</li> </ul>
<b>Reporting Period</b>	Monthly

## 2.4 Charge Event 4 - Compliance with Release Dates

Charge Event 4	Compliance with Release Dates
Formulae	$\frac{\text{Number of Erroneous Releases}}{\text{Number of Erroneous Detentions}}$
Charge	<p>Each Erroneous Release results in a charge of ██████ per day from the date of the Erroneous Release until the Inmate is taken into physical custody, up to a maximum of ██████</p> <p>Each Erroneous Detention results in a charge of ██████ per day from the date of the Erroneous Detention until the Inmate is released from custody.</p>
Definitions	<p><b>Erroneous Release</b> means an Inmate is released from custody prior to the date on which the Inmate was legally entitled to be released, except to the extent this is the direct result of an act or omission of the State or its Associates.</p> <p><b>Erroneous Detention</b> means an Inmate is held in custody after the date from when the Inmate should have been legally released, except to the extent this is the direct result of an act or omission of the State or its Associates.</p>
Counting Rules	<p>For Erroneous Release, count the number of Inmates that are released from custody prior to the date on which they were legally entitled to be released and the number of days for which they have been released</p> <p>For Erroneous Detention, count the number of Inmates that are held beyond the date from when they should have been legally released and the number of days for which they have been detained</p>
Reporting Requirements	<p>For each Erroneous Detention:</p> <ul style="list-style-type: none"> <li>• details of the Inmate,</li> <li>• details of the legal release date and actual release date, and</li> <li>• reason for Erroneous Detention</li> </ul> <p>For each Erroneous Release:</p> <ul style="list-style-type: none"> <li>• details of relevant Inmate;</li> <li>• details of the legal release date, actual release date, and date when the Inmate is taken into legal custody following the Erroneous Release;</li> <li>• details of the period during which the Inmate was erroneously released, and</li> <li>• reason for Erroneous Release</li> </ul>
Reporting Period	Monthly

## 3. Key Performance Indicators

### 3.1 KPI 1 – Current Case Plans

KPI 1	Current Case Plans
Formulae	$\frac{\text{(Number of Eligible Inmates with a Current Case Plan)}}{\text{(Number of Eligible Inmates)}} \times 100$



<b>KPI 1</b>	<b>Current Case Plans</b>												
<b>Calculation of Quality Failure Points</b>	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>		Performance Range	Quality Failure Points	Target			Level 1			Level 2		
	Performance Range	Quality Failure Points											
Target													
Level 1													
Level 2													
<b>Definitions</b>	<p><b>Current Case Plan</b> means:</p> <p>(a) a Complete Case Plan which exists within six weeks of the date of</p> <p>(i) sentence, for newly sentenced inmates who were on remand at the Correctional Centre; or</p> <p>(ii) reception into the Correctional Centre, for sentenced inmates transferred to the Correctional Centre; and</p> <p>(b) a Complete Case Plan which has been reviewed and updated as required by the Services Specification and, in any case, no less frequently than once every six Months.</p> <p><b>Eligible Inmates</b> means all sentenced inmates at the Correctional Complex who have three months or more remaining on their sentence (before the earliest possible release date) and who have been at the Correctional Complex under sentence for at least six weeks.</p> <p><b>Complete Case Plan</b> means a case plan for each sentenced inmate which complies with the Corrections Legislation and the Services Specification and is entered in OIMS.</p>												
<b>Counting Rules</b>	<p><b>Numerator:</b> Number of Eligible Inmates with a Current Case Plan</p> <p><b>Denominator:</b> Number of Eligible Inmates</p>												
<b>Reporting Requirements of Project Co</b>	<p>For each Eligible Inmate</p> <ul style="list-style-type: none"> <li>• date of Case Plan assessments;</li> <li>• results of Case Plan assessments;</li> <li>• date the Case Plan was finalised and the date the Case Plan should have been finalised in accordance with the Services Specification;</li> <li>• Case Plan goals including priority rating;</li> <li>• formulated interventions for each Case Plan goal;</li> <li>• date expected to complete each intervention; and</li> <li>• dates Case Plan reviewed.</li> </ul>												
<b>Reporting Period</b>	Monthly												

## 3.2 KPI 2 – Outstanding Case Plan Interventions

KPI 2	Outstanding Case Plan Interventions																								
Formulae	<p><b>A.</b> (Number of Outstanding Case Plan Interventions for High/Medium Risk Inmates) / (Number of Case Plan Interventions scheduled to be Completed for High/Medium Risk Inmates) x 100</p> <p><b>B.</b> (Number of Outstanding Case Plan Interventions for Low Risk Inmates) / (Number of Case Plan Interventions scheduled to be Completed for Low Risk Inmates) x 100</p>																								
Calculation of Quality Failure Points	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month for A and B depending on its performance against each sub-component relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1" data-bbox="520 622 1442 869"> <thead> <tr> <th data-bbox="520 622 842 663">A – Medium/High Risk</th> <th data-bbox="842 622 1129 663">Performance Range</th> <th data-bbox="1129 622 1442 663">Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td data-bbox="520 663 842 703">Target</td> <td data-bbox="842 663 1129 703"></td> <td data-bbox="1129 663 1442 703"></td> </tr> <tr> <td data-bbox="520 703 842 788">Level 1</td> <td data-bbox="842 703 1129 788"></td> <td data-bbox="1129 703 1442 788"></td> </tr> <tr> <td data-bbox="520 788 842 869">Level 2</td> <td data-bbox="842 788 1129 869"></td> <td data-bbox="1129 788 1442 869"></td> </tr> </tbody> </table> <table border="1" data-bbox="520 913 1442 1153"> <thead> <tr> <th data-bbox="520 913 842 954">B – Low Risk</th> <th data-bbox="842 913 1129 954">Performance Range</th> <th data-bbox="1129 913 1442 954">Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td data-bbox="520 954 842 994">Target</td> <td data-bbox="842 954 1129 994"></td> <td data-bbox="1129 954 1442 994"></td> </tr> <tr> <td data-bbox="520 994 842 1079">Level 1</td> <td data-bbox="842 994 1129 1079"></td> <td data-bbox="1129 994 1442 1079"></td> </tr> <tr> <td data-bbox="520 1079 842 1153">Level 2</td> <td data-bbox="842 1079 1129 1153"></td> <td data-bbox="1129 1079 1442 1153"></td> </tr> </tbody> </table>	A – Medium/High Risk	Performance Range	Quality Failure Points	Target			Level 1			Level 2			B – Low Risk	Performance Range	Quality Failure Points	Target			Level 1			Level 2		
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Definitions	<p><b>Case Plan Interventions</b> means:</p> <ul style="list-style-type: none"> <li>(a) <b>Offence Related Programs:</b> a structured intervention that addresses the factors directly linked to offending behaviour.</li> <li>(b) <b>Adult Basic Education (ABE):</b> a structured intervention that develops skills to improve reading, writing, oral communication and numeracy</li> <li>(c) <b>Vocational Education and Training (VET):</b> a course or traineeship that teaches skills and qualifications for employment</li> <li>(d) <b>Services that support Inmate wellbeing:</b> one-to-one services that address psychological, motivational or welfare factors that impact on an Inmate's well-being.</li> <li>(e) <b>Personal Development and Life Skills Programs:</b> a structured program that addresses the life skills and well being of the Inmate's needs.</li> <li>(f) <b>Re-integration Services and Community Referrals:</b> provision of services and referrals to service providers to assist the Inmate to successfully re-integrate into the community upon release.</li> </ul> <p><b>Outstanding Case Plan Interventions</b> means Case Plan Interventions scheduled to be completed in the reporting period where Completion of Case Plan Interventions has not been achieved by the time contemplated in the Case Plan.</p> <p><b>Completion of Case Plan Interventions or Completed Case Plan Interventions</b> means:</p> <ul style="list-style-type: none"> <li>(a) in respect of an Offence Related Program:</li> </ul>																								

KPI 2	Outstanding Case Plan Interventions
	<p>(a) determination in writing by the program facilitator that the participating Inmate has satisfied the components of the program, and</p> <p>(i) the Inmate attended at least [REDACTED] of program sessions;</p> <p>(g) in respect of Adult Basic Education, attainment by the participating Inmate of a higher level on the Australian Core Skills Framework;</p> <p>(h) in respect of Vocational Education and Training, attainment by the participating Inmate of a course module or attainment of a recognised qualification;</p> <p>(i) in respect of services that support Inmate wellbeing, evidence that contact between the participating Inmate and the relevant service provider has taken place that addresses psychological, motivation or welfare factors for the participating Inmate and the relevant service provider determines in writing that the intervention is complete; and</p> <p>(j) in respect of a Personal Development and Life Skills Program:</p> <p>(i) determination in writing by the program facilitator that the participating Inmate has satisfied the components of the program; and</p> <p>(ii) the Inmate attended at least [REDACTED] of program sessions; and</p> <p>(k) in respect of Reintegration Services and Community Referrals, evidence of referral of the participating Inmate to a relevant service.</p> <p>and in each case entered in OIMS.</p> <p><b>High/Medium Risk Inmates</b> means the Inmates in the Correctional Complex who are assessed by Project Co or its Associates as having a high or medium Likelihood of Reoffending having regard to the requirements of the Corrections Legislation and the Services Specification.</p> <p><b>Likelihood of Reoffending</b> means the risk of the Inmate further offending. It does not take into account the seriousness of further offending or the degree of damage it may cause.</p> <p><b>Low Risk Inmates</b> means the Inmates in the Correctional Complex who are assessed by Project Co or its Associates as having a low Likelihood of Reoffending having regard to the requirements of the Corrections Legislation and the Services Specification.</p>
<b>Counting Rules</b>	<ul style="list-style-type: none"> <li>• <b>Numerator:</b> Count the number of Case Plan Interventions scheduled to be completed but not completed in the reporting period for High/Medium Risk Inmates or Low Risk Inmates (as the case may be)</li> <li>• <b>Denominator:</b> Count the number of Case Plan Interventions scheduled to be completed in the reporting period for High/Medium Risk Inmates or Low Risk Inmates (as the case may be).</li> </ul>
<b>Reporting Requirements</b>	<p>Details of each failure to complete a Case Plan Intervention in the reporting period including:</p> <ul style="list-style-type: none"> <li>• scheduled date of Case Plan Intervention,</li> <li>• type and nature of Case Plan Intervention,</li> <li>• attendance by the Inmate at each session of intervention (if applicable);</li> <li>• reason(s) for non-completion of the Case Plan Intervention; and</li> <li>• revised scheduled date for completion of the Case Plan Interventions.</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.3 KPI 3 – Specified Serious Incidents

KPI 3	Specified Serious Incidents
<p><b>Formulae</b></p> <p><b>Calculation of Quality Failure Points</b></p>	<p><b>A. Number of Deliberately Lit Fires, Security Breaches and Non-Fatal Drug Overdoses</b></p> <p><b>B. Number of Serious Contraband Breaches identified by the State</b></p> <p>The Quality Failure Points which Project Co will accrue each Month are as follows:</p> <p>(a) Deliberately Lit Fires, Security Breaches and Non-Fatal Drug Overdoses - [REDACTED] per incident</p> <p>(b) Serious Contraband Breaches - [REDACTED] per item, [REDACTED] [REDACTED] subject to a cap of [REDACTED] per search.</p>
<p><b>Definitions</b></p>	<p><b>Serious Contraband</b> means any contraband which has the potential to threaten the security or good order of any part of the Correctional Complex or the secure custody of an Inmate, and is deemed to include mobile phones or any part of them, illicit drugs, alcohol, matches, lighters, synges, illegal pornographic material and Weapons.</p> <p><b>Serious Contraband Breach</b> means the identification of an item of Serious Contraband within the Correctional Complex by the State as part of a random search carried out in accordance with the Deed, the Corrections Legislation or a Policy.</p> <p><b>Deliberately Lit Fire</b> means a fire that causes injury or death to a person, or damage to any part of the Correctional Complex (such as an accommodation area, common area, recreational area, work area or yard, rather than a cell), that was, in the opinion of the State or the General Manager, deliberately lit.</p> <p><b>Non-Fatal Drug Overdose</b> means an Inmate requires medical intervention and is admitted to hospital (including a correctional centre hospital or clinic, infirmary or any off Site medical centre that serves as an equivalent) of a hospital for the Inmates; after ingesting an illicit substance including non-prescription medication, prescription medication not prescribed to the Inmate or in quantities other than as prescribed, illicit drugs, chemicals or fermented substances.</p> <p><b>Security Breach</b> means an incident or event that has the potential to seriously affect the security or good order of any part of the Correctional Complex or Correctional Centre or the secure custody of an Inmate and is deemed to include:</p> <p>(a) where an Inmate is found in an unauthorised area of the Correctional Complex (but does not breach or otherwise pass the outer most secure perimeter of the Correctional Complex) or breaches a Security Barrier in the Correctional Centre</p> <p>(b) a failure for any reason to secure an Inmate during lock-in;</p> <p>(c) failure by Project Co or its Associates to account for an Inmate at the times required in accordance with the Output Specification; or</p> <p>(d) an unauthorised discharge of a firearm by any person within the Correctional Complex or while an Inmate is on temporary leave or being (or required to be) escorted by Project Co or its Associates</p> <p><b>Security Barrier</b> means a physical structure designed to limit movement to and from a secure area.</p> <p><b>Specified Serious Incident</b> means a Deliberately Lit Fire, Security Breach, Serious Contraband Breach or Non-Fatal Drug Overdose.</p>

KPI 3	Specified Serious Incidents
	<p><b>Weapons</b> means any offensive weapon or instrument (as defined by the Crimes Act 1900 (NSW)).</p>
<b>Counting Rules</b>	<p><b>Deliberately Lit Fire</b> Count the number of Deliberately Lit Fires during the reporting period, regardless of the number of Inmates or Non-Inmates involved in the incident.</p> <p><b>Security Breach</b> Count the number of Security Breaches by reference to the number of Inmates involved in each and every incident or event during the reporting period, except in relation to the unauthorised discharge of a firearm, which will be counted with reference to the number of events or incidents during the reporting period. For example:</p> <ul style="list-style-type: none"> <li>(a) if two Inmates are found together in unauthorised areas of the Correctional Complex, then count two Security Breaches;</li> <li>(b) if there were two lock-ins during the reporting period and each time two Inmates were not secured, count four Security Breaches;</li> <li>(c) if there are three incidents whereby Project Co or its Associates cannot account for two inmates, count six Security Breaches; or</li> <li>(d) if one incident results in the unauthorised discharge of multiple firearms then count this as one Security Breach.</li> </ul> <p><b>Serious Contraband Breach</b> Count the number of Serious Contraband identified by the State during the reporting period. For example, if 10 mobile phones are found by the State within the Correctional Complex within a reporting period (whether they are found during one inspection or on multiple occasions) count 10 Serious Contraband Breaches during the reporting period.</p> <p><b>Non-Fatal Drug Overdose</b> Count the number of Inmates that suffer a Non-Fatal Drug Overdose during the reporting period.</p>
<b>Reporting Requirements</b>	<p>Details of each Specified Serious Incident must include</p> <ul style="list-style-type: none"> <li>• date and time of the Specified Serious Incident</li> <li>• location of the Specified Serious Incident</li> <li>• details of Inmate(s) involved in the Specified Serious Incident;</li> <li>• details of Non-Inmate(s) involved in the Specified Serious Incident;</li> <li>• summary of incident or event;</li> <li>• details of response to the Specified Serious Incident;</li> <li>• Project Co's or its Associates' intended actions to minimise future risk of Specified Serious Incidents; and</li> <li>• General Manager's report regarding the Specified Serious Incident in accordance with the Corrections Legislation.</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.4 KPI 4 – Assaults on Non-Inmates

KPI 4	Assaults on Non-Inmates												
Formulae	<p><b>A. Number of Non-Inmate victims of Substantiated Serious Assault.</b></p> <p><b>B. Number of Non-Inmate victims of Substantiated Significant Assault.</b></p> <p><b>C. Number of Non-Inmate victims of Substantiated Assault by Inmates.</b></p>												
Calculation of Quality Failure Points	<p>The Quality Failure Points which Project Co will accrue each Month is as follows:</p> <p>A. Substantiated Serious Assaults – [REDACTED] per Non-Inmate victim</p> <p>B. Substantiated Significant Assaults - [REDACTED] per Non-Inmate victim</p> <p>C. Substantiated Assault – the following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> <tr> <td>Level 1</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> <tr> <td>Level 2</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> </tbody> </table>		Performance Range	Quality Failure Points	Target	[REDACTED]	[REDACTED]	Level 1	[REDACTED]	[REDACTED]	Level 2	[REDACTED]	[REDACTED]
	Performance Range	Quality Failure Points											
Target	[REDACTED]	[REDACTED]											
Level 1	[REDACTED]	[REDACTED]											
Level 2	[REDACTED]	[REDACTED]											
Definitions	N/A												
Counting Rules	<p><b>Serious Assault</b></p> <p>Count the number of Non-Inmates who were victims of a Serious Assault that was Substantiated during the reporting period. For example, if two Inmates perpetrate a Serious Assault on one Non-Inmate, count one Non-Inmate. If a Serious Assault takes place in a reporting period but this is not Substantiated until another reporting period, count the Serious Assault in the period in which it is Substantiated.</p> <p><b>Significant Assault</b></p> <p>Count the number of Non-Inmates who were victims of a Significant Assault that was Substantiated during the reporting period. For example, if two Inmates perpetrate a Significant Assault on one Non-Inmate, count one Non-Inmate. If a Significant Assault takes place in a reporting period but this is not Substantiated until another reporting period, count the Significant Assault in the period in which it is Substantiated.</p> <p><b>Assault</b></p> <p>Count the number of Non-Inmates who were victims of an Assault during the reporting period. If two Inmates perpetrate an Assault on one Non-Inmate, count one Non-Inmate. If an Assault takes place in a reporting period but is not Substantiated until another reporting period, count the Assault in the period in which it was Substantiated.</p>												
Reporting Requirements	<p>Details of each Substantiated Serious Assault, Significant Assault or Assault (as the case may be) must include:</p> <ul style="list-style-type: none"> <li>• date and time of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• location of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• details of Inmates involved in the Substantiated Serious Assault, Significant Assault or Assault (as the case may be).</li> </ul>												

KPI 4	Assaults on Non-Inmates
	<ul style="list-style-type: none"> <li>• details of Non-Inmates involved in the Substantiated Serious Assault, Significant Assault or Assault (as the case may be), including as a victim;</li> <li>• summary of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• details of Project Co's or its Associates' response to the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• details of Non-Inmate injury;</li> <li>• Project Co's intended actions to minimise future risk to Non-Inmates; and</li> <li>• General Manager's report regarding the Substantiated Serious Assault, Significant Assault or Assault (as the case may be) in accordance with the Corrections legislation.</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.5 KPI 5 – Assaults on Inmates by other Inmates

<b>KPI 5</b>	<b>Assaults on Inmates by Inmates</b>												
<b>Formulae</b>	<p><b>A. Number of Inmate victims of Substantiated Serious Assault.</b></p> <p><b>B. Number of Inmate victims of Substantiated Significant Assault</b></p> <p><b>C. (Number of Inmate victims of Substantiated Assault by Inmates) / (Daily Average Inmate Population) x 100.</b></p>												
<b>Calculation of Quality Failure Points</b>	<p>The Quality Failure Points which Project Co will accrue each Month is as follows:</p> <p>A. Substantiated Serious Assaults – [REDACTED] per Inmate victim</p> <p>B. Substantiated Significant Assaults – [REDACTED] per Inmate victim</p> <p>C. Substantiated Assault - The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges</p> <table border="1"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> <tr> <td>Level 1</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> <tr> <td>Level 2</td> <td>[REDACTED]</td> <td>[REDACTED]</td> </tr> </tbody> </table>		Performance Range	Quality Failure Points	Target	[REDACTED]	[REDACTED]	Level 1	[REDACTED]	[REDACTED]	Level 2	[REDACTED]	[REDACTED]
	Performance Range	Quality Failure Points											
Target	[REDACTED]	[REDACTED]											
Level 1	[REDACTED]	[REDACTED]											
Level 2	[REDACTED]	[REDACTED]											
<b>Definitions</b>	N/A												
<b>Counting Rules</b>	<p><b>Serious Assault</b></p> <p>Count the number of Inmates who were victims of a Serious Assault that was substantiated during the reporting period. For example, if two Inmates perpetrate a Serious Assault on three Inmates, count three Inmates. If a Serious Assault takes place in a reporting period but this is not Substantiated until another reporting period, count the Serious Assault in the period in which it is Substantiated.</p> <p><b>Significant Assault</b></p> <p>Count the number of Inmates who were victims of a Significant Assault that was Substantiated during the reporting period. For example, if two Inmates perpetrate a Significant Assault on three Inmates, count three Inmates. If a Significant Assault takes place in a reporting period but this is not Substantiated until another reporting period, count the Significant Assault in the period in which it is Substantiated.</p> <p><b>Assault</b></p> <p>Count the number of Inmates who were victims of an Assault during the reporting period. If four Inmates perpetrate an Assault on one Inmate, count one Inmate. If an Assault takes place in a reporting period but is not Substantiated until another reporting period, count the Assault in the period in which it was Substantiated.</p>												
<b>Reporting Requirements</b>	<p>Details of each Substantiated Serious Assault, Significant Assault or Assault (as the case may be) must include:</p> <ul style="list-style-type: none"> <li>• date and time of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• location of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> </ul>												



KPI 5	Assaults on Inmates by Inmates
	<ul style="list-style-type: none"> <li>• details of Inmate(s) involved in the Substantiated Serious Assault, Significant Assault or Assault (as the case may be), including as victim(s)</li> <li>• details of Non-Inmate(s) involved in the Substantiated Serious Assault Significant Assault or Assault (as the case may be);</li> <li>• summary of the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• details of response to the Substantiated Serious Assault, Significant Assault or Assault (as the case may be);</li> <li>• details of any injury.</li> <li>• Project Co's or its Associates' intended actions to minimise future risk to Inmates; and.</li> <li>• General Manager's report regarding the Substantiated Serious Assault, Significant Assault or Assault (as the case may be) in accordance with the Corrections Legislation</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.6 KPI 6 – Illicit Drug Use

<b>KPI 6</b>	<b>Illicit Drug Use</b>												
<b>Formulae</b>	<b>(Number of Positive Random Drug Tests) / (Number of Random Drug Tests) x 100</b>												
<b>Calculation of Quality Failure Points</b>	The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges												
	<table border="1"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>		Performance Range	Quality Failure Points	Target			Level 1			Level 2		
	Performance Range	Quality Failure Points											
Target													
Level 1													
Level 2													
<b>Definitions</b>	<p><b>Random Drug Test</b> means a random drug test to identify illicit drug use conducted by Project Co or its Associates in respect of a [redacted] sample of the population of Eligible Inmates as randomly selected by the State each Month and notified to Project Co in accordance with the Deed.</p> <p><b>Eligible Inmates</b> include all Inmates except Inmates who have been in custody for less than 30 days</p> <p><b>Positive</b> means samples for which the pathology identifies positive findings for drug use except positive findings attributed to prescribed medication for that Inmate. Residual Effects Nil Creatinine Detected or Window Periods</p> <p><b>Nil Creatinine Detected</b> means the pathology results find that the sample does not contain the enzyme found in urine and cannot be tested.</p> <p><b>Residual Effects</b> means where the pathology results find a positive result but the drug use by the Inmate has previously been detected and on subsequent testing the level is shown to be less than the previous pathology results.</p> <p><b>Window Periods</b> means that the pathology results find that the drug use was due to drugs taken by the relevant Inmate prior to reception into the Correctional Complex</p>												
<b>Counting Rules</b>	<p><b>Numerator:</b> Count the number of Positive Random Drug Test samples collected during the reporting period.</p> <p><b>Denominator:</b> The number of Random Drug Tests collected at the Correctional Complex during the reporting period.</p>												
<b>Reporting Requirements</b>	<ul style="list-style-type: none"> <li>• Date Random Drug Test was administered</li> <li>• Details of each Inmate tested;</li> <li>• Results of each Random Drug Test; and</li> <li>• Details of each Inmate who refused testing.</li> </ul>												
<b>Reporting Period</b>	Monthly												

## 3.7 KPI 7 – Serious Self Harm

<b>KPI 7</b>	<b>Serious Self-Harm</b>												
<b>Formulae</b>	Number of incidents of Serious Self-Harm												
<b>Calculation of Quality Failure Points</b>	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>		Performance Range	Quality Failure Points	Target			Level 1			Level 2		
	Performance Range	Quality Failure Points											
Target													
Level 1													
Level 2													
<b>Definitions</b>	<p><b>Serious Self-Harm</b> means deliberate injury to oneself that results in</p> <p>(a) immediate transfer to hospital or any off Site medical centre that serves as an equivalent of a hospital for the Inmates; and</p> <p>(b) medical treatment as an inpatient (regardless of whether this treatment is received in the emergency department or otherwise),</p> <p>but excluding Unnatural Deaths (as defined in Charge Event 1 (Unnatural Deaths)) and Non-Fatal Drug Overdoses (as defined in KPI 3 (Specified Serious Incidents)).</p>												
<b>Counting Rules</b>	<p>Count the number of incidents of Serious Self-Harm that occur during the reporting period.</p> <p>If an Inmate suffers multiple separate injuries that results in one Serious Self-Harm incident, then count as one incident. If an Inmate suffers multiple incidents in the reporting period, each incident is counted separately.</p>												
<b>Reporting Requirements</b>	<ul style="list-style-type: none"> <li>• Date and time of the Serious Self-Harm.</li> <li>• Location of the Serious Self-Harm</li> <li>• Details of each Inmate involved in the Serious Self-Harm.</li> <li>• Summary of the Serious Self-Harm.</li> <li>• Details of response to the Serious Self-Harm</li> <li>• Report from the medical professional attending to the Inmate injury including where an Inmate is admitted to hospital, correctional centre clinic, infirmary or correctional centre hospital.</li> <li>• Details of the Inmate injury</li> <li>• Project Co's intended action to minimise or avoid the future risk to Inmates.</li> <li>• Report from the General Manager of the Correctional Centre in respect of the Serious Self-Harm.</li> </ul>												
<b>Reporting Period</b>	Monthly												

## 3.8 KPI 8 – Temporary Leave Programs

<b>KPI 8</b>	<b>Temporary Leave Programs and Compliance with Temporary Leave Orders</b>													
<b>Formulae</b>	<p>A. <math>\frac{\text{Number of Inmates participating in Temporary Leave Programs}}{\text{Number of Inmates Eligible for Temporary Leave Programs}} \times 100</math></p> <p>B. <b>Number of Temporary Leave Orders Breached</b></p>													
<b>Calculation of Quality Failure Points</b>	<p>A. The following table sets out the Quality Failure Points which Project Co will accrue each Month for A and B depending on its performance against each sub-component relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1" data-bbox="523 622 1436 873"> <thead> <tr> <th></th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table> <p>B. Temporary Leave Orders Breached - [redacted] points per breach</p>			Performance Range	Quality Failure Points	Target			Level 1			Level 2		
	Performance Range	Quality Failure Points												
Target														
Level 1														
Level 2														
<b>Definitions</b>	<p><b>A. Temporary Leave Programs</b></p> <p><b>Temporary Leave Program</b> means the following programs for Inmates Eligible for Temporary Leave Programs</p> <p>(a) weekend and day leave</p> <p>(b) external work release program; or</p> <p>(c) education release under a local leave perm 1 for education</p> <p><b>Inmates Eligible for Temporary Leave Programs</b> means Inmates who are identified as being eligible for Temporary Leave Programs in accordance with the Output Specification and the Corrections Legislation, and Eligible Inmates will be construed accordingly.</p> <p><b>B. Temporary Leave Orders Breached</b></p> <p><b>Temporary Leave Order Breached</b> means an Inmate has failed to comply with the conditions of the Inmate's temporary leave order except to the extent that the failure relates to the late return by an Inmate</p> <p>(a) arising from circumstances which are beyond the reasonable control of the Inmate, except to the extent that such failure was caused by a failure by Project Co or its Associates to provide the Services in accordance with this Deed,</p> <p>(b) during the period which is up to 30 minutes after the designated return time specified in the temporary leave order; or</p> <p>(c) arising from an Escape from Temporary Leave (as defined in KPI 12).</p>													
<b>Counting Rules</b>	<p>A. <u>Numerator</u>: Number of Eligible Inmates participating in a Temporary Leave Program.</p> <p><u>Denominator</u>: Number of Inmates Eligible for Temporary Leave Programs</p> <p>B. <b>Temporary Work Orders</b> - Count the number of Temporary Leave Orders Breached in the reporting period</p> <p>If an Inmate has multiple Temporary Leave Orders Breached, each Temporary Leave Order Breached is counted separately.</p>													

KPI 6	Temporary Leave Programs and Compliance with Temporary Leave Orders
Reporting Requirements	<p><b>A. Temporary Leave Programs</b></p> <ul style="list-style-type: none"> <li>• Details of Temporary Leave Program participation.</li> </ul> <p><b>B. Temporary Leave Orders</b></p> <ul style="list-style-type: none"> <li>• Date of the Temporary Leave Order Breached.</li> <li>• Details of the conditions the Inmate failed to comply with that resulted in the Temporary Leave Order Breached</li> <li>• Assessment of suitability for Temporary Leave Program for those Inmates who have a Temporary Leave Order Breached during the reporting period</li> </ul>
Reporting Timeframe	Monthly

## 3.9 KPI 9 – Time out of cells

KPI 9	Time out of Cells
Formulae	The number of <b>Out of Cell Hour Failure Periods</b>
Calculation of Quality Failure Points	Quality Failure Points per Failure Period
Definitions	<p><b>Failure Periods</b> are calculated as <math>(A - B)</math>, rounded up to the nearest whole number where:</p> <p><b>A</b> = the sum of the Variance in Out of Cell Hours per day per Inmate over the course of the Month</p> <p><b>B</b> = 2 x Daily Average Inmate Population for the Month</p> <p>The minimum number of Failure Periods is zero i.e. Failure Periods cannot be negative.</p> <p><b>Variance in Out of Cell Hours</b> is calculated on a daily basis for each Inmate as the Minimum Out of Cell hours less the Actual Out of Cell hours, expressed in 30 minute intervals or part thereof. The minimum number of Variance in Out of Cell Hours is zero i.e. Variance in Out of Cell Hours cannot be a negative number.</p> <p><b>Actual Out of Cell hours</b> is calculated on a daily basis for each Inmate as the number of hours that the Inmate is not confined to their cell or Residential Accommodation. If an Inmate opts to remain in the Inmate's cell or Residential Accommodation during a time when the Inmate is permitted to leave the cell or Residential Accommodation, that period is included in the calculation of Actual Out of Cell hours.</p> <p><b>Minimum Out of Cell hours</b> for Inmates is specified in section 3.7.2.1 of the Services Specification, subject to Approved Exceptions</p> <p><b>Approved Exceptions</b> means:</p> <ul style="list-style-type: none"> <li>(a) monthly scheduled searches of the Correctional Complex in accordance with the Deed;</li> <li>(b) Inmates in segregated custody; and</li> <li>(c) variations to the daily operating routine following a Critical Incident, Serious Incident (as specified in the Services Specification) or Serious Assault provided these affect the fewest number of Inmates and for the shortest period practicable.</li> </ul>
Counting Rules	<p><u>Example:</u></p> <ul style="list-style-type: none"> <li>• Minimum Out of Cell Hours per day for Secure Custody Inmate = 9 hours</li> <li>• Actual Out of Cell Hours for 1,000 Inmates held in Secure Custody each day in January = 6.5 hours</li> <li>• Assume the Daily Average Inmate Population for January is 1,700</li> <li>• The Variance in Out of Cell Hours for each of those 1,000 Inmates for each day in January is calculated as <math>(9 - 6.5) = 2.5</math> hours = 5 x 30 minute intervals</li> <li>• Failure Periods = <math>(5 \times 1,000 \text{ Inmates} \times 31 \text{ days}) - (2 \times 1,700) = 151,000</math></li> <li>• Quality Failure Points are calculated as [REDACTED]</li> </ul>
Reporting Requirements	<ul style="list-style-type: none"> <li>• Actual Out of Cell Hours based on the approved Correctional Centre routine for Inmates.</li> <li>• Details of all irregular lockdowns, including: <ul style="list-style-type: none"> <li>o Date of lockdown;</li> <li>o Area of lockdown and Inmates affected by lockdown;</li> <li>o Reason for lockdown</li> </ul> </li> </ul>

KPI 9	Time out of Cells
	<ul style="list-style-type: none"><li>o Number of Inmates affected by lock-down; and</li><li>o Duration of the lockdown.</li></ul>
<b>Reporting Period</b>	Monthly

## 3.10 KPI 10 – Purposeful Activity

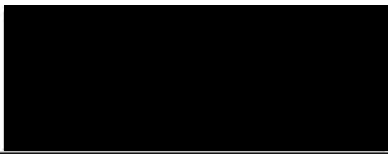
KPI 10	Purposeful Activity																								
Formulae	<p><b>A.</b> <math>(\text{Total sentenced Inmate hours in Purposeful Activity}) / (\text{Daily average sentenced Inmate population}) / (\text{Number of days in reporting period})</math></p> <p><b>B.</b> <math>(\text{Total remand Inmate hours in Purposeful Activity}) / (\text{Daily average remand Inmate population}) / (\text{Number of days in reporting period})</math></p>																								
Calculation of Quality Failure Points	<p>The following table sets out the Quality Failure Points which Project 10 will accrue each Month for A and B depending on its performance against each sub-component relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th>A.</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table> <table border="1"> <thead> <tr> <th>B.</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>	A.	Performance Range	Quality Failure Points	Target			Level 1			Level 2			B.	Performance Range	Quality Failure Points	Target			Level 1			Level 2		
A.	Performance Range	Quality Failure Points																							
Target																									
Level 1																									
Level 2																									
B.	Performance Range	Quality Failure Points																							
Target																									
Level 1																									
Level 2																									
Definitions	<p><b>Purposeful Activity</b> means:</p> <p>(a) the following activities on any day of the week</p> <p>(i) <b>Commercial Industries, Service Industries or Work Release;</b></p> <p>(ii) <b>Offence Related Programs:</b> a structured intervention that addresses the factors directly linked to offending behaviour.</p> <p>(iii) <b>Adult Basic Education (ABE):</b> a structured intervention that develops skills to improve reading, writing, oral communication and numeracy.</p> <p>(iv) <b>Vocational Education and Training (VET):</b> a course or traineeship that teaches skills and qualifications for employment.</p>																								



KPI 10	Purposeful Activity
	<p>(v) <b>Services that support Inmate wellbeing:</b> one-to-one services that assess or address psychological, motivational, pre-release or welfare factors that impact on an inmate's well-being;</p> <p>(vi) <b>Personal Development and Life Skills Programs</b> a structured program that addresses the life skills and well-being of the Inmate's needs;</p> <p>(vii) <b>Re-Integration Programs and Services:</b> provision of programs and/or one-to-one services that assist the Inmate to successfully re-integrate into the community upon release as contemplated by an Inmate's case plan for a sentenced Inmate or as otherwise approved by the State in respect of paragraph (a)(ii) to (a)(vii) or</p> <p>(vi) <b>Exercise</b> not more than one hour each day for exercise in the open air, or</p> <p>(b) the following activities on weekends and public holidays</p> <p>(i) <b>Recreational Activities</b> including sports activities and any other recreational activities provided within the Correctional Complex to create a sense of community and to provide recreation for the Inmates; or</p> <p>(ii) <b>Community and social activities</b> including any activities which provide the opportunity for Inmates to purposefully engage with each other for leisure purposes.</p> <p><b>Commercial Industries</b> means programs run by Project Co or its Associates at the Correctional Complex which operate on a commercial fee for service basis (e.g. sale of products/services to external clients and sale of products/services to the correctional system).</p> <p><b>Service Industries</b> means employment to maintain the self-sufficiency of the Correctional Complex which are not subject to a fee for service (e.g. kitchens, laundries, gardening). This includes community projects and other unpaid work.</p> <p><b>Work Release</b> means employment in the community under industrial award conditions as part of temporary leave.</p>
<p><b>Counting Rules</b></p>	<p>For each of A and B, count the total number of relevant Inmate hours engaged in Purposeful Activity during the reporting period. For the avoidance of doubt any time spent traveling to or from Purposeful Activity (e.g. any time spent in transit or route movement) is not to be counted in the number of hours an Inmate is engaged in Purposeful Activity.</p> <p>Divide this by the Daily Average Inmate Population for sentenced Inmates (A) or remand Inmates (B) excluding any exempt Inmates (as listed below)</p> <p>Divide this by the number of days in reporting period to find the average number of hours of Purposeful Activity per sentenced Inmate (A) and remand Inmate (B) per day.</p> <p>The following Inmates are exempt from this KPI:</p> <ul style="list-style-type: none"> <li>• Inmates who are 65 years of age or over and who elect not to participate in Purposeful Activities, either in whole or part;</li> <li>• Inmates with chronic ill health, a debilitating condition, a disability or some other medical condition (as assessed by a medical health professional) to</li> </ul>

KPI 10	Purposeful Activity
	<p>the extent that it prevents that Inmate from participating in Purposeful Activities, either in whole or part;</p> <ul style="list-style-type: none"> <li>• Inmates who for specified reasons cannot reasonably achieve a minimum of [REDACTED] (for sentenced Inmates) or [REDACTED] (for remand Inmates) of Purposeful Activities, provided those reasons have been approved by the State.</li> <li>• Inmates, to the extent serving a period of loss of privileges.</li> <li>• Inmates attending court (whether in person or via an audio visual link) but only for the day(s) during the reporting period on which they are attending court. For the avoidance of doubt, Inmates who attend court in the reporting period are not exempt for the whole reporting period.</li> <li>• Inmates accommodated in a high security or management unit of the Correctional Complex (and alternative arrangements are in place in accordance with the Output Specification or as agreed with the State in writing) or</li> <li>• Inmates subject to a temporary leave order where the purpose of the temporary leave order is not for Purposeful Activity (including compassionate leave or hospital appointments).</li> </ul>
<b>Reporting Requirements</b>	N/A
<b>Reporting Period</b>	Monthly

## 3.11 KPI 11 – Staff Misconduct

<b>KPI 11</b>	<b>Staff Misconduct</b>
<b>Formulae</b>	<p>A. Number of incidents of Staff Misconduct</p> <p>B. Number of Staff Misconduct not known to Project Co or its Associates</p> <p>C. Number of Staff Misconduct incidents Not Reported or Misreported</p>
<b>Calculation of Quality Failure Points</b>	<p>The Quality Failure Points which Project Co will accrue each Month is as follows</p> 
<b>Definitions</b>	<p><b>Staff Misconduct</b> means:</p> <p>(a) a member of Staff is convicted of an offence, whether or not such a conviction is recorded and whether or not such an offence was committed in connection with the employment of the Staff member at the Correctional Complex, subject only to the Exceptions, or</p> <p>(b) a finding of misconduct of a member of Staff, including:</p> <p>(i) any finding of misconduct by the General Manager or the State (acting reasonably) as a consequence of an event that arises in connection with the employment of the Staff member at the Correctional Complex including any breach of Law, Policies or procedures or any professional standards or guidelines applicable to the position of that Staff member, or</p> <p>(ii) any finding of professional misconduct, negligence or malpractice by an appropriate professional regulatory body or a court or tribunal against any member of Staff.</p> <p><b>Exceptions</b> means:</p> <p>(a) any convictions for traffic related offences that have not arisen from, during or in connection with the employment of the Staff member at the Correctional Complex, or</p> <p>(b) any conviction for which the Staff member has received a pardon or which has been quashed.</p> <p><b>Staff Misconduct not known to Project Co or its Associates</b> means identification by the State of Staff Misconduct which, based on the findings of a State investigation, Project Co or its Associates did not know of, but ought reasonably to have known of at the time the State identified the Staff Misconduct</p> <p><b>Staff Misconduct Not Reported or Misreported</b> means failure by Project Co or any of its Associates to report or to correctly report any Staff Misconduct found, proven or substantiated whether in the reporting period or in a prior reporting period</p>
<b>Counting Rules</b>	<p>A. Count the number of incidents for which Staff Misconduct.</p> <p>B. Count the number of incidents of Staff Misconduct not known to Project Co or its Associates during the reporting period.</p> <p>C. Count the number of incidents of Staff Misconduct Not Reported or Misreported during the reporting period.</p>
<b>Reporting Requirements</b>	Report all findings of staff misconduct to the CSNSW Professional Standards Branch (PSB) as they occur

<b>KPI 11</b>	<b>Staff Misconduct</b>
<b>Reporting Period</b>	Monthly

## 3.12 KPI 12 – Escapes from Temporary Leave

<b>KPI 12</b>	<b>Escapes from Temporary Leave</b>
<b>Formula</b>	<b>Number of Escapes from Temporary Leave Programs</b>
<b>Calculation of Quality Failure Points</b>	Project Co will accrue [REDACTED] Quality Failure Points for each Escape from Temporary Leave
<b>Definitions</b>	<p><b>Escape from Temporary Leave</b> means when a minimum security Inmate:</p> <p>(a) departs, without lawful authority, from the location of an authorised temporary leave program (whether supervised or unsupervised), and is subsequently charged by NSW Police with escape from lawful custody; or</p> <p>(b) fails to return from an authorised temporary leave program (whether supervised or unsupervised) or returns late and is subsequently charged by NSW Police with escape from lawful custody.</p>
<b>Counting Rules</b>	<p>The number of Escapes from temporary leave during the reporting period.</p> <p>If two or more Inmates Escape from temporary leave at the same time or together, then this is counted as two or more Escapes from Temporary Leave (as relevant).</p>
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>• Compliance with relevant Services Requirements.</li> <li>• Summary of the incident, events leading to the Escape from Temporary Leave, detection and the response by Project Co or its Associates.</li> <li>• Project Co or its Associates' intended actions to prevent future Escapes from Temporary Leave. If none, the rationale supporting this decision.</li> <li>• Report of the General Manager regarding the Escape from Temporary Leave.</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.13 KPI 13 – Accuracy of Reporting

