

Confidential

New Grafton Correctional Centre - Project Deed

The Minister for Corrections on behalf of the Crown in right of the State of New South Wales, Infrastructure New South Wales and the Commissioner of Corrective Services

and

NorthernPathways Pty Limited (ACN 618 985 452) in its capacity as trustee for the NorthernPathways Project Trust (ABN 36 175 930 685)

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New Grafton Correctional Centre Project Deed

Date 14 June 2017

Parties The Minister for Corrections on behalf of the Crown in right of the State of New South Wales, Infrastructure New South Wales (ABN 85 031 302 516) and the Commissioner of Corrective Services

NorthernPathways Pty Limited (ACN 618 985 452) in its capacity as trustee for the NorthernPathways Project Trust (ABN 36 175 930 685)
(Project Co)

Background

- A. The State has conducted a public tender process and selected Project Co as the preferred tenderer for the Project.
- B. This Deed sets out the terms on which:
- (a) Project Co agrees to design, construct, and procure the finance for, the Correctional Complex and deliver the Services;
 - (b) the State agrees to pay the CDPD Amount to Finance Co and the Monthly Service Payments to Project Co; and
 - (c) the risks associated with the Project are allocated as between the State and Project Co.

Operative provisions

Part A - Interpretation and project parameters

1. Definitions

In this Deed, unless the context otherwise requires:

Abatement means an amount in dollars deducted in accordance with the Payment Schedule, from a Monthly Service Payment, in respect of Unavailability, Meal Availability Failure or a Quality Failure.

Aboriginal Participation Plan (Construction) means the Delivery Phase Plan of that name.

Aboriginal Participation Plan (Operations) means the Operating Phase Plan of that name.

Aboriginal Participation Report (Construction) means the Delivery Phase Report of that name.

Aboriginal Participation Report (Operations) means the Operating Phase Report of that name.

Accounts and Records has the meaning given in clause 60.1(a).

Additional Commercial Acceptance Tests has the meaning given in clause 25.4(a).

Additional Payment Date has the meaning given in the Receivables Purchase Deed.

Additional Receivables has the meaning given in the Receivables Purchase Deed.

Additional Technical Completion Tests has the meaning given in clause 23.4(a).

Adjoining Property means any land adjoining or in close proximity to, or in the vicinity of, the Site, and each and every part of that land, including improvements on the land such as walls, fencing, buildings and infrastructure on, under or within the land.

Adjustment Note has the meaning given in the GST Law.

Adverse Rights means all (if any) interests, rights, affectations, encumbrances, Easements, covenants (including any rights, Easements and other affectations or encumbrances in respect of conduits) and other restrictions on use (excluding rights of light and air):

- (a) affecting or impacting the Site as set out in the Project Information; or
- (b) of which Project Co has actual knowledge,

in each case as at the date of this Deed.

Agent means the person appointed from time to time as agent under the Facility Agreement and, as at the date of this Deed, is Commonwealth Bank of Australia (ABN 48 123 123 124).

Agreed Uninsurable Risk means each:

- (a) Day 1 Uninsurable Risk; and
- (b) Uninsurable Risk, but only as agreed or determined in accordance with clause 47.1.

Amendment has the meaning given in clause 57.1(a).

Appointed Principal Contractor means:

- (a) in respect of the Delivery Phase Sites, during the period prior to and including the Date of Technical Completion, the D&C Subcontractor; and
- (b) in respect of the Delivery Phase Sites, during the period after the Date of Technical Completion until the Date of Commercial Acceptance, the Operator; and
- (c) in respect of the Operating Phase Site, during the period after the Date of Commercial Acceptance until the Expiry Date, the Operator.

Approval means:

- (a) each Key Planning Approval;
- (b) the Stage 2 Development Consent; and
- (c) any other licence, permit, authorisation, consent, assessment, approval, determination, certificate, accreditation, registration, clearance, permission, exemptions, notification, application, filing, lodgement, deed, direction or declaration or the like, which must be obtained or satisfied (as the case may be) in connection with the Project.