KPI 13	Accuracy of Reporting
<b>Formulae</b>	<p><b>A. Number of Non-Compliant Incident Reports</b></p> <p><b>B. Number of Critical Reporting Failures</b></p>
<b>Calculation of Quality Failure Points</b>	<p>The Quality Failure Points which Project Co will accrue each Month is as follows:</p> <p>A. [ ] points per Non-Compliant Incident Report</p> <p>B. [ ] points per Critical Reporting Failure</p>
<b>Definitions</b>	<p><b>Non-Compliant Incident Reports</b> means those incident reports provided to the State in accordance with Legislation, Policy or the Deed that do not comply with relevant Legislation, Policy or the Deed (as applicable)</p> <p><b>Critical Reporting Failure</b> means a failure by Project Co to provide critical incident reports to the State in accordance with Legislation, Policy or the Deed within the timeframes specified in Legislation, Policy or the Deed (as applicable).</p>
<b>Counting Rules</b>	<p>A. Count the number of Non-Compliant Incident Reports during the reporting period</p> <p>B. Count the number of Critical Reporting Failures during the reporting period</p>
<b>CSNSW Validation</b>	Review by Monitors including a qualitative review of reports.
<b>Reporting Requirements</b>	<p>For each Non-Compliant Incident Report:</p> <ul style="list-style-type: none"> <li>• details of the relevant incident report;</li> <li>• details of the relevant Legislation, Policy or section of the Deed that it does not comply with including specific clause references; and</li> <li>• details of the reasons why the Non-Compliant Incident Report arose</li> </ul> <p>For each Critical Reporting Failure:</p> <ul style="list-style-type: none"> <li>• details of the relevant critical incident report</li> <li>• details of the timeframe specified in Legislation, Policy or the Deed including specific clause references;</li> <li>• details of the timeframe in which the relevant critical incident report was provided, and</li> <li>• details of the reasons why the Critical Reporting Failure arose</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.14 KPI 14 – Adherence to Performance Improvement Notice cure plans

KPI 14	Adherence to Performance Improvement Notice cure plans
<b>Formulae</b>	<b>Number of failures to comply with a Performance Improvement Notice cure plan</b>
<b>Calculation of Quality Failure Points</b>	Project Co will accrue [ ] Quality Failure Points for each failure to comply with a Performance Improvement Notice cure plan
<b>Definitions</b>	If the State has not issued a Major Default Notice or Default Termination Notice in respect of the failure to comply, the State may issue a performance improvement notice to Project Co if it fails to comply with the Services Requirements ( <b>Performance Improvement Notice or PIN</b> )

	<p>If the State issues a Performance Improvement Notice, Project Co must develop a cure plan to remedy the failures identified in the Performance Improvement Notice, which PIN cure plan must be provided to the State for review in accordance with the Review Procedures.</p> <p>All PIN cure plans must identify the timeframe for remedy.</p> <p>For the avoidance of doubt, the issue of a Performance Improvement Notice does not, in any way, affect or limit the State's rights to issue Major Default Notices or Default Termination Notices in accordance with this Deed.</p>
<b>Counting Rules</b>	Count the number of Performance Improvement Notice cure plans not complied with during the reporting period. If the State subsequently issues a Major Default Notice or Default Termination Notice in respect of the failure to comply with the Services Requirements for which a PIN has been issued, that PIN is to be disregarded for the purposes of these counting rules.
<b>Reporting Requirements</b>	<p>For each Performance Improvement Notice cure plan not complied with:</p> <ul style="list-style-type: none"> <li>• the steps or actions which were not completed in accordance with the PIN cure plan, and</li> <li>• the reason why the PIN cure plan was not complied with</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.15 KPI 15 – Carrying out scheduled FM Service tasks

KPI 15	Carrying out scheduled FM Service tasks																
<p><b>Formulae</b></p> <p><b>A. Number of Type 1 Failures</b></p> <p><b>B. Number of Type 2 Failures</b></p> <p><b>Calculation of Quality Failure Points</b></p>	<p>The following tables set out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges</p> <p><b>A. Number of Type 1 Failures</b></p> <table border="1" data-bbox="518 533 1436 786"> <thead> <tr> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> </tr> </tbody> </table> <p><b>B. Number of Type 2 Failures</b></p> <table border="1" data-bbox="518 824 1436 1077"> <thead> <tr> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> </tr> </tbody> </table>	Performance Range	Quality Failure Points	Target		Level 1		Level 2		Performance Range	Quality Failure Points	Target		Level 1		Level 2	
Performance Range	Quality Failure Points																
Target																	
Level 1																	
Level 2																	
Performance Range	Quality Failure Points																
Target																	
Level 1																	
Level 2																	
<p><b>Definitions</b></p>	<p><b>Type 1 Failures</b> means incidents of failure to undertake Non-Critical Maintenance Tasks in accordance with the Asset Management Plan, in the reporting period</p> <p><b>Type 2 Failures</b> means incidents of failure to undertake Critical Planned Maintenance Tasks in accordance with the Asset Management Plan in the reporting period.</p> <p><b>Critical Planned Maintenance Tasks</b> means any planned maintenance tasks identified in the Asset Management Plan undertaken to the following:</p> <ul style="list-style-type: none"> <li>(a) communication systems;</li> <li>(b) electrical services;</li> <li>(c) fire and life safety engineering services;</li> <li>(d) medical equipment; or</li> <li>(e) security systems.</li> </ul> <p><b>Non-Critical Maintenance Tasks</b> means any planned maintenance tasks which are not Critical Planned Maintenance Tasks.</p>																
<p><b>Counting Rules</b></p>	<p>Count the number of Type 1 and Type 2 Failures that occur in the reporting period</p>																
<p><b>Reporting Requirements</b></p>	<p>Report of planned maintenance tasks completed in accordance with the Asset Maintenance Schedule</p>																
<p><b>Reporting Period</b></p>	<p>Monthly</p>																



### 3.16 KPI 16 – Rectifying FM Service Failures

For the purposes of this KPI, the following definitions will apply:

**FM Service Failure** has the meaning given to it in Schedule 16 (Payment Schedule).

**FM Table** means the definitions set out in the following table

<b>FM Table</b>	
<p><b>Level A FM Service Failure – Emergency</b></p> <p>means any FM Service Failure which:</p> <ul style="list-style-type: none"> <li>• is life threatening or, if not remedied immediately, will potentially be life threatening;</li> <li>• is serious enough to cause significant damage to the Site or Correctional Complex;</li> <li>• poses, or has the potential to pose, an infection or health and safety risk to inmates, Staff, Visitors or other users if not Rectified immediately;</li> <li>• may result in a partial or total lock-down if not Rectified immediately; or</li> <li>• is otherwise deemed by the State as requiring Rectification within the Level A Rectification Period</li> </ul>	<p><b>Level A Rectification Period</b></p> <p>60 minutes</p>
<p><b>Level B FM Service Failure – Urgent/High Priority</b></p> <p>means any FM Service Failure that is not categorised as a Level A FM Service Failure and:</p> <ul style="list-style-type: none"> <li>• is interrupting or if not Rectified within the Level B Rectification Period, has the potential to interrupt the operation or functionality of the Site or Correctional Complex; or</li> <li>• may develop into a Level A FM Service Failure if not Rectified within the Level B Rectification Period</li> </ul>	<p><b>Level B Rectification Period</b></p> <p>6 hours</p>
<p><b>Level C FM Service Failure – Medium Priority</b></p> <p>means any FM Service Failure which is not categorised as a Level A or B FM Service Failure and:</p> <ul style="list-style-type: none"> <li>• does not pose an immediate risk (health and safety or otherwise) to inmates, Staff, Visitors or other users and is not likely to pose an immediate risk (health and safety or otherwise) to the users if not remedied within the Level C Rectification Period; or</li> <li>• causes no more than very minor disruption, inconvenience or loss of amenity to the Site or Correctional Complex; or</li> <li>• potentially causes more than minor disruption, inconvenience to Project Co or its Associates in carrying out the operations if not Rectified within the Level C Rectification Period.</li> </ul>	<p><b>Level C Rectification Period</b></p> <p>24 hours</p>
<p><b>Level D FM Service Failure – Low Priority</b></p>	<p><b>Level D Rectification Period</b></p>

FM Table	
<p>means any FM Service Failure which is not categorised as a Level A, B or C Service Failure and</p> <ul style="list-style-type: none"> <li>• does not pose any immediate or potential danger or risk in any way to Inmates, Staff, Visitors or other users;</li> <li>• will not immediately disrupt the Site, or the purposes, functions and uses of the Correctional Complex if not Rectified; or</li> <li>• is considered highly unlikely to develop into a Level A, Level B or Level C Service Failure even if not Rectified until the expiry of the Level D Rectification Period</li> </ul>	<p>Within 5 calendar days</p>

**Rectification Period** has the meaning attributed to it in Schedule 16 (Payment Schedule).

**Rectify** has the meaning attributed to it in Schedule 16 (Payment Schedule)

**Respond** has the meaning attributed to it in Schedule 16 (Payment Schedule)

- (a) On becoming aware of an FM Service Failure, Project Co must:
  - (i) Respond as soon as practicable, and
  - (ii) categorise the FM Service Failure in accordance with the FM Table.
- (b) Once categorised, an FM Service Failure cannot be re-categorised as a lower FM Service Failure level unless agreed with the State. If an FM Service Failure has occurred and Project Co does not categorise the FM Service Failure, then the level of the FM Service Failure may be determined by the State. The State may alter the level of an FM Service Failure assigned by Project Co by notifying Project Co. If Project Co disputes the changed level, then Project Co may refer for resolution in accordance with the Project Deed. In the interim, Project Co must Rectify the FM Service Failure in accordance with the level given by the State.
- (c) Project Co is entitled to request a Temporary Fix in accordance with Schedule 16 (Payment Schedule)
- (d) The Quality Failure Points attributable to each incident of failure to Rectify an FM Service Failure within the relevant Level A-D Rectification Periods are calculated in accordance with the following table:

KPI 16	Rectifying facilities management failure events							
<b>Formulae</b>	<p><b>A. Number of incidents of failure to Rectify a Level A FM Service Failures within the Level A Rectification Period</b></p> <p><b>B. Number of incidents of failure to Rectify a Level B FM Service Failures within the Level B Rectification Period</b></p> <p><b>C. Number of incidents of failure to Rectify a Level C FM Service Failures within the Level C Rectification Period</b></p> <p><b>D. Number of incidents of failure to Rectify a Level D FM Service Failures within the Level D Rectification Period</b></p>							
<b>Calculation of Quality Failure Points</b>	<p>The following tables set out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges</p> <p><b>A. Number of incidents of failure to Rectify a Level A FM Service Failure within the Level A Rectification Period</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%;"></th> <th style="width: 25%;">Performance Range</th> <th style="width: 25%;">Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>			Performance Range	Quality Failure Points			
	Performance Range	Quality Failure Points						

<b>KPI 16</b>	<b>Rectifying facilities management failure events</b>		
	Target	[Redacted]	
	Level 1		
	Level 2		
	<b>B. Number of incidents of failure to Rectify a Level B FM Service Failure within the Level B Rectification Period</b>		
		Performance Range	Quality Failure Points
	Target	[Redacted]	
	Level 1		
	Level 2		
	<b>C. Number of incidents of failure to Rectify a Level C FM Service Failure within the Level C Rectification Period</b>		
		Performance Range	Quality Failure Points
Target	[Redacted]		
Level 1			
Level 2			
<b>D. Number of incidents of failure to Rectify a Level D FM Service Failure within the Level D Rectification Period</b>			
	Performance Range	Quality Failure Points	
Target	[Redacted]		
Level 1			
Level 2			
<b>Counting Rules</b>	<p>For each of A-D, count the number of incidents of failure to Rectify an FM Service Failure within the relevant Rectification Period.</p> <p><u>Example:</u></p> <p>A Level A FM Service Failure is detected by the BMS at 3pm on a Thursday. The Level A Rectification Period is 60 minutes and no Temporary Fix is agreed with the State</p> <p>The Level A FM Service Failure is Rectified at 5.30pm on the same Thursday. This represents two incidents of failure to Rectify the Level A FM Service Failure within the Level A</p>		

KPI 16	Rectifying facilities management failure events
<p><b>Reporting Requirements</b></p>	<p>Rectification Period which equates to [REDACTED] Quality Failure Points [REDACTED]</p> <p>Project Co must provide a reporting system capable of undertaking comprehensive and complete self-monitoring of the delivery of the Services in accordance with the Performance Monitoring Program and must ensure that for each FM Service Failure, Project Co must record the following:</p> <ul style="list-style-type: none"> <li>• a unique identification number;</li> <li>• the nature of the FM Service Failure;</li> <li>• the date, time, extent and duration of the FM Service Failure;</li> <li>• the specific location of the FM Service Failure;</li> <li>• the applicable FM Service Failure level;</li> <li>• the required and actual Rectification Period; and</li> <li>• the Quality Failure Points attributable to the FM Service Failure.</li> </ul> <p>Where the FM Service Failure gives rise to Critical Incidents, Project Co is to separately provide a critical incident report.</p>
<p><b>Reporting Period</b></p>	<p>Monthly</p>

## 3.17 KPI 17 – Chronic Healthcare Plans

<b>KPI 17</b>	<b>Chronic Healthcare Plans</b>								
<b>Formula</b>	$\frac{\text{(Number of Eligible Custodial Patients with an Up to Date Chronic Healthcare Plan)}}{\text{(Number of Eligible Custodial Patients)}} \times 100$								
<b>Calculation of Quality Failure Points</b>	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> </tr> </tbody> </table>	Performance Range	Quality Failure Points	Target		Level 1		Level 2	
Performance Range	Quality Failure Points								
Target									
Level 1									
Level 2									
<b>Definitions</b>	<p><b>Up to Date Chronic Healthcare Plan</b> means:</p> <ul style="list-style-type: none"> <li>(a) a plan has been prepared in accordance with the Services Requirements within the Required Timeframe and which includes: <ul style="list-style-type: none"> <li>(i) the identification of the health needs of the Custodial Patient;</li> <li>(ii) the specification of the health care interventions and treatments that the Custodial Patient is likely to need;</li> <li>(iii) the inclusion of a date when the plan will be reviewed;</li> <li>(iv) the appropriate linkage with other agencies and organisations for all necessary health care follow-ups on the Custodial Patient's release from the Correctional Complex;</li> <li>(v) goals agreed with the Custodial Patient relating to ongoing health management and</li> <li>(vi) evidence of discussion of the goals and nature of the plan with the Custodial Patient;</li> </ul> </li> <li>(b) <b>(Chronic Healthcare Plan)</b>; and</li> <li>(c) the plan has been adhered to such that the required health care and treatment interventions, referrals and follow ups have been implemented in accordance with the Chronic Healthcare Plan; and</li> <li>(d) the Chronic Healthcare Plan has been updated and revised as appropriate based on the passage of time and the chronic health condition of the Custodial Patient, including further assessments of the necessity for other interventions.</li> </ul> <p><b>Required timeframe</b> means:</p> <ul style="list-style-type: none"> <li>(a) 29 days from (as applicable) reception at the Correctional Complex or diagnosis by Project Co or its Associates of the chronic illness; or</li> <li>(b) where a Custodial Patient has been identified as having a chronic health condition by an alternative health care provider prior to reception at the Correctional Complex, the later of: <ul style="list-style-type: none"> <li>(i) 29 days from the date of identification of the chronic health condition; or</li> <li>(ii) 14 days from the date of the Custodial Patient's transfer to the Correctional Complex</li> </ul> </li> </ul>								

KPI 17	Chronic Healthcare Plans
	<p><b>Eligible Custodial Patients</b> means Custodial Patients who have been at the Correctional Complex for at least 29 days and</p> <ul style="list-style-type: none"> <li>(a) have chronic conditions, as determined in accordance with the Services Specification; or</li> <li>(b) are identified as requiring a Chronic Healthcare Plan in accordance with the Services Specification,</li> </ul> <p>but do not include Custodial Patients who have been released or transferred from the Correctional Complex prior to the last calendar day of the Month</p>
<b>Counting Rules</b>	<p><u>Numerator</u>: The number of Eligible Custodial Patients with an Up to Date Chronic Healthcare Plan</p> <p><u>Denominator</u>: The number of Eligible Custodial Patients.</p>
<b>Reporting Requirements of Project Co</b>	<p>For each Eligible Custodial Patient without an Up to Date Chronic Healthcare Plan, Project Co or its Associates' intended actions to ensure the Eligible Custodial Patient has an Up to Date Chronic Healthcare Plan in the following Month</p>
<b>Reporting Period</b>	Monthly

## 3.18 KPI 18 – Timely Primary Health Services

<b>KPI 18</b>	<b>Provision of (timely) primary health services</b>
<b>Formulas</b>	<b>A. Number of Failure Periods for Priority 1 Custodial Patients</b> <b>B. Number of Failure Periods for Priority 2 Custodial Patients</b>
<b>Calculation of Quality Failure Points</b>	A ■■■ Quality Failure Points per Failure Period B ■■■ Quality Failure Points per Failure Period
<b>Definitions</b>	<p><b>Failure Periods</b> means the number of days (or part of them) in excess of the Required Timeframes that a Custodial Patient in the Month had to wait for non-emergency primary health referrals. For the avoidance of doubt, non-emergency primary health referrals do not include the initial reception/assessment process to the Condo/Hotel Complex, or urgent/emergency treatment (where shorter time periods apply).</p> <p><b>Priority 1 Custodial Patients</b> means Custodial Patients whose health condition is deteriorating and who require attention within one to three days.</p> <p><b>Priority 2 Custodial Patients</b> means Custodial Patients where lack of immediate intervention may result in an adverse health outcome and who require attention within three to fourteen days.</p> <p><b>Required Timeframes</b> means</p> <p>(a) For Priority 1 Custodial Patients, 72 hours; and</p> <p>(b) For Priority 2 Custodial Patients, 14 days.</p>
<b>Counting Rules</b>	<p>For each of A and B above, count the number of Failure Periods that each Custodial Patient had to wait in excess of the Required Timeframes.</p> <p>For example, if a Priority 1 Custodial Patient is identified at 5pm on a Friday and that patient does not receive a primary health referral until 2pm on the following Tuesday, count 0.88 (being (93-72)/24 rounded to two decimal places) Failure Periods.</p> <p>Where a Custodial Patient received a non-urgent primary health referral within the Required Timeframe, count zero Failure Periods.</p> <p>Exclude Failure Periods which arise due to non-attendance of the Custodial Patient (other than where the non-attendance arises as a result of a failure by Project Co or its Associates to perform the Services in accordance with this Doc.) provided that, if it were not for the non-attendance of the Custodial Patient, the Required Timeframe would have been met for the Custodial Patient.</p>
<b>Reporting Requirements of Project Co</b>	Number of Failure Periods for Priority 1 Custodial Patients Number of Failure Periods for Priority 2 Custodial Patients
<b>Reporting Period</b>	Monthly

## 3.19 KPI 19 – Health Discharge Plans

<b>KPI 19</b>	<b>Health discharge plans</b>																								
<b>Formulae</b>	<p><b>A. (Number of In-Scope Sentenced Custodial Patients provided with a Health Discharge Plan)/(Number of In-Scope Sentenced Custodial Patients) x 100</b></p> <p><b>B. (Number of In-Scope Remand Custodial Patients provided with a Health Discharge Plan)/(Number of In-Scope Remand Custodial Patients) x 100</b></p>																								
<b>Calculation of Quality Failure Points</b>	<p>The following table sets out the Quality Failure Points which Project Cu will accrue each Month for A and B above depending on its performance against each sub-component relative to the Target, Level 1 and Level 2 Performance Ranges</p> <table border="1"> <thead> <tr> <th>A – Sentenced Inmates</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table> <table border="1"> <thead> <tr> <th>B – Remand Inmates</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>	A – Sentenced Inmates	Performance Range	Quality Failure Points	Target			Level 1			Level 2			B – Remand Inmates	Performance Range	Quality Failure Points	Target			Level 1			Level 2		
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Level 2																									
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Level 1																									
Level 2																									
<b>Definitions</b>	<p><b>Health Discharge Plan</b> means a health discharge plan that meets the requirements of the Services Specification.</p> <p><b>In-scope Sentenced Custodial Patients</b> means all sentenced Custodial Patients where the known date of release from the Correctional Complex is in the subsequent Month and for whom a health discharge plan is required in accordance with the Services Specification, and includes Specified Custodial Patients.</p> <p><b>In-scope Remand Custodial Patients</b> means all remand Custodial Patients where the next known court date is in the subsequent Month and for whom a health discharge plan is required in accordance with the Services Specification, and includes Specified Custodial Patients</p> <p><b>Specified Custodial Patients</b> means Custodial Patients:</p> <ul style="list-style-type: none"> <li>• with chronic health issues;</li> <li>• with mental illness or significant mental health issues</li> <li>• with alcohol and other drug issues;</li> <li>• with a Chronic Healthcare Plan (as defined in KPI 17)</li> <li>• with prescribed pharmacotherapy treatments, or</li> <li>• who are Aboriginal and Torres Strait Islander Custodial Patients.</li> </ul>																								



KPI 19	Health discharge plans
<b>Counting Rules</b>	<p>In the case of Custodial Patients presented to court and released by the court, the Health Discharge Plan will be deemed to have been provided if it is documented in Project Co or its Associates' records and DIMS and is available to the Custodial Patient upon request.</p> <p><b>Exclude</b></p> <ul style="list-style-type: none"> <li>• In-scope Remand Custodial Patients who were presented to court within 24 hours of being received at the Correctional Complex and for whom no health screening was conducted or</li> <li>• In-scope Remand Custodial Patients where the Custodial Patient was released in advance of the next booked court date.</li> </ul>
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>• Number of In-Scope Sentenced Custodial Patients provided with a Health Discharge Plan</li> <li>• Number of In-Scope Sentenced Custodial Patients</li> <li>• Number of In-Scope Remand Custodial Patients provided with a Health Discharge Plan</li> <li>• Number of In-Scope Remand Custodial Patients</li> </ul>
<b>Reporting Period</b>	Monthly

**3.20 KPI 20 – Early Detection Programs and Immunisation Services**

KPI 20	Early detection programs and immunisation services																								
Formulae	<p>A. <math>(\text{Number of Eligible Custodial Patients provided with Immunisations}) / (\text{Number of Eligible Custodial Patients}) \times 100</math></p> <p>B. <math>(\text{Number of High Risk Custodial Patients provided with EDP}) / (\text{Number of High Risk Custodial Patients}) \times 100</math></p>																								
Calculation of Quality Failure Points	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month for A and B above depending on its performance against each sub-component relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1" data-bbox="577 622 1401 904"> <thead> <tr> <th>A – Immunisations</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table> <table border="1" data-bbox="577 958 1401 1205"> <thead> <tr> <th>B – EDP</th> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> <td></td> </tr> </tbody> </table>	A – Immunisations	Performance Range	Quality Failure Points	Target			Level 1			Level 2			B – EDP	Performance Range	Quality Failure Points	Target			Level 1			Level 2		
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B – EDP	Performance Range	Quality Failure Points																							
Target																									
Level 1																									
Level 2																									
Definitions	<p><b>Eligible Custodial Patients</b> means all Custodial Patients who provide voluntary informed consent for Immunisations and who are</p> <ul style="list-style-type: none"> <li>(a) received into custody at the Correctional Complex in the last 14 days of the previous Month; or</li> <li>(b) received into custody at the Correctional Complex in the current Month excluding the last 14 days of the Month.</li> </ul> <p><b>Immunisations</b> means immunisation services in accordance with the Services Specification.</p> <p><b>High Risk Custodial Patients</b> means Custodial Patients:</p> <ul style="list-style-type: none"> <li>(a) identified as at risk of a blood borne virus or a sexually transmissible infection; and</li> <li>(b) who voluntarily undergo screening,</li> </ul> <p>who are</p> <ul style="list-style-type: none"> <li>(c) received into custody at the Correctional Complex in the last 14 days of the previous Month; or</li> <li>(d) received into custody at the Correctional Complex in the current Month excluding the last 14 days of the Month.</li> </ul>																								

<b>KPI 20</b>	<b>Early detection programs and Immunisation services</b>
	<b>EDP</b> means early detection programs for blood borne viruses and sexually transmissible infections in accordance with the Services Specification.
<b>Counting Rules</b>	<p><b>A. Immunisations</b></p> <p><u>Numerator</u>: Number of Eligible Custodial Patients provided with Immunisations</p> <p><u>Denominator</u>: Number of Eligible Custodial Patients</p> <p><b>B. EDP</b></p> <p><u>Numerator</u>: Number of High Risk Custodial Patients provided with EDP</p> <p><u>Denominator</u>: Number of High Risk Custodial Patients</p>
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>• Number of Eligible Custodial Patients provided with Immunisations</li> <li>• Number of Eligible Custodial Patients</li> <li>• Number of High Risk Custodial Patients provided with EDP</li> <li>• Number of High Risk Custodial Patients</li> </ul>
<b>Reporting Period</b>	Monthly

## 3.21 KPI 21 – Health Related Incident Reporting

KPI 21	Health Related Incident Reporting
Formulae	<p><b>A. Number of Failure Periods for submitting RCA incident reports to the State within the Required Timeframe</b></p> <p><b>B. Number of Failure Periods for Resolving Custodial Patient complaints within the Required Timeframe</b></p> <p><b>C. Number of Incorrect Incidents in the Month</b></p>
Calculation of Quality Failure Points	<p>The Quality Failure Points which Project Co will accrue each Month is as follows:</p> <p>A. Root Cause Analysis – [REDACTED] points per Failure Period</p> <p>B. Complaints – [REDACTED] per Failure Period</p> <p>C. Incidents – [REDACTED] per Incorrect Incident</p>
Definitions	<p><b>Failure Periods</b> are calculated as the number of 24 Hour periods in excess of the Required Timeframes before the Root Cause Analysis incident report is submitted or the Custodial Patient complaint is Resolved in accordance with the requirements of the Services Specification.</p> <p><b>Root Cause Analysis or RCA</b> means contemporary root cause analysis processes in accordance with the Deed in respect of all serious adverse incidents, where requested by the State through IIMS.</p> <p><b>IIMS</b> means the NSW Ministry of Health Incident Information Management System.</p> <p><b>Incorrect Incidents</b> means Health Procedures which were performed:</p> <ul style="list-style-type: none"> <li>(a) at the incorrect site (i.e. body part);</li> <li>(b) on the incorrect Custodial Patient;</li> <li>(c) which should not have been performed in accordance with NSW Health Policies; or</li> <li>(d) were performed using equipment that was not in accordance with NSW Health Policies.</li> </ul> <p><b>Health Procedures</b> means diagnostic and surgical procedures including dentistry, minor invasive procedures, radiology, chemotherapy and dialysis.</p> <p><b>Resolve, Resolved and Resolving</b> means meeting with the Custodial Patient to discuss their complaint (whether made orally to Staff at the Correctional Complex or submitted in writing including through external services such as the NSW Health Care Complaints Commission or the NSW Ombudsman's Office) and providing (as appropriate) an explanation, apology or proposed rectification to the Custodial Patient. A written complaint also requires a written response.</p> <p><b>Required Timeframes</b> means:</p> <ul style="list-style-type: none"> <li>(a) for Performance Target A within 70 days of notification by the State through IIMS;</li> </ul>

KPI 21	Health Related Incident Reporting
<p><b>Counting Rules</b></p>	<p>(b) for Performance Target B, within 35 days of Project Co or its Associates being notified of the complaint.</p> <p>A. Example</p> <p>Project Co is notified of the requirement to submit an RCA through IIMS on 15 March 2025. Project Co submits the RCA to the Ministry of Health on 27 May 2025 i.e. 73 days later. Count three Failure Periods.</p> <p>B. Example:</p> <p>A written complaint is lodged by an Inmate on 15 March 2025. Project Co meets with the Inmate on 17 April 2025 (i.e. 33 days later) to discuss the complaint and apologise. Project Co does not provide a written response to the Inmate until 20 April 2025 (i.e. 37 days after the complaint is lodged). Count two Failure Periods.</p> <p>C. Example</p> <p>An Inmate is referred to hospital for an X-Ray of their left arm. They are suspected of having a broken right arm and therefore the referral was incorrect. Count one Incident.</p> <p>If a Health Procedure is performed on a Custodial Patient at the incorrect site and the Health Procedure should have been performed on a different Custodial Patient, count two Incidents.</p>
<p><b>Reporting Requirements of Project Co</b></p>	<ul style="list-style-type: none"> <li>• Number of Failure Periods for submitting RCA incident reports to the State within the Required Timeframe</li> <li>• Number of Failure Periods for Resolving Custodial Patient complaints within the Required Timeframe</li> <li>• Relevant details of each Incorrect Incident</li> </ul>
<p><b>Reporting Period</b></p>	<p>Monthly</p>

## 3.22 KPI 22 – Drug and Alcohol Referrals for Pregnancies

KPI 22	Drug and Alcohol Referrals for Pregnancies
Formula	Number of pregnant Custodial Patients with a history of drug and or alcohol use received into custody at the Correctional Complex and not Referred within 12 hours in accordance with the Services Specification (Failure)
Calculation of Quality Failure Points	The Quality Failure Points which Project Co will accrue each Month is [REDACTED] per Failure
Definitions	<p>Referred means:</p> <p>(a) advice is sought from the addictions specialist or drug and alcohol medical officer in respect of treatment for the pregnant Custodial Patient and</p> <p>(b) the pregnant Custodial Patient meets with the addictions specialist / drug and alcohol medical officer.</p>
Counting Rules	The 12 hour period commences at the time of the Custodial Patient's initial reception
Reporting Requirements of Project Co	<ul style="list-style-type: none"> <li>Number of pregnant Custodial Patients with a history of drug and alcohol use received into custody at the Correctional Complex in the reporting period.</li> <li>Number of pregnant Custodial Patients with a history of drug and alcohol use received into custody at the Correctional Complex in the reporting period and not referred to the addictions specialist or drug and alcohol medical officer within 12 hours in accordance with the Services Specification.</li> </ul>
Reporting Period	Monthly

3.23 KPI 23 – Health Screening

<b>KPI 23</b>	<b>Health Screening</b>								
<b>Formula</b>	$\frac{\text{(Number of Custodial Patients received into custody at the Correctional Complex in the Period who undergo a Health Assessment within 24 hours)}}{\text{(Number of Custodial Patients received into custody at the Correctional Complex in the Period)}} \times 100$								
<b>Calculation of Quality Failure Points</b>	<p>The following table sets out the Quality Failure Points which Project Co will accrue each Month depending on its performance relative to the Target, Level 1 and Level 2 Performance Ranges.</p> <table border="1"> <thead> <tr> <th>Performance Range</th> <th>Quality Failure Points</th> </tr> </thead> <tbody> <tr> <td>Target</td> <td></td> </tr> <tr> <td>Level 1</td> <td></td> </tr> <tr> <td>Level 2</td> <td></td> </tr> </tbody> </table>	Performance Range	Quality Failure Points	Target		Level 1		Level 2	
Performance Range	Quality Failure Points								
Target									
Level 1									
Level 2									
<b>Definitions</b>	<p><b>Health Assessment</b> means,</p> <ul style="list-style-type: none"> <li>(a) a comprehensive health assessment in accordance with the Services Specification for Custodial Patients whose reception at the Correctional Complex is the initial reception into the NSW correctional system;</li> <li>(b) a health assessment review in accordance with the Services Specification for Custodial Patients transferred to the Correctional Complex from another correctional centre or from a hospital; or</li> <li>(c) gross health observations for Custodial Patients who are physically or mentally unwell or violent until such time as the Custodial Patient is sufficiently well or non-violent for the assessments in (a) or (b) above to be completed</li> </ul> <p><b>Period</b> means</p> <ul style="list-style-type: none"> <li>(a) the last day of the preceding Month; and</li> <li>(b) all days in the Month excluding the last day of the Month</li> </ul>								
<b>Counting Rules</b>	<p><b>Numerator:</b> Number of Custodial Patients received into custody at the Correctional Complex in the Period who undergo a Health Assessment within 24 hours of reception into the Correctional Centre</p> <p><b>Denominator:</b> Number of Custodial Patients received into custody at the Correctional Complex in the Reporting Period</p>								
<b>Reporting Requirements of Project Co</b>	<ul style="list-style-type: none"> <li>• Number of Health Assessments undertaken for each of (a), (b) and (c) in the Definitions.</li> <li>• Total number of Custodial Patients received into custody at the Correctional Complex in the period.</li> </ul>								
<b>Reporting Period</b>	Monthly								

## Schedule 18 — Residual Life Schedule

In addition to Project Co's Handover obligations under this Deed, Project Co must ensure at the end of the Operating Phase that the items identified in the table below have the Required Residual Life as set out in Column 2.

**Required Residual Life** is the period measured from the Final Expiry Date during which the item must be free from Defects and otherwise Fit For Purpose (without any major maintenance or refurbishment works) when operated and maintained in accordance with comparable requirements to those in this Deed.

Item	Required Residual Life (Years)
<b>Architectural</b>	
Structural elements including substructures	25
Floor structures	25
Roof structures (excluding secondary steel, purlins, girts)	25
Internal structural walls	25
Internal partitions including openings	15
Drainage and below ground civil engineering infrastructure	10
Roof finishes (including secondary structural steel, purlins, girts)	10
External hard services (including concrete pathways, paving courts)	10
Flexible pavements (including perimeter road)	10
Rigid pavements (including pavements)	10
<b>Engineering services</b>	
Packaged air conditioners	10
Chillers	15
Boilers	15
Calorifier	15
Ductwork	10
Dampers	15
Fans/ventilators	15
Electric motors	15
Condensing water coolers	15
Tanks	10
Reciprocating engines/compressors	15
Switchboards	10



<b>Item</b>	<b>Required Residual Life (Years)</b>
Pumps	5
Valves	5
Valve actuators	5
Piping	10
Heating/cooling coils	10
BMS system	10
Fire detection	5
Fire suppression	15
Fire hoses	5
Switchboards and panels	15
Power factor correction	15
UPS system	5
Generators	15
Meters	5
Light fittings (internal)	5
Light fittings (external)	7
Fibre cabling	20
Structured cabling	20
Network equipment	5
IPTV	5
Public address	5
Audio visual equipment	5
Video conferencing equipment	5
<b>Security services</b>	
All hardware	5

## **Schedule 19 — Ownership Schedule**

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## Schedule 20 - Equity Documents Schedule

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Unless the context otherwise requires, capitalised terms used in this Schedule and not otherwise defined in this Deed have the meanings given to them in the [REDACTED] (defined below).

Each of the following is an Equity Document:

1. [REDACTED]
2. the document titled [REDACTED] dated on or about the date of this Deed between, among others, the Equity Investors and Project Co (the [REDACTED]);
3. the [REDACTED] and [REDACTED] (as applicable) of each Group Member;
4. any document which amends, novates or replaces any other Equity Document; and
5. any other document the Equity Investors agree in writing is an Equity Document.

## Schedule 21 - Finance Documents Schedule

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Unless the context otherwise requires, capitalised terms used in this Schedule and not otherwise defined in this Deed have the meanings given to them in the [REDACTED] defined below).

Each of the following is a Finance Document:

1. the document titled [REDACTED] dated on or about the date of this Deed between, among others, Project Co, the Agent and the Security Trustee (the [REDACTED]);
2. the [REDACTED]
3. each [REDACTED]
4. each [REDACTED]
5. each [REDACTED]
6. each [REDACTED]
7. the [REDACTED]
8. each [REDACTED]
9. each [REDACTED]
10. any document which amends, novates or replaces any other Finance Document; and
11. any other document the Agent and Project Co nominate as a Finance Document prior to the date of this Deed.

## Schedule 22 — Insurance

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### Introduction

There are two parts to this Schedule:

- Part A — Insurance during the Delivery Phase; and
- Part B — Insurance during the Operating Phase.

## Part A – Insurance during the Delivery Phase

Project Co must procure, or caused to be procured, and thereafter maintained, each of the Insurances specified in this Part A on the terms set out in this Part A. Where any sub-limits are not expressly specified in any such Insurance, the policy limit specified for that Insurance applies.

Summary of cover required:

- (a) Contract Works Insurance (Material Damage);
- (b) Contract Works Insurance (Public Liability);
- (c) not used;
- (d) Contract Works Insurance (Advance Loss of Profits);
- (e) Marine Transit (Material Damage);
- (f) Design and Construct Professional Indemnity Insurance;
- (g) Workers' Compensation Insurance;
- (h) Motor Vehicle Insurance; and
- (i) D&C Subcontractor Temporary Equipment Insurance.

### (a) Contract Works Insurance (Material Damage)

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co
Insured	<p>Each of:</p> <ul style="list-style-type: none"> <li>▪ Project Co and its Associates;</li> <li>▪ the State and its Associates;</li> <li>▪ the Security Trustee; and</li> <li>▪ the D&amp;C Subcontractor; and</li> <li>▪ Subcontractors engaged in respect of the Works</li> </ul> <p>and each other party which has an insurable interest or is required to be insured under any Project Document relating to the Delivery Phase Activities to Technical Completion.</p>
Sum insured	The full cost of reinstatement or replacement of the Works based on the capital cost at the date of this Deed, amended in accordance with this Deed (including as a result of a Modification)
Scope of cover	<p>Physical loss, destruction or damage to the Works or in respect of the Delivery Phase Activities to Technical Completion, including construction and reinstatement of the Works, and testing and commissioning of plant and equipment insofar as it relates to the Delivery Phase Activities to Technical Completion</p> <p>Insurance to include coverage at a minimum for the following:</p> <ul style="list-style-type: none"> <li>▪ materials, plant and equipment on the Delivery Phase Sites;</li> <li>▪ principal-owned materials;</li> <li>▪ continuation of cover for physical loss, destruction or damage to the Works post Technical Completion which occurs during the defects liability period and;</li> </ul>

Insurance element	Minimum Requirement
	<ul style="list-style-type: none"> <li>- is caused by the Insured in the course of complying with its obligations in respect of the defects liability provisions of this Deed; or</li> <li>- is due to a cause arising prior to the commencement of the defects liability period;</li> </ul> <ul style="list-style-type: none"> <li>▪ tunnelling (if part of the Delivery Phase Activities to Technical Completion) subject to a sub limit of at least \$50 million;</li> <li>▪ trenching and dewatering;</li> <li>▪ off site fabrication;</li> <li>▪ professional fees with a sub limit of at least \$45 million;</li> <li>▪ removal of debris with a sub limit of at least \$45 million;</li> <li>▪ expediting expenses with a minimum sub limit of 125% of normal costs or \$15,000,000 for any one occurrence whichever is the lesser;</li> <li>▪ 15% contract price escalation;</li> <li>▪ inland transit, off-site storage with a sub limit of at least \$5 million in respect of inland transit and \$10 million in respect of off-site storage;</li> <li>▪ subsidence/earth movement;</li> <li>▪ civil works/excavation works;</li> <li>▪ riots, strikes, industrial action;</li> <li>▪ Equipment commissioning and testing;</li> <li>▪ Temporary Equipment and works (other than D&amp;C Subcontractor's and Its Subcontractors' Temporary Equipment), scaffolding and formwork;</li> <li>▪ Equipment excluding Temporary Equipment, but where in transit shall be subject to a sub-limit of not less than \$2,000,000 and where in offsite storage shall be subject to a sub-limit of not less than \$10,000,000;</li> <li>▪ temporary protection and/or loss mitigation expenses, with a sub limit of at least \$5 million; and</li> <li>▪ cover for loss of or damage to and the cost to rectify, replace or repair property which is free of defective materials, workmanship, design, plan, or specification but is damaged in consequence of other property which has defective materials, workmanship, design, plan, or specification.</li> </ul>
Situation of risk	Anywhere in the Commonwealth of Australia, including whilst in transit (other than ocean marine transit) between any places therein.
Retroactive date	N/A
Deductibles	
Premium	As per the Financial Model
Additional requirements	The policy must be procured and maintained on a project specific basis.
Period of insurance	From Financial Close to the end of the defects liability period (or equivalent related to the Works) under the D&C Subcontract.



**(b) Contract Works Insurance (Public Liability)**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	Each of: <ul style="list-style-type: none"> <li>▪ Project Co and its Associates;</li> <li>▪ the State and its Associates;</li> <li>▪ Justice Health and its Associates;</li> <li>▪ the Security Trustee;</li> <li>▪ the D&amp;C Subcontractor; and</li> <li>▪ Subcontractors engaged in respect of the Delivery Phase Activities, and each other party which has an insurable interest or is required to be insured under any Project Document relating to the Delivery Phase Activities.</li> </ul>
Sum insured	\$250 million for any one occurrence or series of occurrences arising out of the same source or original cause in connection with the Delivery Phase Activities, and unlimited in the aggregate during the period of insurance but in the aggregate of all occurrences in any one period of insurance with respect to products and pollution liability and completed operations liability.
Scope of cover	Legal liability (including to counterparties) for personal injury and/or property damage caused by an occurrence during the period of insurance, where such occurrence: <ul style="list-style-type: none"> <li>▪ arises out of the construction/site works activities related to the Delivery Phase Activities; or</li> <li>▪ arises out of the occupation by any Insured of any part of the Delivery Phase Sites handed over and put into use at any time prior to the whole of the Works achieving Commercial Acceptance or completion (as applicable);</li> <li>▪ occurs during the defects liability period or equivalent related to the Works under the D&amp;C Subcontract, and is caused by any Insured whilst remedying any defects in the Works in accordance with its contractual rights or obligations.</li> </ul>
Situation of risk	Anywhere in the Commonwealth of Australia.
Retroactive date	N/A
Deductibles	
Premium	As per the Financial Model
Additional requirements	<ul style="list-style-type: none"> <li>▪ Cross liability clause.</li> <li>▪ Severability and non imputation clauses.</li> <li>▪ Worker to worker Liability - to ensure that each Insured is covered for each claim by any worker, not being their respective employees, injured during construction activities relating to the Delivery Phase Activities.</li> </ul>

Insurance element	Minimum Requirement
	<ul style="list-style-type: none"> <li>▪ Expenses incurred by any Insured for first aid to others for bodily injury at the time of an occurrence.</li> <li>▪ Pollution liability but only if caused by a sudden, accidental, unexpected and unintended occurrence.</li> <li>▪ On hook liability.</li> <li>▪ Bodily injury and/or property damage arising from an error or omission in design or specification or breach of professional duty.</li> <li>▪ Cover for mobile plant and equipment not required to be registered/used as a tool of trade (unless separate insurance procured for this exposure under another Insurance).</li> <li>▪ Cover for existing or other property (including any existing buildings) in the Insured's care, custody or control, but this may exclude the smallest component of property in the Insured's care custody or control being worked on.</li> </ul>
Period of insurance	From Financial Close to the end of the defects liability period or equivalent for the Works under the D&C Subcontract.

(c) **Not used**

(d) **Contract Works Insurance (Advance Loss of Profits)**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	Each of: <ul style="list-style-type: none"> <li>▪ Project Co;</li> <li>▪ Finance Co;</li> <li>▪ the Security Trustee; and</li> <li>▪ the Operator.</li> </ul>
Level of cover	36 months of the total Monthly Service Payments (unabated) less 27 months of the Operator component of the Monthly Service Payments (unabated) payable under the Operator Subcontract.
Scope of cover	Advance Loss of Profits Insurance with respect to the risks of loss or damage to the Correctional Complex insured under the Contract Works Insurance (Material Damage) policy.
Situation of risk	Anywhere in the Commonwealth of Australia.
Retroactive date	N/A.
Deductibles	
Premium	As per the Financial Model.

Insurance element	Minimum Requirement
Additional requirements	<p>Contract Works Insurance (Advance Loss of Profits), shall include:</p> <ul style="list-style-type: none"> <li>▪ Nominated Suppliers' premises extension with a minimum sub limit of \$7,500,000.</li> <li>▪ Public utilities extension with a minimum sub limit of \$7,500,000.</li> <li>▪ Prevention of access with a minimum sub limit of \$7,500,000.</li> <li>▪ Cover for additional costs of working and increased additional costs of working with a minimum sub limit of \$7,500,000.</li> <li>▪ The policy must be procured and maintained on a project specific basis.</li> </ul>
Period of insurance	From Financial Close to Technical Completion.

**(e) Marine Transit (Material Damage)**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	<p>Each of:</p> <ul style="list-style-type: none"> <li>▪ Project Co and its Associates;</li> <li>▪ the State and its Associates;</li> <li>▪ the Security Trustee; and</li> <li>▪ the D&amp;C Subcontractor; and</li> <li>▪ Subcontractors engaged in respect of the Relevant Infrastructure, and each other party which has an insurable interest or is required to be insured under any Project Document relating to the Delivery Phase Activities.</li> </ul>
Level of cover	<p>Marine Transit</p> <p>Sum insured is a limit of indemnity equivalent to not less than the maximum total value of the property to be transferred in any one shipment, plus a provision for the costs of freight, insurance, taxes and duties as may be applicable.</p>
Scope of cover	Unless covered under the Contract Works (Material Damage) insurance in respect of the Works, a policy of Marine Transit insurance open in respect to the shipment or carriage of the relevant items of imported property intended to be employed about or used in connection with the Delivery Phase Activities.
Situation of risk	Worldwide.
Retroactive date	N/A
Maximum deductibles	
Premium	As per the Financial Model.
Additional requirements	Nil

Insurance element	Minimum Requirement
Period of insurance	From the time of leaving the manufacturer or other place of original order in the country of origin until arrival at the Delivery Phase Sites.

## (f) Design and Construct Professional Indemnity Insurance

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	The D&C Subcontractor, Subcontractors to the D&C Subcontractor, the Operator and Project Co in accordance with the Additional Requirements specified below.
Sum insured	Minimum coverage of \$50 million for any one claim and \$100 million in the aggregate.
Scope of cover	Project-specific policy covering legal liability arising from an act error or omission of the insured in relation to the performance of each Insured's professional activities and duties in connection with the Works or the Correctional Complex.
Situation of risk	Anywhere in the Commonwealth of Australia.
Retroactive date	No later than the earlier of: (a) the commencement of preparation of Project Co's Proposal; and (b) the release of the request for Project Co's Proposal by the State.
Deductibles	
Premium	As per the Financial Model.
Additional Requirements	<ul style="list-style-type: none"> <li>▪ The policy must have a sum insured of no less than \$50 million in relation to the Works and Delivery Phase Activities, and must include an: <ul style="list-style-type: none"> <li>(a) indemnity to Project Co as principal for its vicarious liability arising out of acts, errors and omissions of the D&amp;C Subcontractor, its subcontractors and consultants; and</li> <li>(b) indemnity to the D&amp;C Subcontractor for its vicarious liability arising out of acts, errors and omissions of its subcontractors and consultants; and</li> <li>(c) indemnity to the Operator for its vicarious liability arising out of acts, errors and omissions of its subcontractors and consultants.</li> </ul> </li> <li>▪ Contractual clauses between Project Co and any Subcontractor must not contain provisions which preclude recovery for breach of professional duty up to the limit of the insurance.</li> <li>▪ Include cover for construction defects as a result of error in design or specification.</li> <li>▪ Severability and non-imputation clauses.</li> <li>▪ Proportionate liability.</li> </ul>

Insurance element	Minimum Requirement
	<ul style="list-style-type: none"> <li>▪ Contractual liability.</li> <li>▪ Risk mitigation and rectification.</li> </ul>
Period of insurance	From Financial Close to 7 years after the Date of Technical Completion.

**(g) Workers' Compensation Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	Each party is required to comply with its obligations at law in respect of Workers' Compensation and Employer's Liability insurance.
Level of cover	As required by Law.
Risks covered	As required by Law.
Retroactive date	N/A.
Deductibles	
Annual Premium	N/A.
Excess	N/A.
Waiting Period	No waiting period.
Additional requirements	N/A.
Period of cover	From Financial Close to the end of the defects liability period or equivalent related to the Works under the D&C Subcontract.

**(h) Motor Vehicle Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	Each party is required to procure and maintain its own insurance for vehicles to be used in connection with the Delivery Phase Activities.
Level of cover	Minimum coverage of \$30 million per occurrence and in the aggregate in respect of third party property damage.
Risks covered	Third party property damage in respect of all vehicles used in connection with the Delivery Phase Activities.
Retroactive date	N/A.
Deductibles	

Insurance element	Minimum Requirement
Premium	N/A.
Additional requirements	All motor vehicles must be registered currently for compulsory third party insurance as required by Law, if for use on public roads. Policy must cover unregistered vehicles or vehicles used as a tool of trade unless covered under the Contract Works (Public Liability) policy.
Period of cover	From Financial Close to the end of the defects liability period or equivalent related to the Works under the D&C Subcontract.

(i) **D&C Subcontractor Temporary Equipment Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	D&C Subcontractor
Insured	Each party in respect of its own Temporary Equipment (including Temporary Equipment used in connection with the Works and Delivery Phase Activities).
Level of cover	Indemnity value of the respective Temporary Equipment
Scope of cover	Physical loss, damage or destruction to Temporary Equipment whether owned or hired by the Insured used for the purposes of undertaking the Works (to the extent not insured under Contract Works Insurance - Material Damage policy).
Situation of risk	Anywhere in the Commonwealth of Australia.
Maximum deductibles	
Period of insurance	From Financial Close to the Date of Technical Completion.

## Part B — Insurance during the Operating Phase

Project Co must procure, or cause to be procured, and thereafter maintained, each of the insurances with respect to the Operating Phase Site or Project specified in this Part B for the applicable period of insurance upon the minimum terms specified in this Part B. Where any sub-limits are not expressly specified in any such insurance, the policy limit specified for that insurance applies.

All amounts specified below in relation to Industrial Special Risks/Consequential Loss Insurance, Public and Products Liability Insurance and Motor Vehicle Insurance will be subject to annual indexation in accordance with clause 2.13.

Summary of Operating Phase insurances required:

- (a) Industrial Special Risks/Consequential Loss Insurance;
- (b) Public and Products Liability Insurance;
- (c) Professional Indemnity Insurance;
- (d) Workers' Compensation Insurance; and
- (e) Motor Vehicle Insurance.

### (a) Industrial Special Risks / Consequential Loss Insurance

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	<p>Each of:</p> <ul style="list-style-type: none"> <li>▪ any Project Co Entity;</li> <li>▪ the State and its Associates (excluding contractors and consultants);</li> <li>▪ the Security Trustee; and</li> <li>▪ the Operator,</li> </ul> <p>and any other party which has an insurable interest or is required to be insured under any Project Document in relation to the Operating Phase Site.</p>
Sum insured	<p>Reflecting a combined limit of no less than the aggregation of the following:</p> <ul style="list-style-type: none"> <li>▪ in relation to the Operating Phase Site, its full reinstatement or replacement value;</li> <li>▪ in relation to consequential loss (business interruption), an amount equivalent to 36 Monthly Service Payments (unabated) (other additional amounts as specified by this Schedule); and</li> <li>▪ an amount sufficient to replace the Project Co contents of the Site.</li> </ul>
Scope of Cover	<p><b>Section 1 Material Loss or Damage</b></p> <p>Coverage for physical loss, destruction of or damage to the Site or the Correctional Complex for their reinstatement and/or replacement value from any cause not otherwise excluded from an industry standard Mark IV wording. Some indicative sub limits (for the first year of the Operating Phase and indexed thereafter in accordance with clause 2.13) are set out below. Actual sub limits are to be as determined in accordance with clause 46.8 of this Deed.</p> <p><b>Property covered:</b></p> <ul style="list-style-type: none"> <li>▪ Buildings and roads</li> </ul>

Insurance element	Minimum Requirement																		
	<ul style="list-style-type: none"> <li>▪ Plant, machinery, boilers</li> <li>▪ Contents</li> <li>▪ Raw stock and materials</li> <li>▪ Unregistered plant and Equipment (mobile plant/ forklifts)</li> <li>▪ Tunnels and links</li> </ul> <p><b>Perils covered to include at a minimum:</b></p> <ul style="list-style-type: none"> <li>▪ Earthquake</li> <li>▪ Flood</li> <li>▪ Action of the sea: tidal wave/ tsunami</li> <li>▪ Storm/ tempest/ cyclone</li> <li>▪ Hail/ lightning strike</li> <li>▪ Landslip/ earth movement</li> <li>▪ Fire/explosion</li> <li>▪ Impact</li> <li>▪ Burglary/ theft</li> <li>▪ Malicious damage</li> <li>▪ Riots/ strikes/ civil commotion</li> <li>▪ Accidental damage</li> </ul> <p><b>Sub Limits:</b></p> <table border="0" style="width: 100%;"> <tr> <td style="width: 70%;">Removal of Debris</td> <td style="width: 30%;">10% of Sum Insured</td> </tr> <tr> <td>Accidental Damage</td> <td>\$50 million</td> </tr> <tr> <td>Expediting Expenses</td> <td>\$10 million</td> </tr> <tr> <td>Change in Temperature (Controlled Environment)</td> <td>\$5 million</td> </tr> <tr> <td>Property in Transit (within Australia)</td> <td>\$5 million</td> </tr> <tr> <td>Machinery breakdown</td> <td>\$20 million</td> </tr> <tr> <td>Boiler and pressure vessel explosion <i>(This sub-limit applies to damage to the boiler only and not to resultant damage)</i></td> <td>Replacement cost of boiler and pressure vessel</td> </tr> <tr> <td>Electronic data processing equipment breakdown</td> <td>\$10 million</td> </tr> <tr> <td>Fraudulent or dishonest acts</td> <td>\$1 million</td> </tr> </table> <p><b>Section 2 Consequential Loss</b></p> <p>Coverage for consequential loss (business interruption) in respect of loss of anticipated revenue and additional expense arising out of the insured risks of loss of or damage to the Correctional Complex.</p> <p><b>Sub Limits:</b></p>	Removal of Debris	10% of Sum Insured	Accidental Damage	\$50 million	Expediting Expenses	\$10 million	Change in Temperature (Controlled Environment)	\$5 million	Property in Transit (within Australia)	\$5 million	Machinery breakdown	\$20 million	Boiler and pressure vessel explosion <i>(This sub-limit applies to damage to the boiler only and not to resultant damage)</i>	Replacement cost of boiler and pressure vessel	Electronic data processing equipment breakdown	\$10 million	Fraudulent or dishonest acts	\$1 million
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Insurance element	Minimum Requirement														
	<table border="0"> <tr> <td>Increased costs of working</td> <td>Not sub-limited</td> </tr> <tr> <td>Additional increased cost of working</td> <td>\$25 million</td> </tr> <tr> <td>Utilities memorandum</td> <td>\$75 million</td> </tr> <tr> <td>Prevention of access</td> <td>\$50 million</td> </tr> <tr> <td>Suppliers</td> <td>\$50 million</td> </tr> <tr> <td>Human infectious disease</td> <td>\$25 million</td> </tr> <tr> <td>Professional fees/ claims preparation costs</td> <td>\$5 million</td> </tr> </table>	Increased costs of working	Not sub-limited	Additional increased cost of working	\$25 million	Utilities memorandum	\$75 million	Prevention of access	\$50 million	Suppliers	\$50 million	Human infectious disease	\$25 million	Professional fees/ claims preparation costs	\$5 million
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Utilities memorandum	\$75 million														
Prevention of access	\$50 million														
Suppliers	\$50 million														
Human infectious disease	\$25 million														
Professional fees/ claims preparation costs	\$5 million														
Situation of risk	Anywhere in the Commonwealth of Australia (and whilst in transit).														
Retroactive date	N/A														
Deductibles															
Additional requirements	<ul style="list-style-type: none"> <li>▪ Section 1 to cover physical loss, destruction or damage to property: <ul style="list-style-type: none"> <li>▪ belonging to any Insured;</li> <li>▪ for which any Insured is responsible or has assumed responsibility to insure prior to damage occurring; and</li> <li>▪ in which an Insured acquires an insurable interest during the period of insurance (an insurable interest which is related to the Site or Relevant Infrastructure).</li> </ul> </li> <li>▪ Cover for sue and labour expenses.</li> <li>▪ Cover for construction works where total contract value for that works is less than \$500,000.</li> <li>▪ Extra costs of reinstatement (sub limit of \$100 million).</li> <li>▪ Marine Transit cover within Australia (sub limit of \$500,000).</li> <li>▪ An appropriate amendment to the basis of settlement clause to clarify that the policy will cover the reductions in the Monthly Service Payment in accordance with the Performance Regime as a result of an insured peril.</li> <li>▪ An appropriate amendment to the policy will be required to clarify that (subject to overall limits, and policy terms and conditions) that the State and any Associate of the State are entitled to be covered under this policy to the extent that the Monthly Service Payment is not reduced in accordance with the Performance Regime as a result of an event, act, omission, fact, matter or occurrence (in whole or part) but the State or any Associate of the State incurs Liabilities that would otherwise be claimable under the policy, such as increased costs of working or additional increased costs of working.</li> <li>▪ The policy must be procured on a project specific basis.</li> <li>▪ Co-insurance provisions not to apply to Section 1 &amp; Section 2.</li> </ul>														
Period of cover	<p>For an initial period of 16 months commencing on the Date of Technical Completion.</p> <p>Thereafter for a period of 12 months commencing on the Operational Commencement Date, to be renewed annually until the Expiry Date.</p>														

**(b) Public and Products Liability Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	<p>Each of:</p> <ul style="list-style-type: none"> <li>▪ Project Co and its Associates (excluding the D&amp;C Subcontractor and its Associates);</li> <li>▪ Security Trustee;</li> <li>▪ the State and its Associates in respect of their vicarious liability for the acts and omissions of Project Co or any of its Associates (excluding the D&amp;C Subcontractor and its Associates) or the Operator;</li> <li>▪ Justice Health and its Associates in respect of their vicarious liability for the acts and omissions of Project Co or any of its Associates (excluding the D&amp;C Subcontractor and its Associates) or the Operator; and</li> <li>▪ the Operator.</li> </ul>
Sum insured	<ul style="list-style-type: none"> <li>▪ \$500 million for any one occurrence with regards to Public Liability; and</li> <li>▪ \$500 million in the annual aggregate for Products Liability.</li> </ul>
Sub-limit	A sub-limit for sexual or other molestation/abuse related claims will be agreed with the State prior to the initial placement of this policy and prior to each Insurance Review Date based on the prevailing market at the relevant time.
Scope of cover:	<ul style="list-style-type: none"> <li>▪ To cover legal liability for claims in respect of: physical loss, destruction or damage to real or personal property, including property in the care, custody and control of the Insured, for which the Insured is responsible and which is not otherwise already insured for the Insured's benefit, and including consequential economic loss; and</li> <li>▪ personal injury (including libel and slander), disease or death of any person including resultant economic loss,</li> </ul> <p>arising out of or in connection with its products, the provision of the Services, and this Deed during the Operating Phase.</p>
Situation of risk	Anywhere in the Commonwealth of Australia (and whilst in transit).
Retroactive date	N/A.
Deductibles	
Premium	As per the Financial Model.
Additional requirements	<ul style="list-style-type: none"> <li>▪ The policy must be procured and maintained on a project specific basis.</li> <li>▪ Care custody and control.</li> <li>▪ Cover for car park vehicles in care, custody or control.</li> <li>▪ Worker to worker liability.</li> </ul>

Insurance element	Minimum Requirement
	<ul style="list-style-type: none"> <li>▪ Liability arising out of personal injury to contract labour hire persons.</li> <li>▪ Cover liability arising from construction operations on site.</li> <li>▪ Sudden and accidental pollution.</li> <li>▪ Cover for principal's vicarious liability.</li> <li>▪ Cover for mobile plant and equipment not required to be registered/used as a tool of trade or registered plant whilst used as a tool of trade (unless separate insurance procured for this exposure).</li> <li>▪ Cover liability arising from Inmate escape.</li> <li>▪ Policy must not exclude or limit liability in connection with:               <ul style="list-style-type: none"> <li>(a) the ownership, purchasing, storage, the use of or creation of any radioactivity, radiation, ionising radiation, radioactive isotopes/material for the purpose of treatment, medical research or any general business use (for the avoidance of doubt, the State will only accept a general war/nuclear activity related exclusion); or</li> <li>(b) biohazards (for the avoidance of doubt, the State will only accept pollution or other similar exclusion that does not exclude liability in connection with biohazardous material).</li> </ul> </li> </ul>
Period of cover	<p>For an initial period of 16 months commencing on the Date of Technical Completion.</p> <p>Thereafter for a period of 12 months commencing on the Operational Commencement Date, to be renewed annually until the Expiry Date.</p>

**(c) Operating Phase - Professional Indemnity Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	The Operator.
Sum insured	\$10,000,000 for any claim and in the aggregate, with one automatic reinstatement.
Scope of cover	Covering legal liability arising from an act error or omission of the insured in relation to the performance of each insured's professional activities and duties in connection with the Services.
Situation of risk	Anywhere in the Commonwealth of Australia.
Retroactive date	<p>No later than the earlier of:</p> <ul style="list-style-type: none"> <li>▪ the commencement of preparation of Project Co's Proposal; and</li> <li>▪ the release of the Request for Proposal.</li> </ul>
Deductibles	
Premium	As per the Financial Model

Insurance element	Minimum Requirement
Additional Requirements	<p>Severability and non-imputation clauses.</p> <p>Contractual clauses between Project Co, the Operator, consultants and Subcontractors must not contain provisions which preclude recovery for breach of professional duty up to the limit of insurance.</p> <p>Policy to respond to legal liability (breach of professional duty) following a medical malpractice related issue.</p> <p>Proportionate Liability.</p>
Period of Insurance	From the Date of Technical Completion until the Expiry Date plus an additional 7 years.

**(d) Workers' Compensation Insurance**

Insurance element	Minimum Requirement
Party responsible for procuring insurance	Project Co.
Insured	Each party is required to procure its own Workers' Compensation and Employer's Liability policy, in respect of its statutory obligations and otherwise as required by Law and commercial prudence.
Level of cover	As required by Law.
Risks covered	As required by Law.
Retroactive date	N/A.
Deductibles	
Excess	N/A.
Waiting period	No waiting period.
Additional requirements	N/A.
Period of cover	From the Date of Technical Completion until the Expiry Date.

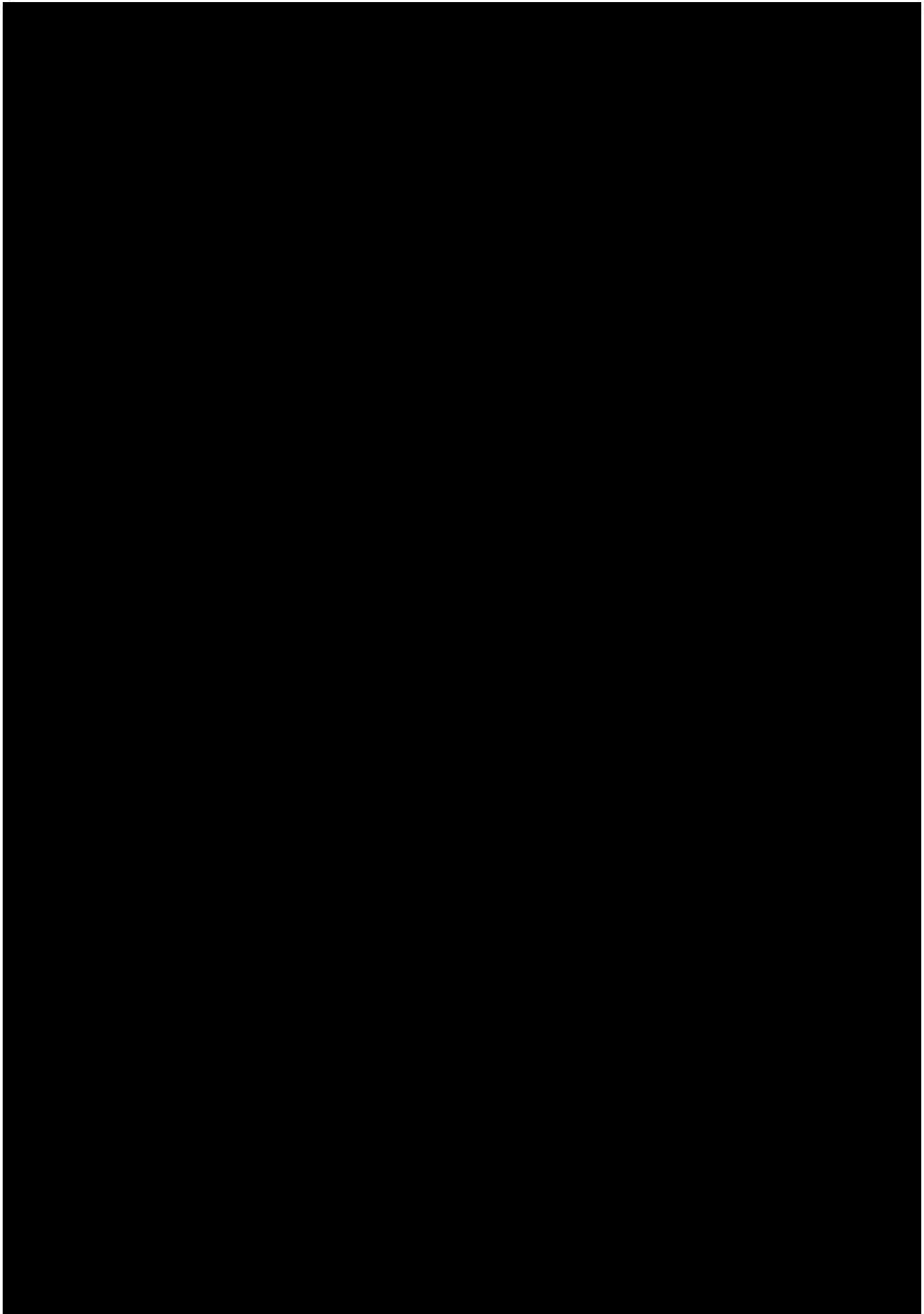
**(e) Motor Vehicle Insurance**

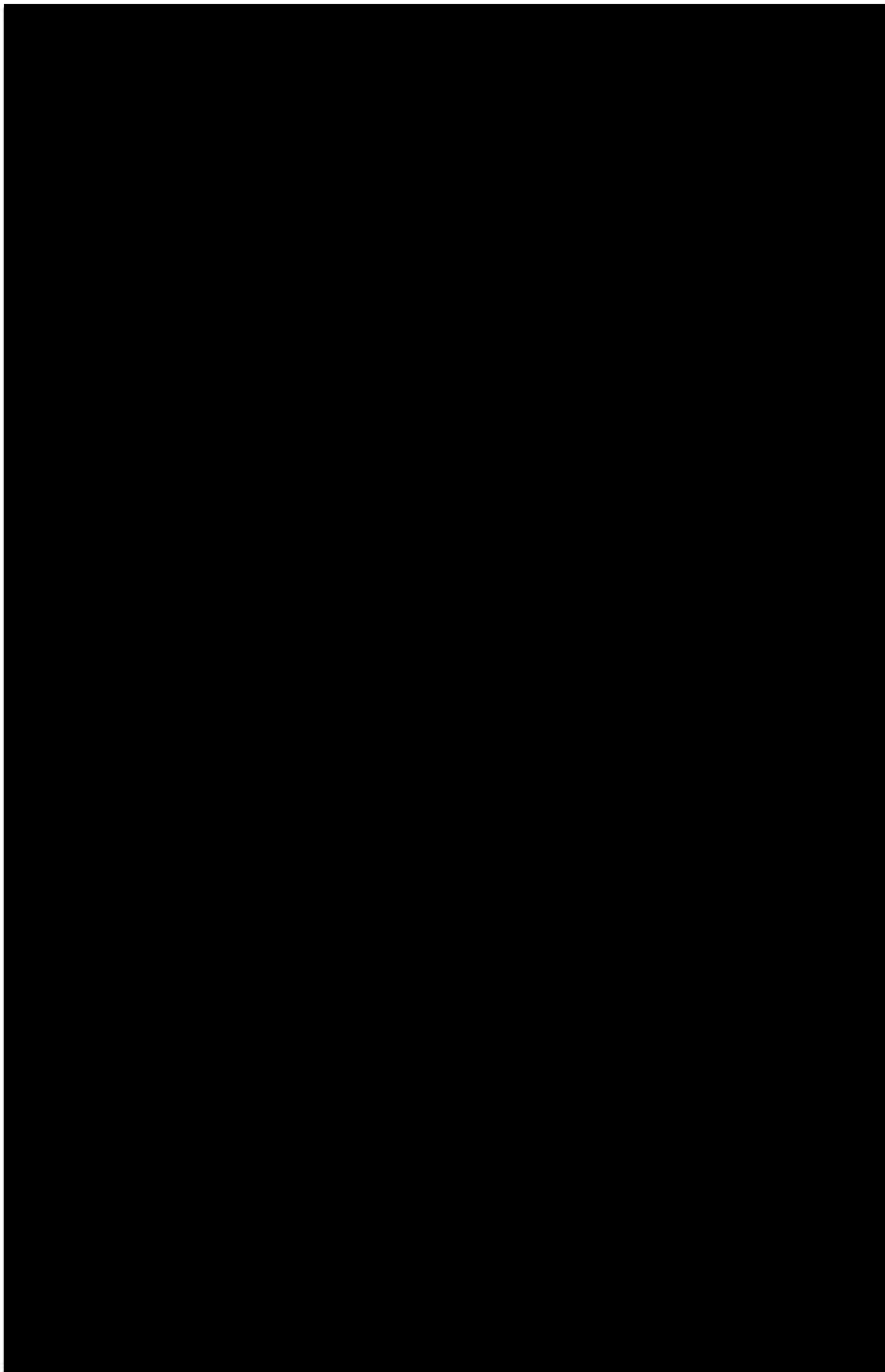
Insurance element	Minimum Requirement
Party responsible for procuring the insurance	Project Co.
Insured	Each party to procure its own insurance for vehicles to be used in connection with the Services.
Level of cover	Minimum coverage of \$30 million per occurrence and in the aggregate in respect of third party property damage.
Risks covered	Third party property damage in respect of all vehicles used in connection with the Services.
Retroactive date	N/A.

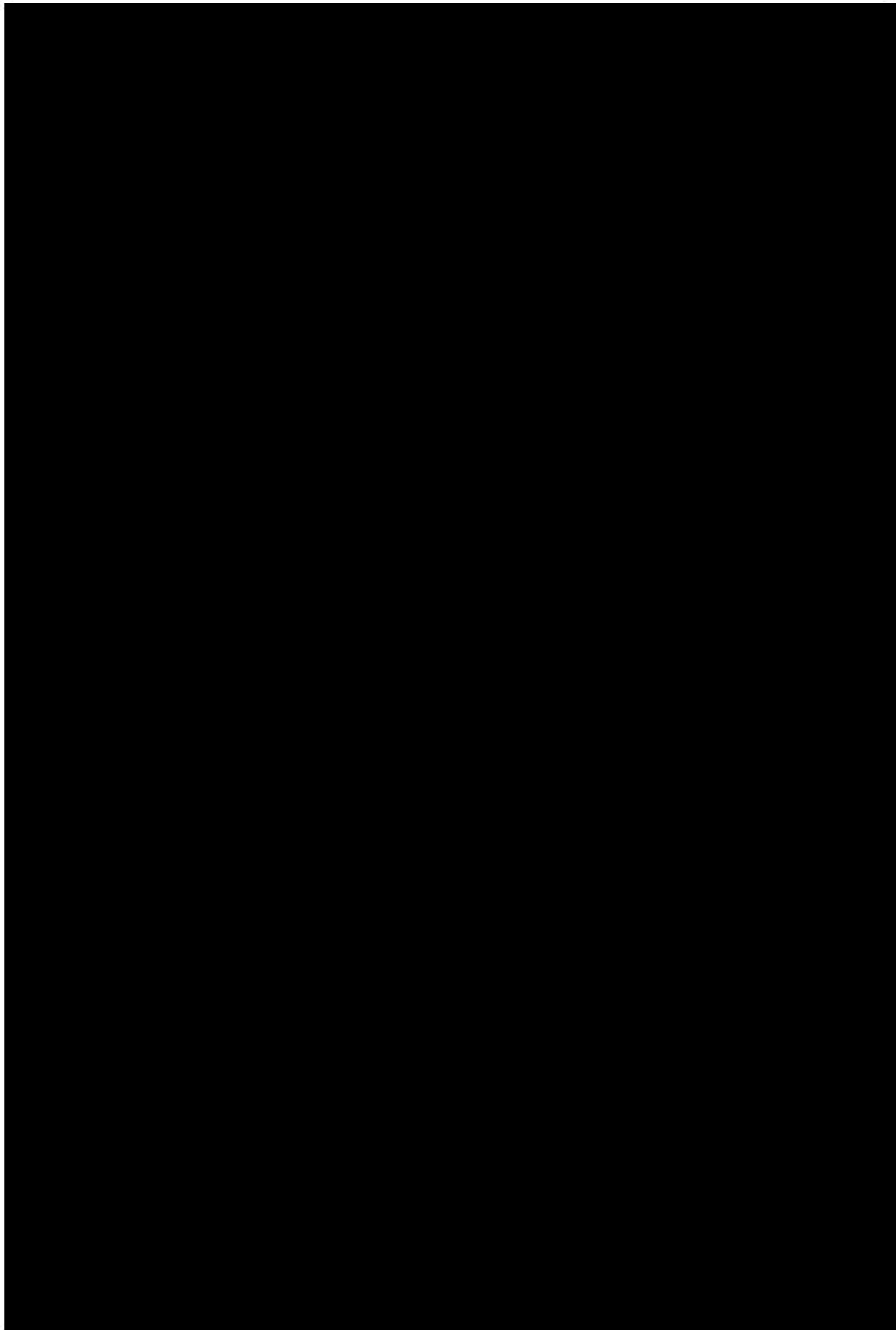
Insurance element	Minimum Requirement
Deductibles	
Additional requirements	All motor vehicles must be registered currently for compulsory third party insurance as required by Law, if for use on public roads.  Cover for mobile plant and equipment not required to be registered or used as a tool of trade or registered plant whilst used as a tool of trade (unless separate insurance procured for this exposure or covered under the Public and Products Liability Insurance).
Period of cover	From the Date of Technical Completion until the Expiry Date.

## **Schedule 23 - Commercially Sensitive Information**

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## Schedule 24 — Termination Payments Schedule

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### 1. Definitions

For the purposes of this Schedule, the following definitions shall apply:

**Actual Proceeds** has the meaning given to it in Section 2.3(h) of this Schedule.

**Additional Amount** has the meaning given to it in Section 2.3(b) of this Schedule.

**Base Case Project Return** means the percentage set out as the "Base Case Project Return" in the Model Output Schedule.

**Capital Sum** means the capital sum offered by each Compliant Tenderer under the Tender Process or the capital sum which the New Project Co is to pay to the State, in each case in consideration for the State entering into the New Contract, as the context permits or requires.

**Compensation Date** means either:

- (a) if Section 3.2(c) of this Schedule applies, the earlier of:
  - (i) the date that the New Contract is entered into; and
  - (ii) the date on which the Termination Payment payable to Project Co has been agreed or determined in accordance with Section 3.6 (*Termination for Default Termination Event*) of this Schedule; or
- (b) if Section 3.3 (*Expert determination*) of this Schedule applies, the date on which the Estimated Fair Value has been agreed or determined.

**Compliant Tender** means a tender which meets all of the Qualification Criteria.

**Compliant Tenderer** means a tenderer who submits a Compliant Tender.

**Debt Interest Rate** means the total non-default interest rate payable on Debt as provided in the Financial Model.

**Deemed New Contract** means a contract on the same terms and conditions as this Deed as at the Termination Date, but with the following amendments:

- (a) if this Deed is terminated during the Delivery Phase, then the Date for Completion shall be extended by such period as would have been granted to allow a New Project Co (had one been appointed) to achieve Completion;
- (b) any Major Default Notices shall be cancelled; and
- (c) the term of such contract shall be equal to the period from the Compensation Date to and including the Final Expiry Date.

**Disgorgement Claim** means, if any Project Co Entity is or becomes subject to an Insolvency Event, and any payment to or transaction with the State is alleged to be void, voidable, or defective by reason of Part 5.7B of the Corporations Act.

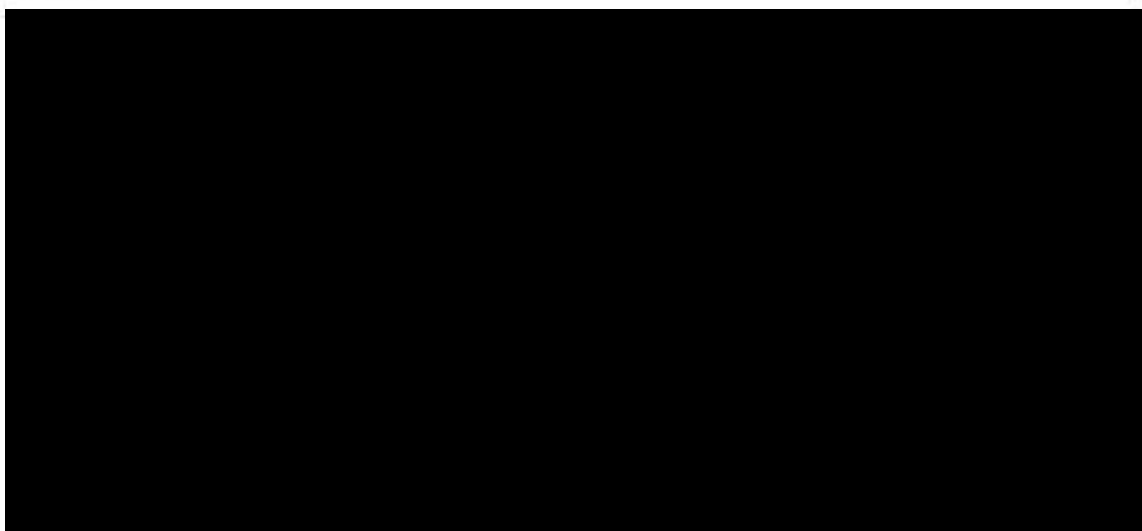
**Estimated Fair Value or EFV** means the amount determined in accordance with Sections 3.3 (*Expert determination*) and:

- (a) if the Termination Date occurs prior to Completion, Section 3.4 (*Estimated Fair Value before Completion*) of this Schedule; or

- (b) if the Termination Date occurs after Completion, Section 3.5 (*Estimated Fair Value after Completion*) of this Schedule,

which a third party would pay to the State as the Fair Value of the Deemed New Contract.

**Fair Value** means the amount at which an asset, equity or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidation sale.



**Instalment Amount** has the meaning given to it in Section 2.1(d) of this Schedule.

**Instalment Date** means the date on which any Project Co Entity would have been required to pay debt service payments or repayments to the Financiers under the Finance Documents had this Deed not been terminated by the State and there was no default under the Finance Documents.

**Liquid Market** means that there are at least two parties (in addition to any party controlled by the Financiers, each of whom is capable of being a suitable substitute contractor) in the prevailing market for public private partnership contracts or similar contracts for the provision of services (in each case the same as or similar to this Deed), such that the result of that tender process would provide a reasonably likely indicator of Fair Value.

**New Contract** means a contract on the same terms and conditions as this Deed as at the Termination Date, but with the following amendments:

- (a) if this Deed is terminated during the Delivery Phase, then the Date for Completion shall be extended by a period to allow a New Project Co to complete the Works;
- (b) any Major Default Notices shall be cancelled;
- (c) the term of such contract shall be equal to the period from the Compensation Date to and including the Final Expiry Date;
- (d) the New Project Co will pay a Capital Sum to the State on entering into the New Contract; and
- (e) any other amendments which do not materially reduce the Capital Sum which a tenderer would be prepared to pay in consideration for the State entering into the New Contract.

**New Project Co** means the party who has entered or who will enter into a New Contract with the State.

**Post Termination Service Payment** means for the whole or any part of a Month or Months during the period from the Termination Date to the Compensation Date, an amount equal to the Monthly Service Payment (assuming no Volumetric Adjustment, no Cohort Adjustment, no Pass

Through Costs, no Escort Payments, no Incentive Payments, no Floating Rate Adjustments and no Total Deductions) which would have been payable for the relevant Month or Months under this Deed had this Deed not been terminated, less an amount equal to the aggregate of (without double counting):

- (a) all cost components of the Monthly Service Payment relating to the performance of the Project Activities and the Insurance; and
- (b) any costs associated with alternative performance of the Project Activities but only to the extent such costs exceed the cost components of the Monthly Service Payment relating to the performance of the Project Activities and the insurance (whether or not any such Project Activities are undertaken); and
- (c) any Rectification Costs incurred by the State during the Month (or part thereof) to which the Post Termination Service Payment relates.

For the avoidance of doubt, the Post Termination Service Payment can be an amount that is less than zero.

**Project Co Additional Amount** has the meaning given to it in Section 2.3(c)(i) of this Schedule.

**Provisional Proceeds** has the meaning given to it in Section 2.3(a) of this Schedule.

**Qualification Criteria** means the criteria which the State requires tenderers to meet as part of the Tender Process, which shall be:

- (a) criteria having substantially the same effect as the criteria applied by the State when selecting those to be invited to submit detailed proposals and any other final offers under the procurement process used in the selection of Project Co to deliver the Project;
- (b) the financial ability of the tenderers to pay the Capital Sum;
- (c) the technical ability of the tenderers to deliver the Project Activities;
- (d) the independence of the tenderer from Project Co and the State; and
- (e) any other relevant tender criteria selected by the State acting reasonably.

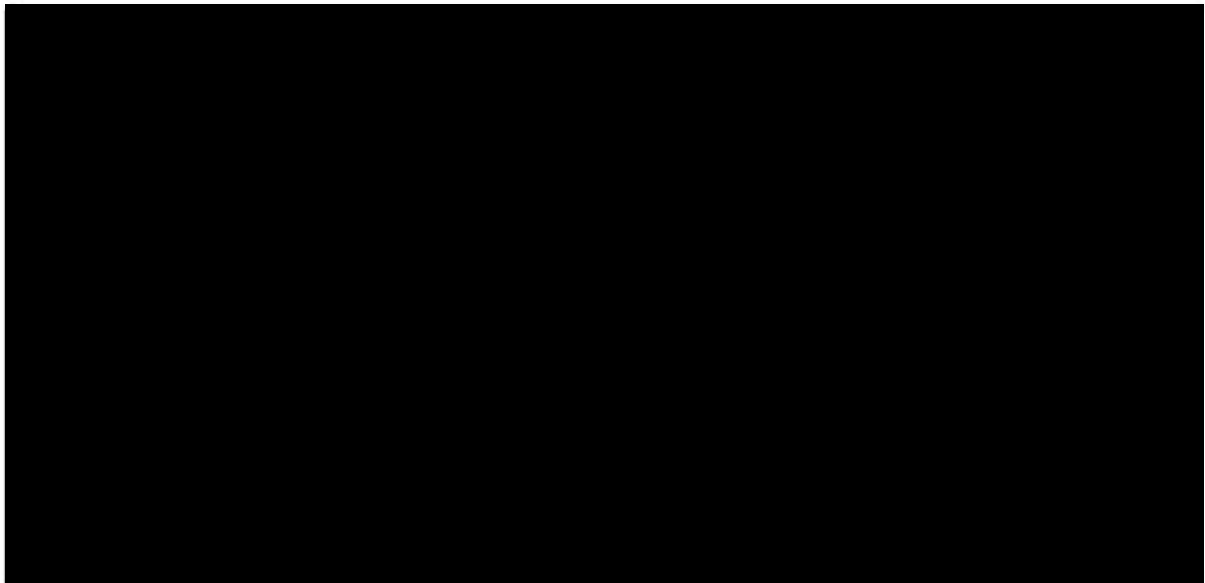
**Receivables Refund Payment** has the meaning given in the Receivables Purchase Deed.