Artefacts means any places, fossils, bones, artefacts, coins, articles of value or antiquity, structures, natural features or remains or things of scientific, geological, historical, aesthetic, social, spiritual, cultural or aboriginal heritage or archaeological interest.

Assessment Period means the period:

- (a) commencing on the date the Development Consent Authority receives Project Co's last response to submissions following the expiry of the Exhibition Period; and

- (b) ending on the date the Development Consent Authority issues the Stage 2 Development Consent.

Asset Management Plan means the Operating Phase Plan of that name.

Associate or **Associates** means, in relation to a person, any Related Body Corporate of that person, and any officer, agent, adviser, consultant, contractor or employee of that person or that Related Body Corporate and:

- (a) in the case of Project Co, includes:
- (i) the Project Co Representative;
 - (ii) the General Manager;
 - (iii) any Consortium Member (other than Project Co) and their respective officers, agents, advisers, consultants, contractors, employees, nominees and licensees, each acting in connection with the Project;
 - (iv) the Equity Investors, any Subcontractors (that are not covered by paragraph (a)(iii)) and their respective officers, agents, advisers, consultants, contractors, employees, nominees or licensees, each acting in connection with the Project; and
 - (v) any person on or at the Site at the express or implied invitation of Project Co or a Subcontractor in connection with the performance of the Project Activities,

but does not include the State or any of the State's Associates, the Independent Certifier or any Handover Reviewer; and

- (b) in the case of the State, includes:
- (i) officers, agents, advisers, consultants, contractors, authorised officers and employees of the State, each acting in connection with the Project;
 - (ii) the State Representative and any other person responsible for the administration or management or implementation of the Project, or any aspect of the Project, for and on behalf of the State; and
 - (iii) the Minister;
 - (iv) the Commissioner;
 - (v) Monitors;
 - (vi) the Parole Authority;
 - (vii) Official Visitors; and
 - (viii) any other person to whom the State delegates a right, power, function or duty under this Deed,

but does not include Justice Health, Project Co or any of Project Co's Associates, the Independent Certifier, any Handover Reviewer or the author of the Site Data.

Australian Industry Participation Compliance Report (Delivery) means the Delivery Phase Report of that name.

Australian Industry Participation Compliance Report (Operations) means the Operating Phase Report of that name.

Australian Industry Participation Plan (Delivery) means the Delivery Phase Plan of that name.

Authority means:

- (a) any governmental, semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality; and
- (b) any other person having jurisdiction over, or ownership of, any Utilities, External Infrastructure or Utility Infrastructure.

Bank Bill means a bill of exchange (as defined in the *Bills of Exchange Act 1909* (Cth)) that has been accepted by a bank authorised under a law of the Commonwealth of Australia or any state to carry on banking business.

Bank Bill Rate, for a period, means:

- (a) the rate, expressed as a yield per cent per annum (rounded up (if necessary) to four decimal places) that is quoted as the average bid rate on the Reuters monitor system page 'BBSY' (or any page that replaces that page) at about 10.10am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in Months which is closest to that period; or
- (b) if there is a manifest error in the calculation of that average bid rate, or if no average bid rate is published for Bank Bills of that tenor by about 10.30am, then the Bank Bill Rate will be the rate reasonably determined by the State, having regard to the rates otherwise bid for Bank Bills having a tenor as described above, at or around that time, to be the appropriate equivalent rate.

Base Case Financial Model means Project Co's audited financial model for the Project, as at the date of this Deed, a copy of which has been initialled by both parties and is annexed as Attachment 1.

Benchmarked Insurances means the industrial special risks insurance and public and products liability insurance required to be taken out by Project Co in accordance with the Insurance Schedule.

Beneficiaries has the meaning given in clause 61.8.