**Rectification Costs** means an amount equal to the aggregate of the reasonable and proper costs incurred by the State in curing, rectifying or remedying any Project Co Entity's defaults.

**Senior Debt** means the lower of:

- (a) amounts outstanding under the Finance Documents in respect of Debt; or
- (b) amounts that would have been outstanding under the Finance Documents in respect of Debt had:
  - (i) Project Co received the Monthly Service Payments forecast in the Base Case Financial Model; and
  - (ii) each Project Co Entity complied with all of its obligations in respect of Debt under the Finance Documents.

**State's Date for Completion** has the meaning given to it in Section 3.4(b) of this Schedule.



**Tender Costs** means the internal and external costs reasonably incurred or reasonably expected to be incurred by the State in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value (including the cost of the independent expert appointed pursuant to Section 3.3(e) of this Schedule).

**Tender Documentation** means the documentation issued by the State to request tenders from any parties interested in entering into a New Contract in accordance with Section 3.2(c) of this Schedule.

**Tender Process** means the process by which the State requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and negotiates to enter into a New Contract with a New Project Co, in accordance with Section 3.2(c) of this Schedule.

**Termination Date** means the date of termination of this Deed in accordance with clause 49 (*Termination*) of this Deed.

**Termination Debt** means an amount equal to the sum of:

- (a) the Senior Debt as at the Termination Date; and
- (b) where the State elects to pay for the Termination Payment via lump sum, all amounts, including costs of early termination of hedging arrangements and other breakage costs, payable by any Project Co Entity to the Financiers as a result of prepayment under the Finance Documents, subject to each Project Co Entity and the Financiers mitigating all such costs to the extent reasonably possible,

less:

- (a) all credit balances on any bank accounts held by the Financiers or any of them for or on behalf of any Project Co Entity on the Termination Date; and
- (b) where the State elects to pay for the Termination Payment via lump sum, all amounts, including benefits of early termination of hedging arrangements and other breakage benefits, payable by the Financiers to any Project Co Entity as a result of prepayments of amounts outstanding under the Finance Documents.

**Termination Equity IRR** means:

- (a) for the period on and from Financial Close to (but excluding) the first date on which the Financial Model contemplates an Equity Investor providing Equity, the Equity IRR;

- (b) for the period on and from the first date on which the Financial Model contemplates an Equity Investor providing Equity to (but excluding) the Date of Commercial Acceptance, a rate equal to the Equity IRR less 0.5%; and
- (c) for the period on and from the Date of Commercial Acceptance to (but excluding) the Final Expiry Date, a rate equal to the Equity IRR less 1.8%.

**Voluntary Termination Equity Value** has the meaning given to it in Section 4 (*Voluntary Termination by the State*) of this Schedule.

## 2. Payment of Termination Payment

### 2.1 Timing of payment and instalment option

- (a) If this Deed is terminated under clause 49 (Termination) of this Deed, the State must pay to Project Co the Termination Payment on or before the date which is 90 days after the Termination Date (or where termination is pursuant to clause 49.4 (*Default Termination Event*) of this Deed, 30 days after the Compensation Date (this is later) unless it elects, in its absolute discretion, to pay in instalments in accordance with Section 2.1(b) of this Schedule.
- (b) If Project Co is entitled to a Termination Payment in accordance with clause 49.6 (*Payment on termination*) of this Deed and this Schedule:
  - (i) subject to Section 2.1(b)(ii) of this Schedule, the State shall, at its sole discretion, elect to pay by:
    - A. lump sum; or
    - B. where the State has not elected to assume (or have its nominee assume) the Liability of the Project Co Entities for all outstanding Debt pursuant to clause 49.7(a) (*Novation of liabilities to the State*) of this Deed, instalments (in amounts determined in accordance with Section 2.1(c) of this Schedule) on the Instalment Dates; and
  - (ii) where the State determines to retender for the Project and receives a lump sum payment, it will in turn pay Project Co by way of a lump sum (but not until it is in receipt of the lump sum payment from the retender for the Project).
- (c) If the State elects to pay the Termination Payment by instalments, it must pay the Instalment Amount applicable to that Instalment Date on each of the Instalment Dates.
- (d) The instalment amounts (**Instalment Amount**) means the amount calculated in accordance with the following formula:
  - (i) if the sum of the Termination Payment and the Receivables Refund Payment is less than or equal to the Debt at the Termination Date, amounts equivalent to the repayments or payments (as applicable) that are payable under the Finance Documents must be paid at the times when payment is due under the Finance Documents until the sum of the amounts paid is equal to the sum of the Termination Payment and the Receivables Refund Payment and interest accrued on the Receivables Refund Payment under clause 7.2 (Interest on unpaid element of the Receivables Refund Payment) of the Receivables Purchase Deed and interest accrued on the Termination Payment under Section 2.2 (*Payment of Interest*) of this Schedule; or
  - (ii) if the sum of the Termination Payment and the Receivables Refund Payment is greater than the Debt at the Termination Date:
    - A. amounts equivalent to the repayments or payments (as applicable) that are payable under the Finance Documents must be paid at the times when

- the payment is due under the Finance Documents until the sum of the Debt and any interest accrued on the Receivables Refund Payment under clause 7.2 (Interest on unpaid element of the Receivables Refund Payment); of the Receivables Purchase Deed and interest accrued on the Termination Payment under Section 2.2 (Payment of interest) of this Schedule has been fully paid; and
- B. the difference between the Debt at the Termination Date and the sum of the Termination Payment and the Receivables Refund Payment will be paid as a lump sum on or before the date which is 90 days after the Termination Date (or where termination is pursuant to clause 49.4 (Default Termination Event) of this Deed, 30 days after the Compensation Date if this is later).
- (e) If the State has elected to pay the Termination Payment by instalments:
- (i) I must pay the Instalment Amount applicable to each Instalment Date on that Instalment Date; and
- (ii) I may (within 30 days of written notice to Project Co) pay any outstanding element of:
- A. the Termination Payment (plus any additional costs incurred under the Finance Documents as a result of the breaking of any hedging arrangements, provided each Project Co Entity and the Financiers mitigate all such costs to the extent reasonably possible); and
- B. the Receivables Refund Payment under the Receivables Purchase Deed, on the next Instalment Date
- (f) If the State fails to make a payment to Project Co in accordance with Section 2.1(e) of this Schedule within the time period specified in Section 2.1(e) of this Schedule, Project Co may issue a notice to the State setting out (including calculations) the amount of the Termination Payment outstanding to be paid by the State and the State must pay that amount within 20 Business Days of receipt of such notice.

## 2.2 Payment of interest

In respect of Termination Payments calculated under this Schedule only interest shall accrue on any unpaid element of the Termination Payment:

- (a) in respect of a Termination Payment calculated under Section 3 (Termination for Default Termination Event) of this Schedule, from the 31st day after the Compensation Date to (and excluding) the date on which the Termination Payment is paid in full. Interest shall accrue on that Termination Payment at the default rate provided in the relevant Finance Document. Interest is payable on the date on which the Termination Payment is paid; and
- (b) in respect of any Termination Payment calculated under Sections 4 (Voluntary Termination by the State) or 5 (Force Majeure and Uninsurable Risks) of this Schedule, from and including the Termination Date to (and excluding) the date on which the Termination Payment is paid in full. Interest on the Termination Debt portion of that Termination Payment shall accrue at the Debt Interest Rate from and including the day after the Termination Date to and including the 90th day after the Termination Date and thereafter on the whole of that Termination Payment at the default rate provided in the relevant Finance Document. Interest is payable on the date on which the Termination Payment is paid.

## 2.3 Treatment of insurance proceeds

- (a) Notwithstanding any term of this Deed, if the calculation of the Termination Payment requires the parties to take into account insurance proceeds that have not yet been

received by any Project Co Entity, then receipt (or non-receipt) of the insurance proceeds, or uncertainty as to the quantity or timing of receipt of the same, shall not delay the calculation or payment of the Termination Payment and instead the parties shall calculate the Termination Payment on the basis of the maximum amount of proceeds that those Project Co Entities are reasonably likely to recover assuming that Project Co has complied with its insurance obligations under clause 45 (Insurance) of this Deed (**Provisional Proceeds**) taking into account all information that is then available to the parties

- (b) If following the calculation of the Termination Payment, the insurance proceeds that any Project Co Entity actually recovers (**Actual Proceeds**) are less than the Provisional Proceeds, the State shall, immediately upon notification of the Actual Proceeds by Project Co, pay to Project Co an amount equal to that by which the Provisional Proceeds exceed the Actual Proceeds (**Additional Amount**); and (to the avoidance of doubt, the State will not be required to pay any interest on this Additional Amount.
- (c) If, following the calculation of the Termination Payment, the Actual Proceeds are more than the Provisional Proceeds, the State may, in its sole discretion:
  - (i) direct Project Co to immediately upon receipt of the Actual Proceeds by any Project Co Entity, pay to the State an amount equal to that by which the Actual Proceeds exceed the Provisional Proceeds (**Project Co Additional Amount**); or
  - (ii) if the State has not paid the Termination Payment in full at that time, reduce the outstanding Termination Payment by the Project Co Additional Amount,
 and no Project Co Entity will be required to pay any interest on any Project Co Additional Amount.
- (d) The State shall not be required to make any payment under Section 2.1(b)(ii) of this Schedule to the extent that the Actual Proceeds are less than the Provisional Proceeds as a result of a breach by Project Co of its obligations under this Deed.
- (e) References to insurance proceeds in Sections 2.3(b) to 2.3(d) (inclusive) of this Schedule are to insurance proceeds that any Project Co Entity is entitled to retain and which it has not applied and it is not obliged to apply in respect of its reinstatement obligations.

## 2.4 General obligations

- (a) Project Co must (and must procure Finance Co to) use all reasonable endeavours to mitigate any losses or costs forming part of any Termination Payment.
- (b) Any Termination Payment payable to Project Co must be calculated in accordance with this Schedule without any double counting.
- (c) If the Deed is terminated after the State has given Project Co a CDPD Satisfaction Notice and prior to payment of the CDPD Amount by the State, the calculation of any amounts in respect of this Schedule shall be determined on the basis that the CDPD Satisfaction Notice was not given.

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## 3. Termination for Default Termination Event

### 3.1 Default Termination Event

If the State terminates this Deed following a Default Termination Event in accordance with clause 49.4 (Default Termination Event) of this Deed (regardless of whether the State otherwise has the right to terminate for any other reason), the State shall, at its sole discretion, elect to:

- (a) re-tender the provision of the Project Activities in accordance with Section 3.2 (Re-tendering process) of this Schedule, or

- (b) require an expert determination in accordance with Section 3.3 (*Expert determination*) of this Schedule.

### 3.2 Re-tendering process

- (a) The State shall be entitled to elect to re-tender the provision of the Project Activities in accordance with Section 3.1(a) of this Schedule if:
- (i) the State notifies Project Co on or before the date falling 20 Business Days after the Termination Date;
  - (ii) there is a Liquid Market and either:
    - A. the Financiers have not exercised their rights to step in under clause 5 of the Financiers Tripartite Deed; or
    - B. the Financiers have exercised their rights to step-in under clause 5 of the Financiers Tripartite Deed and the Financiers have not procured the transfer of Project Co's rights and liabilities under this Deed to a suitable substitute contractor or have failed to use all reasonable efforts to do so,
 in which case the amount of compensation payable by the State shall be agreed or determined in accordance with Sections 3.2(c) and 3.6 (*Termination for Default / Termination / vent*) of this Schedule.
- (b) Any Dispute in relation to whether a Liquid Market exists may be referred by either party for dispute resolution in accordance with clause 50 (*Dispute Resolution procedure*) of this Deed.
- (c) If the State elects to re-tender the provision of the Project Activities in accordance with Section 3.2(a) of this Schedule, the following provisions shall apply:
- (i) the objective of the Tender Process shall be to identify a new project company and the highest Capital Sum offered by a Compliant Tenderer;
  - (ii) the State Representative shall use its reasonable endeavours to complete the Tender Process as soon as practicable having regard to the assistance given by Project Co in connection with the Tender Process;
  - (iii) the State Representative shall notify Project Co of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms;
  - (iv) for each Month during the period from the Termination Date until the Compensation Date (and any part of a Month prior to the Compensation Date), the State shall pay to Project Co the Post Termination Service Payment. Each Post Termination Service Payment shall be payable monthly in arrears on or before the date falling 20 Business Days after the end of each Month or after the Compensation Date (as the case may be). If any Post Termination Service Payment is less than zero then it shall be carried forward and shall be set off against any future positive Post Termination Service Payments. If any such Post Termination Service Payment has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Termination Payment;
  - (v) as soon as practicable after tenders have been received, the State Representative shall determine the Compliant Tenders and shall notify Project Co of:
    - A. the highest Capital Sum offered by a Compliant Tenderer; and
    - B. the Tender Costs.



- (vi) if the State receives less than two tenders (or less than two Compliant Tenders) in response to the Tender Process, the provisions of Section 3.3 (*Expert determination*) of this Schedule shall apply;
- (vii) the State may elect at any time prior to the receipt of two Compliant Tenders to follow the no-re-tendering procedure under Section 3.1(a) of this Schedule by notifying Project Co that this election has been made and upon the making of such an election, the provisions of Section 3.3 (*Expert determination*) of this Schedule shall apply; and
- (viii) in the event that the Tender Process is not completed within 12 months from the date of issue of the Tender Documentation, the provisions of Section 3.3 (*Expert determination*) of this Schedule shall apply.

### 3.3 Expert determination

If

- (a) the State elects to require expert determination pursuant to Sections 3.1 (*Default Termination Event*) or 3.2(c)(vii) of this Schedule;
- (b) the provisions of Sections 3.2(c)(vi), 3.2(c)(vii) or 3.2(c)(viii) of this Schedule apply; or
- (c) the conditions set out in Section 3.2(a) of this Schedule are not satisfied,

the following provisions apply:

- (d) for each Month during the period from the Termination Date until the Compensation Date (and any part of a Month prior to the Compensation Date) the State shall pay to Project Co the Post Termination Service Payment, in accordance with Section 3.2(c)(v) of this Schedule;
- (e) the parties will procure the services of an independent expert to determine the Estimated Fair Value based on the formula set out in Sections 3.4 (*Estimated Fair Value before Completion*) and 3.5 (*Estimated Fair Value after Completion*) of this Schedule (as applicable) and agree that the Estimated Fair Value as determined by the independent expert will be final and binding; and
- (f)
  - a) forecast amounts of revenues and costs must be calculated by the independent expert on a nominal basis as at the Termination Date, whereby future amounts are indexed at the indexation rates in the Financial Model;

### 3.4 Estimated Fair Value before Completion

- (a) The Estimated Fair Value before Completion shall be determined by the independent expert, based on the following formula:

**EFV** = the lower of

- (i) the actual costs (including capitalised interest and fees) properly incurred by Project Co (being no more than the costs forecast to be incurred as shown in the Financial Model) referable to the Delivery Phase Activities up to and including the Termination Date; and
- (ii) the following amount:
  - A. the sum of the total costs forecast to be incurred in respect of all of the Delivery Phase Activities in the period from Financial Close to the Date for Completion (as set out in the Financial Model) on the basis that:

- 1) costs will include capitalised interest and fees (being no more than the capitalised interest and fees forecast to be incurred as shown in the Financial Model) up to and including the Termination Date;
  - 2) costs forecast to be incurred in respect of the Delivery Phase Activities after the Termination Date until the State's Date for Completion are discounted back from the dates the independent expert has determined back to the Termination Date at the Base Case Project Return; and
  - 3) capitalised interest and fees forecast to be incurred (as set out in the Financial Model) after the Termination Date will be excluded,
- less
- B the independent expert's determination of the costs to be incurred by the State (including a reasonable assessment of the risk of costs overruns) from the Termination Date to achieve Completion by the State's Date for Completion discounted from the dates the independent expert has determined back to the Termination Date at the Base Case Project Return.
- (b) In this Section 3.4 (*Estimated Fair Value before Completion*), the State's Date for Completion means
- (i) if the independent expert determines that, with a reasonable provision for acceleration, Completion can be achieved by the Date for Completion, the Date for Completion; or
  - (ii) if the independent expert determines that, even with a reasonable provision for acceleration, Completion cannot be achieved by the Date for Completion then the independent expert's determination of the earliest possible date by which Completion can be achieved (including a reasonable provision for acceleration and a reasonable assessment of the risk of time overruns).

### 3.5 Estimated Fair Value after Completion

The Estimated Fair Value after Completion shall be determined by the independent expert, based on the following formula:

$$EFV = A - B$$

where:

EFV = Estimated Fair Value

A = the total of all payments of the Monthly Service Payments and GDPD Amount forecast to be made to the relevant Project Co Entity had this Deed not been terminated over the term of the Deemed New Contract, calculated and discounted as at the Termination Date by the Base Case Project Return; and

B = the total of all costs reasonably forecast to be incurred by the State as a direct result of termination of this Deed, calculated and discounted to the Termination Date by the Base Case Project Return, such costs to include:

- (a) the costs reasonably forecast to be incurred by the State over the term of the Deemed New Contract in connection with providing the Project Activities to the standard required by the Deemed New Contract;
- (b) a reasonable risk assessment of any cost overruns that will arise whether or not forecast in the Financial Model; and

- (c) any Rectification costs required to deliver services under the Deemed New Contract to the standard required in the Deemed New Contract and any additional operating costs required to restore operating service standards

### 3.6 Termination for Default Termination Event

If this Deed is terminated pursuant to clause 49.4 (*Default Termination Event*) of this Deed, the Termination Payment shall be calculated as follows:

Termination Payment to TP means

$$TP = A - B - C - D - E - F + G - H - I - K - R$$

where:

- A** = the highest Capital Sum offered by a Compliant Lenderer if Section 3.2 (*Re-tendering process*) of this Schedule applies, or the Estimated Fair Value as determined by Section 3.4 (*Estimated Fair Value before Completion*) or Section 3.5 (*Estimated Fair Value after Completion*) (as applicable); if Section 3.3 (*Expert determination*) of this Schedule applies;
- B** = the Tender Costs;
- C** = amounts that the State is entitled to set off or deduct under this Deed including, for the avoidance of doubt, any Post Termination Service Payment which is less than zero and which has not been set off on or before the Compensation Date in accordance with Section 3.7(c)(iv) of this Schedule, the costs of carrying out any works to ensure that the Relevant Infrastructure is in accordance with the requirements of this Deed and all other reasonable costs incurred by the State in connection with the relevant Default Termination Event and as a direct result of terminating this Deed;
- D** = any amounts owing by any Project Co Entity to the State under the Project Documents as at the Termination Date;
- E** = any gains which have or will accrue to any Project Co Entity as a result of the termination of this Deed and any other Project Documents;
- F** = the net amount (which, for the avoidance of doubt, shall be net of any amount deductible under the relevant insurance policy) any Project Co Entity is entitled to retain, or would be entitled to retain had each Project Co Entity complied with the requirements of clause 46 (*Insurance*) of this Deed and the relevant insurance policy (as applicable), under any insurance policy;
- G** = any amounts due and payable by the State to any Project Co Entity in accordance with the terms of the State Project Documents as at the Termination Date, and only to the extent that such amounts should have been paid prior to the Termination Date but remained unpaid at the Termination Date;
- H** = the total of all cash on deposit or otherwise held to the benefit of any Project Co Entity and any other amounts owing to any Project Co Entity as at the Termination Date;
- I** = any amounts paid to Project Co by the State (including as a component of the Monthly Service Payment) for maintenance, refurbishment or capital replacement where that maintenance, refurbishment or capital replacement has not been carried out by Project Co;
- K** = any amount which the State is required to pay to discharge or settle any Disgorgement Claim, plus legal costs on an indemnity basis, plus any amount which the State, acting reasonably, provisions for the payment of any Disgorgement Claim plus legal costs until such time as the Disgorgement Claim is withdrawn, released, or statute-barred, and

**R** = the Receivables Refund Payment.

If the Termination Payment as calculated above is zero or a negative number, the State shall have no obligation to make any payment to Project Co and the State shall be released from all liability to Project Co for breaches and/or termination of this Deed and any other Project Documents other than any Claim notified to the State prior to the date of termination in accordance with this Deed which was not otherwise due and payable under this Deed on the Termination Date and which does not arise by reason of termination of this Deed.

#### 4. Voluntary Termination by the State

If this Deed is terminated pursuant to clause 49.2 (*Voluntary Termination*) of this Deed, the Termination Payment shall be calculated as follows, unless the sum of such Termination Payment and the Receivables Refund Payment is calculated to be less than the Termination Debt, in which case the Termination Payment will be taken to be the amount necessary in order to ensure that the sum of such Termination Payment and the Receivables Refund Payment is equal to the Termination Debt:

**Termination Payment or TP means:**

$$TP = A + B + C - D - E - F + G - H + I - J - K - R$$

where:

- A** = an amount equal to the Termination Debt;
- B** = the amount which when taken together with dividends (or other distributions) paid, interest paid and principal repaid and any other monies paid by Project Co to Equity Investors, taking account of the actual timing of such payments, gives an internal rate of return to Equity Investors equal to the relevant Termination Equity IRR (the Voluntary Termination Equity Value);
- C** = an amount equal to the [REDACTED];
- D** = any amounts owing by any Project Co Entity to the State, under the State Project Documents as at the Termination Date;
- E** = any gains which have or will accrue to any Project Co Entity as a result of the termination of this Deed and any other Project Documents, not included in the definition of Termination Debt;
- F** = the net amount (which, for the avoidance of doubt, shall be net of any amount deductible under the relevant insurance policy) any Project Co Entity is entitled to retain, or would be entitled to retain had each Project Co Entity complied with the requirements of clause 46 (*Insurance*) of this Deed and the relevant insurance policy (as applicable), under any insurance policy;
- G** = any amounts due and payable by the State to any Project Co Entity in accordance with the terms of the State Project Documents as at the Termination Date, and only to the extent that such amounts should have been paid prior to the Termination Date but remained unpaid at the Termination Date;
- H** = the total of all cash on deposit or otherwise held to the benefit of any Project Co Entity as at the Termination Date and any other amounts owing to any Project Co Entity as at the Termination Date;
- I** = the total of all redundancy payments for employees of Project Co which have been or will be reasonably and properly incurred and arise as a direct result of the termination of this Deed;
- J** = the costs (if any) which are required to be incurred to ensure that the Relevant Infrastructure and the Site meets the Handover Condition as at the Expiry Date;

- K** = any amount which the State is required to pay to discharge or settle any Disgorgement Claim, plus legal costs on an indemnity basis, plus any amount which the State, acting reasonably, provisions for the payment of any Disgorgement Claim plus legal costs until such time as the Disgorgement Claim is withdrawn, released, or statute-barred; and
- R** = the Receivables Refund Payment.

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## 5. Force Majeure and Uninsurable Risks

If this Deed is terminated pursuant to clauses 44.6 (*Consequences of State election not to repair or rebuild*), 47.3 (*Agreed Uninsurable Risks resulting in loss or damage*) or 49.3 (*Termination for Force Majeure*) of this Deed, the Termination Payment shall be calculated as follows:

$$TP = A - B - C - D + E + F - G + H - I - K - R$$

where:

- A** = an amount equal to the Termination Debt;
- B** = any gains which have or will accrue to any Project Co Entity as a result of the termination of this Deed and any other Project Documents, not included in the definition of Termination Debt;
- C** = any amounts owing by any Project Co Entity to the State under the State Project Documents as at the Termination Date;
- D** = the net amount (which, for the avoidance of doubt, shall be net of any amount deductible under the relevant insurance policy) any Project Co Entity is entitled to retain, or would be entitled to retain had each Project Co Entity complied with the requirements of clause 46 (*Insurance*) of this Deed and the relevant insurance policy (as applicable), under any insurance policy;
- E** = 50% of the Voluntary Termination Equity Value;
- F** = any amounts due and payable by the State to Project Co in accordance with the terms of the State Project Documents as at the Termination Date, and only to the extent that such amounts should have been paid prior to the Termination Date but remained unpaid at the Termination Date;
- G** = the total of all cash on deposit or otherwise held to the benefit of any Project Co Entity as at the Termination Date and any other amounts owing to any Project Co Entity as at the Termination Date;
- H** = an amount equal to the [REDACTED];
- I** = the costs (if any) which are required to be incurred to ensure that the Relevant Infrastructure and the Site meets the Handover Condition as at the Expiry Date;
- K** = any amount which the State is required to pay to discharge or settle any Disgorgement Claim, plus legal costs on an indemnity basis, plus any amount which the State, acting reasonably, provisions for the payment of any Disgorgement Claim plus legal costs until such time as the Disgorgement Claim is withdrawn, released, or statute-barred; and
- R** = the Receivables Refund Payment.

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## 6. Negative Termination Payment

- (a) Subject to section 6(b), if the Termination Payment calculated under this Schedule is a negative amount, the State will be entitled to deduct the absolute value of that negative

amount from the Receivables Refund Payment payable by the State to Finance Co under the Receivables Purchase Deed

- (b) The State will not be entitled to deduct the absolute value of a negative Termination Payment calculated under section 4 from the Receivables Refund Payment payable by the State to Finance Co under the Receivables Purchase Deed to the extent that as a result of that deduction the amount of the Receivables Refund Payment will be less than the Termination Debt.
- (c) The parties acknowledge and agree that if after deducting the amounts identified under section 6(a), the Receivables Refund Payment is a negative amount, such Receivables Refund Payment will be deemed to be zero.
- (d) If the Termination Payment calculated under this Schedule is a negative amount, for all purposes other than that set out in section 6(a), such Termination Payment will be deemed to be zero and Project Co shall have no obligation to make any payment of that amount to the State.

## Schedule 25

### New Grafton Correctional Centre Independent Certifier Deed of Appointment

[Insert] [insert ABN]

[Insert] [insert ABN/ACN] (**Project Co**)

[Insert] [insert ABN/ACN] (**Independent Certifier**)

## Schedule 25 — Independent Certifier Deed of Appointment

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**Independent Certifier Deed of Appointment** made on

<b>Parties</b>	[insert]	
	[insert]	(Project Co)
	[insert]	(Independent Certifier)

**Background**

- A. The background to the Project is set out in the Project Deed.
- B. The Independent Certifier is experienced generally in construction and project management and in particular, in the review of design documentation and the design and construction of correctional centres, and offers its expertise in those fields.
- C. The State Project Documents contemplate that the Independent Certifier will discharge certain functions, including those set out in the Services Schedule.
- D. The Independent Certifier will perform its obligations in accordance with the terms and conditions of this Deed.

**Operative provisions****1. Definitions and interpretation****1.1 Project Deed definitions incorporated**

Unless otherwise expressly defined, expressions used in this Deed have the meanings given to them in the Project Deed.

**1.2 Definitions**

In this Deed, unless the context otherwise requires:

**Commencement Date** has the meaning given to it in clause 2.1.

**Consumer Price Index** has the meaning given in the Payment Schedule.

**Contract Particulars** means the particulars set out in Schedule 1.

**Dispute** has the meaning given in clause 16.2.

**Disputing Parties** has the meaning given in clause 16.2.

**Deed** means this deed and includes all schedules, exhibits, attachments and annexures to it.

**Downstream Independent Certifier Contracts** means:

- (a) the Sub-Independent Certifier Deed;
- (b) the D&C Subcontract;
- (c) the Operator Subcontract; and
- (d) the other contracts (if any) set out in the Contract Particulars.

**Downstream Independent Certifier Functions** mean the functions, powers and obligations of the Independent Certifier under the Downstream Independent Certifier Contracts.

**Downstream Parties** means:

- (a) the D&C Subcontractor;
- (b) the Operator; and
- (c) the other parties (if any) set out in the Contract Particulars.

**Expiry Date** means the date which is the earlier of:

- (a) the end of the Term; and
- (b) termination of this Deed in accordance with clause 17.

**Fee** means the sum of the Initial Fee and the Monthly Fees as adjusted from time to time in accordance with clause 10 and the Payment Schedule.

**Independent Certifier's Representative** means the person named in the Contract Particulars or any other person appointed from time to time by the Independent Certifier, with the approval of the Project Parties to replace that person.

**Initial Fee** means the lump sum amount payable to the Independent Certifier for the performance of the Services during the Initial Period as set out in the Payment Schedule.

**Initial Period** is the first (insert) months of the Term commencing on the Commencement Date.

**Key People** means the people identified as such in the Contract Particulars.

**Lump Sum** means each amount specified as such in section 9 of the Payment Schedule, as adjusted from time to time in accordance with the Payment Schedule.

**Monthly Fee** means the amount payable to the Independent Certifier for the performance of the Services in respect of a month after the Initial Period in accordance with the Payment Schedule.

**Monthly Fee Estimate** means the estimated Fees payable to the Independent Certifier for the performance of the Services for the relevant month as adjusted from time to time in accordance with clause 11.1(b) and the Payment Schedule.

**Payment Schedule** means Schedule 3.

**Project Deed** means the document entitled *New Grafton Correctional Centre – Project Deed* between the State and Project Co dated on or about the date of this Deed.

**Project Parties** means the State and Project Co.

**Project Parties' Representatives** means, in respect of each of the State and Project Co, the person named in the Contract Particulars or any other person appointed from time to time by notice in writing from the relevant Project Party to the Independent Certifier and the other Project Party to replace that person.

**Quarter** means:

- (a) the period from the end of the Initial Period until the day before the next Quarterly Date;
- (b) each 3 month period commencing on a Quarterly Date; and
- (c) the period from the last Quarterly Date during the Term until the Expiry Date.

**Quarterly Date** means every 3 January, 1 April, 1 July and 1 October during the Term.

**Resource Adjustment** is an adjustment in the level of resources which are required from the Independent Certifier to perform the Services.

**Resource Adjustment Order** is the document issued by the Project Parties in accordance with section 11.5 or 11.6(a)(i) of the Payment Schedule.

**Schedule of Rates** means the schedule of rates and prices set out in section 9 of the Payment Schedule as adjusted from time to time in accordance with the Payment Schedule.

**Services** means:

- (a) all of the functions conferred on the Independent Certifier under this Deed (including in the Services Schedule), the State Project Documents or the Downstream Independent Certifier Contracts, as varied in accordance with clause 11 or in accordance with terms of the Downstream Independent Certifier Contracts;
- (b) all other things or tasks which the Independent Certifier must do to comply with its obligations under this Deed, the State Project Documents or the Downstream Independent Certifier Contracts; and
- (c) without limiting paragraph (b), all other things and tasks not described in this Deed, the State Project Documents or the Downstream Independent Certifier Contracts if those things and tasks should have been reasonably anticipated by an experienced and expert professional provider of similar services as being necessary for the performance of those things or tasks or which are otherwise capable of inference from this Deed, the State Project Documents or the Downstream Independent Certifier Contracts.

**Services Schedule** means Schedule 2.

**State** means:

- (a) The Minister for Corrections on behalf of the Crown in right of the State of New South Wales;
- (b) Infrastructure New South Wales (ABN 85 031 302 510); and
- (c) for the purposes of the Project Deed and the Operator Side Deed only, the Commissioner of Corrective Services.

**Substitute Certifier** has the meaning given in clause 11.2(a).

**Term** means the period from the Commencement Date to the date one month after the expiry of the Delivery Phase or such later date as agreed by the parties.

**Transition Out Period** means the period 24 months prior to the end of the Term.

**Transition Out Plan** means a plan prepared by the Independent Certifier to meet its obligations in accordance with clause 13 which is in a form agreed by the Project Parties, in accordance with clause 13.

**Upstream Independent Certifier Contracts** means:

- (a) this Deed;
- (b) the Project Deed; and
- (c) the other contracts (if any) set out in the Contract Particulars.

**Upstream Independent Certifier Functions** means the functions, powers and obligations of the Independent Certifier under the Upstream Independent Certifier Contracts.

### 1.3 Interpretation

In this Deed:

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

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;
- (c) **(Deed and Schedule references)**: a reference to:
  - (i) a party, clause, Schedule, Exhibit, Attachment or Annexure is a reference to a party, clause, Schedule, Exhibit, Attachment or Annexure of or to this Deed; and
  - (ii) a section is a reference to a section of a Schedule.
- (d) **(document as amended)**: a reference to a document, deed, agreement or instrument, or a provision of any such document, deed, agreement or instrument, includes a reference to that document, deed, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a body politic, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust.
- (g) **(legislation)**: a reference to legislation includes its delegated legislation, and a reference to that legislation or delegated legislation, or a provision of either, includes consolidations, amendments, re-enactments and replacements and all ordinances, by-laws, regulations and other statutory instruments (however described) issued under it;
- (h) **(Policies)**: a reference to a Policy includes that Policy as amended or updated from time to time;

- (i) **(definitions)** if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) **(“includes”)** ‘includes’ and ‘including’ will be read as if followed by the phrase ‘(without limitation)’;
- (k) **(“or”)** the meaning of ‘or’ will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) **(Information)** a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (m) **(“\$”)** a reference to ‘\$’, AUD or dollar is to Australian currency;
- (n) **(Business Day)** if the day on or by which anything is to be done under this Deed is not a Business Day, that thing must be done no later than the next Business Day;
- (o) **(day)**, except as otherwise provided in this Deed or where a reference is made to ‘Business Days’ day means a calendar day;
- (p) **(time)** a reference to time is a reference to time in Sydney, Australia;
- (q) **(rights)** a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (r) **(function)** a function includes a power, authority or duty;
- (s) **(obligations and liabilities)** a reference to an obligation or a Liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (t) **(“may”)** except to the extent that the State is expressly required under this Deed to act reasonably in exercising a power, right or remedy, the term ‘may’, when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion (and without regard to Project Co or the Independent Certifier) and the State has no obligation to do so;
- (u) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
  - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
  - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity.
- (v) **(asset)**: references to an asset include any real or personal, present or future, tangible or intangible, property or asset (including intellectual property) and any right, interest, revenue or benefit in, under or derived, from the property or asset;
- (w) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision; and
- (x) **(Delivery Phase Program)**: a reference to the Delivery Phase Program is a reference to the most recent Delivery Phase Program that has been reviewed and not rejected in accordance with the Review Procedures;

#### 1.4 Business Day

If the day on or by which anything is to be done in accordance with this Deed is not a Business Day, that thing must be done:

- (a) **(payments)** if it involves a payment other than a payment which is due on demand, on the preceding Business Day; or
- (b) **(otherwise)** in all other cases, no later than the next Business Day

**1.5 Joint and several Liability of Independent Certifier**

If the Independent Certifier comprises more than one person:

- (a) the obligations of those persons are joint and several, and
- (b) each Project Party may proceed against any or all of them for any failure of the Independent Certifier to comply with any obligation in accordance with this Deed or otherwise.

**1.6 Several Liability of the Project Parties**

If a provision of this Deed binds the Project Parties, that provision binds each of the Project Parties severally and not jointly and severally.

**1.7 Relationship of the parties**

- (a) **(No partnership or joint venture):** The relationship between and among the Project Parties to this Deed will not be that of partners or joint venturers and nothing in this Deed will be deemed to constitute a partnership or joint venture among them and no party will have authority or power to act unilaterally as agent for the other.
- (b) **(The Independent Certifier):** The Independent Certifier is acting as an independent contractor for the Project Parties and therefore the Independent Certifier is not authorised to enter into any binding obligations on behalf of the Project Parties.
- (c) **(No relationship):** Unless otherwise expressly provided, this Deed does not
  - (i) create a partnership, joint venture or fiduciary relationship between the parties to this Deed; or
  - (ii) impose any duty of good faith on the State.

**1.8 Approvals, directions and notices in writing**

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

**1.9 State's rights and obligations**

- (a) **(Acknowledgements):** The parties do acknowledge the substance, operation and potential effect and consequences of clause 2.10 (State's executive rights duties and functions) of the Project Deed in relation to this Deed.
- (b) **(No Claim):** Subject to clause 1.9(c), Project Co and the Independent Certifier will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (c) **(Liability for breach):** Clauses 1.9(a) and 1.9(b) do not limit any Liability which the State would have had to Project Co or the Independent Certifier under any State Project Document as a result of a breach by the State of a term of any State Project Document, but for these clauses.

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**2. Conditions precedent****2.1 Conditions precedent**

The rights and obligations of the parties under this Deed will not commence until the later of:

- (a) the date of execution of this Deed by all parties to this Deed; and
  - (b) the date of execution of the Project Deed by all parties to the Project Deed.
- (Commencement Date).**

## 2.2 Failure to achieve Financial Close

- (a) **(Failure to achieve Financial Close):** If the Project Parties do not achieve Financial Close by the Condition Precedent Deadline, then the Project Parties may, at their option, terminate this Deed by notice to the Independent Certifier.
- (b) **(Independent Certifier's rights on termination):** Where this Deed is terminated in accordance with this clause 2.2, then, notwithstanding clause 12.7:
- (i) the Independent Certifier will only be entitled to be paid the proportion of the Fee for the Services performed up to the date of termination in accordance with the Payment Schedule; and
  - (ii) the Independent Certifier will not otherwise be entitled to bring any Claim against the Project Parties arising out of or in connection with:
    - (A) the termination of this Deed; or
    - (B) the Project, the State Project Documents or the Downstream Independent Certifier Contracts.

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## 3. General obligations of the Independent Certifier

### 3.1 Appointment

- (a) **(Appointment):** Each of the Project Parties appoint the Independent Certifier under this Deed to perform the Services for the benefit of each of the Project Parties.
- (b) **(Acceptance of appointment):** The Independent Certifier confirms its acceptance of the appointment.

### 3.2 Services

The Independent Certifier must carry out the Services in accordance with this Deed for the Term.

### 3.3 Effect of Services Schedule

The Project Parties and the Independent Certifier acknowledge that the Services Schedule:

- (a) is indicative only;
- (b) is not intended to be a complete description of the Services;
- (c) does not limit or otherwise affect the Services or the performance of the Services; and
- (d) cannot be used as an aid to interpretation of the Services.

### 3.4 Warranties

The Independent Certifier represents and warrants to the Project Parties that:

- (a) **(status):** it is a corporation as that expression is defined in the Corporations Act having limited liability, incorporated (or taken to be incorporated) or registered and validly existing under the Corporations Act;
- (b) **(power):** it has the corporate power to own its assets and to carry on its business as it is now being conducted;
- (c) **(authority):** it has full power and authority to enter into and perform its obligations under this Deed;
- (d) **(corporate authorisations):** it has taken all necessary action to authorise the execution, delivery and performance of this Deed;
- (e) **(document binding):** this Deed constitutes its legal, valid and binding obligations and, subject to any necessary stamping and registration, is enforceable in accordance with its terms;
- (f) **(no contravention):** the execution, delivery and performance by it of this Deed does not and will not violate, breach, or result in a contravention of:
  - (i) any Law;



- (f) its constitution or other constituent documents; or
- (g) any encumbrance or document which is binding on L or any of its assets;
- (g) **(licences):** it and its relevant personnel possess all relevant and necessary licences to perform the Services and they will hold such licences, to the extent required by Law, until completion of the Services or earlier termination of this Deed;
- (h) **(no misrepresentations):** the information provided by it in connection with this Deed is true, accurate and complete in all material respects and not misleading in any material respect (including by omission);
- (i) **(no immunity):** it does not (in any capacity) have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution or otherwise); and
- (j) **(litigation):** no litigation, arbitration, tax claim, dispute or administrative or other proceeding has been commenced or threatened against it which is likely to have a material adverse effect upon its ability to perform the Services.

Except as otherwise provided, each representation and warranty contained in this Deed is made on the date of this Deed and will be deemed to be repeated immediately before each notice or certificate is issued by the Independent Certifier under the Project Documents with reference to the facts and circumstances then subsisting.

### 3.5 Initial Delivery Phase Program

The Independent Certifier acknowledges and agrees that:

- (a) it has received and reviewed the Initial Delivery Phase Program;
- (b) the sequencing and logic of the activities between Technical Completion and Commercial Acceptance shown in the Initial Delivery Phase Program constitute part of the critical path contained and shown in the Initial Delivery Phase Program, such that a delay in achieving Technical Completion will cause an equivalent day for day delay to the achievement of Commercial Acceptance;
- (c) any determination by it will be made consistent with clause 3.5(p) except to the extent any updated Delivery Phase Program amends the logic or sequencing of the activities to be performed between Technical Completion and Commercial Acceptance; and
- (d) in considering any updated Delivery Phase Program, it will (exercising the standard of skill, care and diligence expected of it under this Deed) advise Project Co in writing:
  - (i) whether there has been a change to the sequencing or logic of the activities between Technical Completion and Commercial Acceptance; and
  - (ii) if so, whether or not the sequencing and logic of the activities between Technical Completion and Commercial Acceptance shown in the updated Delivery Phase Program constitute part of the critical path contained and shown in the updated Delivery Phase Program (and, if not, it will provide reasons for its opinion).

---

## 4. Various functions of the Independent Certifier

- (a) **(Independent Certifier):** This clause 4 only applies if the Independent Certifier undertaking the Upstream Independent Certifier Functions is the same entity undertaking the Downstream Independent Certifier Functions.
- (b) **(Upstream Independent Certifier Functions paramount):** The Project Parties and the Independent Certifier acknowledge and agree that the Upstream Independent Certifier Functions represent the paramount role of the Independent Certifier, with the intent that:
  - (i) if there is any ambiguity, conflict, discrepancy or inconsistency between any Upstream Independent Certifier Functions and any Downstream Independent Certifier Functions, the Upstream Independent Certifier Functions will prevail as between the parties to this Deed;

- (ii) neither the existence nor the terms of a Downstream Independent Certifier Function nor the exercise, failure to exercise or manner of exercise of a Downstream Independent Certifier Function will be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of, an Upstream Independent Certifier Function; and
- (ii) neither:
  - (A) the receipt by the Independent Certifier of any notice, claim, plan, program, report, manual, model or any other document or information nor the giving of any notice, the making of any comment or any other act or omission by the Independent Certifier arising in connection with a Downstream Independent Certifier Function; nor
  - (B) the existence or performance of any function by, any consultation with, or provision of any notice, report, certificate, comment or any other document or information to, the Independent Certifier by any other reviewer, certifier, engineer, advisor or other consultant engaged by any party other than the State,
 will:
  - (C) give rise to any obligation on the part of the Independent Certifier to exercise (or exercise) in a particular manner) any Upstream Independent Certifier Function;
  - (D) relieve Project Co from the giving of any notice, claim, plan, program, report, manual, model or any other document or information or the doing of any other thing in respect of an Upstream Independent Certifier Function in order to give rise to any obligation on the part of the Independent Certifier to exercise that Upstream Independent Certifier Function; or
  - (E) be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of, an Upstream Independent Certifier Function.
- (c) **(State approval and consent):** The Project Parties and the Independent Certifier acknowledge and agree that:
  - (i) the Independent Certifier may not exercise any function or enter into any arrangement arising in connection with the Project other than in accordance with this Deed (including in accordance with clause 7.4), unless approved by the State in writing and on such terms approved by the State; and
  - (ii) no Downstream Independent Certifier Function may be varied, altered or amended without the State's consent.
- (d) **(No Liability):** Subject to clause 4(e), to the extent permitted by Law, none of the State, its Associates or the Independent Certifier will have any Liability, nor will Project Co or its Associates be entitled to make, continue or enforce any Claim against, or seek, pursue or obtain an indemnity against or contribution to Liability from the State, any of its Associates or the Independent Certifier, and Project Co indemnifies the State, its Associates and the Independent Certifier in respect of any such Claim a Project Co Associate makes, arising in connection with:
  - (i) any ambiguity, conflict, discrepancy or inconsistency between any Upstream Independent Certifier Functions and any Downstream Independent Certifier Functions; or
  - (ii) subject to clause 9.8:
    - (A) the exercise, failure to exercise or manner of exercise of any Downstream Independent Certifier Function;
    - (B) any act or omission of the Independent Certifier arising in connection with the performance of any Downstream Independent Certifier Function; or

- (f) the giving of any notice, claim, plan, program, report, manual, model or any other document or information, or any other act or omission in respect of any Downstream Independent Certifier Function or any Downstream Independent Certifier Contract.
- (e) **(No exclusion of Liability):** For the avoidance of doubt, clause 4(d) will not operate to exclude the Independent Certifier's Liability with respect to:
- (i) a failure by the Independent Certifier to comply with clause 4(g), or
  - (ii) any matter for which the Independent Certifier has provided an indemnity in accordance with clause 9.8.
- (f) **(Duty of care to Project Parties):** The Independent Certifier acknowledges that it owes a duty of care to the Project Parties when performing the Downstream Independent Certifier Functions.
- (g) **(Obligations when performing downstream functions):** The Independent Certifier warrants to the Project Parties that, in performing the Downstream Independent Certifier Functions, it will:
- (i) comply with all Laws, act honestly, diligently, reasonably and with the degree of professional care, knowledge, experience and skill which would be expected of an expert professional providing services similar to the Services for projects similar to the Project;
  - (ii) at all times, act within the time requirements for the performance of its obligations both as:
    - (A) Independent Certifier in accordance with this Deed and the State Project Documents; and
    - (B) Independent Certifier when performing any Downstream Independent Certifier Function which has an equivalent Upstream Independent Certifier Function;
  - (iii) at all times act independently of the relevant Downstream Parties and all other parties to the Downstream Independent Certifier Contracts;
  - (iv) ensure that the performance of any Downstream Independent Certifier Function does not give rise to any (or the possibility of any) conflict of interest;
  - (v) ensure that it does not otherwise compromise its ability to perform the Upstream Independent Certifier Functions in accordance with this Deed;
  - (vi) when performing the Downstream Independent Certifier Functions, provide to the State copies of all written communications and details of all non-written communications with the Downstream Parties and consult with and provide all further information required by the State in connection with those communications;
  - (vii) otherwise comply with any reasonable requirements of the State for the purposes of the warranties set out in this clause 4(g), and
  - (viii) use and apply the same methodology that it uses and applies in performing the Upstream Independent Certifier Functions.
- (h) **(Fee payable solely for Services):** The Project Parties and the Independent Certifier acknowledge and agree that the Fee payable in accordance with this Deed will be payable solely for, and will relate solely to, the performance of the Services and will not be payable for or relate to any Downstream Independent Certifier Functions, which will be separately payable.
- (i) **(Delegation of risks, liabilities, obligations and responsibilities):** Any express or implied delegation of risks, liabilities, obligations or responsibilities by Project Co and its respective Associates, whether in a Downstream Independent Certifier Contract or otherwise, does not constitute approval of such delegation by the State or in any way limit or derogate from the scope of Project Co's obligations in accordance with the State Project Documents or this Deed or affect in any way the obligations of the Independent Certifier in accordance with the State Project Documents or this Deed. References to

risks, liabilities, obligations or responsibilities assumed or accepted or acknowledgements given by any such entity or Associate in relation to any such delegation will be construed as assumed or accepted or given (as applicable) by Project Co in accordance with the State Project Documents.

- (j) **(No effect on Upstream Independent Certifier Functions):** Reference in a Downstream Independent Certifier Contract to the performance of a function by the Independent Certifier under any Downstream Independent Certifier Contract, or the provision to or receipt by the Independent Certifier of a document, certificate or notice from any Downstream Party (in its capacity as Independent Certifier), does not in any way affect the functions of the Independent Certifier under the State Project Documents or this Deed.

## 5. Performance by Independent Certifier

### 5.1 Standard of care

The Independent Certifier must exercise the standard of skill, care and diligence in the performance of the Services that would be expected of an expert professional provider of the Services experienced in providing services similar to the Services for projects similar to the Project.

### 5.2 Duty to act honestly, professionally and independently

The Independent Certifier must, in performing the Services act honestly, professionally and independently of the Project Parties and the Downstream Parties and their respective contractors, suppliers and consultants.

### 5.3 Time requirements

The Independent Certifier must perform the Services:

- (a) within the time limits specified in this Deed and the State Project Documents; and
- (b) where no time limit is specified, within a reasonable time.

### 5.4 Conflict of interest

(a) **(Warranty):** The Independent Certifier warrants that:

- (i) as at the date of this Deed, no conflict of interest arises out of its engagement by the Project Parties under this Deed; and
- (ii) if during the term of this Deed, it becomes aware of the existence or possibility of a conflict of interest, it will:
  - (A) immediately notify the Project Parties of that conflict of interest or possible conflict of interest; and
  - (B) take such steps to avoid or mitigate the conflict of interest or possible conflict of interest as the Project Parties may reasonably require.

(b) **(Prior approval):** The Independent Certifier must not exercise any function nor enter into any arrangement arising out of or in respect of or in connection with the Project other than in accordance with this Deed unless approved, in writing, by the Project Parties and on such terms as are approved by the State.

### 5.5 Communications with Project Parties

The Independent Certifier must ensure that a copy of each written communication between the Independent Certifier and a Project Party which relates to the Project or this Deed is promptly given to the other Project Party.

### 5.6 No authority to give directions or waive requirements

The Independent Certifier has no authority to:

- (a) give directions to the Project Parties or the Downstream Parties, other than as may (if at all) be expressly set out in this Deed or the State Project Documents;

- (b) waive or vary any requirements of the State Project Documents or a Downstream Independent Certifier Contract; or
- (c) discharge or release a party from any of its obligations under the State Project Documents.

### 5.7 Acknowledgement of reliance

The Independent Certifier acknowledges that each Project Party and each Downstream Party:

- (a) is entitled to, and will rely on:
  - (i) the skill and expertise of the Independent Certifier in the performance of the Services; and
  - (ii) any certificate signed or given by the Independent Certifier under the State Project Documents; and
- (b) may suffer Liability if the Independent Certifier does not perform the Services in accordance with the requirements of this Deed.

### 5.8 Knowledge of Project Parties' requirements

The Independent Certifier warrants that

- (a) it has informed itself of the requirements of the State Project Documents and the Downstream Independent Certifier Contracts insofar as they relate to the Services;
- (b) without limiting clause 5.5(a), it has informed itself of all time limits and other requirements for any function which the Independent Certifier must perform in accordance with the State Project Documents and the Downstream Independent Certifier Contracts;
- (c) it has informed itself of the nature of the work necessary for the performance of the Services and (to the maximum extent possible) the means of access to and facilities within the Site, including any restrictions on any such access; and
- (d) it has satisfied itself as to the sufficiency of the Fee having regard to the costs which it will incur in complying with its obligations in accordance with this Deed.

### 5.9 Co-ordination and co-operation

The Independent Certifier must, in performing the Services:

- (a) co-operate with the Project Parties and the Downstream Parties and their respective contractors, suppliers and consultants;
- (b) co-ordinate the Services with the work to be performed by the Project Parties and the Downstream Parties, and their respective contractors, suppliers and consultants; and
- (c) avoid any unnecessary interference, disruption or delay to the work to be performed by the Project Parties and the Downstream Parties and their respective contractors, suppliers and consultants.

### 5.10 Personnel

The Independent Certifier must provide sufficient numbers of experienced and competent personnel to perform its obligations in accordance with this Deed within the timeframes specified in this Deed, in the State Project Documents and in the Downstream Independent Certifier Contracts.

### 5.11 Key People

Without limiting its obligations in accordance with clause 5.10, the Independent Certifier must:

- (a) ensure that the Key People perform the functions specified in the Contract Particulars and, unless reasonably directed otherwise by the Project Parties, ensure that they are committed and available to the Project as required to fulfil the requirements of this Deed and the State Project Documents;
- (b) subject to clause 5.11(c), not remove the Key People without the prior consent of the Project Parties (which must not be unreasonably withheld or delayed);

- (c) use its best endeavours to ensure that none of the Key People resign or otherwise become unavailable to perform their functions as required by clause 5.11(a);
- (d) without limiting clause 5.11(a) and in relation to any Key People who resign or otherwise become or may become unavailable to perform their functions as required by clause 5.11(a) (whether temporarily or permanently), notify the Project Parties accordingly including advising the Project Parties of the way in which the Independent Certifier proposes to address the unavailability of any such Key People;
- (e) if any of the Key People are removed, die, become seriously ill or resign, subject to the approval of the Project Parties, replace them as soon as practicable with persons of at least equivalent skill and experience; and
- (f) ensure that the Key People are from time to time available for consultation with a Project Party as often as that Project Party may reasonably require.

### 5.12 Independent Certifier's Representative

The Independent Certifier:

- (a) has nominated the Independent Certifier's Representative as the person to act as its representative for the Services;
- (b) may from time to time, nominate another person to act as the Independent Certifier's Representative, subject to the Project Parties' approval (in their sole and absolute discretion and with no obligation to do so), in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) confirms that the Independent Certifier's Representative has the power and authority to bind the Independent Certifier.

### 5.13 Subcontracting

The Independent Certifier:

- (a) may not subcontract the performance of any of its Services without the prior written consent (which consent may be granted subject to conditions) of each Project Party; and
- (b) remains responsible for the performance of the Services in accordance with this Deed, notwithstanding any such subcontracting.

## 6. Role of the Project Parties

### 6.1 No interference or influence

- (a) **(No interference or influence):** A Project Party must not interfere with, or attempt to influence, the Independent Certifier in the performance of any of the Services. A communication allowed by this Deed or the Project Deed will not, however, of itself constitute a breach of this clause 6.1(a);
- (b) **(Project Parties may provide comments):** Clause 6.1(a) will not prevent a Project Party from providing written comments to the Independent Certifier in respect of any aspect of the Project Activities.

### 6.2 Provision of information

Project Co must, as soon as practicable, ensure that the Independent Certifier is provided with all information, assistance, documentation, models and particulars as the Independent Certifier reasonably requests:

- (a) relating to the Services;
- (b) required under the State Project Documents and the Downstream Independent Certifier Contracts to be provided to the Independent Certifier; and
- (c) to enable it to perform the Services effectively and otherwise in accordance with the State Project Documents, the Downstream Independent Certifier Contracts and this Deed.

### 6.3 Access to records and systems

Without limiting the obligations of Project Co under the State Project Documents or clause 6.2, Project Co must provide the Independent Certifier with such information and documentation (including all Design Deliverables) and access to Project Co's books, records and systems as the Independent Certifier may reasonably require to enable it to perform the Services effectively and otherwise in accordance with this Deed and the State Project Documents. Nothing in this clause 6.3 will be construed as a waiver of legal professional privilege.

### 6.4 Access to premises

Project Co must ensure that the Independent Certifier is given such access to any place where any part of the Project Activities are being carried out (including access to the premises of its contractors, suppliers and consultants) and all necessary assistance as is required to enable the Independent Certifier to perform the Services effectively and in accordance with the requirements of this Deed, the State Project Documents and the Downstream Independent Certifier Contracts.

### 6.5 Right to enter, inspect and test

- (a) **(Right of entry)** Subject to clause 6.5(b), the Independent Certifier (or any person authorised by the Independent Certifier) may during Business Hours or upon giving reasonable notice to Project Co (except in the case of an emergency when no notice is required) enter the Site or the offices of Project Co to:
- (i) inspect, observe or test any part of the Relevant Infrastructure or the Project Activities (whether or not such inspections, observations or tests are otherwise required in accordance with this Deed);
  - (ii) exercise any right or carry out any obligation which the Independent Certifier has in accordance with any State Project Document; or
  - (iii) take such other action as the Independent Certifier considers necessary to exercise its rights in accordance with this Deed and to discharge its duties, powers and obligations.
- (b) **(Conditions of access):** When entering the Site in accordance with clause 6.5(a), the Independent Certifier must and must ensure any authorised person:
- (i) complies with the Site Access and Interface Protocols;
  - (ii) does not unnecessarily interfere with the carrying out of the Project Activities; and
  - (iii) does not damage the Relevant Infrastructure or the Site.
- (c) **(Project Co to assist):** If requested by the Independent Certifier, Project Co must assist the Independent Certifier in connection with any inspection or testing in accordance with this clause 6.5, including:
- (i) providing access to such part of the Relevant Infrastructure and all Project Co Materials as may be required by the Independent Certifier;
  - (ii) preparing samples of materials used in connection with the Relevant Infrastructure as required by the Independent Certifier; and
  - (iii) forwarding the samples prepared in accordance with clause 6.5(c)(ii) to the Independent Certifier or such other place or person notified by the Independent Certifier.

### 6.6 Meetings

The Project Parties must:

- (a) allow the Independent Certifier to attend design meetings; and
- (b) attend such meetings with the Independent Certifier as the Independent Certifier may reasonably request to enable it to perform the Services effectively and otherwise in accordance with this Deed.

## 6.7 Co-operation

Project Co must and must ensure that each Downstream Party and Project Co's contractors, suppliers and consultants co-operate with the Independent Certifier during the carrying out of the Services.

## 6.8 Project Parties not liable

At no time will a Project Party be liable to the other Project Party or its Associates for any act or omission by the Independent Certifier whether or not in accordance with or purportedly in accordance with a provision of this Deed, the State Project Documents or otherwise.

# 7. Reporting and meetings

## 7.1 Progress reports

The Independent Certifier must submit a written report to each Project Party:

- (a) 2 Business Days before each meeting of the Project Control Group in accordance with clause 10.8 of the Project Deed
- (b) in such form as the Project Parties may reasonably require; and
- (c) containing details of:
  - (i) Project Co's compliance (and details of any non-compliances) with the State Project Documents
  - (ii) the results of the review of the Design Deliverables in accordance with clause 16.1 (*Delivery Phase Plans and Reports*) of the Project Deed;
  - (iii) the results of the review of the Delivery Phase Program in accordance with clause 16.2 (*Delivery Phase Program*) of the Project Deed;
  - (iv) the results of review of construction of the Works in accordance with clause 19.4 (*Corrective Action Plan*) of the Project Deed
  - (v) any Delivery Phase Plans, Delivery Phase Reports, Operating Phase Plans, Operating Phase Reports, notices and other information and documentation and the results of any review of those documents or that information received from Project Co in accordance with the State Project Documents;
  - (vi) the results of any review of the operation of the quality system developed and implemented by Project Co or a Key Subcontractor and any review and assessment of the quality of the Project Activities in accordance with the State Project Documents.
  - (vii) any determination in accordance with clause 38.5 (*Extension of time and relief determined by Independent Certifier*) of the Project Deed.
  - (viii) any notices given by a Project Party to the Independent Certifier and any notices issued by the Independent Certifier.
  - (ix) progress of Project Co to Completion including the status of any Defects and the rectification of any Defects;
  - (x) the forecast cost of the Services (including for the current and following Quarter), taking into account current expenditure, resourcing and future forecasts;
  - (xi) notification of reports requested by one Project Party in accordance with clause 7.4;
  - (xii) relevant details in relation to the performance of any Downstream Independent Certifier Functions; and
  - (xiii) such other matters in respect of the Services as the Project Parties (acting jointly) may reasonably request from time to time



## 7.2 Project Control Group

- (a) **(Establishment)** The Project Control Group will be established in accordance with clause 10.8 *(Project Control Group)* of the Project Deed.
- (b) **(The Independent Certifier's obligations):** The Independent Certifier must:
- (i) attend each meeting of the Project Control Group, if requested by the State; and
  - (ii) present and explain each progress report prepared in accordance with clause 7.1 at the relevant meeting.

## 7.3 Meetings with Project Parties

The Independent Certifier must attend, and ensure that all relevant Key People attend, meetings with the Project Parties monthly during the Term or as otherwise agreed by the parties, to discuss the progress of the Services.

## 7.4 Reports requested by one Project Party

- (a) **(Request by one Project Party):** A Project Party may request the Independent Certifier to prepare an additional report which is not otherwise required by the State Project Documents.
- (b) **(Independent Certifier to prepare report):** The Independent Certifier must prepare the additional report as requested in accordance with clause 7.4(a), except where the Independent Certifier is:
- (i) of the reasonable opinion that it would be inappropriate to prepare such a report in light of the performance and nature of the Services; or
  - (ii) not reasonably capable of preparing such a report.
- (c) **(Cost of reports):** The cost of additional reports prepared in accordance with this clause 7.4 will be paid to the Independent Certifier in accordance with the Payment Schedule.

## 7.5 Questions relating to a report

- (a) **(Project Parties may submit questions):** Without limiting clauses 6.1(b) or 7.2(b)(ii), a Project Party may submit questions or queries to the Independent Certifier in relation to a report issued in accordance with clause 7.1.
- (b) **(Independent Certifier to respond):** Subject to clause 5.5, the Independent Certifier must, within a reasonable period having regard to the nature of the question or query, respond in writing to questions and queries submitted by a Project Party in accordance with this clause 7.5.

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## B. Quality

### 8.1 Quality assurance system

The Independent Certifier must:

- (a) **(plan and develop):** plan, develop and implement a quality assurance system which meets the requirements of the relevant AS/NZS ISO Standards as and when they are published;
- (b) **(operate and maintain):** develop, operate and maintain a quality assurance plan that sets out all activities the Independent Certifier will carry out in order to implement its quality assurance system referred to in clause 8.1(a); and
- (c) **(provide Project Party Representative):** within 14 days of the date of this Deed, provide the Project Parties' Representative(s) with details of the quality assurance system which complies with clause 8.1(a) and which the Independent Certifier proposes to adopt.

### 8.2 Audit

- (a) **(Independent Certifier must allow audits):** The Independent Certifier must:

- (i) allow any audit of its quality assurance system in accordance with this Deed by a Project Party or a third party appointed by the Project Parties, at the request of a Project Party and at the cost of that Project Party; and
  - (ii) fully co-operate with that third party in respect of the carrying out of the quality assurance audit.
- (b) **(Access to premises and Information):** Without limiting clause 6.3, 6.4, 6.5 or 8.2(a), the Independent Certifier must, at all times:
- (i) give to the Project Parties or the third party appointed by the Project Parties (as the case may be) access to premises occupied by the Independent Certifier where the Services are being undertaken; and
  - (ii) permit the Project Parties or the third party appointed by the Project Parties to inspect applicable information relevant to the quality assurance audit.

### 8.3 Quality assurance not to relieve Independent Certifier

The Independent Certifier will not be relieved of any responsibilities or obligations in accordance with this Deed as a result of:

- (a) compliance with the requirements of this clause 8.1;
- (b) any acts or omissions of the Project Parties with respect to the requirements of this clause 8, including:
  - (i) any review of, comments upon, or notice in respect of, the quality assurance system; and
  - (ii) any audit in accordance with clause 8.2.

### 8.4 Non-complying services

The Independent Certifier must at its cost:

- (a) unless directed otherwise by the Project Parties, re-perform all Services which have not been performed in accordance with this Deed; and
- (b) take all such steps as may be reasonably necessary to:
  - (i) mitigate the effect on the Project Parties of the failure to perform the Services in accordance with this Deed; and
  - (ii) put the Project Parties (as closely as possible) in the positions in which they would have been had the Independent Certifier performed the Services in accordance with this Deed, including all such steps as may be reasonably directed by the Project Parties.

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## 9. Liability, insurance and indemnity

### 9.1 Limitation of Liability

Subject to clause 9.2, the Independent Certifier's total Liability under all Claims which the Project Parties might have (whether jointly or severally) against the Independent Certifier:

- (a) arising in connection with this Deed;
- (b) arising in connection with the Upstream Independent Certifier Functions; or
- (c) otherwise at Law or in equity including:
  - (i) any statute (insofar as it is possible to exclude such Liability); or
  - (ii) in tort for negligence or otherwise, including negligent misrepresentation.

in respect of any fact, matter or thing under, arising in connection with the Upstream Independent Certifier Functions or Upstream Independent Certifier Contracts will be limited in aggregate to the greater of:

- (d) the amount specified in the Contract Particulars; or

- (e) to the extent that the Liability is the subject of an indemnity under any policy of insurance, the amount of any such indemnity limit.

## 9.2 Exclusions

The limitation of Liability in clause 9.1 does not apply to any Claims arising in connection with any of the following on the part of the Independent Certifier or anyone for whom it is responsible:

- (a) criminal acts or fraud;
- (b) any conduct, act or omission done or to be done by the Independent Certifier or any officer, agent, adviser, consultant, contractor, subcontractor or employee of the Independent Certifier which results in death, personal injury or damage to property;
- (c) wilful misconduct, being any conduct, act or omission done or to be done by the Independent Certifier or any officer, agent, adviser, consultant, contractor, subcontractor or employee of the Independent Certifier which results from conscious, intentional or reckless disregard of any provision of this Deed or the rights or welfare of those who are or may be affected by that conduct, act or omission;
- (d) gross negligence, being any negligent act or omission which the Independent Certifier knew, or ought reasonably to have been aware, would result in substantial losses being incurred by a Project Party; or
- (e) abandonment of all or any material part of the Upstream Independent Certifier Functions.

## 9.3 Insurances

- (a) **(Insurances):** The Independent Certifier must hold and maintain from the Commencement Date:
  - (i) **(public liability insurance):** public liability insurance:
    - (A) endorsed to include the Project Parties as named insureds in respect of any Liability the Project Parties may incur arising in connection with the acts or omissions of the Independent Certifier;
    - (B) covering, without limitation, the Independent Certifier's Liability in accordance with clause 9.8;
    - (C) with a limit of indemnity of not less than the amount specified in the Contract Particulars; and
    - (D) with a deductible of not more than the amount specified in the Contract Particulars; and
  - (ii) **(professional indemnity insurance):** project specific professional indemnity insurance which:
    - (A) has a limit of indemnity of not less than the amount specified in the Contract Particulars for any single claim in respect of legal Liability (including, without limitation, in connection with property damage, personal injury or death) arising in connection with a breach of clause 4 or any other breach of professional duty, whether owed in contract or otherwise, by reason of any negligent act, error or omission by the Independent Certifier or its employees, agents or consultants;
    - (B) has a deductible of not more than the amount specified in the Contract Particulars; and
    - (C) has a retroactive date which is the Commencement Date,
 which complies with the requirements for insurances set out in clause 9.3(b) (as applicable); and
  - (iii) **(workers' compensation insurance):** workers' compensation insurance against any Liability, whether in accordance with statute or at common law, for the death of, or injury to, persons employed by the Independent Certifier, or if the Independent Certifier is comprised of more than one party the persons employed by each such party in carrying out the Services.

- (b) **(Requirements for insurance):**
- (i) The insurances referred to in clauses 9.3(a)(i) and 9.3(a)(ii) must be effected with Reputable Insurers and be on such terms as are approved by the State (such approval not to be unreasonably withheld).
  - (ii) If the Independent Certifier comprises more than one person, the insurances referred to in clauses 9.3(a)(i) and 9.3(a)(ii) must (subject always to the overall limit of indemnity not being increased as a result):
    - (A) insure each of those parties both jointly and severally; and
    - (B) include a cross liability clause whereby the insurer agrees
      - (i) to waive all rights of subrogation or action that it may have or acquires against all or any of the persons comprising the insured; and
      - (ii) that the term 'insured' applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them.

#### 9.4 Notice of matter affecting insurance

The Independent Certifier must notify the Project Parties 30 days in advance of any event which could affect its insurance cover or if any policy is cancelled, avoided or allowed to lapse.

#### 9.5 Provision of information

The Independent Certifier must provide to the Project Parties:

- (a) certified copies of the insurance policies (where the Project Parties are included as named insured(s)) and;
- (b) certificates of currency, with respect to the insurances effected and maintained by the Independent Certifier for the purposes of this clause 9, at any time on request by any Project Party and upon the renewal of each policy.

#### 9.6 Periods for insurance

The Independent Certifier must keep:

- (a) the professional indemnity insurance current for a period of 7 years after the cessation of the Services or the date of termination of this Deed, whichever is earlier;
- (b) the employers liability and workers compensation insurance current until it ceases to perform the Services;
- (c) the public liability insurance current until it ceases to perform the Services; and
- (d) any other insurances current for such time as may reasonably be required by the Project Parties.

#### 9.7 Obligations unaffected by insurance

The requirement to effect and maintain insurance in this clause 9 does not limit the Liability or other obligations of the Independent Certifier in accordance with this Deed.

#### 9.8 Indemnity

- (a) **(Breach and negligent act or omission):** Subject to clause 9.5, the Independent Certifier is liable for and must indemnify each Project Party against any Claim or loss brought against, suffered or incurred by a Project Party
  - (i) in connection with:
    - (A) any loss of, or damage or destruction to, property; or
    - (B) any injury to, illness or death of, any person,
 to the extent caused by the Independent Certifier or its officers, directors, employees or contractors; or

- (ii) arising out of, or in connection with, and to the extent caused by:
  - (A) any breach of this Deed by the Independent Certifier, or
  - (B) any fraudulent, negligent, reckless, unlawful or malicious act or omission of the Independent Certifier or its officers, directors, employees or contractors.

(including any Claim brought against a Project Party by another Project Party and any Claim or loss suffered or incurred by a Project Party to another Project Party)
- (iii) **(Reduction in Liability):** The Independent Certifier's liability under this clause 9.8 is reduced proportionally to the extent to which any action, proceeding, claim or demand arises out of any fraudulent, negligent, reckless, unlawful or malicious act or omission of the Project Parties or their employees or agents.
- (c) **(Survival):** All obligations to indemnify under this Deed survive termination of this Deed.

### 9.9 Proportionate Liability

- (a) **(No reduction in insurance covers):** The Independent Certifier must ensure that all policies of insurance against liabilities, which it is required by this Deed to effect or maintain, do not reduce or exclude the insurance cover in respect of liabilities governed by the *Civil Liability Act 2002 (NSW)* or any corresponding legislation of another Australian jurisdiction, by reason of the manner in which that legislation operates or does not operate, as the case may be, in light of any of the provisions of this Deed and the obligations undertaken by the Independent Certifier in connection with it.
- (b) **(Reasonable endeavours):** To the extent that the Insurance is not specific to the Project, the Independent Certifier is only required to use its reasonable endeavours to procure insurance on the terms referred to in clause 9.9(a).

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## 10. Payment

In consideration of the Independent Certifier performing the Services in accordance with this Deed, the State will, subject to clause 7.4, pay to the Independent Certifier the Fee subject to and in accordance with the Payment Schedule.

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## 11. Change to or suspension of Services and appointment of Substitute Certifier

### 11.1 Change to Services

- (a) **(Notice of change to Services):** The Project Parties may, by joint notice to the Independent Certifier, instruct the Independent Certifier to carry out a change to Services (including an addition or omission) which is within the general scope of this Deed. The Independent Certifier must comply with any such instruction. For the avoidance of doubt, a Resource Adjustment is not of itself a change to the Services.
- (b) **(Adjustments to Monthly Fee Estimates):** The relevant Monthly Fee Estimate will be adjusted to reflect the change to the Services referred to in clause 11.1(a) in accordance with the Schedule of Rates. If the adjustment to the relevant Monthly Fee Estimate for the change to the Services cannot be determined by reference to the Schedule of Rates, the adjustment will be a reasonable amount determined by the State and Project Co.

### 11.2 Appointment of Substitute Certifier

- (a) **(Appointment of Substitute Certifier):** The Independent Certifier acknowledges that the Project Parties may appoint another certifier to carry out those Services which are omitted as referred to in clause 11.1(a) (**Substitute Certifier**).
- (b) **(Rights and powers):** The Substitute Certifier will have all of the rights and powers of the Independent Certifier under the Project Documents in connection with those Services.

- (c) **(Decisions):** Any decision of a Substitute Certifier so appointed will be treated (between the Project Parties but not as between the Project Parties and the Independent Certifier) as if it is a decision of the Independent Certifier.
- (d) **(No responsibility for performance):** Without prejudice to any Claim which any Project Party may have in respect of the performance of the Independent Certifier, the Independent Certifier is not responsible for the performance of the Substitute Certifier.

### 11.3 Independent Certifier must continue to perform

Notwithstanding a change to the Services or the appointment of a Substitute Certifier, the Independent Certifier must continue to perform its Services, as changed in accordance with clause 11.1 of this Deed.

### 11.4 Suspension of Services

- (a) **(Notice):** The Project Parties may, by joint notice to the Independent Certifier, instruct the Independent Certifier to suspend and, after a suspension has been instructed, to recommence, the performance of any or all of the Services.
- (b) **(Payment during suspension):** During the period which the Independent Certifier's performance of the Services are suspended in accordance with clause 11.4(a), the State and Project Co will pay the Independent Certifier subject to the provisions of this Deed for the Services that are not suspended (if at all).

### 11.5 Meeting of all Project Parties

- (a) **(Project Party may call meeting):** If a Project Party is of the opinion that the Independent Certifier is not performing its duties in accordance with this Deed, that Project Party may call a meeting of the Project Parties' Representatives who must attend within 2 Business Days (or such other period as requested by that Project Party) to decide an appropriate action to resolve the issue:
  - (i) requesting that the Independent Certifier comply with this Deed;
  - (ii) changing the Services of the Independent Certifier in accordance with clause 11.1 and appointing a Substitute Certifier in accordance with clause 11.2 in connection with the Services which the Independent Certifier is not performing in accordance with this Deed;
  - (iii) suspending the Services of the Independent Certifier in accordance with clause 11.4, or
  - (iv) terminating the appointment of the Independent Certifier in accordance with clause 12.

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## 12. Termination

### 12.1 Notice of default

If the Independent Certifier is in breach of this Deed and the breach is, in the reasonable opinion of the Project Parties, able to be remedied then the Project Parties may jointly give notice to the Independent Certifier:

- (a) specifying the breach, and
- (b) requiring that the breach be remedied within 7 days, or such later date as agreed by the State and Project Co.

### 12.2 Termination for breach

If

- (a) the Independent Certifier is in breach of this Deed and the breach is not, in the reasonable opinion of the Project Parties, able to be remedied; or
- (b) the Project Parties give a notice in accordance with clause 12.1 and the breach is not remedied within the period of time notified to the Independent Certifier in accordance with clause 12.1(b).

If so, subject to clause 12.5, the Project Parties may immediately terminate the appointment of the Independent Certifier by joint notice to the Independent Certifier.

### 12.3 Termination for insolvency

If an Insolvency Event occurs in respect of the Independent Certifier then, subject to clause 12.5, the Project Parties may immediately terminate the appointment of the Independent Certifier by joint notice to the Independent Certifier, whether or not the Independent Certifier is then in breach of this Deed.

### 12.4 Termination for convenience

Subject to clause 12.6, the Project Parties may at any time for their convenience terminate the appointment of the Independent Certifier upon 21 days joint notice to the Independent Certifier, and appoint another person to act as the Independent Certifier.

### 12.5 No automatic termination upon termination of any State Project Document

The appointment of the Independent Certifier does not automatically terminate upon the termination of any of the State Project Documents.

### 12.6 Prior agreement on replacement

Prior to serving a notice in accordance with clause 12.2, 12.3 or 12.4, except where the Project Deed has been terminated, the Project Parties must have agreed upon (or failing agreement, the State having determined) acting reasonably, another person to act as the Independent Certifier.

### 12.7 Independent Certifier's rights upon termination for convenience

Where the appointment of the Independent Certifier is terminated in accordance with clause 12.4:

- (a) the Independent Certifier is only entitled to be paid by the State and Project Co in accordance with the Payment Schedule the proportion of the Fee for Services performed up to the date of the termination; and
- (b) the Independent Certifier will not otherwise be entitled to bring any Claim against the State or Project Co arising in connection with:
  - (i) the termination of this Deed; or
  - (ii) the Project or the State Project Documents.

### 12.8 Termination without prejudice

Termination of the appointment of the Independent Certifier will be without prejudice to any other rights which the Project Parties may have in respect of any breach of the terms of this Deed which occurred prior to the date of termination.

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## 13. Transition out

### 13.1 Transition Out Period

- (a) **(Obligations)**. During the Transition Out Period, the Independent Certifier must:
  - (i) provide the Services required in accordance with, and otherwise comply with, the Transition Out Plan; and
  - (ii) without being limited by clause 13.1(a)(i), cooperate and consult with the Project Parties and do all such tasks and things as may be reasonably necessary to ensure:

- (A) the smooth transition to the Project Parties of the Independent Certifier's responsibilities for the monitoring of Project Co's carrying out of the Project Activities; and
  - (B) the final completion of all the Services and the full discharge of all of the Independent Certifier's responsibilities in accordance with this Deed.
- (b) **(Transition Out Plan):** For the purposes of clause 13.1(a), the Independent Certifier must:
- (i) prepare a draft of the Transition Out Plan and provide it to the Project Parties by no later than 60 Business Days before the commencement of the Transition Out Period which:
    - (A) is based on the draft Transition Out Plan submitted by the Independent Certifier with its tender for the Services; and
    - (B) takes into account all relevant considerations which have arisen during the Term;
  - (ii) provide all drafts of the Transition Out Plan to the Project Parties for review and consult with the Project Parties as required in relation to such drafts;
  - (iii) review and, if necessary, update the Transition Out Plan and make such amendments as may be reasonably required by the Project Parties to any draft of the Transition Out Plan; and
  - (iv) finalise, to the reasonable satisfaction of the Project Parties, the Transition Out Plan by no later than 20 Business Days before the commencement of the Transition Out Period.
- (c) **(Review Transition Out Plan every 6 months):** The Independent Certifier must review the Transition Out Plan at least once every 6 months during the Transition Out Period. The Independent Certifier must consult with the Project Parties as required in relation to any necessary amendments to the Transition Out Plan. The Project Parties may require the Independent Certifier, by notice, to make reasonable amendments to the Transition Out Plan during the Transition Out Period, if reasonably necessary to achieve the objectives specified in clause 13.1(a)(i).

### 13.2 Delivery of documents

Upon completion of the Services, or upon the termination of the appointment of the Independent Certifier, the Independent Certifier:

- (a) must deliver up to the Project Parties or to such other person as the Project Parties may direct, all books, records, drawings, specifications and other documentation in the possession, custody or control of the Independent Certifier relating to the Services; and
- (b) acknowledges that the Project Parties have the right to use all such books, records, drawings, specifications and other documents for the purposes of the Project.

### 13.3 Reasonable assistance

Prior to completion of the Services, or upon the termination of the appointment of the Independent Certifier, the Independent Certifier must provide full assistance to the Project Parties, the Downstream Parties and any successor to the Independent Certifier appointed in order to enable such successor to be in a position to perform the Services with effect from the appointment of such successor.

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## 14. GST

- (a) **(Interpretation):**
  - (i) Except where the context suggests otherwise, terms used in this clause 14 have the meanings given to those terms by the GST Act (as amended from time to time).



- (i) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable in tax periods) will be treated as a separate supply for the purposes of this clause 14.
  - (ii) Unless otherwise expressly stated, all consideration to be provided under this Deed is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 14.
  - (iv) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (b) **(Reimbursements):** Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (c) **(Additional amount of GST payable):** Subject to clause 14(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this Deed:
- (i) any amount payable or consideration to be provided under any provision of this Deed (other than this clause 14), for that supply is exclusive of GST
  - (ii) any party (**Recipient**) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply, and
  - (iii) the Supplier must provide a Tax Invoice to the Recipient for that supply no later than the time at which the GST Amount for that supply is to be paid in accordance with clause 14(c)(ii).
- (d) **(Variation of GST):**
- (i) If the GST Amount properly payable in relation to a supply (as determined in accordance with clause 14(c) and clause 14(e)), varies from the additional amount paid by the Recipient under clause 14(c), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this clause 14(c) is deemed to be a payment, credit or refund of the GST Amount payable under clause 14(c).
  - (ii) The Supplier must issue an Adjustment Note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this Deed as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.
- (e) **(Exchange of non-monetary consideration):**
- (i) To the extent that the consideration provided for the Supplier's Taxable Supply to which clause 14(c) applies is a Taxable Supply made by the Recipient (the **Recipient Supply**), the GST Amount that would otherwise be payable by the Recipient to the Supplier in accordance with clause 14(c) will be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
  - (ii) The Recipient must issue to the Supplier an invoice for any Recipient Supply on or before the time at which the Recipient must pay the GST Amount in accordance with clause 14(c) (or the time at which such GST Amount would have been payable in accordance with clause 14(c) but for the operation of clause 14(e)(i)).
- (f) **(No merger):** This clause 14 will not merge on completion or termination of this Deed.
- (g) **(Application of Project Deed):** If clause 36 (*Payments Adjustments & Taxes*) of the Project Deed would apply in connection with a Taxable Supply to which this clause 14 also applies then clause 36 (*Payments Adjustments & Taxes*) of the Project Deed will apply in connection with that supply and the provisions of this clause 14 (but for this paragraph) will not apply.

## 15. NSW Code and Guidelines

### 15.1 Reference

In addition to terms defined in this Deed, terms used in this clause 15 have the same meaning as is attributed to them in the New South Wales Government's Implementation Guidelines to the NSW Code of Practice for the Building and Construction Industry (**NSW Guidelines**) (as published by the NSW Treasury July 2013 and as amended or updated from time to time). The NSW Code and NSW Guidelines are available at [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au).

### 15.2 Primary Obligation

- (a) **(Compliance):** In carrying out the Services, the Independent Certifier must at all times comply with, and meet any obligations imposed by, the NSW Government's Code of Practice for the Building and Construction Industry (**NSW Code**) and the NSW Guidelines.
- (b) **(Notification):** The Independent Certifier must notify the Construction Compliance Unit (CCU) and the State of any possible non-compliance with the NSW Code and the NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- (c) **(Subcontractors):** Where the Independent Certifier engages a subcontractor or consultant, the Independent Certifier must ensure that subcontractor or consultancy contract imposes on the subcontractor or consultant equivalent obligations to those in this clause 15 (under the heading 'NSW Code and Guidelines'), including that the subcontractor or consultant must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.
- (d) **(Sanctions):** The Independent Certifier must not appoint or engage another party in relation to the Project or the Services where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or the NSW Guidelines.

### 15.3 Access and information

- (a) **(Maintenance of records):** The Independent Certifier must maintain adequate records of compliance with the NSW Code and the NSW Guidelines by it, its subcontractors, consultants and related entities.
- (b) **(Access):** The Independent Certifier must allow, and take reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
  - (i) enter and have access to sites and premises (or part thereof) controlled by the Independent Certifier;
  - (ii) inspect any work, material, machinery, appliance, article or facility;
  - (iii) access information and documents;
  - (iv) inspect and copy any record relevant to the Services or the Project;
  - (v) have access to personnel; and
  - (vi) interview any person.

as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and the NSW Guidelines, by the Independent Certifier, its subcontractors, consultants, and related entities.
- (c) **(Production of documents):** The Independent Certifier, and its related entities, must agree to, and comply with, a request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

### 15.4 Sanctions

- (a) **(Warranties):** The Independent Certifier warrants that at the time of entering into this Deed, neither it, nor any of its related entities, are subject to a sanction in connection with

- the NSW Code or the NSW Guidelines that would have precluded it from responding to a procurement process for work to which the NSW Code and the NSW Guidelines apply.
- (b) **(Compliance):** If the Independent Certifier does not comply with, or fails to meet any obligation imposed by the NSW Code or the NSW Guidelines, a sanction may be imposed against it in connection with the NSW Code or the NSW Guidelines.
- (c) **(Sanctions)** Where a sanction is imposed:
- (i) it is without prejudice to any rights that would otherwise accrue to the parties; and
  - (ii) the NSW Government (through its agencies, Ministers and the CCU) is entitled to:
    - (A) record and disclose details of non-compliance with the NSW Code or the NSW Guidelines and the sanction; and
    - (B) take them into account in the evaluation of future procurement processes and responses that may be submitted by the Independent Certifier, or its related entities, in respect of work to which the NSW Code and the NSW Guidelines apply.