Best Delivery Practices means design, supply, construction, installation, commissioning and repair practices which are carried out:

- (a) with the standard of skill, care and diligence which may reasonably be expected of a skilled and experienced professional carrying out design, supply, construction, installation, commissioning and repair work similar to the Delivery Phase Activities;
- (b) in a manner safe to all people and the Environment;
- (c) in a manner which facilitates Best Services Practices;
- (d) with the intent of ensuring reliable, long term and safe operation of the Correctional Complex;
- (e) by trained and experienced personnel using high quality, safe and proper equipment, tools, procedures and industry standards;
- (f) with adequate levels of resources, including personnel, materials and supplies; and
- (g) using suitable, new and high quality finishes and materials which are free from defects.

Best Industry Practices means Best Delivery Practices and Best Services Practices (or either as the context requires).

Best Services Practices means the practices required for the operation and maintenance of a correctional complex similar to the Correctional Complex with services similar to the Services, which are performed:

- (a) with the standard of skill, care and diligence which may reasonably be expected of a skilled and experienced professional suitably qualified in the provision of services similar to the Services at a correctional complex similar to the Correctional Complex;
- (b) in a manner safe to all people and the Environment;
- (c) with the intent of ensuring reliable, long term and safe operation of the Correctional Complex;
- (d) by trained and experienced personnel using high quality, safe and proper equipment, tools, procedures and industry standards;
- (e) with adequate levels of resources, including personnel, materials and supplies;
- (f) using suitable, new and high quality finishes and materials which are free from defects; and
- (g) with a commitment to continually providing innovation and meeting advancements in technology and improving the standards and quality of the Services, provided that this requirement in and of itself does not require Project Co to upgrade the Correctional Complex.

Business Day means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney, New South Wales.

Business Hours means between 9:00 am and 5:00 pm on a Business Day.

CCE Model Variation Event has the meaning given in clause 59.3(a)(iii).

CCU has the meaning given in clause 15.2(b).

CDPD Adjustment Protocol means the protocol to update the Financial Model and the Model Output Schedule for the payment of the CDPD Amount (if applicable) in accordance with clauses 35 and 59, as attached in Schedule 13.

CDPD Amount means the lesser of:

- (a) [REDACTED] of the Debt outstanding immediately prior to the scheduled amortisation payment which falls due on the CDPD Payment Date; and
- (b) [REDACTED] of the Debt forecast in the Financial Model to be outstanding immediately prior to the scheduled amortisation payment which falls due on the CDPD Payment Date in the Financial Model.

CDPD Conditions has the meaning given in clause 35.1.

CDPD Notice Date means the date of the notice issued by Project Co under clause 35.3(c).

CDPD Payment Date means the last day of the "Interest Period" (as that term is defined in the Facility Agreement) which is at least 15 Business Days after:

- (a) the delivery of the CDPD Satisfaction Notice; or

- (b) such other date determined by the State in its absolute discretion, which date must be after the commencement of the CDPD Period.

CDPD Period means the period of time:

- (a) beginning on the second anniversary of the later of the Original Date for Commercial Acceptance and the Date of Commercial Acceptance; and
- (b) ending on the fourth anniversary of the later of the Original Date for Commercial Acceptance and the Date of Commercial Acceptance.

CDPD Satisfaction Notice has the meaning given in clause 35.3(d)(i).

Certificate of Commercial Acceptance has the meaning given in clause 25.9(a)(i).

Certificate of Technical Completion has the meaning given in clause 23.9(a)(i).

Change Compensation Event has the meaning given in the Change Compensation Principles.

Change Compensation Principles means Schedule 5.

Change in Control means:

- (a) where, at any time, any person or Entity alone or together with any Associate or Associates, ceases to or commences to, directly or indirectly have Control of an Entity; or
- (b) a change in the manager, trustee or Responsible Entity of any Group Member that is a trust.

For the purposes of this definition, Associate or Associates has the meaning given in the Corporations Act and includes a person deemed to be an Associate of a designated body (within the meaning of section 12 of the Corporations Act).