## 15.5 Compliance

- (a) **(Cost):** The Independent Certifier bears the cost of ensuring its compliance with the NSW Code and the NSW Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the NSW Code and the NSW Guidelines. The Independent Certifier is not entitled to make any Claim from the State or the NSW Government for such costs.
- (b) **(Performance of Services):** Compliance with the NSW Code and the NSW Guidelines does not relieve the Independent Certifier from responsibility to perform the Services and any other obligation under this Deed, or from any legal liability, whether or not arising from its compliance with the NSW Code and the NSW Guidelines.
- (c) **(Proposed change to Services).** Where a change to the Services is proposed in accordance with clause 11, and that change to the Services may, or may be likely to affect compliance with the NSW Code or the NSW Guidelines, the Independent Certifier must immediately notify the State of the change to the Services:
- (i) the extent to which compliance with the NSW Code or the NSW Guidelines will be, or is likely to be, affected by the change to the Services; and
  - (ii) what steps the Independent Certifier proposes to take to mitigate any adverse impact of the change to the Services,
- and the State will direct the Independent Certifier as to the course it must adopt within 10 Business Days of receiving notice.

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## 16. Dispute Resolution

### 16.1 Disputes to be resolved in accordance with the Project Deed

Any dispute between the Project Parties arising in connection with this Deed must be resolved in accordance with the procedures set out in clause 50 (*Dispute Resolution procedure*) of the Project Deed.

### 16.2 Notice of dispute

If any dispute (other than a dispute which is to be referred for resolution in accordance with clause 16.1) arises between one or both of the Project Parties (on the one hand) and the Independent Certifier (on the other hand) (**Disputing Parties**) in respect of any fact, matter or thing arising out of or in connection with the Services or this Deed (**Dispute**), any of the Disputing Parties may give notice to each of the other parties specifying:

- (a) the dispute or difference;
- (b) particulars of the reasons for being dissatisfied; and
- (c) the position which is believed to be correct.

### 16.3 Executive negotiation

The Dispute identified in the notice given under clause 16.2 is to be referred to the Executive Negotiators described in the Contract Particulars who must:

- (a) meet and undertake genuine and good faith negotiations with a view to resolving the Dispute, and
- (b) if they cannot resolve the Dispute, endeavour to agree upon a procedure to resolve the Dispute.

### 16.4 Reference to Mediation

If the persons described in the Contract Particulars cannot resolve, or agree upon a procedure to resolve, the Dispute within 10 Business Days after the date the notice is given under clause 16.2, or within such longer period of time as those persons may agree, the Dispute is to be submitted to mediation in accordance with clauses 16.5 to 16.8.

### 16.5 Mediation

Within 5 Business Days of the expiration of the period referred to in clause 16.4, the Dispute will be referred for mediation to:

- (a) the person set out in the Contract Particulars, or
  - (b) if
    - (i) no such person is specified; or
    - (ii) the mediator specified in the Contract Particulars or the person appointed in accordance with this clause 16.5(b):
      - (A) is unavailable
      - (B) declines to act, or
      - (C) does not respond within 5 Business Days of a request for advice as to whether they are able to conduct the mediation,
- a person appointed by the President (or acting President, as the case may be) of the Resolution Institute.

### 16.6 Place of mediation

The place of mediation will be Sydney.

### 16.7 Evidence not admissible

Evidence of anything said, documents presented to, admissions made or matters raised in the course of any mediation will be confidential to the Disputing Parties and the mediator and will not be admissible in any subsequent proceedings.

### 16.8 Costs

Failing any agreement to the contrary between the Disputing Parties, the costs of the mediation (including any fees charged by the mediator) will be shared equally between the Disputing Parties.

### 16.9 Reference to litigation

If after 15 Business Days of the Mediator nominated in accordance with clause 16.5 having accepted his or her appointment, the Dispute has not been resolved, then the Dispute may be referred to litigation.

### 16.10 Condition precedent to litigation

The Project Parties and the Independent Certifier must comply with the provisions of clauses 16.2 to 16.9 as a condition precedent to commencing court proceedings in respect of any Dispute to which clause 16.2 applies (other than proceedings for urgent or injunctive or interlocutory relief).

### 16.11 Services to continue

The Independent Certifier must continue to perform the Services in accordance with this Deed notwithstanding the existence of a Dispute referred to in this clause 16.7

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## 17. Confidential Design Information

The Independent Certifier must:

- (a) **(Access)** only provide access to Confidential Design Information to Relevant Persons who:
  - (i) are not Uncleared Personnel, are permitted to receive Confidential Design Information in accordance with clause 62.2 of the Project Deed and, where required by the State, have satisfied any Probity Investigation under clause 60.2 of the Project Deed; and
  - (ii) require access to that Confidential Design Information to perform the Services;
- (b) **(Limited portion)** where it is necessary to grant access to Confidential Design Information in accordance with clause 17(A), grant access to the most limited portion of the Confidential Design Information possible; and
- (c) **(Records)** keep, and make available to the State on request, records detailing the recipient of any Confidential Design Information, the date of disclosure and the Confidential Design Information that has been disclosed.

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## 18. Notices

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

- (a) **(In writing)**, must be in writing;
- (b) **(addressed)**, must be addressed as set out below (or as otherwise notified by that party to each other party from time to time):

**State**

Attention: [Insert]  
 Address: [Insert]  
 Email: [Insert]

**Project Co:**

Attention: [Insert]  
 Address: [Insert]  
 Email: [Insert]

**Independent Certifier:**

Attention: [Insert]  
 Address: [Insert]  
 Email: [Insert]

- (c) **(signed)**, must be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that party on its behalf;
- (d) **(form of delivery)**, must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 18(b);
- (e) **(taken to be received)**, are taken to be received by the addressee at the address set out in clause 18(b):
  - (i) in the case of delivery by hand, on delivery at the address of the addressee unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;

- (i) subject to clause 15(f), in the case of prepaid post, on the fourth Business Day after the date of posting to an address within Australia and on the seventh Business Day after the date of posting by airmail to an address outside Australia, or
- (ii) in the case of email, the first to occur of
  - (A) receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
  - (B) the time that the communication enters an information system which is under the control of the addressee; or
  - (C) the time that the communication is first opened or read by the addressee; unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day; and
- (f) (notices sent by post): if sent by post from within Australia, must be sent using the priority postal service offered by Australia Post (or any other postal service provider that assumes any or all of the functions of Australia Post) or other such similar service.

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## 19. Miscellaneous

### 19.1 Governing Law and Jurisdiction

- (a) (Governing Law) This Deed is governed by, and must be construed according to, the Laws of New South Wales, Australia.
- (b) (Jurisdiction) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed.

### 19.2 Entire agreement

To the extent permitted by Law and in relation to its subject matter, this Deed:

- (a) (entire understanding), embodies the entire understanding of the parties and constitutes the entire terms agreed by the parties; and
- (b) (prior agreements) supersedes any prior agreement of the parties.

### 19.3 Further acts and documents

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

### 19.4 Survival of certain provisions

- (a) (Surviving clauses): All provisions of this Deed which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provision in connection with:
  - (i) the State's rights to set-off and recover money;
  - (ii) confidentiality or privacy;
  - (iii) Intellectual Property Rights;
  - (iv) any obligation to make any records available to the State;
  - (v) any indemnity or financial security given in accordance with this Deed;
  - (vi) any limitation or exclusion of liability; and

- (vi) any right or obligation arising on termination of this Deed.
- (b) **(Interpretation)** No provision of this Deed which is expressed to survive the termination of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination of this Deed.
- (c) **(Survival of rights and obligations)** No right or obligation of any party will merge on completion of any transaction under this Deed. All rights and obligations under this Deed survive the execution and delivery of any transfer or other document which implements any transaction under this Deed.

### 19.5 Waiver

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

### 19.6 Consents and approvals

A consent or approval required under this Deed from the State may be given or withheld, or may be given subject to any conditions, as the State (in its absolute discretion) thinks fit unless this Deed expressly provides otherwise.

### 19.7 Amendments

Except as otherwise expressly provided in this Deed, this Deed may only be varied by a deed executed by or on behalf of each party.

### 19.8 Expenses

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

### 19.9 Severance

If, at any time, a provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this Deed; or
- (b) that provision under the Law of any other jurisdiction.

### 19.10 Counterparts

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

### 19.11 Moratorium legislation

The provisions of all Laws which come into effect after the date of this Deed and operate to:

- (a) increase or improve any of Project Co's or the Independent Certifier's rights, powers or remedies under this Deed or otherwise; or
- (b) prejudicially affect the exercise by the State of any right, power or remedy under this Deed or otherwise,

are expressly waived.

### 19.12 Proportionate liability

To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this Deed, howsoever those rights, obligations or liabilities are sought to be enforced.

### 19.13 Indemnity held on trust

- (a) **(Benefit of indemnities)** The State holds on trust for its Associates the benefit of:
- (i) each indemnity, promise and release given by Project Co or the Independent Certifier under this Deed in favour of the State's Associates; and
  - (ii) each right in this Deed to the extent that such right is expressly provided to be for the benefit of the State or its Associates.
- (b) **(Project Co and Independent Certifier Acknowledgement):** Project Co and the Independent Certifier acknowledge the existence of such trusts and consents to:
- (i) the State exercising rights in relation to, or otherwise enforcing such indemnities, releases and rights on behalf of its Associates; and
  - (ii) the State's Associates exercising rights in relation to, or otherwise enforcing the indemnities, releases and those rights as if they were a party to this Deed.

### 19.14 Assignment

Except as expressly contemplated by this Deed, none of Project Co nor the Independent Certifier may assign or transfer any of its rights or obligations under this Deed.

### 19.15 Set off

- (a) Without limiting the State's rights under the Project Deed, all moneys which the State may pay or incur and for which Project Co is liable under the terms of the Project Deed or in respect of which it is under this Deed liable to make reimbursement to or indemnify the State, may be deducted by the State from all moneys due, becoming due or to become due from it to Project Co under the Project Deed or may be recovered from Project Co by action at Law or otherwise.
- (b) Notwithstanding any other provision of this Deed, the State may set off or deduct from any moneys payable by the State to the Independent Certifier, under this Deed or otherwise, any amounts:
- (i) for which the Independent Certifier must reimburse the Project Parties;
  - (ii) which the Project Parties pay on the Independent Certifier's behalf; or
  - (iii) which are then due and payable by the Independent Certifier to the Project Parties (whether or not such amounts are expressed to be a debt due from the Independent Certifier to the Project Parties), under or in connection with this Deed or arising out of or in respect of or in connection with the Independent Certifier Services.

### 19.16 No representation or reliance

- (a) **(No representation):** Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Deed, except for representations or inducements expressly set out in this Deed.
- (b) **(No reliance):** Each party acknowledges and confirms that it does not enter into this Deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Deed.

### 19.17 Indemnities

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



**Executed as a deed.**

**State**

*[Execution block to be inserted prior to execution]*

**Project Co**

*[Execution block to be inserted prior to execution]*

**Independent Certifier**

*[Execution block to be inserted prior to execution]*

## Schedule 1 — Contract Particulars

### 1. Other Downstream Independent Certifier Contracts

[insert]

### 2. Other Downstream Parties

[insert]

### 3. Other Upstream Independent Certifier Contracts

### 4. Independent Certifier's Representative

Name: [insert]

Address: [insert]

Email: [insert]

### 5. Project Parties' Representatives

State: [insert]

Project Co: [insert]

### 6. Key People

Name	Role
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]
[To be inserted]	[To be inserted]

### 7. Limitation on Independent Certifier's Liability

Limit: [redacted]

### 8. Professional indemnity insurance

Minimum limit of indemnity: [redacted] or any one claim and in the aggregate

Maximum deductible: [redacted]

9. Public Liability insurance

Minimum limit of indemnity: [REDACTED] or any single occurrence and unlimited in the aggregate as to the number of occurrences for any one period of insurance

Maximum deductible: [REDACTED]

10. Dispute resolution

State's Executive Negotiator: [Insert]

Project Co's Executive Negotiator: [Insert]

Independent Certifier's Executive Negotiator: [Insert]

Mediator: [Insert]

## Schedule 2 — Services

### 1. General

The Independent Certifier must:

- (a) become familiar with the role (express or implied) under the State Project Documents and the Downstream Independent Certifier Contracts of the "Independent Certifier" and review information made available to the Independent Certifier by the parties in order to become fully acquainted with the Project;
- (b) discharge the functions which the State Project Documents and the Downstream Independent Certifier Contracts contemplate will be discharged by the Independent Certifier;
- (c) attend meetings and report as required from time to time by the parties;
- (d) issues certificates in accordance with and in the form set out in this Deed and the Project Documents; and
- (e) otherwise discharge the functions of the Independent Certifier under, and in accordance with, the Project Documents, including the Output Specification and the Downstream Independent Certifier Contracts.

### 2. References to functions of the Independent Certifier

References to functions of the Independent Certifier under the Project Deed	
Clause 1	Definitions
Clause 2	General rules of interpretation
Clause 3	Conditions Precedent
Clause 5	Overarching obligations
Clause 6	The Site
Clause 10	Parties, personnel and community
Clause 14	Independent Certifier
Clause 16	Delivery Phase Plans and Reports and Delivery Phase Program
Clause 17	Design
Clause 18	Equipment during Delivery Phase
Clause 19	Construction
Clause 20	State access during the Delivery Phase
Clause 21	Testing and comments
Clause 23	Technical Completion
Clause 24	Commissioning Period
Clause 25	Commercial Acceptance

Clause 28	Operating Phase Site Access
Clause 37	Expiry obligations
Clause 38	Delivery Phase delay
Clause 38A	Compensable Events – Delivery Phase
Clause 50	Dispute Resolution procedure

## Schedule 3 — Payment Schedule

### 1. Payment of the Fee for Services

- (a) **(State responsible):** Subject to section 1(b), and without limiting any provision of the Project Deed, the State will be liable for making any payments due to the Independent Certifier under this Deed.
- (b) **(Payment for special reports):** Without limiting any provision of the Project Deed, the relevant Project Party requesting the preparation of an additional report under clause 7.4 will be solely responsible for payment to the Independent Certifier for the costs associated with the preparation of such additional report.

### 2. Payment claim

- (a) **(Independent Certifier to prepare and submit):** Subject to section 5, the Independent Certifier must submit to the State and Project Co:
  - (i) a claim for payment of the Initial Fee
    - (A) as a lump sum for Services performed during the Initial Period; and
    - (B) calculated in and otherwise in accordance with this Payment Schedule; and
  - (ii) a claim for payment on account of the Monthly Fee (not including any additional report required under clause 7.4):
    - (A) for the Services performed in accordance with this Deed during a month, at the end of the month; and
    - (B) calculated in and otherwise in accordance with this Payment Schedule.
- (b) **(Content)** Each payment claim prepared in accordance with section 2(a) must set out:
  - (i) a breakdown of the Services (including details of personal days worked for each resource in a form and including such information and supporting documentation as the Project Parties may require from time to time) actually carried out during the relevant month;
  - (ii) details of approved disbursements actually incurred during the relevant month (including such information and supporting documentation as the Project Parties may require from time to time); and
  - (iii) the part of the Fee then payable calculated in accordance with section 11, and otherwise in a form and substance agreed with the Project Parties.
- (c) **(Payment Claims for special reports):** Where an additional report has been requested by a Project Party under clause 7.4, the independent Certifier must submit a separate payment claim to the Project Party who made the request in respect of the preparation of the report.

### 3. Payment

- (a) **(Payment of Fee):** Subject to sections 3(b), 4(b) and 5, within 20 Business Days of receipt of a payment claim in accordance with section 2(a) the State must pay the Independent Certifier the Fee which the State believes represents the contract value of the Services performed by the Independent Certifier during the period for which the payment claim is submitted.
- (b) **(Payment for special reports):** Within 20 Business Days of receipt of a payment claim under section 2(c), the relevant Project Party must pay the Independent Certifier the amount which it believes represents the value of the Services performed by the

Independent Certifier relating to the preparation of the additional report during the period for which the payment claim is submitted

#### 4. Payment of wages by Independent Certifier

- (a) **(Signed statement required)** Before a payment is made to the Independent Certifier under section 3, the relevant Project Party may require the Independent Certifier to give the Project Parties a statement signed by the Independent Certifier stating that no wages or payments to any sub-contractors of the Independent Certifier are due and owing by the Independent Certifier in respect of the Services at the time of payment.
- (b) **(Possible to withhold money):** If, within 2 Business Days after the request, the Independent Certifier fails to provide the statement, then the party responsible for the payment of the relevant payment claim may withhold payment of moneys due to the Independent Certifier until the statement is received.

#### 5. Insurance

Before a payment claim can be made by the Independent Certifier under section 2(a), the Independent Certifier must have effected the insurances required by clause 9.3 and provided evidence of this to the Project Parties. If a payment claim is purported to be submitted by the Independent Certifier prior to effecting such insurance and providing such evidence, neither of the Project Parties will be liable to make any payment in respect of such claim.

#### 6. Books of account

The Independent Certifier must, for the purposes of this Deed:

- (a) **(Maintenance):** institute and maintain all proper books of account and operating records necessary to afford a correct and complete record and explanation of all payment claims (including relevant supporting documentation) made by the Independent Certifier under this Deed; and
- (b) **(Access):** permit the Project Parties' representatives (and any persons authorised in writing by either of them) access at all reasonable times to all relevant books of account and operating records necessary to establish that all payment claims made by the Independent Certifier and all moneys paid to the Independent Certifier under the terms of this Deed are or have been properly accounted for.

#### 7. Notification of disputed amounts

If the State or Project Co disputes any amount which the Independent Certifier has claimed then the State or Project Co (as applicable) must notify the Independent Certifier of its reasons for disputing that amount within 20 Business Days after receipt of the relevant payment claim.

#### 8. The Initial Fee

[insert]

#### 9. Fees after Initial Period

##### 9.1 Fees payable for Services

Applicable Services	Fee Status	Lump Sum Amount
Design development	Lump Sum	[insert]

(refer to clauses 16 and 17 of the Project Deed)		
Construction (refer to clauses 18, 19, 20 and 21 of the Project Deed)	Lump Sum	{insert}
Technical Completion (refer to clause 23 of the Project Deed)	Lump Sum	{insert}
Commissioning and Commercial Acceptance (refer to clauses 24 and 25 of the Project Deed)	Lump Sum	{insert}
Services that may be required after Commercial Acceptance	Schedule of Rates	N/A

## 9.2 Schedule of Rates

{insert}

## 10. Disbursements

The Independent Certifier will:

- (a) **(Entitlement)**, only be entitled to reimbursement of disbursements for which the Independent Certifier is to be paid on a schedule of rates basis under this Deed if those disbursements:
- have been reasonably and properly incurred for the sole purpose of performing Services;
  - have the prior approval of the State and Project Co;
  - to the extent applicable, are in accordance with the Schedule of Rates; and
  - are supported by documentation provided to the State and Project Co which is satisfactory to the State and Project Co; and
- (b) **(Disbursements)** not be entitled to make any Claim against the State and Project Co arising in connection with disbursements or other costs incurred in connection with the performance of the Services other than in accordance with section 10(a).

## 11. Payments

### 11.1 Initial Period

Subject to section 12:

- the amount of the Fee payable in accordance with clause 3 following conclusion of the Initial Period will be equal to the amount of the Initial Fee as set out in section 8;
- that amount will be payable following conclusion of the Initial Period in accordance with clause 3 and not in monthly or other instalments during the Initial Period; and
- the Initial Fee is a fixed amount and is not subject to adjustment.



**11.2 After Initial Period**

Subject to sections 11.4 and 11.2, where the Independent Certifier makes a payment claim under section 2(a) after the Initial Period, the Monthly Fee then payable will be equal to:

- (a) that portion of the Lump Sum or Lump Sums that is payable for the applicable Services (as set out in section 9.1) actually performed in the relevant month, based on the personnel days incurred during the relevant month;
- (b) for Services that may be required after Commercial Acceptance, the costs of the Independent Certifier in providing those Services based on the Schedule of Rates and
- (c) approved disbursements incurred during the relevant month.

**11.3 Adjustment of Monthly Fee Estimates and Schedule of Rates**

- (a) The amounts with respect to the Schedule of Rates are to be indexed in accordance with the Consumer Price Index;
- (b) The Lump Sums are fixed and are not subject to adjustment except in accordance with section 11.8(b).

**11.4 Monthly Fee Estimate**

The total Monthly Fees payable to the Independent Certifier in respect of any month under section 11.2 must not be greater than the Monthly Fee Estimate in respect of that month unless otherwise agreed by the Project Parties.

**11.5 Resource Adjustment Order**

The Project Parties may at any time direct the Independent Certifier to carry out a Resource Adjustment by issuing a document entitled 'Resource Adjustment Order' in accordance with this section.

**11.6 Notice of resource evaluation**

No fewer than 20 Business Days before the start of every Quarter, the Independent Certifier must provide the Project Parties with a notice setting out:

- (a) its evaluation of the resource levels (in a form set out in Schedule 4 or as otherwise agreed by the Project Parties) required for the Quarter having regard to the actual nature and extent of the Services to be carried out by the Independent Certifier during the relevant Quarter; and
- (b) having regard to its evaluation of the resource levels and the Fees payable for the relevant Services as set out in section 9, the amount by which it proposes that the Monthly Fee Estimates for that Quarter should be adjusted as a result of the Resource Adjustment (if any) which the Independent Certifier should effect in the relevant Quarter.

**11.7 Quarterly meeting**

No fewer than 10 Business Days before the start of every Quarter, the Independent Certifier must meet with the Project Parties to:

- (a) evaluate the resource levels required for the Quarter having regard to the actual nature and extent of the Services to be carried out by the Independent Certifier in that Quarter; and
- (b) discuss:
  - (i) the possibility of effecting a Resource Adjustment in that Quarter; and
  - (ii) the Independent Certifier's estimate of the amount by which the Monthly Fee Estimates for that Quarter should be adjusted as a result of any such Resource Adjustment.

**11.8 Resource Adjustment and its approval**

- (a) If the Project Parties and the Independent Certifier agree on a Resource Adjustment and the adjustments in the Monthly Fee Estimates for a Quarter before the start of the relevant

Quarter (and such adjustments would result in equal or lower Monthly Fee Estimates in respect of the relevant Quarter), then:

- (i) the Project Parties will issue a Resource Adjustment Order;
  - (ii) the Monthly Fee Estimates for that Quarter will be adjusted by the agreed adjustments in the Monthly Fee Estimates; and
  - (iii) the Independent Certifier must promptly effect the Resource Adjustment.
- (b) Without limitation to section 11.2(a), in connection with an agreed Resource Adjustment:
- (i) the Project Parties and the Independent Certifier may agree that the Lump Sum or Lump Sums for the applicable Services should be adjusted, and
  - (ii) if the parties so agree, the Resource Adjustment Order issued by the Project Parties will specify the amount by which the relevant Lump Sum or Lump Sums will be adjusted.

## 12. GST

All lump sums, rates and amounts in this Payment Schedule do not include GST

## Schedule 4 – Resource Allocation pro forma

[Insert]

## Schedule 26

### New Grafton Correctional Centre Design Subcontract Side Deed

**[Insert name of Design Subcontractor]**

[insert ABN/ACN]

**[Insert name of D&C Subcontractor]**

[insert ABN/ACN]

**[Insert name of Project Co]**

[insert ABN/ACN]

**[Insert name of State party]**

[insert ABN]

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This **Design Subcontract Side Deed** is made on

**Between:**

[Insert name of party] ABN [Insert ABN] of [Insert address] (**Design Subcontractor**);

[Insert name of party] ABN [Insert ABN] of [Insert address] (**D&C Subcontractor**);

[Insert name of party] ABN [Insert ABN] of [Insert address] (**Project Co**);

[Insert name of party] ABN [Insert ABN] of [Insert address];

## Recitals:

- A The State and Project Co have entered, or will enter, into the Project Deed for the provision of the Project.
- B Project Co has subcontracted its obligations to carry out Delivery Phase Activities to the D&C Subcontractor pursuant to the D&C Subcontract.
- C The D&C Subcontractor has subcontracted its obligations to carry out the Services in connection with the Delivery Phase Activities to the Design Subcontractor pursuant to the Subcontract.
- D The Design Subcontractor has agreed to grant to the State certain rights in relation to the Subcontract.

The parties agree as follows:

---

## 1. Definitions and interpretation

### 1.1 Project Deed definitions Incorporated

Unless otherwise expressly defined in this Deed, expressions used in this Deed have the meanings given to them in the Project Deed.

### 1.2 Definitions

In this Deed:

**Approved Nominee** means a person nominated by the State and approved by the Design Subcontractor in accordance with clause 6.5 as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of the D&C Subcontractor under the Subcontract; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and subcontracts) which are sufficient to enable it to perform the obligations of the D&C Subcontractor under the Subcontract.

**Deed** means this deed and includes all schedules, exhibits, attachments and annexures to it.

**Default Event** means:

- (a) any default (however described) by the D&C Subcontractor under the Subcontract; or
- (b) any other event or circumstance,

which alone or with the giving of notice or passage of time or both, would entitle the Design Subcontractor to terminate, rescind, accept the repudiation of, or suspend any or all of the Design Subcontractor's obligations under the Subcontract.

**Effective Date** means the date specified in the Novation Notice.

**Material Adverse Effect** means a material adverse effect on:

- (a) the ability of any of a Project Co Entity, the D&C Subcontractor or the Design Subcontractor to perform and observe their respective obligations under any Project Document to which it is a party; or
- (b) the rights of the State under any State Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document.

**Novation Notice** has the meaning given in clause 6.1

**PPS Law** means:

- (a) the *Personal Property Securities Act 2009* (Cth) and any regulation made at any time under the PPSA, including the *Personal Property Securities Regulations 2010* (Cth) (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a).

**Project Deed** means the document entitled 'New Grafton Correctional Centre - Project Deed' between the State and Project Co dated on or about the date of this Deed.

**Security Interest** has the meaning given to the term in the PPS Law.

**Services** means [insert]

**State** means

- (a) The Minister for Corrections on behalf of the Crown in right of the State of New South Wales;
- (b) Infrastructure New South Wales (ABN 85 031 302 515); and
- (c) for the purposes of the Project Deed and the Operator Site Deed only, the Commissioner of Corrective Services.

**Subcontract** means the contract titled [insert] between the D&C Subcontractor and the Design Subcontractor dated on or about the date of this Deed.

### 1.3 Interpretation

In this Deed:

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

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;
- (c) **(Deed and Schedule references)**: a reference to:
  - (i) a party, clause, Schedule, Exhibit, Attachment or Annexure is a reference to a party, clause, Schedule, Exhibit, Attachment or Annexure of or to this Deed; and



- (ii) a section is a reference to a section of a Schedule;
- (d) **(document as amended)** a reference to a document, deed, agreement or instrument, or a provision of any such document, deed, agreement or instrument, includes a reference to that document, deed, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)** a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)** a reference to a person includes an individual, the estate of an individual, a body politic, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) **(legislation)** a reference to legislation includes its delegated legislation and a reference to that legislation or delegated legislation, or a provision of either, includes consolidations, amendments, re-enactments and replacements, and all ordinances, by-laws, regulations and other statutory instruments (however described) issued under it;
- (h) **(Policies)** a reference to a Policy includes that Policy as amended or updated from time to time;
- (i) **(definitions)** if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) **(“includes”)** ‘includes’ and ‘including’ will be read as if followed by the phrase ‘(without limitation)’;
- (k) **(“or”)** the meaning of ‘or’ will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) **(information)** a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (m) **(“\$”)** a reference to ‘\$’, AUD or dollar is in Australian currency;
- (n) **(Business Day)** if the day on or by which anything is to be done under this Deed is not a Business Day, that thing must be done no later than the next Business Day;
- (o) **(day)** except as otherwise provided in this Deed or where a reference is made to ‘Business Days’, day means a calendar day;
- (p) **(time)** a reference to time is a reference to time in Sydney, Australia;
- (q) **(rights)** a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (r) **(function)** a function includes a power, authority or duty;
- (s) **(obligations and liabilities)** a reference to an obligation or a Liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (t) **(“may”)** except to the extent that the State is expressly required under this Deed to act reasonably in exercising a power, right or remedy, the term ‘may’ when used in the context of a power, right or remedy exercisable by the State means that the State can exercise that power, right or remedy in its absolute and unfettered discretion (and without regard to Project Co, the D&C Subcontractor or the Design Subcontractor) and the State has no obligation to do so;
- (u) **(construction)** where there is a reference to an Authority, institute or association or other body referred to in this Deed which

- (j) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity this Deed is deemed to refer to that other entity or
- (k) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity.
- (v) (asset): references to an asset include any real or personal, present or future, tangible or intangible, property or asset (including intellectual property) and any right, interest, revenue or benefit in, under or derived, from the property or asset;
- (w) (**contra preferentem rule not to apply**): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision, and
- (x) (**PPS Law defined terms**): each of the terms 'financing statement', 'financing charge statement' and 'verification statement' have the meanings given to them in the PPS Law

#### 1.4 Inconsistencies

To the extent of any inconsistency between the terms of this Deed and the Subcontract, this Deed will prevail over the Subcontract.

#### 1.5 Project Deed, the State Security and Financiers Tripartite Deed

The Design Subcontractor acknowledges that they have received a copy of the Project Deed, the State Security and the Financiers Tripartite Deed.

#### 1.6 Exclusion of Civil Liability Act

To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this Deed, however those rights, obligations or liabilities are sought to be enforced.

#### 1.7 State's executive rights, duties and functions

- (a) (**Acknowledgements**): The parties acknowledge the substance, operation and potential effect and consequences of clause 2.10 (*State's executive rights, duties and functions*) of the Project Deed in relation to this Deed.
- (b) (**No Claim**): Subject to clause 1.7(c), Project Co and the Design Subcontractor will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (c) (**Liability for breach**): Clauses 1.7(a) and 1.7(b) do not limit any Liability which the State would have had to Project Co or the Design Subcontractor under any State Project Document as a result of a breach by the State of a term of any State Project Document but for these clauses.

---

## 2. Securities

### 2.1 Design Subcontractor acknowledgements and consents

The Design Subcontractor:

- (a) acknowledges and consents to the grant of, subject to the Financiers Tripartite Deed, security over all of each Project Co Entity's right, title and interest in and to the Subcontract pursuant to the State Security;
- (b) acknowledges the rights created under the State Security in favour of the State including the appointment by Project Co of the State as the lawful attorney of Project Co to do, perform and exercise all things, acts and rights under the D&C Subcontract on behalf and for the account of Project Co pursuant to the State Security, subject to the rights of the Security Trustee under the Financiers Tripartite Deed;

- (c) acknowledges and agrees that, without limiting the State's obligations under this Deed, the State is not subject to any duty or obligation under the Subcontract as a result of the State Security; and
- (d) acknowledges that the grant of the State Security is not, and the exercise by the State of its rights under the State Security will not, of itself, constitute a Default Event.

## 2.2 Not used

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## 3. Design Subcontractor's warranty and State's rights and liability

### 3.1 Not used

### 3.2 Not used

### 3.3 Subcontracting and Probity Investigations

- (a) The Design Subcontractor acknowledges the State's rights and Project Co's obligations under the following clauses of the Project Deed:
  - (i) clause 12 (Subcontracting and third party arrangements);
  - (ii) the clauses listed in clause 12.3(a)(i) (Requirements for subcontracting); and
  - (iii) clause 63 (Probity Events and Probity Investigations)
- (b) The Design Subcontractor must not subcontract any of its obligations under the Subcontract without ensuring that Project Co has obtained the prior consent of the State to that subcontract, where the State's consent is required in accordance with clause 12 (Subcontracting and third party arrangements) of the Project Deed.
- (c) Without limiting the previous paragraphs, the Design Subcontractor acknowledges and agrees that:
  - (i) in accordance with clauses 12 (Subcontracting and third party arrangements) and 63 (Probity Events and Probity Investigations) of the Project Deed, the State may, from time to time, or may require Project Co to, conduct Probity Investigations of the Design Subcontractor and/or Relevant Persons in respect of the Design Subcontractor, or other persons to whom the Design Subcontractor is proposing to subcontract any of its obligations under the Subcontract;
  - (ii) it will procure all relevant consents from any persons in respect of whom a Probity Investigation is to be conducted; and
  - (iii) it will not appoint, or retain the appointment of, and will ensure that no other person appoints, or retains the appointment of, a person to the position of a Relevant Person in relation to the performance of any Project Activities unless the State has given approval (including following a Probity Investigation and any other investigations that the State reasonably requires in accordance with the Project Deed)

### 3.4 No liability for information

The Design Subcontractor acknowledges and agrees that:

- (a) any information, data and documents provided by the State
  - (i) are provided for information purposes only and all of the State's and its Associates' Intellectual Property Rights therein remain the property of the State or its Associates (as the case may be); and
  - (ii) do not form part of this Deed or constitute an invitation, offer or recommendation by or on behalf of the State or its Associates; and

- (b) to the extent permitted by Law, neither the State nor any of its Associates will have any liability to the Design Subcontractor or any of its Associates, nor will the Design Subcontractor or any of its Associates be entitled to make any Claim against the State, or seek, pursue or obtain an indemnity against or contribution to Liability from the State or any of its Associates arising out of or in connection with
  - (i) the provision of, or purported reliance upon, or use of any information, data and documents referred to in clause 3.4(a) by the Design Subcontractor or any other person to whom such information is disclosed by the Design Subcontractor, any of its respective Associates or any person on any of their behalf
  - (ii) any reference to the State in the Subcontract; or
  - (iii) any review of, comments upon, acceptance, approval or certification of the form or substance of the Subcontract by the State

### 3.5 Subcontract not to affect State's rights

Each of Project Co and the Design Subcontractor acknowledges and agrees that:

- (a) where the Design Subcontractor is expressed in the Subcontract to have a right (or possible right) to compensation or relief which is dependent on or determined by reference to the Project Deed or an equivalent or similar right of Project Co:
  - (i) this does not of itself expand Project Co's rights, or the State's Liability, under the Project Deed to include the compensation or relief to which the Design Subcontractor is or may become entitled under the Subcontract; and
  - (ii) Project Co's rights, and the State's Liability, under the Project Deed will be determined solely in accordance with the terms of the Project Deed;
- (b) as between the State (on the one hand) and Project Co, the D&C Subcontractor and the Design Subcontractor (on the other hand), Project Co, the D&C Subcontractor and the Design Subcontractor accept and will bear the risk of any inconsistency, ambiguity or discrepancy between the terms of the Subcontract and this Deed; and
- (c) notwithstanding anything to the contrary in the Subcontract, the Design Subcontractor has no right to deal directly with the State or participate in any meeting, consultation or process (including negotiation or dispute resolution); unless
  - (i) expressly provided to the contrary in the Project Deed or this Deed; or
  - (ii) the State consents in writing.

---

## 4. Not used

## 5. Not used

## 6. Novation of Subcontract

### 6.1 Option

The State may require a novation of the Subcontract in accordance with this clause 6 upon the termination of the Project Deed by giving a notice to the D&C Subcontractor and Design Subcontractor (**Novation Notice**).

### 6.2 Novation of Subcontract

With effect from the Effective Date

- (a) the parties novate the Subcontract so that the State (or, if applicable, the Approved Nominee) and the Design Subcontractor are parties to a new contract on the same terms as the Subcontract as amended by this Deed; and

- (b) any reference in the Subcontract to the D&C Subcontractor shall be read as a reference to the State (or, if applicable, the Approved Nominee).

### **6.3 Rights and obligations of the State and the Design Subcontractor under the Subcontract**

If the State gives a Novation Notice then, subject to clause 6.7, with effect from the Effective Date

- (a) the State (or, if applicable, the Approved Nominee),
- (i) is entitled to all rights and benefits under the Subcontract to which, but for this Deed, the D&C Subcontractor would have been entitled at and after the Effective Date;
  - (ii) must perform all obligations and discharge all liabilities under the Subcontract which, but for this Deed, the D&C Subcontractor would have been required to perform or discharge at and after the Effective Date; and
  - (iii) is bound by and must comply with all other provisions of the Subcontract by which, but for this Deed, the D&C Subcontractor would have been bound at and after the Effective Date; and
- (b) the Design Subcontractor
- (i) is entitled to all rights and benefits under the Subcontract to which, but for this Deed, it would have been entitled at and after the Effective Date;
  - (ii) must perform all obligations and discharge all liabilities under the Subcontract which, but for this Deed, it would have been required to perform or discharge at and after the Effective Date; and
  - (iii) is bound by and must comply with all other provisions of the Subcontract by which, but for this Deed, it would have been bound at and after the Effective Date,
- as if the State (or, if applicable, the Approved Nominee) had originally been a party to the Subcontract in place of the D&C Subcontractor.

### **6.4 Release by Design Subcontractor**

With effect from the Effective Date, the Design Subcontractor releases the D&C Subcontractor from all obligations and liability under or in respect of the Subcontract to be performed or discharged at or after the Effective Date.

### **6.5 Release by the D&C Subcontractor**

With effect from the Effective Date, the D&C Subcontractor releases the Design Subcontractor from all obligations and liability under or in respect of the Subcontract to be performed or discharged at or after the Effective Date.

### **6.6 Not used**

### **6.7 Obligations and liability prior to the Effective Date**

Nothing in this Deed releases the D&C Subcontractor or the Design Subcontractor from any obligation or liability under the Subcontract arising or accruing before the Effective Date and the State (or, if applicable, the Approved Nominee) does not assume any such obligation or liabilities under this Deed.

**6.8 Not used****6.9 Approved Nominee**

- (a) The State's nominee may be named as a party to the Subcontract in substitution for the D&C Subcontractor if the State's nominee is an Approved Nominee.
- (b) The Design Subcontractor must:
- (i) notify the State as to whether the State's nominee is an Approved Nominee, on or before the date falling 30 days after the date of receipt of all information reasonably required by the Design Subcontractor to decide whether the nominated person is an Approved Nominee;
  - (ii) not unreasonably withhold or delay its decision on whether the State's nominee is an Approved Nominee; and
  - (iii) enter into a side deed with the State and the Approved Nominee on substantially the same terms as this Deed.
- (c) If the Novation Notice specifies that the Approved Nominee is a person other than the State, the State must, at the time it gives a Novation Notice, provide to the Design Subcontractor the following particulars of the Approved Nominee:
- (i) name, place of incorporation and identity of shareholder(s)
  - (ii) if available, its most recent published audited accounts; and
  - (iii) sufficient particulars of the finance available to the Approved Nominee to enable the Design Subcontractor to decide whether to grant its consent to the Approved Nominee.

**6.10 Bonds**

If the State gives a Novation Notice then, as from the Effective Date, the D&C Subcontractor must (with the support of the Design Subcontractor to effect this provision) either:

- (a) procure the novation or assignment to the State (or, subject to clause 6.9, the Approved Nominee) of any performance security (including any performance guarantees or bonds) held by the D&C Subcontractor under the Subcontract prior to the Effective Date (**Bonds**), or
- (b) procure the issue to the State (or, if applicable, the Approved Nominee) of replacement bonds for the same undrawn value and on the same terms as the Bonds held by the D&C Subcontractor under the Subcontract prior to the Effective Date.

**6.11 Not used****6.12 Not used****7. Not used****8. Representations and warranties****8.1 Representations and warranties by Design Subcontractor**

- (a) The Design Subcontractor represents and warrants for the benefit of the State that:
- (i) **(power to execute)** it has the power to execute, deliver and carry out its obligations under this Deed and each other Project Document to which it is a party and all necessary action has been taken to authorize that execution, delivery and performance.

- (ii) **(legality)** the execution, delivery and performance of this Deed and each other Project Document to which I is a party does not violate any Law, document or agreement to which it is a party or which is binding on it or any of its assets;
- (iii) **(validity)** this Deed and each other Project Document to which it is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
- (iv) **(registration)**: it is duly registered, properly constituted and remains in existence;
- (v) **(no trust relationship)**: except as stated in this Deed, it is not the trustee, manager or Responsible Entity of any trust nor does I hold any property subject to or impressed by any trust;
- (vi) **(information true and correct)**: all information provided by it to the State is as at the date on which it is provided true and correct and the Design Subcontractor is not aware of any material facts or circumstances that have not been disclosed to the State and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Deed or consent to the entry into the Subcontract;
- (vii) **(litigation)**: no Claim against it is current or pending or (to its knowledge) is threatened, which will or is likely to have a Material Adverse Effect upon it or its ability to perform its financial and other obligations under this Deed or any other Project Document to which it is a party;
- (viii) **(Insolvency Event)**: no Insolvency Event has occurred in respect of it;
- (ix) **(accounts)**:
  - (A) its most recent consolidated audited (if the requirement for auditing is applicable) accounts give a true and fair view of its and its subsidiaries' state of affairs as at the date to which they relate and the results of its and its subsidiaries' operations for the accounting period ended on such date;
  - (B) there has been no material adverse change in its or its subsidiaries' state of affairs since such date; and
  - (C) such accounts have been prepared in accordance with the Corporations Act and accounting principles and practices generally accepted in Australia consistently applied, except to the extent of departures from such principles and practices disclosed in such accounts;
- (x) **(no default)**
  - (A) it is not in default under any document or agreement binding on it or its assets which relates to financial indebtedness; and
  - (B) nothing has occurred which would, with the giving of notice and/or lapse of time, constitute an event of default, cancellation, prepayment event (pursuant to a bona fide right to exercise prepayment) or similar event (whatever called) under any such document or agreement, which would have a Material Adverse Effect;
- (xi) **(no immunity)**: neither it nor any of its assets enjoys any immunity from set off, suit or execution in any jurisdiction; and
- (xii) **(own investigations)**: in entering into this Deed, the Subcontract and any other Project Document to which it is a party I relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State, Project Co, the D&C Subcontractor or any other person unless in respect of Project Co, the D&C Subcontractor or any other person, other than the State or an Associate of the State, it is expressly permitted to do so in accordance with a Project Document in which it is a party.