Change in Law means:

- (a) the coming into effect of, or a change to, or the repeal of, Legislation; or
- (b) any judgement or decision of a court of law which changes the way a Law is applied or interpreted,

after the date of this Deed, but does not include:

- (c) a change in the way a Law is applied or interpreted due to:
 - (i) the failure of Project Co or any of its Associates to comply with a Law, Policy or Approval; or
 - (ii) a Project Co Act or Omission;
- (d) any new Law or change in existing Law relating to Taxes including the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the GST Law;
- (e) any new Law or change in or repeal of any existing Law which was not in force at the date of this Deed but which:
 - (i) had been published in the Government Gazette by way of bill, draft bill or draft statutory instrument or otherwise specifically referred to prior to the date of this Deed;

- (ii) is listed or referred to in the Output Specification, the Proposal, Project Information or any Project Document;
 - (iii) a party exercising Best Industry Practices would have reasonably foreseen or anticipated prior to the date of this Deed;
 - (iv) is substantially the same as a Law in force prior to the date of this Deed; or
 - (v) is substantially the same as any other requirement with which any Project Co Entity was required to comply under any State Project Document as at the date of this Deed; or
- (f) any new Law or change in any existing Law relating to the matters (if any) specified in the Contract Particulars.

Change in Management means a change in:

- (a) any Entity which provides management functions to any Project Co Entity;
 - (b) the senior employees of any Entity which provides management functions to any Project Co Entity; or
 - (c) the senior management of any Project Co Entity,
- as applicable.

Change in Mandatory Requirements means:

- (a) a:
 - (i) Project-Specific Change in Law; or
 - (ii) Change in Policy;

that occurs after the date of this Deed and that will have an effect on the cost of carrying out the Project Activities; or
- (b) a General Change in Law that occurs after the Operational Commencement Date, that will have an effect on the cost of carrying out the Project Activities.

Change in Policy means any one or more of the following that occurs after the date of this Deed:

- (a) the introduction of a new Policy;
- (b) a change in a Policy;
- (c) any changes to or new conditions attaching to any Key Planning Approval; or
- (d) any withdrawal, revocation, suspension, invalidation or replacement of all or any part of a Key Planning Approval,

but does not include:

- (e) any one of the events referred to in paragraphs (a) to (d):
 - (i) of which the State has expressly notified any Project Co Entity prior to the date of this Deed;
 - (ii) which is contained or referred to in the Output Specification, the Proposal, any Project Document or Project Information or any other

material provided by the State to Project Co or any of its Associates in connection with the Project prior to the date of this Deed;

- (iii) which a party performing activities similar to the Project Activities in accordance with Best Industry Practices would have reasonably foreseen or anticipated prior to the date of this Deed;
 - (iv) which is substantially the same as a Policy or any condition to any Key Planning Approval in force prior to the date of this Deed; or
 - (v) which is substantially the same as any other requirement with which any Project Co Entity was required to comply with under the State Project Documents prior to the date of this Deed;
- (f) any:
- (i) new Approval;
 - (ii) new requirement to obtain a new Approval; or
 - (iii) amendment, repeal or change in, or any requirement to amend or change, an existing Approval,

other than a Key Planning Approval;
- (g) any of the events referred to in paragraphs (a) to (d) that results from or is in response to any Project Co Act or Omission; or
- (h) any new Policy or change in any existing Policy relating to the matters (if any) specified in the Contract Particulars.

Change Notice has the meaning given in the Change Compensation Principles.

Change Response has the meaning given in the Change Compensation Principles.

Charge Event means an event described as a 'Charge Event' in the Performance Regime.

Claim means any claim, action, demand, suit, proceeding, penalty or fine (including by way of contribution or indemnity) made:

- (a) in connection with the Project Documents, the Relevant Infrastructure, the Site or the Project; or
- (b) at Law or for specific performance, restitution or payment of money (including damages).

CLM Act means the *Contaminated Land Management Act 1997* (NSW).

Commercial Acceptance means when all the Commercial Acceptance Criteria have been met to the satisfaction of the State (acting reasonably).

Commercial Acceptance Criteria means those criteria identified as such in the Commercial Acceptance Schedule.