## 8.2 Repetition of representations and warranties

The representations and warranties in this clause 8 are taken to be repeated immediately before Financial Close on the basis of the facts and circumstances as at that date.

## 8.3 Reliance on representations and warranties

The Design Subcontractor acknowledges that the State exercised the Deed and agreed to take part in the transactions that this Deed contemplates in reliance on the representations and warranties that are made or repeated in this clause 8.

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## 9. Undertakings by Design Subcontractor

The Design Subcontractor undertakes to the State as follows:

- (a) **(notification of Default Event)**: it will notify the State of any Default Event promptly after it gives notice of that Default Event in accordance with the Subcontract;
- (b) **(documents in relation to Default Event)**: it will promptly give the State a copy of all documents issued by the Design Subcontractor to the D&C Subcontractor in relation to a Default Event;
- (c) **(no amendment without consent)**: it will not, without first obtaining the consent of the State
  - (i) make or permit any amendment or replacement of or addition to;
  - (ii) terminate, surrender, rescind or accept repudiation of;
  - (iii) permit the novation, assignment or substitution of any party's rights, obligations or interest in, except when in accordance with this Deed or clause 8.4 of the Financiers Tripartite Deed; or
  - (iv) allow any express waiver of its material rights and obligations under, the Subcontract, provided that the State will not withhold its consent to an amendment or other action contemplated in clauses 9(c)(i) to 9(c)(iv) to which it has consented in accordance with the Project Deed.
- (d) **(disposals)**: it will not, after Financial Close, transfer, assign, mortgage, charge, encumber or otherwise deal with its rights, obligations or interests in the Subcontract without first procuring that the proposed transferee, assignee, mortgagee or chargee executes a deed in favour of the State (in form and substance approved by the State) pursuant to which the transferee, assignee, mortgagee or chargee agrees to accept and be bound by this Deed as if it were the Design Subcontractor.
- (e) **(attend meetings and inspections)**: it will (when reasonably requested by the State):
  - (i) attend, where reasonable and appropriate, meetings with the State or any of the State's Associates;
  - (ii) provide the State or any of the State's Associates and authorised personnel with
    - (A) in the case of the Design Subcontractor, full access to
      - (I) not used
      - (II) any place where any Services are being carried out or materials are being prepared or stored,
 to the extent provided in the Project Deed, and
    - (B) any other information, records or documents that the State or any of its Associates (acting reasonably) requires in relation to the carrying out of



the Services or compliance with the Subcontract or any information required by the State to comply with requests from the New South Wales Auditor-General; and

- (ii) permit the State or any of the State's Associates to attend all tests and inspections to be carried out in connection with the Project in accordance with the terms of the Subcontract, to the extent provided in and in accordance with, the Project Deed, and
- (f) **(access to records):** at the request of the State to the extent provided in, and in accordance with, the Project Deed, it will:
  - (i) permit the State or any of its Associates to inspect all records, reports, plans, programs, specifications and design documents prepared or kept by the Design Subcontractor in relation to the Services and the Project; and
  - (ii) supply the State or any of its Associates with a copy of any such report or document which they may require from time to time.

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## 10. Acknowledgement by Project Co and the D&C Subcontractor

Project Co and the D&C Subcontractor consent to the terms of this Deed and will co-operate in the implementation of this Deed.

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## 11. Dispute Resolution

If any dispute or difference of opinion arises between the parties under this Deed, each party may refer any such matter for resolution in accordance with this clause 11 and the dispute or difference of opinion must be resolved in the same manner that disputes or differences of opinion under the Project Deed are resolved. Accordingly, the provisions of clauses 50 (Dispute Resolution procedure) to 53 (Arbitration) of the Project Deed are incorporated into this Deed but as if:

- (a) the only persons party to the Project Deed, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute; and
- (b) the only matters for expert determination under those provisions are the matters referred for expert determination under this Deed.

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## 12. GST

- (a) **(Interpretation):**
  - (i) Except where the context suggests otherwise, terms used in this clause 12 have the meanings given to those terms by the GST Act (as amended from time to time)
  - (ii) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 12.
  - (iii) Unless otherwise expressly stated, all consideration to be provided under this Deed is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 12.
  - (iv) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (b) **(Reimbursements):** Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be

limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

- (c) **(Additional amount of GST payable):** Subject to clause 12(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this Deed:
- (i) any amount payable or consideration to be provided under any provision of this Deed (other than this clause 12), for that supply is exclusive of GST;
  - (ii) any party (**Recipient**) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply; and
  - (iii) the Supplier must provide a Tax Invoice to the Recipient for that supply no later than the time at which the GST Amount for that supply is to be paid in accordance with clause 12(c)(ii).
- (d) **(Variation of GST):**
- (i) If the GST Amount properly payable in relation to a supply (as determined in accordance with clause 12(c) and clause 12(f)), varies from the additional amount paid by the Recipient under clause 12(c), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this clause 12(c) is deemed to be a payment, credit or refund of the GST Amount payable under clause 12(c).
  - (ii) The Supplier must issue an Adjustment Note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this Deed as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.
- (e) **(Exchange of non-monetary consideration):**
- (i) To the extent that the consideration provided for the Supplier's Taxable Supply to which clause 12(c) applies is a Taxable Supply made by the Recipient (the **Recipient Supply**), the GST Amount that would otherwise be payable by the Recipient to the Supplier in accordance with clause 12(c) will be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
  - (ii) The Recipient must issue to the Supplier an invoice for any Recipient Supply on or before the time at which the Recipient must pay the GST Amount in accordance with clause 12(c) (or the time at which such GST Amount would have been payable in accordance with clause 12(c) but for the operation of clause 12(e)(i)).
- (f) **(No merger):** This clause 12 will not merge on completion or termination of this Deed.
- (g) **(Application of Project Deed)** If clause 36 (*Payments Adjustments & Taxes*) of the Project Deed would apply in connection with a Taxable Supply to which this clause 12 also applies then clause 35 (*Payments Adjustments & Taxes*) of the Project Deed will apply in connection with that supply and the provisions of this clause 12 (but for this paragraph) will not apply.

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### 13. PPSA

- (a) If the State determines that this Deed is or contains a Security Interest, the parties (other than the State) agree to promptly do anything (including amending any document or executing any new document) which the State reasonably requires for the purposes of:
- (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;

- (i) enabling the State to apply for registration, or give any notification in connection with the Security Interest; or
  - (ii) enabling the State to exercise rights in connection with the Security Interest.
- (b) The parties (other than State) agree not to exercise its rights to make any request of the State under section 275 of the PPSA, to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.
- (c) The parties (other than the State) irrevocably and unconditionally waives its right to receive any notice of any verification statement in respect of any financing statement or financing change statement relating to this Deed.

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## 14. Notices

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

- (a) (in writing) must be in writing;
- (b) (addressed): must be addressed as follows (in as otherwise notified by that party to each other party from time to time)

### State

Name: [insert]

Address: [insert]

Email: [insert]

For the attention of: [insert]

### Project Co

Name: [insert]

Address: [insert]

Email: [insert]

For the attention of: [insert]

### D&C Subcontractor

Name: [insert]

Address: [insert]

Email: [insert]

For the attention of: [insert]

### Design Subcontractor

Name: [insert]

Address: [insert]

Email: [insert]

For the attention of: [Insert]

- (c) **(signed)**: must be signed by the party making the communication or by the solicitor for or any attorney, director, secretary or authorised agent of that party or its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 14(b); and
- (e) **(taken to be received)** are taken to be received by the addressee at the address set out in clause 14(b):
  - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
  - (ii) subject to clause 14(f), in the case of prepaid post on the fourth Business Day after the date of posting to an address within Australia and on the tenth Business Day after the date of posting by email to an address outside Australia;
  - (iii) in the case of email, the first to occur of
    - (A) receipt by the sender of any email acknowledgment from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
    - (B) the time that the communication enters an information system which is under the control of the addressee; or
    - (C) the time that the communication is first opened or read by the addressee, unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day; and
- (f) **(notices sent by post)**: if sent by post from within Australia, must be sent using the priority postal service offered by Australia Post (or any other postal service provider that assumes any or all of the functions of Australia Post) or other such similar service.

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## 15. Confidential Information and disclosure

### 15.1 Confidential Information and disclosure by the State

- (a) Subject to clause 15.1(b), the State and any Authority may disclose any information in connection with the Project, including Project Information;
- (b) The State may only disclose the Commercially Sensitive Information
  - (i) in accordance with:
    - (A) Laws or for the enforcement of any criminal law;
    - (B) where disclosure is in the course of the official duties of a minister, the Treasurer, the Premier or the Attorney General;
    - (C) to satisfy the disclosure requirements of the NSW Auditor-General in accordance with the Public Finance and Audit Act 1983 (NSW);
    - (D) to satisfy the requirements of Parliamentary accountability;
    - (E) to any Associate of the State to the extent necessary for the purpose of the Project provided they agree to maintain the confidentiality of any Commercially Sensitive Information;

- (F) in annual reports of the State; or
  - (G) in accordance with policies of the State or the NSW Government or any Authority;
- (c) for any tender process required to be conducted under the Termination Payments Schedule; or
- (d) where the Commercially Sensitive Information is any part of the Design Deliverables, the Design Requirements or the Services Requirements, for the purpose of conducting any tender process required by the terms of the Project Deed.

## 15.2 Confidential Information and disclosure by the Design Subcontractor

- (a) **(Confidentiality obligation):** Subject to clauses 15.2(b) and clause 15.4(p), the Design Subcontractor must treat as secret and confidential all Confidential Information and must not, and must procure that its Associates do not, without the prior written consent of the State, make public or disclose to any person any Confidential Information.
- (b) **(Disclosure of Confidential Information):** Without limiting the Design Subcontractor's obligations under clause 15.2(a) and subject to clause 15.2(c), the Design Subcontractor may disclose Confidential Information
- (i) to its Associates to the extent necessary for the purpose of undertaking the Project; and
  - (ii) in accordance with clause 15.4.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, the Design Subcontractor must ensure that the person to whom the information is disclosed enters into a confidentiality deed with it to keep the Confidential Information confidential in accordance with this clause 15.
- (d) **(Permitted disclosure):** The Design Subcontractor may disclose Confidential Information and will not be required to seek the State's consent to a disclosure, announcement or statement under clause 15.2(a) or 15.3(a) or to enter into a confidentiality deed under clause 15.2(c) where the disclosure, announcement or statement is:
- (i) required by Law, provided that it:
    - (A) notifies the State of the requirement to make that disclosure; and
    - (B) takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
  - (ii) required to obtain legal or other advice from its advisers, provided that the relevant adviser is under a duty of confidentiality;
  - (iii) required to be made to a court in the course of proceedings to which the Design Subcontractor is a party; or
  - (iv) required by a relevant recognised stock exchange, subject to:
    - (A) the disclosure, announcement or statement does not refer to the State's or any of its Associates' involvement in the Project; and
    - (B) the Design Subcontractor having used all reasonable endeavours to obtain the State's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant recognised stock exchange.

### 15.3 Public announcements by Design Subcontractor

Subject to clause 15.2(d) the Design Subcontractor must:

- (a) not make any public disclosures, announcements or statements in relation to the Project or the State's or any of the State's Associates' involvement in the Project, without the State's prior consent;
- (b) comply with any terms and conditions the State imposes and must use all reasonable endeavours to agree with the State the wording and timing of all public disclosures, announcements or statements by it or any of its Associates relating to the Project or the State's or any of the State's Associates' involvement in the Project before the relevant disclosure, announcement or statement is made; and
- (c) as soon as practicable, give to the State a copy of any public disclosure, announcement or statement agreed to or approved by the State in accordance with this clause 15.3 or for which the State's consent or approval was not required in accordance with clause 15.4

### 15.4 Information public or known

Notwithstanding anything in this clause 15 any party may disclose information in connection with the Project (including any Confidential Information) if

- (a) the party can demonstrate that the relevant information is already generally available and in the public domain otherwise than as a result of breach of this clause 15; or
- (b) the relevant information is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party.

### 15.5 Disclosure by the State under GIPA Act

- (a) Notwithstanding the other provisions of this clause 15 the parties acknowledge that
  - (i) the Project Documents and information concerning the Project Documents will be published on the State's contracts register in accordance with Division 5 of Part 3 of the GIPA Act; and
  - (ii) the State may make the Project Documents (other than the Key Subcontracts) or any of them available to any person.
- (b) The parties acknowledge that:
  - (i) the State will notify the Design Subcontractor of any proposed disclosure of Commercially Sensitive Information by the State under the GIPA Act no later than 20 Business Days before the proposed date of disclosure;
  - (ii) following notification by the State in accordance with clause 15.5(b)(i), the State will take reasonable steps to consult with the Design Subcontractor before disclosing Commercially Sensitive Information under the GIPA Act;
  - (iii) if, following:
    - (A) notification by the State in accordance with clause 15.5(b)(i); or
    - (B) consultation between the State and the Design Subcontractor in accordance with clause 15.5(b)(ii),

the Design Subcontractor objects to disclosure of some or all of the Commercially Sensitive Information, the Design Subcontractor must provide details of any such objection within five Business Days after the date the Design Subcontractor received notification from the State or the date on which the consultation process concluded (as relevant)

- (iv) the State may take into account any objection received from the Design Subcontractor pursuant to clause 15.5(b)(iii) in determining whether the Commercially Sensitive Information identified by the Design Subcontractor should be disclosed; and
- (v) nothing in this clause 15.5 will limit or otherwise affect the discharge of the State's obligations under the GIPA Act

## 15.6 Personal Information

The Design Subcontractor must:

- (a) not collect any Personal Information except in accordance with the Design Requirements and Services Requirements, all Laws and Policies;
- (b) not disclose any Personal Information to any person other than as is necessary to provide the Services or to comply with Laws and then only in accordance with the Design Requirements and Services Requirements, all Laws and Policies; and
- (c) keep, and make available to the State on request, records detailing the recipient of any Personal Information that the Design Subcontractor has disclosed, the date of disclosure and the Personal Information that has been disclosed.

## 15.7 Confidential Design Information

The Design Subcontractor must:

- (a) **(Access)**, only provide access to Confidential Design Information to Relevant Persons who:
  - (i) are not Uncleared Personnel, and permitted to receive Confidential Design Information in accordance with clause 62.2 of the Project Deed and, where required by the State, have satisfied any Probity Investigation under clause 63.2 of the Project Deed; and
  - (ii) require access to that Confidential Design Information to perform the Services;
- (b) **(Limited portion)**, where it is necessary to grant access to Confidential Design Information in accordance with clause 15.7(a), grant access to the most limited portion of the Confidential Design Information possible; and
- (c) **(Records)**, keep, and make available to the State on request, records detailing the recipient of any Confidential Design Information, the date of disclosure and the Confidential Design Information that has been disclosed.

## 15.8 Privacy

- (a) **(Compliance)**, Without limiting any obligations in respect of privacy set out in the Design Requirements or the Services Requirements, the Design Subcontractor agrees to, and will ensure that the Subcontract and any other subcontract entered into by the Design Subcontractor in relation to the Project contains terms which require the Design Subcontractor to, be bound by the Privacy Legislation with respect to any act done, or practice engaged in, by it in connection with this Deed or with the Subcontract or other relevant subcontract (as the case may be), in the same way as the State would be bound by the Privacy Legislation, in connection with that act or practice had it been directly done or engaged in by the State.
- (b) **(Release and indemnity)**, The Design Subcontractor must release, indemnify and must keep indemnified on demand the State and its Associates from and against any Claim or Liability (including any Claim made by, or Liability to, a third party) which the State or any of its Associates suffer or incur resulting from any act done or practice engaged in by the Design Subcontractor or any of its respective Associates in connection with the Project, which would, had that act or practice been done or engaged in by the State, have contravened any of the Privacy Legislation.

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## 16. Termination of this Deed

- (a) **(Satisfaction of obligations under the Subcontract):** This Deed will terminate upon the performance and satisfaction of all of the obligations under the Subcontract.
- (b) **(Does not affect rights of parties):** The termination of this Deed does not affect the rights of any party which have accrued to that party before the date of termination.
- (c) **(Surviving clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provision in connection with:
- (i) the State's rights to set off and recover money;
  - (ii) confidentiality or privacy;
  - (iii) Intellectual Property Rights;
  - (iv) any obligation to make any records available to the State;
  - (v) any indemnity or financial security given in accordance with this Deed;
  - (vi) any limitation or exclusion of liability; and
  - (vii) any right or obligation arising on termination or expiry of this Deed.
- (d) **(Interpretation):** No provision of this Deed which is expressed to survive the termination, rescission or expiration of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination, rescission or expiration of this Deed.
- (e) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction under this Deed. All rights and obligations under this Deed survive the execution and delivery of any transfer or other document which implements any transaction under this Deed.

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## 17. Governing law and jurisdiction

### 17.1 Governing law

This Deed is governed by, and must be construed according to, the laws of New South Wales, Australia.

### 17.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought within an inconvenient forum, if that venue falls within clause 17.2(a).

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## 18. Miscellaneous

### 18.1 Entire agreement

To the extent permitted by law and in relation to its subject matter, this Deed:



- (a) **(entire understanding)** embodies the entire understanding of the parties and constitutes the entire terms agreed by the parties; and
- (b) **(prior agreements)**: supersedes any prior agreement of the parties

## 18.2 Further acts and documents

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

## 18.3 Waiver

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

## 18.4 Consents and approvals

A consent or approval required under this Deed from the State may be given or withheld or may be given subject to any conditions, as the State (in its absolute discretion) thinks fit, unless this Deed expressly provides otherwise.

## 18.5 Amendments

Except as otherwise expressly provided in this Deed, this Deed may only be varied by a deed executed by or on behalf of each party.

## 18.6 Expenses

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

## 18.7 Severance

If, at any time, a provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this Deed, or
- (b) that provision under the Law of any other jurisdiction.

## 18.8 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Deed, except for representations or inducements expressly set out in this Deed.
- (b) Each party acknowledges and confirms that it does not enter into this Deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Deed.

## 18.9 Counterparts

This Deed may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the deed of each party who has executed and

delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same Deed.

### 18.10 Moratorium legislation

The provisions of all Laws which come into effect after the date of this Deed and operate to

- (a) increase or improve any of Project Co's, the D&C Subcontractor's or the Design Subcontractor's rights, powers or remedies under this Deed or otherwise, or
- (b) prejudicially affect the exercise by the State of any right, power or remedy under this Deed or otherwise,

are expressly waived.

### 18.11 Limitation of liability

*[Note: This clause is to be reviewed in respect of the relevant subcontract.]*

- (a) Despite any other provision of any Project Document, the maximum aggregate liability of the Design Subcontractor to the State, Associates of the State, Project Co, Associates of Project Co, the D&C Subcontractor and Associates of the D&C Subcontractor arising out of or in connection with the Project Documents whether in contract, in tort (including negligence) or otherwise is no greater than the maximum liability of the Design Subcontractor under clause *[insert]* of the Subcontract, subject to the same exceptions, exclusions and limitations as are specified in the Subcontract, less the liability incurred (from time to time) by the Design Subcontractor under the Subcontract.
- (b) The payment by the Design Subcontractor of any moneys owing to the D&C Subcontractor under the Subcontract:
  - (i) to the State in accordance with this Deed, or
  - (ii) in accordance with a direction of the State given under or in connection with this Deed,
 will be deemed full discharge of the Design Subcontractor's obligations in respect of that amount under the Subcontract.
- (c) The Design Subcontractor must, within 10 Business Days of a request by the State, notify the value of any claim against the Design Subcontractor by Project Co, the D&C Subcontractor or their respective Associates, together with any further detail regarding the calculation of such amount as reasonably requested by the State.

**Executed as a deed.**

*[Execution blocks to be inserted prior to execution.]*

## Schedule 27

### New Grafton Correctional Centre D&C Side Deed

**[Insert name of D&C Subcontractor]**

[insert ABN/ACN]

**[Insert name of Parent Guarantor]**

[insert ABN/ACN]

**[Insert name of Project Co]**

[insert ABN/ACN/ABN]

**[Insert name of State party]**

[insert ABN]

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**This Subcontract Side Deed is made on**

**Between:**

[Insert name of party] ABN [Insert ABN] of [Insert address] (**D&C Subcontractor**)

[Insert name of party] ABN [Insert ABN] of [Insert address] (**Parent Guarantor**);

[Insert name of party] ABN [Insert ABN] of [Insert address] (**Project Co**);

[Insert name of party] ABN [Insert ABN] of [Insert address]

**Recitals:**

- A The State and Project Co have entered, or will enter, into the Project Deed for the provision of the Project.
- B Project Co has subcontracted its obligations to carry out the Works to the D&C Subcontractor pursuant to the Subcontract.
- C The Parent Guarantor has, pursuant to the Parent Guarantee, guaranteed to Project Co the performance of the D&C Subcontractor's obligations under the Subcontract.
- D The D&C Subcontractor and the Parent Guarantor have agreed to grant to the State certain rights in relation to the Subcontract Documents.

**The parties agree as follows:**

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## **1. Definitions and interpretation**

### **1.1 Project Deed definitions incorporated**

Unless otherwise expressly defined in this Deed, expressions used in this Deed have the meanings given to them in the Project Deed.

### **1.2 Definitions**

In this Deed:

**Additional Obligor** means a company or other entity which is wholly owned by the State.

**Additional Obligor Step-In Notice** has the meaning given in clause 5.1(a)(iv).

**Additional Obligor Step-Out Data** has the meaning given in clause 5.3(d).

**Approved Nominee** means a person nominated by the State and approved by the D&C Subcontractor in accordance with clause 6.9 as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Subcontract; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and subcontracts) which are sufficient to enable it to perform the obligations of Project Co under the Subcontract.

**Assumption Date** has the meaning given in clause 5.3(a).

**Deed** means this deed and includes all schedules, exhibits, attachments and annexures to it.

**Default Event** means:

- (a) any default (however described) by Project Co under the Subcontract, or
- (b) any other event or circumstance,

which alone or with the giving of notice or passage of time or both, would entitle the D&C Subcontractor to terminate, rescind, accept the repudiation of, or suspend any or all of the D&C Subcontractor's obligations under the Subcontract.

**Default Event Notice** has the meaning given in clause 4.7(a).

**Effective Date** means the date specified in the Novation Notice.

**Material Adverse Effect** means a material adverse effect on:

- (a) the ability of any of a Project Co Entity, the D&C Subcontractor or the Parent Guarantor to perform and observe their respective obligations under any Project Document to which it is a party; or
- (b) the rights of the State under any State Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document.

**Novation Notice** has the meaning given in clause 6.1.

**Parent Guarantee** means each deed of guarantee dated on or about the date of this Deed from the Parent Guarantor in favour of Project Co in respect of the obligations of the D&C Subcontractor under the Subcontract; and, if the State gives a Novation Notice, each new guarantee entered into pursuant to clause 6.6.

**PPS Law** means:

- (a) the *Personal Property Securities Act 2009* (Cth) and any regulation made at any time under the PPSA, including the *Personal Property Securities Regulations 2010* (Cth) (each as amended from time to time), and
- (b) any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a).

**Project Co's Rights** has the meaning given in clause 5.3(b);(i)(A).

**Project Deed** means the document entitled *New Grafton Correctional Centre - Project Deed* between the State and Project Co dated on or about the date of this Deed.

**Receiver** means any agent, attorney, trustee, manager, receiver, receiver and manager, administrator, liquidator or provisional liquidator or analogous person appointed under or in connection with the State Security or pursuant to court order on application by the State.

**Security Interest** has the meaning given to the term in the PPS Law.

**State** means:

- (a) The Minister for Corrections on behalf of the Crown in right of the State of New South Wales;
- (b) Infrastructure New South Wales (ABN 85 031 302 516), and



- (c) for the purposes of the Project Deed and the Operator Side Deed only the Commissioner of Corrective Services.

**State Care Notice** has the meaning given in clause 4.2(c)

**Step-In Right** has the meaning given in clause 5.1(a).

**Step-In Period** has the meaning given in clause 5.1(b)

**Subcontract** means the contract titled '[insert]' between Project Co and the D&C Subcontractor dated on or about the date of this Deed

**Subcontract Documents** means the Subcontract and the Parent Guarantee (or either as the context requires).

**Works** means [insert]

### 1.3 Interpretation

In this Deed:

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

and unless the context otherwise requires:

- (i) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender.
- (ii) **(Deed and Schedule references)**: a reference to
- (i) a party, clause, Schedule, Exhibit, Attachment or Annexure is a reference to a party, clause, Schedule, Exhibit, Attachment or Annexure of or to this Deed; and
  - (ii) a section is a reference to a section of a Schedule;
- (d) **(document as amended)**: a reference to a document, deed, agreement or instrument or a provision of any such document, deed, agreement or instrument includes a reference to that document, deed, agreement or instrument as amended, varied, supplemented, varied or replaced from time to time.
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation.
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a body politic, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust.
- (g) **(legislation)**: a reference to legislation includes its delegated legislation, and a reference to that legislation or delegated legislation, or a provision of either, includes consolidations, amendments, re-enactments and replacements, and all ordinances, by-laws, regulations and other statutory instruments (however described) issued under it;
- (h) **(Policies)**: a reference to a Policy includes that Policy as amended or updated from time to time.
- (i) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) **(includes)**: 'includes' and 'including' will be read as if followed by the phrase '(without limitation)';

- (k) ('or') the meaning of 'or' will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) ('information'): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (m) ('\$'): a reference to '\$', AUD or dollar is to Australian currency;
- (n) ('Business Day'): if the day on or by which anything is to be done under this Deed is not a Business Day, that thing must be done no later than the next Business Day;
- (o) ('day'): except as otherwise provided in this Deed or where a reference is made to 'Business Days', day means a calendar day;
- (p) ('time'): a reference to time is a reference to time in Sydney, Australia;
- (q) ('rights'): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (r) ('function'): a function includes a power, authority or duty;
- (s) ('obligations and liabilities'): a reference to an obligation or a Liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (t) ('may'): except to the extent that the State is expressly required under this Deed to act reasonably in exercising a power, right or remedy, the term 'may', when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion (and without regard to Project Co, the D&C Subcontractor or the Parent Guarantor) and the State has no obligation to do so;
- (u) ('construction'), where there is a reference to an Authority, institute or association or other body referred to in this Deed which
  - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity;
  - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (v) ('asset'): references to an asset include any real or personal, present or future, tangible or intangible, property or asset (including intellectual property) and any right, interest, revenue or benefit in, under or derived, from the property or asset;
- (w) ('contra proferentem rule not to apply'): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision; and
- (x) ('PPS Law defined terms'): each of the terms 'financing statement', 'financing charge statement' and 'verification statement' have the meanings given to them in the PPS Law.

#### 1.4 Inconsistencies

To the extent of any inconsistency between the terms of this Deed and a Subcontract Document, this Deed will prevail over the applicable Subcontract Document.

#### 1.5 Project Deed, the State Security and Financiers Tripartite Deed

The D&C Subcontractor and the Parent Guarantor acknowledge that they have received a copy of the Project Deed, the State Security and the Financiers Tripartite Deed

## 1.6 Exclusion of Civil Liability Act

To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this Deed, howsoever those rights, obligations or liabilities are sought to be enforced.

## 1.7 State's executive rights, duties and functions

- (a) **(Acknowledgements):** The parties acknowledge the substance, operation and potential effect and consequences of clause 2.10 (*State's executive rights, duties and functions*) of the Project Deed in relation to this Deed.
- (b) **(No Claim):** Subject to clause 1.7(c), Project Co, the D&C Subcontractor and the Parent Guarantor will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (c) **(Liability for breach):** Clauses 1.7(a) and 1.7(b) do not limit any Liability which the State would have had to Project Co, the D&C Subcontractor or the Parent Guarantor under any State Project Document as a result of a breach by the State of a term of any State Project Document but for these clauses.

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## 2. Securities

### 2.1 D&C Subcontractor acknowledgements and consents

The D&C Subcontractor:

- (a) acknowledges and consents to the grant of, subject to the Financiers Tripartite Deed, security over all of each Project Co Entity's right, title and interest in and to the Subcontract Documents pursuant to the State Security;
- (b) acknowledges the rights created under the State Security in favour of the State, including the appointment by Project Co of the State as the lawful attorney of Project Co to do, perform and exercise all things, acts and rights under the Subcontract on behalf and for the account of Project Co, pursuant to the State Security, subject to the rights of the Security Trustee under the Financiers Tripartite Deed.
- (c) acknowledges and agrees that, without limiting the State's obligations under this Deed, the State is not subject to any duty or obligation under the Subcontract as a result of the State Security; and
- (d) acknowledges that the grant of the State Security is not, and the exercise by the State of its rights under the State Security will not, of itself, constitute a Default Event.

### 2.2 Parent Guarantor acknowledgements and consents

The Parent Guarantor:

- (a) acknowledges and consents to the grant of the security over all of Project Co's rights, title and interest in and to the Parent Guarantee pursuant to the State Security;
- (b) acknowledges the rights created under the State Security in favour of the State, including the appointment by Project Co of the State as the lawful attorney of Project Co to do, perform and exercise all things, acts and rights under the Parent Guarantee on behalf of and for the account of Project Co, pursuant to the State Security, subject to the rights of the Security Trustee under the Financiers Tripartite Deed.
- (c) acknowledges and agrees that, without limiting the State's obligations under this Deed, the State is not subject to any duty or obligation under the Parent Guarantee as a result of the State Security; and
- (d) acknowledges that the grant of the State Security does not, and the exercise by the State of its rights under the State Security will not, of itself, give rise to any rights by the Parent Guarantor to revoke or terminate the Parent Guarantee.

### 3. D&C Subcontractor's warranty and State's rights and liability

#### 3.1 D&C Subcontractor's warranty

- (a) The D&C Subcontractor warrants to the State that it has carried out and provided the Subcontract has not been terminated, will continue to carry out its duties under the Subcontract in accordance with the Subcontract; and that it has exercised and will continue to exercise, in carrying out the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent contractor providing those Works in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing, the D&C Subcontractor covenants with the State that it has carried out and will, provided the Subcontract has not been terminated, carry out and complete the Works in accordance with the Subcontract and duly observe and perform all its duties and obligations thereunder.
- (b) Without prejudice to any of the State's other rights under this Deed (including, without limitation, under clauses 4 and 5), the State may only exercise its rights under this clause 3.1 upon:
- (i) the State exercising its step-in rights under the Project Deed;
  - (ii) the termination of the Project Deed or Project Co's employment under the Project Deed; or
  - (iii) Project Co no longer being responsible for performing the Project substantially on the basis set out in the Project Deed and/or the Monthly Service Payment regime no longer applying.

#### 3.2 State's rights under Project Deed and State Security

- (a) The D&C Subcontractor and the Parent Guarantor each acknowledge and agree that:
- (i) the State's rights under any State Security, including the appointment by any Project Co Entity of the State as attorney of the relevant Project Co Entity to do, perform and exercise all things, acts and rights under the Subcontract Documents on behalf of and for the account of the relevant Project Co Entity; and
  - (ii) the State's rights and Project Co's obligations under the Project Deed, including under the following clauses of the Project Deed:
    - (A) clause 11.3 (Audits for compliance with this Deed);
    - (B) clause 13 (Workforce);
    - (C) clause 20 (State access during the Delivery Phase);
    - (D) clause 28.2 (State access to the Correctional Complex, records and inmates);
    - (E) clause 32 (Asset Ownership and Condition);
    - (F) clause 37 (Expiry obligations);
    - (G) clause 42 (Emergencies and Step-In by the State);
    - (H) clause 48 (Major Default);
    - (I) clause 49 (Termination);
    - (J) clause 60 (Records and Accounts);
    - (K) clause 61 (Intellectual Property Rights);
    - (L) clause 62 (Confidential Information and disclosure); and

- (M) clause 63 (Probity Events and Probity Investigations).
- (b) The D&C Subcontractor must:
- (i) exercise its rights under the Subcontract in a way that facilitates the effective exercise by the State of the rights referred to in clause 3.2(a) and
  - (ii) permit the State or a State Associate to have access to, and take copies of, the information to which the State is entitled to have access in accordance with the State's rights referred to in clause 3.2(a).
- (c) During the period in which the State is exercising a right referred to in clause 3.2(a), the State may, in accordance with the Project Deed and the Subcontract, require the suspension or the continuation of performance by the D&C Subcontractor of its obligations under the Subcontract, and if it does so, the D&C Subcontractor must (without limiting its rights under clauses 4 and 5) comply with this requirement and with all reasonable directions of the State in relation to the performance of the Subcontract by the D&C Subcontractor during such period.
- (c) The requirement of the State that the D&C Subcontractor suspend or continue to perform its obligations under the Subcontract and the giving of any direction under clause 3.2(c) by the State does not constitute an assumption by the State of any obligations of the D&C Subcontractor under the Subcontract.

### 3.3 Subcontracting and Probity Investigations

- (a) The D&C Subcontractor and the Parent Guarantor each acknowledges the State's rights and Project Co's obligations under the following clauses of the Project Deed:
- (i) clause 12 (Subcontracting and third party arrangements);
  - (ii) the clauses listed in clause 12.3(a); (ii) (Requirements for subcontracting); and
  - (iii) clause 63 (Probity Events and Probity Investigations).
- (b) The D&C Subcontractor must not subcontract any of its obligations under the Subcontract without ensuring that Project Co has obtained the prior consent of the State to that subcontract, where the State's consent is required in accordance with clause 12 (Subcontracting and third party arrangements) of the Project Deed.
- (c) Without limiting the previous paragraphs, the D&C Subcontractor and the Parent Guarantor each acknowledge and agree that:
- (i) in accordance with clauses 12 (Subcontracting and third party arrangements) and 63 (Probity Events and Probity Investigations) of the Project Deed, the State may, from time to time, or may require Project Co to, conduct Probity Investigations of the D&C Subcontractor, the Parent Guarantor and/or Relevant Persons in respect of the D&C Subcontractor (excluding the Project Co Representative) or other persons to whom the D&C Subcontractor is proposing to subcontract any of its obligations under the Subcontract;
  - (ii) it will procure all relevant consents from any persons in respect of whom a Probity Investigation is to be conducted; and
  - (iii) it will not appoint, or retain the appointment of, and will ensure that no other person appoints, or retains the appointment of, a person to the position of a Relevant Person in relation to the performance of any Project Activities unless the State has given approval (including following a Probity Investigation and any other investigations that the State reasonably requires in accordance with the Project Deed).

### 3.4 No liability for information

The D&C Subcontractor and the Parent Guarantor each acknowledge and agree that:

- (a) any information, data and documents provided by the State:
  - (i) are provided for information purposes only and all of the State's and its Associates' Intellectual Property Rights therein remain the property of the State or its Associates (as the case may be); and
  - (ii) do not form part of this Deed or constitute an invitation, offer or recommendation by or on behalf of the State or its Associates; and
- (b) to the extent permitted by Law, neither the State nor any of its Associates will have any Liability to the D&C Subcontractor, the Parent Guarantor or any of their Associates, nor will the D&C Subcontractor, the Parent Guarantor or any of their Associates be entitled to make any Claim against the State, or seek, pursue or obtain an indemnity against or contribution to Liability from the State or any of its Associates arising out of or in connection with
  - (i) the provision of, or purported reliance upon, or use of any information, data and documents referred to in clause 3.4(a) by the D&C Subcontractor, the Parent Guarantor, or any other person to whom such information is disclosed by the D&C Subcontractor, the Parent Guarantor, any of their respective Associates or any person on any of their behalf;
  - (ii) any reference to the State in a Subcontract Document; or
  - (iii) any review of, comments upon, acceptance, approval or certification of the form or substance of a Subcontract Document by the State

### 3.5 Subcontract not to affect State's rights

Each of Project Co, the D&C Subcontractor and the Parent Guarantor acknowledge and agree that

- (a) where the D&C Subcontractor is expressed in the Subcontract to have a right (or possible right) to compensation or relief which is dependent on or determined by reference to the Project Deed or an equivalent or similar right of Project Co:
  - (i) this does not of itself expand Project Co's rights, or the State's Liability, under the Project Deed to include the compensation or relief to which the D&C Subcontractor is or may become entitled under the Subcontract; and
  - (ii) Project Co's rights, and the State's Liability, under the Project Deed will be determined solely in accordance with the terms of the Project Deed;
- (b) as between the State (on the one hand) and Project Co, the D&C Subcontractor and the Parent Guarantor (on the other hand), Project Co, the D&C Subcontractor and the Parent Guarantor accept and will bear the risk of any inconsistency, ambiguity or discrepancy between the terms of the Subcontract and this Deed; and
- (c) notwithstanding anything to the contrary in the Subcontract, neither the D&C Subcontractor nor the Parent Guarantor has any right to deal directly with the State or participate in any meeting, consultation or process (including negotiation or dispute resolution) unless:
  - (i) expressly provided to the contrary in the Project Deed or this Deed; or
  - (ii) the State consents in writing;

---

## 4. State's right to cure Default Event

### 4.1 State's cure rights

- (a) On becoming aware of any Default Event (and subject to clause 4.1(b)), the State may (but is not obliged to) take steps to cure or remedy, or procure the cure or remedy of, that Default Event

- (b) Clause 4.1(a) only applies if the D&C Subcontractor has given a State Cure Notice in accordance with clause 4.2(c).
- (c) Upon the State exercising any of its rights under this clause 4.1, Project Co must cease exercising its rights and performing its obligations under the Subcontract (other than Project Co's obligation to pay money) to the extent and for such period as Project Co is prevented from performing such obligations by the State's exercise of its rights pursuant to clause 4.1(a) (but only until such time as the State ceases to exercise those rights in accordance with clause 4.1(d)).
- (d) If the State exercises its rights pursuant to clause 4.1(a), the State may, after giving reasonable prior notice to Project Co, cease to exercise those rights, and in any event, will cease to exercise those rights once the relevant Default Event has been remedied.

#### 4.2 Restriction on right to terminate or suspend

The D&C Subcontractor must not terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Subcontract unless each of the following conditions has been satisfied:

- (a) the D&C Subcontractor has given to the State prior notice setting out details of the Default Event giving rise to the right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Subcontract, together with the statements referred to in clause 4.3 (Default Event Notice);
  - (b) if the D&C Subcontractor's right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Subcontract is subject to any right of a Financier to cure or remedy the Default Event:
    - (i) the cure or remedy period available to the Financiers in respect of the Default Event under any Finance Document has expired without a cure or remedy being achieved; or
    - (ii) the Security Trustee has notified the D&C Subcontractor in writing that it does not intend to cure or remedy the Default Event
  - (c) the D&C Subcontractor has given notice to the State confirming that, either:
    - (i) the requirements of clause 4.2(b) are satisfied; or
    - (ii) the D&C Subcontractor's right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Subcontract is not subject to any right of the Financiers to cure or remedy the Default Event.
- ;State Cure Notice) and**
- (d) any one of the following has occurred:
    - (i) if:
      - (A) the Default Event is a failure to pay an amount which is due and payable to the D&C Subcontractor, such Default Event has not been cured or remedied within [10] Business Days after the date on which the State Cure Notice is given to the State (or such longer period as is permitted under the Subcontract or agreed to by the D&C Subcontractor); or
      - (B) the Default Event is not one described in clause 4.2(d)(i)(A) but is otherwise capable of cure or remedy within [20] Business Days after the date on which the State Cure Notice is given to the State (or such longer period as is permitted under the Subcontract or agreed to by the D&C Subcontractor), that Default Event has not been cured or remedied within the relevant period;

- (ii) if the Default Event is not one described in clause 4.2(d)(i) but is nevertheless reasonably capable of cure or remedy, the State has not commenced curing or remedying the Default Event within 20 Business Days after the date on which the State Cure Notice is given and has not continued to diligently pursue that cure or remedy;
- (iii) if the Default Event is not reasonably capable of cure or remedy and the Default Event Notice contains a claim for reasonable compensation for the Default Event, Project Costs of the State (or another person on behalf of either of them) have not paid or otherwise provided that compensation to the D&C Subcontractor:
  - (A) to the extent that the relevant amount of compensation has been referred to expert determination under clause 11, within 20 Business Days after that dispute is resolved; or
  - (B) otherwise within 20 Business Days after the date on which the State received the State Cure Notice;
- (iv) if the Default Event is not reasonably capable of cure or remedy and the Default Event Notice does not contain a claim for reasonable compensation for the Default Event, the State does not commence and continue to perform Project Costs obligations under the Subcontract within 20 Business Days after the date on which the State Cure Notice is given to the State; or
- (v) the State notifies the D&C Subcontractor in writing after receipt of the State Cure Notice that it elects not to cure or remedy, or procure the cure or remedy of, the Default Event.