Commercial Acceptance Outstanding Item means:

- (a) any act, matter, state of affairs or thing that is required in accordance with this Deed to have been performed, achieved, undertaken, provided or completed by Project Co as at Commercial Acceptance which has not been so performed, achieved, undertaken, provided or completed by Project Co, unless the State has determined (acting reasonably), that such act, matter, state of affairs or thing (or the cumulative impact of multiple acts, matters, state of affairs or things) is likely to prevent:

- (i) the Correctional Complex from complying with the FFP Warranty; or
 - (ii) Project Co from delivering the Services in accordance with the Services Requirements; and
- (b) any Technical Completion Outstanding Items that are deemed, agreed or determined to be Commercial Acceptance Outstanding Items in accordance with clause 23.10(e) or clause 23.10(f).

Commercial Acceptance Plan means the Delivery Phase Plan of that name.

Commercial Acceptance Report means a report in respect of Commercial Acceptance required to be submitted by Project Co in accordance with clause 25.7, as amended and updated in accordance with this Deed.

Commercial Acceptance Schedule means Schedule 12.

Commercial Acceptance Tests means all tests required to be carried out in accordance with this Deed to assist in determining whether Commercial Acceptance has been achieved, including those tests identified as such in the Commercial Acceptance Schedule, and any Additional Commercial Acceptance Tests.

Commercially Sensitive Information means the information referred to in the Commercially Sensitive Information Schedule.

Commercially Sensitive Information Schedule means Schedule 23.

Commissioner means the Commissioner of Corrective Services, Department of Justice, as appointed from time to time.

Commissioning Activities means those activities to be performed by Project Co during the Commissioning Period as set out in the Commercial Acceptance Schedule.

Commissioning Period means the period between Technical Completion and Commercial Acceptance.

Commissioning Requirements means the requirements for the Commissioning Period identified as such in the Commercial Acceptance Schedule.

Commitment Deed means the document titled 'New Grafton Correctional Centre – Preferred Proponent Commitment Deed Poll' signed by Serco Australia Pty Ltd (ABN 44 003 677 352), John Holland Pty Ltd (ABN 11 004 282 268) and John Laing Investments Limited (UK company number 780225) and dated 24 March 2017.

Communications and Community Relations Plan means the Delivery Phase Plan and the Operating Phase Plan of that name.

Community Advisory Council means the council for the Correctional Complex appointed by the Minister pursuant to the Corrections Act.

Community Reference Group means the group to be established pursuant to condition A9 of the Stage 1 Development Consent.

Compensable Event means any of the following events occurring during the Delivery Phase:

- (a) the Facilitation Works (Power) not being complete on or before [REDACTED]
- (b) the Facilitation Works (Roads) not being complete on or before [REDACTED]
- (c) the Facilitation Works (Water) not being complete on or before [REDACTED]
or

- (d) an event described in paragraph (h)(ii) (unforeseeable conditions) in the definition of 'Compensable Extension Event'.

Compensable Extension Event means any of the following events occurring during the Delivery Phase:

- (a) **(State breach):** a breach by the State of any State Project Document;
- (b) **(fraudulent act or omission):** a fraudulent, reckless, unlawful or malicious act or omission of the State or any of its Associates in connection with the Project;
- (c) **(Contamination Compensation Event):** a Contamination Compensation Event;
- (d) **(Native Title and Heritage Claims):** cessation or suspension of any part of the Delivery Phase Activities (or a material change in the way the Delivery Phase Activities are carried out) because of:
- (i) a Commonwealth, State or NSW Government direction;
 - (ii) an order of a court or tribunal of competent jurisdiction; or
 - (iii) a requirement of Law,
- in connection with a Heritage Claim or a Native Title Claim (as the case may be), to the extent that the cumulative cessation or suspension (or the impact of a material change in the way the Delivery Phase Activities are carried out) exceeds 10 Business Days;
- (e) **(Project specific industrial action):** industrial action which occurs only at the Site or otherwise only in respect of the Project, which is the direct result of an act or omission of the State or any of its Associates at the Site and in connection with the Project, other than any act or omission which is authorised or permitted under a State Project Document, Policy or Law;
- (f) **(Emergency and Step in):** the State exercises its rights under clause 42.1(a) or its step-in rights under clause 42.3(e) to 42.3(h), other than where the event which gives rise to the exercise of the State's rights is a Force Majeure Event or is due to a Project Co Act or Omission;
- (g) **(Stage 2 Development Consent contest):** a direction by the State to Project Co to contest a condition or requirement of the Stage 2 Development Consent pursuant to clause 6.5(a), except where Project Co fails to contest a condition or requirement of the Stage 2 Development Consent in breach of its obligations under this Deed;
- (h) **(Stage 2 Development Consent):**
- (i) **(delays):** the Stage 2 Development Consent is not granted by the Development Consent Authority by 2 January 2018 to the extent directly caused by:
 - A. a Development Consent Authority Delay;
 - B. the State failing to provide Project Co with landowner consent in respect of the lodgement of the Stage 2 Development Application at least 14 days before the Condition Precedent Deadline;
 - C. the Development Consent Authority requiring additional processes, peer reviews, submissions or information to be undertaken by Project Co prior to the Development Consent Authority granting the Stage 2 Development Consent