#### 4.3 Statements concerning Default Event

- (a) As part of any Default Event Notice, the D&C Subcontractor must submit to the State statements of:
  - (i) where the Default Event is a monetary default:
    - (A) the provisions of the Subcontract alleged to have been breached or not fulfilled; and
    - (B) the amount which must be paid to the D&C Subcontractor to remedy the Default Event;
  - (ii) where the Default Event is of a non-monetary nature:
    - (A) the provisions of the Subcontract alleged to have been breached or not fulfilled;
    - (B) sufficient information to enable the State to identify the material facts;
    - (C) the steps reasonably required to cure or remedy the specified breaches or conditions not fulfilled if reasonably capable of cure or remedy; and
    - (D) the time within which the specified steps can reasonably be expected to be taken;
  - (iii) any rights available to the Financiers, pursuant to any Finance Document to which the D&C Subcontractor is a party, to cure or remedy that Default Event and the period within which that cure or remedy must occur before the Finance Documents permit the D&C Subcontractor to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Subcontract; and
  - (iv) any claims in connection with the Default Event which the D&C Subcontractor is not waiving or abandoning in accordance with clause 4.4.



- (b) If the D&C Subcontractor gives a State Cure Notice to the State in accordance with clause 4.2(c), as part of that notice the D&C Subcontractor must update the matters referred to in clause 4.3(a).

#### 4.4 Warranty of accuracy

- (a) The D&C Subcontractor warrants to the State that statements submitted by it under clause 4.3 will be, so far as reasonably practicable and subject to unintended error which the D&C Subcontractor agrees to promptly rectify, true, complete and accurate statements of the amounts to which the D&C Subcontractor considers itself entitled.
- (b) The D&C Subcontractor and the Parent Guarantor each waive and abandon all claims then known or which ought reasonably to have been known either to the D&C Subcontractor or the Parent Guarantor arising out of or in connection with the Subcontract Documents prior to the date of the Default Event Notice other than the claims disclosed in the statements submitted by it under clause 4.3.

#### 4.5 Disputes as to statements

If the State disputes the amount of any claim or the existence of any default referred to in a Default Event Notice pursuant to clause 11:

- (a) the State must pay the amount not in dispute;
- (b) upon resolution of the dispute in accordance with clause 11, the parties must make payments as determined; and
- (c) during the period of dispute resolution, all parties must continue to perform their obligations under this Deed and the Project Documents.

#### 4.6 Verification

The State may appoint a firm of independent chartered accountants or a firm of technical advisers, in each case approved by Project Co and the D&C Subcontractor (such approval not to be unreasonably withheld or delayed), to verify (at the cost of Project Co) statements submitted by the D&C Subcontractor and the D&C Subcontractor must (subject to such firm(s) executing an appropriate confidentiality agreement in a form reasonably requested by the D&C Subcontractor) permit such firm to have access to and make copies of all records, documents, data and accounting and other information not subject to legal (including, without limitation, solicitor and client) and other professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such statements.

#### 4.7 No Liability

Project Co and the D&C Subcontractor acknowledge that, without limiting the Liability of Project Co (which continues to be responsible for the performance of its obligations under the Subcontract), and without limiting the State's obligations under clause 6, the State will not be liable for any obligation or Liability of Project Co under the Subcontract by reason only of the State performing Project Co's obligations in accordance with the Subcontract. Project Co and the D&C Subcontractor each release the State from any such Liability, except to the extent that such Liability occurs or arises as a direct result of any criminal conduct, fraud or willful misconduct on the part of the State.

#### 4.8 Project Co to compensate the State

Any reasonable loss suffered or incurred by the State arising out of or in any way in connection with the exercise of its rights under this clause 4 will be a debt due from Project Co to the State.

#### 4.9 No limitation on other rights

The exercise (or failure to exercise) by the State of its rights under this clause 4 will not limit the State's rights against Project Co under the State Project Documents or otherwise according to Law.

## 5. Step-in by the State

### 5.1 Step-In Right

- (a) Following receipt of a State Cure Notice, the State may:
- (i) if permitted under the State Security, appoint a Receiver over any Project Co Entity or any or all of its assets (including the Subcontract Documents);
  - (ii) itself enter into possession of any or all of the assets of any Project Co Entity;
  - (iii) take such other action as it is permitted to take under the terms of the Project Documents; or
  - (iv) by notice to the D&C Subcontractor (**Additional Obligor Step-In Notice**), procure that an Additional Obligor assumes jointly and severally with Project Co all of Project Co's rights and obligations under the Subcontract Documents,
- (each a **Step-In Right**).
- (b) The period from the date on which the D&C Subcontractor receives notice of the exercise of any Step-In Right to the earliest of:
- (i) the Additional Obligor Step-Out Date;
  - (ii) the date on which the D&C Subcontractor terminates the Subcontract;
  - (iii) the date of any transfer under clause 6;
  - (iv) the date which the State has notified the D&C Subcontractor that the State will cease to exercise its Step-In Rights; and
  - (v) any other date on which the State ceases to continue to exercise its Step-In Rights
- is the **Step-In Period**.
- (c) The D&C Subcontractor and the Parent Guarantor each acknowledge that the exercise by the State of a Step-In Right will not of itself contravene the Subcontract Documents, or constitute a Default Event under the Subcontract or entitle the D&C Subcontractor or the Parent Guarantor to exercise any right (including termination) under the Subcontract Documents.

### 5.2 Step-In by the State

- (a) Subject to the Financiers Tripartite Deed, the State may at any time after it has become entitled to exercise a Step-In Right, exercise all or any of its rights and carry out all or any of the obligations of Project Co in connection with the Subcontract Documents, as if it were Project Co to the exclusion of Project Co.
- (b) Project Co, the D&C Subcontractor and the Parent Guarantor each agree that, subject to clause 5.3(b), neither the State nor any Associate of the State will have any Liability, and none of Project Co, the D&C Subcontractor or the Parent Guarantor will be entitled to make, continue or enforce any Claim against the State or any Associate of the State, arising in connection with the Subcontract Documents or this Deed, by reason only of the State or any Associate of the State exercising any of Project Co's rights or performing any of Project Co's obligations under the Subcontract Documents other than, and then only to the extent of, any Liability for fraudulent, negligent, reckless, unlawful or malicious acts or omissions of the State or any Associate of the State.

### 5.3 Step-In using Additional Obligor

- (a) The Additional Obligor will become a party to the Subcontract Documents on the date on which the Additional Obligor Step-In Notice is given to the D&C Subcontractor or such later date as the D&C Subcontractor and the State may agree (**Assumption Date**).
- (b) During a Step-In Period in respect of which the State has exercised a Step-In Right under clause 5.1(a)(iv):
- (i) subject to clause 5.3(b)(iii), the Additional Obligor will be jointly and severally:
    - (A) entitled with Project Co to exercise the rights of Project Co under the Subcontract Documents (excluding any accrued rights of Project Co in respect of any loss, cost, damage, charge, expense, outgoing or payment to the extent that the rights arose prior to the Assumption Date) (**Project Co's Rights**); and
    - (B) liable with Project Co for the performance or non-performance of all of Project Co's obligations under the Subcontract Documents arising on or after the Assumption Date except as released in accordance with clause 5.3(e);
  - (ii) as between Project Co, the D&C Subcontractor, the Parent Guarantor and the Additional Obligor, only the Additional Obligor is authorised to deal with the D&C Subcontractor and the Parent Guarantor and to exercise Project Co's Rights;
  - (iii) Project Co acknowledges that it will be legally bound by all the acts and commissions of the Additional Obligor in so dealing with the D&C Subcontractor and the Parent Guarantor and in exercising Project Co's Rights;
  - (iv) the Additional Obligor will be bound by any earlier decision, directions, approvals, notices or consents given or made prior to the Assumption Date;
  - (v) clause 14 will apply to the D&C Subcontractor, the Parent Guarantor and the Additional Obligor as if the address and email address of the Additional Obligor were set out in addition to those of Project Co, and
  - (vi) the D&C Subcontractor and the Parent Guarantor will owe their respective obligations under the Subcontract Documents to Project Co and the Additional Obligor jointly but the performance by the D&C Subcontractor or the Parent Guarantor in favour of either Project Co or the Additional Obligor will be a good discharge of the relevant obligations under the Subcontract Documents.
- (c) Without prejudice to the D&C Subcontractor's rights under clause 4.2, the Additional Obligor will have no obligation to, and no liability in respect of, remedying any default or breach of Project Co under the Subcontract Documents arising prior to the Assumption Date.
- (d) The Additional Obligor may at any time give the D&C Subcontractor not less than 30 days' notice terminating the Additional Obligor's rights or obligations under the Subcontract Documents (without affecting the continuation of Project Co's obligations or liabilities towards the D&C Subcontractor and the Parent Guarantor under the Subcontract Documents). Such notice must specify the date on which it takes effect, which must be
- (i) at least 30 days after the date of the notice, or
  - (ii) if a Novation Notice has been given, the date of the Novation Notice,
- (the **Additional Obligor Step-Out Date**).
- (e) On and from the Additional Obligor Step-Out Date, between the D&C Subcontractor, the Parent Guarantor and the Additional Obligor, each of the D&C Subcontractor, the Parent Guarantor and the Additional Obligor will be released from all obligations under the Subcontract Documents (except for those obligations which have arisen during the

(relevant Step-In Period) whether or not a Claim has been made in respect of those obligations or they have not fallen due to be performed or have not been performed.

#### 5.4 Indemnity

Project Co must indemnify the State, the Associates of the State and any Additional Obligor against any Claim or Liability (including any Claim made by, or Liability to, a third party) the State or any Associate of the State or any Additional Obligor suffers or incurs arising in connection with taking any action under clause 5.2 or clause 5.3, except to the extent that such Claim or Liability is caused or contributed to by any of the events set out in clause 4.5.8 (Limits on Project Co liability to indemnify and release) of the Project Deed.

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## 6. Novation of Subcontract Documents

### 6.1 Option

The State may require a novation of the Subcontract Documents in accordance with this clause 6 upon the termination of the Project Deed by giving a notice to the D&C Subcontractor and the Parent Guarantor (Novation Notice).

### 6.2 Novation of Subcontract

With effect from the Effective Date:

- (a) the parties novate the Subcontract so that the State (or, if applicable, the Approved Nominee) and the D&C Subcontractor are parties to a new contract on the same terms as the Subcontract as amended by this Deed; and
- (b) any reference in the Subcontract to Project Co shall be read as a reference to the State (or, if applicable, the Approved Nominee).

### 6.3 Rights and obligations of the State and the D&C Subcontractor under the Subcontract

If the State gives a Novation Notice then, subject to clause 6.7, with effect from the Effective Date:

- (a) the State (or, if applicable, the Approved Nominee):
  - (i) is entitled to all rights and benefits under the Subcontract to which, but for this Deed, Project Co would have been entitled at and after the Effective Date;
  - (ii) must perform all obligations and discharge all liabilities under the Subcontract which, but for this Deed, Project Co would have been required to perform or discharge at and after the Effective Date; and
  - (iii) is bound by and must comply with all other provisions of the Subcontract by which, but for this Deed, Project Co would have been bound at and after the Effective Date; and
- (b) the D&C Subcontractor:
  - (i) is entitled to all rights and benefits under the Subcontract to which, but for this Deed, it would have been entitled at and after the Effective Date;
  - (ii) must perform all obligations and discharge all liabilities under the Subcontract which, but for this Deed, it would have been required to perform or discharge at and after the Effective Date; and
  - (iii) is bound by and must comply with all other provisions of the Subcontract by which, but for this Deed, it would have been bound at and after the Effective Date.

as if the State (or, if applicable, the Approved Nominee) had originally been a party to the Subcontract in place of Project Co

#### 6.4 Release by D&C Subcontractor

With effect from the Effective Date, the D&C Subcontractor releases Project Co from all obligations and liability under or in respect of the Subcontract to be performed or discharged at or after the Effective Date.

#### 6.5 Release by Project Co

With effect from the Effective Date, Project Co releases the D&C Subcontractor from all obligations and liability under or in respect of the Subcontract to be performed or discharged at or after the Effective Date.

#### 6.6 Novation of Parent Guarantee

If the State gives a Novation Notice then, subject to clause 5.7, with effect from the Effective Date:

- (a) the parties novate the Parent Guarantee so that the State (or, if applicable, the Approved Nominee) will be named as beneficiary to the new deed of guarantee on the same terms as the Parent Guarantee;
- (b) any reference in the Parent Guarantee to Project Co shall be read as a reference to the State (or, if applicable, the Approved Nominee); and
- (c) the Parent Guarantor will guarantee for the benefit of the State (or, if applicable, the Approved Nominee) all of the obligations of the D&C Subcontractor in accordance with the Parent Guarantee.

#### 6.7 Obligations and liability prior to the Effective Date

Nothing in this Deed releases:

- (a) Project Co or the D&C Subcontractor from any obligation or liability under the Subcontract; or
- (b) Project Co, the D&C Subcontractor or the Parent Guarantor from any obligation or liability under the Parent Guarantee,

arising or accruing before the Effective Date and the State (or, if applicable, the Approved Nominee) does not assume any such obligation or liabilities under this Deed.

#### 6.8 Amendments to Subcontract

- (a) with effect from the Effective Date, the terms of the Subcontract will be deemed to be amended as required to reflect the fact that the Project Deed is at an end, and that the Subcontract must operate independently of the Project Deed, on the basis that:
  - (i) the rights and obligations that the State (or, if applicable, the Approved Nominee) will assume under the Subcontract from the Effective Date will be equivalent to those that Project Co would have had under the Subcontract had the Project Deed not been terminated;
  - (ii) the rights and obligations that the D&C Subcontractor will assume under the Subcontract from the Effective Date will be equivalent to those that the D&C Subcontractor would have had under the Subcontract had the Project Deed not been terminated;
  - (iii) any provisions of the Project Deed incorporated by reference into the Subcontract prior to the Effective Date are incorporated in the Subcontract from the Effective Date; and
  - (iv) without affecting the generality of this clause 6.8(a), clauses [insert relevant clauses of the Subcontract] of the Subcontract will be deleted.

- (b) If at or after the Effective Date, there is a dispute between the State (or, if applicable, the Approved Nominee) and the D&C Subcontractor as to how the terms of the Subcontract are deemed to have been amended pursuant to clause 6.8(a), then upon either party serving a written notice to this effect on the other, the dispute will be determined in accordance with clause 11.

## 6.9 Approved Nominee

- (a) The State's nominee may be named as a party to the Subcontract Documents in substitution for Project Co if the State's nominee is an Approved Nominee.
- (b) The D&C Subcontractor must:
- (i) notify the State as to whether the State's nominee is an Approved Nominee on or before the date falling 30 days after the date of receipt of all information reasonably required by the D&C Subcontractor to decide whether the nominated person is an Approved Nominee;
  - (ii) not unreasonably withhold or delay its decision on whether the State's nominee is an Approved Nominee; and
  - (iii) enter into a side deed with the State and the Approved Nominee on substantially the same terms as this Deed.
- (c) If the Novation Notice specifies that the Approved Nominee is a person other than the State, the State must, at the time it gives a Novation Notice, provide to the D&C Subcontractor the following particulars of the Approved Nominee:
- (i) name, place of incorporation and identity of shareholder(s);
  - (ii) if available, its most recent published audited accounts; and
  - (iii) sufficient particulars of the finance available to the Approved Nominee to enable the D&C Subcontractor to decide whether to grant its consent to the Approved Nominee.

## 6.10 Bonds

If the State gives a Novation Notice then, as from the Effective Date, Project Co must (with the support of the D&C Subcontractor to effect this provision) either:

- (a) procure the novation or assignment to the State (or, subject to clause 6.9, the Approved Nominee) of any (insert bonds to be novated/assigned) (each as defined in the Subcontract) held by Project Co under the Subcontract prior to the Effective Date (**Bonds**) or
- (b) procure the issue to the State (or, if applicable, the Approved Nominee) of replacement bonds for the same undrawn value and on the same terms as the Bonds held by Project Co under the Subcontract prior to the Effective Date.

## 6.11 Insurances

- (a) If the D&C Subcontractor is required under the Subcontract to take out and/or maintain any insurance required under clause 46 (*Insurance*) of the Project Deed to be taken out and maintained by Project Co (each such insurance, a **Subcontract Insurance**), then the D&C Subcontractor undertakes to the State to:
- (i) take out and/or maintain the Subcontract Insurances; and
  - (ii) comply with clause 46 (*Insurance*) and Schedule 22 (*Insurance Schedule*) of the Project Deed with respect to the Subcontract Insurances, as if that clause and Schedule were set out in full in this Deed (mutatis mutandis).

- (b) The D&C Subcontractor acknowledges and agrees that the proceeds of any Subcontract Insurance will be applied in accordance with clause 45.11 (*Application of Insurance Proceeds*) of the Project Deed.

#### 6.12 Other documents under the Subcontract

If the State gives a Novation Notice then, as from the Effective Date, Project Co must procure the novation or assignment to the State (or, if applicable, the Approved Nominee) of

- (a) [insert list of documents to be novated/assigned (eg. collateral warranty deeds)].

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### 7. Appointment of D&C Subcontractor as Principal Contractor

[Note. This clause is to be reviewed in respect of the relevant D&C Subcontractor.]

- (a) In this clause 7, the terms 'workplace', 'construction project', 'principal contractor' and 'WHS management plan' have the same meanings as given to those terms under the WHS Legislation.
- (b) Without limiting the D&C Subcontractor's obligations under any other provision of the Project Documents that the D&C Subcontractor is a party to:
- (i) the State:
- (A) engages the D&C Subcontractor as the principal contractor for any construction project forming the whole or part of the Works under regulation 293 of the WHS Regulation; and
- (B) authorises the D&C Subcontractor to have management or control of that part of the workplace to which the construction project relates and to discharge the duties of a principal contractor under the WHS Regulation in relation to any construction project forming the whole or part of the Works;
- (ii) the D&C Subcontractor agrees that its engagement and appointment as principal contractor in respect of any construction project in relation to the Works will continue until the earlier of:
- (A) that construction project being complete
- (B) the Date of Technical Completion;
- (C) the termination of the Subcontract; and
- (D) the Expiry Date;
- (iii) the D&C Subcontractor accepts the engagement in clause 7(b)(i) and agrees to discharge the duties imposed on a principal contractor under the WHS Legislation and under the Project Deed, this Side Deed and the State Project Documents (as applicable) and the D&C Subcontractor's WHS management plan for the construction project
- (iv) if the State's engagement of the D&C Subcontractor as a principal contractor is not effective for any reason, the D&C Subcontractor agrees to discharge the duties imposed on a principal contractor under the WHS Regulation as if it had been engaged as the principal contractor for the construction project under the WHS Regulation, the WHS management plan for the construction project, the Project Deed, the Side Deeds and State Project Documents (as applicable); and
- (v) if the D&C Subcontractor fails to comply with any of its obligations as principal contractor under the WHS Regulation, the WHS management plan for the construction project, the Project Deed, the Side Deeds and the State Project Documents (as applicable), the State may direct Project Co to carry out the D&C Subcontractor's obligations as principal contractor.

## 8. Representations and warranties

### 8.1 Representations and warranties by D&C Subcontractor and Parent Guarantor

- (a) The D&C Subcontractor and the Parent Guarantor each represent and warrant for the benefit of the State that:
- (i) **(power to execute):** it has the power to execute, deliver and carry out its obligations under this Deed and each other Project Document to which it is a party and all necessary action has been taken to authorise that execution, delivery and performance;
  - (ii) **(legality):** the execution, delivery and performance of this Deed and each other Project Document to which it is a party does not violate any Law, document or agreement to which it is a party or which is binding on it or any of its assets;
  - (iii) **(validity):** this Deed and each other Project Document to which it is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
  - (iv) **(registration):** it is duly registered, properly constituted and remains in existence;
  - (v) **(no trust relationship):** except as stated in this Deed, it is not the trustee, manager or Responsible Entity of any trust nor does it hold any property subject to or impressed by any trust;
  - (vi) **(information true and correct):** all information provided by it to the State is as at the date on which it is provided true and correct and neither the D&C Subcontractor nor the Parent Guarantor is aware of any material facts or circumstances that have not been disclosed to the State and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Deed or consent to the entry into the Subcontract;
  - (vii) **(litigation):** no Claim against it is current or pending or (to its knowledge) is threatened, which will or is likely to have a Material Adverse Effect upon it or its ability to perform its financial and other obligations under this Deed or any other Project Document to which it is a party;
  - (viii) **(Insolvency Event):** no Insolvency Event has occurred in respect of it;
  - (ix) **(accounts)**
    - (A) its most recent consolidated audited (if the requirement for auditing is applicable) accounts give a true and fair view of its and its subsidiaries' state of affairs as at the date to which they relate and the results of its and its subsidiaries' operations for the accounting period ended on such date;
    - (B) there has been no material adverse change in its or its subsidiaries' state of affairs since such date, and
    - (C) such accounts have been prepared in accordance with the Corporations Act and accounting principles and practices generally accepted in Australia consistently applied, except to the extent of departures from such principles and practices disclosed in such accounts;
  - (x) **(no default):**
    - (A) it is not in default under any document or agreement binding on it or its assets which relates to financial indebtedness; and
    - (B) nothing has occurred which would, with the giving of notice and/or lapse of time, constitute an event of default, cancellation, prepayment event (pursuant to a bona fide right to exercise prepayment) or similar event (whenever called) under any such document or agreement;



which would have a Material Adverse Effect;

- (xi) (no immunity): neither it, nor any of its assets enjoys any immunity from set off, suit or execution in any jurisdiction; and
- (xii) (own investigations): in entering into this Deed, the Subcontract, the Parent Guarantee and any other Project Document to which it is a party it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State, Project Co or any other person unless in respect of Project Co or any other person, other than the State or an Associate of the State, it is expressly permitted to do so in accordance with a Project Document to which it is a party.

## 8.2 Repetition of representations and warranties

The representations and warranties in this clause 8 are taken to be repeated immediately before Financial Close, on the basis of the facts and circumstances as at that date.

## 8.3 Reliance on representations and warranties

Each of the D&C Subcontractor and the Parent Guarantor acknowledge that the State executed this Deed and agreed to take part in the transactions that this Deed contemplates in reliance on the representations and warranties that are made or repeated in this clause 8.

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## 9. Undertakings by D&C Subcontractor and Parent Guarantor

The D&C Subcontractor and the Parent Guarantor each undertake to the State as follows:

- (a) (notification of Default Event): in the case of the D&C Subcontractor, it will notify the State of any Default Event promptly after it gives notice of that Default Event in accordance with the Subcontract;
- (b) (documents in relation to Default Event): in the case of the D&C Subcontractor, it will promptly give the State a copy of all documents issued by the D&C Subcontractor to Project Co in relation to a Default Event;
- (c) (no amendment without consent): it will not, without first obtaining the consent of the State:
  - (i) make or permit any amendment or replacement of or addition to;
  - (ii) subject to clause 4.2, terminate, surrender, rescind or accept repudiation of;
  - (iii) permit the novation, assignment or substitution of any party's rights, obligations or interest in, except when in accordance with this Deed or clause 8.4 of the Financiers Tripartite Deed; or
  - (iv) allow any express waiver of its material rights and obligations under,
 

a Subcontract Document, provided that the State will not withhold its consent to an amendment or other action contemplated in clauses 9(c)(i) to 9(c)(iv) to which it has consented in accordance with the Project Deed.
- (d) (disposals): it will not, after Financial Close, transfer, assign, mortgage, charge, encumber or otherwise deal with its rights, obligations or interests in a Subcontract Document without first procuring that the proposed transferee, assignee, mortgagee or chargee executes a deed in favour of the State (in form and substance approved by the State) pursuant to which the transferee, assignee, mortgagee or chargee agrees to accept and be bound by this Deed as if it were the D&C Subcontractor or Parent Guarantor (as the case may be);
- (e) (attend meetings and inspections): it will (when reasonably requested by the State):

- (i) attend, where reasonable and appropriate, meetings with the State or any of the State's Associates;
- (ii) provide the State or any of the State's Associates and authorised personnel with:
  - (A) in the case of the D&C Subcontractor, full access to
    - (i) the Site; and
    - (ii) any other place where any Works are being carried out or materials are being prepared or stored,
 to the extent provided in the Project Deed; and
  - (B) any other information, records or documents that the State or any of its Associates (acting reasonably) requires in relation to the carrying out of the Works or compliance with the Subcontract or any information required by the State to comply with requests from the New South Wales Auditor-General; and
- (iii) permit the State or any of the State's Associates to attend all tests and inspections to be carried out in connection with the Project in accordance with the terms of the Subcontract, to the extent provided in, and in accordance with, the Project Deed; and
- (f) (access to records) in the case of the D&C Subcontractor, at the request of the State to the extent provided in, and in accordance with, the Project Deed, the D&C Subcontractor will:
  - (i) permit the State or any of its Associates to inspect all records, reports, plans, programs, specifications and design documents prepared or kept by the D&C Subcontractor in relation to the Works and the Project; and
  - (ii) supply the State or any of its Associates with a copy of any such report or document which they may require from time to time.

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## 10. Acknowledgement by Project Co

Project Co consents to the terms of this Deed and will co-operate in the implementation of this Deed.

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## 11. Dispute Resolution

If any dispute or difference of opinion arises between the parties under this Deed, each party may refer any such matter for resolution in accordance with this clause 11 and the dispute or difference of opinion must be resolved in the same manner that disputes or differences of opinion under the Project Deed are resolved. Accordingly, the provisions of clauses 50 (Dispute Resolution procedure) to 53 (Arbitration) of the Project Deed are incorporated into this Deed, but as if:

- (a) the only persons party to the Project Deed, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute; and
- (b) the only matters for expert determination under those provisions are the matters referred for expert determination under this Deed.

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## 12. GST

- (a) (Interpretation):

- (i) Except where the context suggests otherwise, terms used in this clause 12 have the meanings given to those terms by the GST Act (as amended from time to time).
  - (ii) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 12.
  - (iii) Unless otherwise expressly stated, all consideration to be provided under this Deed is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 12.
  - (iv) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (h) **(Reimbursements):** Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (c) **(Additional amount of GST payable):** Subject to clause 12(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this Deed
- (i) any amount payable or consideration to be provided under any provision of this Deed (other than this clause 12), for that supply is exclusive of GST;
  - (ii) any party (**Recipient**) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply; and
  - (iii) the Supplier must provide a Tax Invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid in accordance with clause 12(c)(ii).
- (d) **(Variation of GST):**
- (i) if the GST Amount properly payable in relation to a supply (as determined in accordance with clause 12(c) and clause 12(e)), varies from the additional amount paid by the Recipient under clause 12(c), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this clause 12(d) is deemed to be a payment, credit or refund of the GST Amount payable under clause 12(c);
  - (ii) The Supplier must issue an Adjustment Note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this Deed as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.
- (e) **(Exchange of non-monetary consideration):**
- (i) To the extent that the consideration provided for the Supplier's Taxable Supply to which clause 12(c) applies is a Taxable Supply made by the Recipient (the **Recipient Supply**), the GST Amount that would otherwise be payable by the Recipient to the Supplier in accordance with clause 12(c) will be reduced by the amount of GST payable by the Recipient on the Recipient Supply;
  - (ii) The Recipient must issue to the Supplier an invoice for any Recipient Supply on or before the time at which the Recipient must pay the GST Amount in accordance with clause 12(c) (or the time at which such GST Amount would have been payable in accordance with clause 12(c) but for the operation of clause 12(c)(i)).

- (f) **(No merger):** This clause 12 will not merge on completion or termination of this Deed.
- (g) **(Application of Project Deed):** If clause 36 (*Payments Adjustments & Taxes*) of the Project Deed would apply in connection with a Taxable Supply to which this clause 12 also applies then clause 36 (*Payments Adjustments & Taxes*) of the Project Deed will apply in connection with that supply and the provisions of this clause 12 (but for this paragraph) will not apply.

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### 13. PPSA

- (a) If the State determines that this Deed is or contains a Security Interest, the parties (other than the State) agree to promptly do anything (including amending any document or executing any new document) which the State reasonably requires for the purposes of:
- (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
  - (ii) enabling the State to apply for registration, or give any notification, in connection with the Security Interest; or
  - (iii) enabling the State to exercise rights in connection with the Security Interest.
- (b) The parties (other than State) agree not to exercise its rights to make any request of the State under section 275 of the PPSA to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.
- (c) The parties (other than the State) irrevocably and unconditionally waives its right to receive any notice of any verbal or statement in respect of any financing statement or financing change statement relating to this Deed.

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### 14. Notices

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

- (a) **(in writing):** must be in writing.
- (b) **(addressed):** must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

**State**

Name: [Insert]

Address: [Insert]

Email: [Insert]

For the attention of: [Insert]

**Project Co**

Name: [Insert]

Address: [Insert]

Email: [Insert]

For the attention of: [Insert]

**D&C Subcontractor**

Name: [Insert]

Address: [Insert]

Email: [Insert]

For the attention of: [Insert]

**Parent Guarantor**

Name: [Insert]

Address: [Insert]

Email: [Insert]

For the attention of: [Insert]

- (c) **(signed)**: must be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of that party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 14(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 14(b):
- (i) in the case of delivery by hand, or delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
  - (ii) subject to clause 14(f) in the case of prepaid post, on the fourth Business Day after the date of posting to an address within Australia and/or the tenth Business Day after the date of posting by airmail to an address outside Australia;
  - (iii) in the case of email, the first to occur of:
    - (A) receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
    - (B) the time that the communication enters an information system which is under the control of the addressee; or
    - (C) the time that the communication is first opened or read by the addressee, unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day; and
- (f) **(notices sent by post)**: if sent by post from within Australia, must be sent using the 'priority' postal service offered by Australia Post (or any other postal service provider that assumes any or all of the functions of Australia Post) or other such similar service.

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## 15. Confidential Information and disclosure

### 15.1 Confidential Information and disclosure by the State

- (a) Subject to clause 15.1(b), the State and any Authority may disclose any information in connection with the Project, including Project Information.

- (b) The State may only disclose the Commercially Sensitive Information
  - (i) in accordance with
    - (A) Laws or for the enforcement of any criminal law;
    - (B) where disclosure is in the course of the official duties of a minister, the Treasurer, the Premier or the Attorney General;
    - (C) to satisfy the disclosure requirements of the NSW Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW);
    - (D) to satisfy the requirements of Parliamentary accountability;
    - (E) to any Associate of the State to the extent necessary for the purpose of the Project; provided they agree to maintain the confidentiality of any Commercially Sensitive Information;
    - (F) in annual reports of the State; or
    - (G) in accordance with policies of the State or the NSW Government or any Authority;
  - (c) for any tender process required to be conducted under the Termination Payments Schedule, or
  - (d) where the Commercially Sensitive Information is any part of the Design Deliverables, the Design Requirements or the Services Requirements, for the purpose of conducting any tender process required by the terms of the Project Deed.

## 15.2 Confidential Information and disclosure by D&C Subcontractor and Parent Guarantor

- (a) **(Confidentiality obligation):** Subject to clauses 15.2(b) and clause 15.4(b) the D&C Subcontractor and the Parent Guarantor must treat as secret and confidential all Confidential Information and must not and must procure that its Associates do not, without the prior written consent of the State, make public or disclose to any person any Confidential Information.
- (b) **(Disclosure of Confidential Information):** Without limiting the D&C Subcontractor and the Parent Guarantor's obligations under clause 15.2(a) and subject to clause 15.2(c), each of the D&C Subcontractor and the Parent Guarantor may disclose Confidential Information:
  - (i) to its Associates to the extent necessary for the purpose of undertaking the Project; and
  - (ii) in accordance with clause 15.4.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, the D&C Subcontractor and the Parent Guarantor (as applicable) must ensure that the person to whom the information is disclosed enters into a confidentiality deed with it to keep the Confidential Information confidential in accordance with this clause 15.
- (d) **(Permitted disclosure):** The D&C Subcontractor and the Parent Guarantor may disclose Confidential Information and will not be required to seek the State's consent to a disclosure, announcement or statement under clause 15.2(a) or 15.3(a) or to enter into a confidentiality deed under clause 15.2(c) where the disclosure, announcement or statement is:
  - (i) required by Law, provided that it:
    - (A) notifies the State of the requirement to make that disclosure; and

- (B) takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
- (i) required to obtain legal or other advice from its advisers provided that the relevant adviser is under a duty of confidentiality;
- (ii) required to be made to a court in the course of proceedings to which the D&C Subcontractor or the Parent Guarantor (as applicable) is a party; or
- (iv) required by a relevant recognised stock exchange, subject to:
  - (A) the disclosure, announcement or statement does not refer to the State's or any of its Associates' involvement in the Project; and
  - (B) the D&C Subcontractor or the Parent Guarantor (as applicable) having used all reasonable endeavours to obtain the State's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant recognised stock exchange.

### 15.3 Public announcements by D&C Subcontractor and Parent Guarantor

Subject to clause 15.2(d), the D&C Subcontractor and the Parent Guarantor must:

- (a) not make any public disclosures, announcements or statements in relation to the Project or the State's or any of the State's Associates' involvement in the Project, without the State's prior consent;
- (b) comply with any terms and conditions the State imposes and must use all reasonable endeavours to agree with the State the wording and timing of all public disclosures, announcements or statements by it or any of its Associates relating to the Project or the State's or any of the State's Associates' involvement in the Project before the relevant disclosure, announcement or statement is made; and
- (c) as soon as practicable, give to the State a copy of any public disclosure, announcement or statement agreed to or approved by the State in accordance with this clause 15.3 or for which the State's consent or approval was not required in accordance with clause 15.4.

### 15.4 Information public or known

Notwithstanding anything in this clause 15, any party may disclose information in connection with the Project (including any Confidential Information) if:

- (a) the party can demonstrate that the relevant information is already generally available and in the public domain otherwise than as a result of breach of this clause 15; or
- (b) the relevant information is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party.

### 15.5 Disclosure by the State under GIPA Act

- (a) Notwithstanding the other provisions of this clause 15, the parties acknowledge that:
  - (i) the Project Documents and information concerning the Project Documents will be published on the State's contracts register in accordance with Division 5 of Part 3 of the GIPA Act; and
  - (ii) the State may make the Project Documents (other than the Key Subcontracts) or any of them available to any person.
- (b) The parties acknowledge that:

- (i) the State will notify the D&C Subcontractor of any proposed disclosure of Commercially Sensitive Information by the State under the GIPA Act no later than 20 Business Days before the proposed date of disclosure;
- (ii) following notification by the State in accordance with clause 15.5(b)(i) the State will take reasonable steps to consult with the D&C Subcontractor before disclosing Commercially Sensitive Information under the GIPA Act;
- (iii) if, following:
  - (A) notification by the State in accordance with clause 15.5(b)(i); or
  - (B) consultation between the State and the D&C Subcontractor in accordance with clause 15.5(b)(ii),
 the D&C Subcontractor objects to disclosure of some or all of the Commercially Sensitive Information, the D&C Subcontractor must provide details of any such objection within five Business Days after the date the D&C Subcontractor received notification from the State or the date on which the consultation process concluded (as relevant);
- (iv) the State may take into account any objection received from the D&C Subcontractor pursuant to clause 15.5(b)(iii) in determining whether the Commercially Sensitive Information identified by the D&C Subcontractor should be disclosed; and
- (v) nothing in this clause 15.5 will limit or otherwise affect the discharge of the State's obligations under the GIPA Act.

#### 15.6 Personal Information

The D&C Subcontractor and the Parent Guarantor must:

- (a) not collect any Personal Information except in accordance with the Design Requirements and Services Requirements, all Laws and Policies;
- (b) not disclose any Personal Information to any person other than as is necessary to provide the Services or to comply with Laws, and then only in accordance with the Design Requirements and Services Requirements, all Laws and Policies; and
- (c) keep, and make available to the State on request, records detailing the receipt of any Personal Information that the D&C Subcontractor has disclosed, the date of disclosure and the Personal Information that has been disclosed.

#### 15.7 Confidential Design Information

The D&C Subcontractor and the Parent Guarantor must:

- (a) **(Access):** only provide access to Confidential Design Information to Relevant Persons who:
  - (i) are not Uncleared Personnel, are permitted to receive Confidential Design Information in accordance with clause 62.2 of the Project Deed and, where required by the State, have satisfied any Probity Investigation under clause 63.2 of the Project Deed; and
  - (ii) require access to that Confidential Design Information to carry out the Works;
- (b) **(Limited portion):** where it is necessary to grant access to Confidential Design Information in accordance with clause 15.7(a), grant access to the most limited portion of the Confidential Design Information possible; and



- (c) **(Records):** keep, and make available to the State on request, records detailing the recipient of any Confidential Design Information, the date of disclosure and the Confidential Design Information that has been disclosed.

## 15.8 Privacy

- (a) **(Compliance).** Without limiting any obligations in respect of privacy set out in the Design Requirements or the Services Requirements, the D&C Subcontractor and the Parent Guarantor agree to, and will ensure that the Subcontract and any other subcontract entered into by the D&C Subcontractor in relation to the Project contains terms which require the D&C Subcontractor to, be bound by the Privacy Legislation with respect to any act done, or practice engaged in, by it in connection with this Deed or with the Subcontract or other relevant subcontract (as the case may be), in the same way as the State would be bound by the Privacy Legislation, in connection with that act or practice had it been directly done or engaged in by the State.
- (b) **(Release and Indemnity).** The D&C Subcontractor and the Parent Guarantor must release, indemnify and must keep indemnified on demand the State and its Associates from and against any Claim or Liability (including any Claim made by, or Liability to, a third party) which the State or any of its Associates suffer or incur resulting from any act done or practice engaged in by the D&C Subcontractor, the Parent Guarantor or any of their respective Associates in connection with the Project, which would, had that act or practice been done or engaged in by the State, have contravened any of the Privacy Legislation.

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## 16. Termination of this Deed

- (a) **(Satisfaction of obligations under the Subcontract):** This Deed will terminate upon the performance and satisfaction of all of the obligations under the Subcontract.
- (b) **(Does not affect rights of parties.)** The termination of this Deed does not affect the rights of any party which have accrued to that party before the date of termination.
- (c) **(Surviving clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provision in connection with
- (i) the State's rights to set-off and recover money;
  - (ii) confidentiality or privacy;
  - (iii) Intellectual Property Rights;
  - (iv) any obligation to make any records available to the State;
  - (v) any indemnity or financial security given in accordance with this Deed;
  - (vi) any limitation or exclusion of liability; and
  - (vii) any right or obligation arising on termination or expiry of this Deed.
- (d) **(Interpretation):** No provision of this Deed which is expressed to survive the termination, rescission or expiration of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination, rescission or expiration of this Deed.
- (e) **(Survival of rights and obligations).** No right or obligation of any party will merge on completion of any transaction under this Deed. All rights and obligations under this Deed survive the execution and delivery of any transfer or other document which implements any transaction under this Deed.

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## 17. Governing law and jurisdiction

### 17.1 Governing law

This Deed is governed by, and must be construed according to, the laws of New South Wales, Australia.

### 17.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings and any claim it may now or in the future have that any proceedings have been brought within an inconvenient forum if that venue falls within clause 17.2(a).

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## 18. Miscellaneous

### 18.1 Entire agreement

To the extent permitted by Law and in relation to its subject matter, this Deed:

- (a) **(entire understanding)** embodies the entire understanding of the parties and constitutes the entire terms agreed by the parties; and
- (b) **(prior agreements)**: supersedes any prior agreement of the parties.

### 18.2 Further acts and documents

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

### 18.3 Waiver

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

### 18.4 Consents and approvals

A consent or approval required under this Deed from the State may be given or withheld, or may be given subject to any conditions, as the State (in its absolute discretion) thinks fit, unless this Deed expressly provides otherwise.

### 18.5 Amendments

Except as otherwise expressly provided in this Deed, this Deed may only be varied by a deed executed by or on behalf of each party.

## 18.6 Expenses

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

## 18.7 Severance

If, at any time, a provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of

- (a) any other provision of this Deed; or
- (b) that provision under the Law of any other jurisdiction.

## 18.8 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Deed, except for representations or inducements expressly set out in this Deed.
- (b) Each party acknowledges and confirms that it does not enter into this Deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Deed.

## 18.9 Counterparts

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

## 18.10 Moratorium legislation

The provisions of all Laws which come into effect after the date of this Deed and operate to

- (a) increase or improve any of Project Co's, the D&C Subcontractor's or the Parent Guarantor's rights, powers or remedies under this Deed or otherwise; or
- (b) prejudicially affect the exercise by the State of any right, power or remedy under this Deed or otherwise

are expressly waived.

## 18.11 Limitation of liability

*[Note: This clause is to be reviewed in respect of the relevant subcontract.]*

- (a) Despite any other provision of any Project Document, the maximum aggregate liability of the D&C Subcontractor and the Parent Guarantor to the State, Associates of the State, Project Co, Associates of Project Co, the Operator and Associates of the Operator arising out of or in connection with the Project Documents whether in contract, in tort (including negligence) or otherwise is no greater than the maximum liability of the D&C Subcontractor under clause [insert] of the Subcontract, subject to the same exceptions, exclusions and limitations as are specified in the Subcontract and the Parent Guarantee, less the liability incurred (from time to time) by the D&C Subcontractor and the Parent Guarantor under the Subcontract Documents.
- (b) The payment by the D&C Subcontractor or the Parent Guarantor of any moneys owing to Project Co under the Subcontract Documents:
  - (i) to the State in accordance with this Deed; or

- (ii) in accordance with a direction of the State given under or in connection with this Deed,

will be deemed full discharge of the D&C Subcontractor and the Parent Guarantor's obligations in respect of that amount under the Subcontract Documents.

- (c) The D&C Subcontractor must, within 10 Business Days of a request by the State, notify the value of any claim against the D&C Subcontractor or the Parent Guarantor by Project Co, the Operator or their respective Associates, together with any further detail regarding the calculation of such amount as reasonably requested by the State

**Executed** as a lead

[Execution blocks to be inserted prior to execution.]