(Additional Planning Studies) but the Additional Planning Studies must:

- 1) be additional to the Stage 1 Development Consent processes, peer reviews, submissions or information required or contemplated by the Stage 1 Development Consent conditions set out in the Contract Particulars; and
- 2) not be foreseeable at the date of this Deed by Project Co or its Associates and which would not have been foreseen at the date of this Deed by a prudent, experienced and competent designer, constructor, planner or operator of facilities similar to the Relevant Infrastructure including by having regard to the Stage 1 Development Consent, the Stage 2 SEARS, Policies and Best Industry Practices;

D. the State lodging the Stage 2 Development Application with the Development Consent Authority after Financial Close; or

E. the State's breach of clause 6.4(c); or

(ii) **(unforeseeable conditions)**: any condition in the Stage 2 Development Consent:

A. which was not foreseeable at the date of this Deed by Project Co or its Associates and which would not have been foreseen at the date of this Deed by a prudent, experienced and competent designer, constructor, planner or operator of facilities similar to the Relevant Infrastructure including by having regard to the Stage 1 Development Consent, the Stage 2 SEARS, Policies and Best Industry Practices; and

B. which will result in:

- 1) a material change to the Works; or
- 2) a material Methodology Change, and

except to the extent due to:

(iii) in respect of limb (h)(i) only, a Project Co Planning Risk Item;

(iv) in respect of limb (h)(ii) only, the batch plant set out in the Proposal being modified such that it constitutes designated development within the meaning of any clause specified in schedule 3 of the EP&A Regulation; and

(v) in respect of limbs (h)(i) and (h)(ii) above:

A. any insufficiency or incompleteness in the documentation prepared by Project Co in connection with obtaining the Stage 2 Development Consent or a modification to it which is initiated by Project Co or its Associates (including in preparing the Stage 2 Development Application);

B. Project Co failing to comply with a Stage 2 Development Application Obligation; or

C. the Stage 2 Development Application being inconsistent with the Stage 1 Development Consent;

- (i) **(Stage 2 Development Consent change)**: any change or modification to the Stage 2 Development Consent granted by the Development Consent Authority in response to a request by the State for that change or modification contemplated by clause 6.6;
- (j) **(Facilitation Works)**:
 - (i) the Facilitation Works (Power) not being complete on or before [REDACTED]
 - (ii) the Facilitation Works (Roads) not being complete on or before [REDACTED]
 - (iii) the Facilitation Works (Water) not being complete on or before [REDACTED] or [REDACTED]
 - (iv) the Facilitation Works (Telecommunications) not being complete on or before [REDACTED] or [REDACTED]
- (k) **(other events)**: any other event described as a Compensable Extension Event in this Deed.

Compensable Intervening Event means any of the following events occurring during the Operating Phase:

- (a) **(State breach)**: a breach by the State of any State Project Document;
- (b) **(fraudulent act or omission)**: a fraudulent, reckless, unlawful or malicious act or omission of the State or any of its Associates in connection with the Project;
- (c) **(Contamination Compensation Event)**: a Contamination Compensation Event;
- (d) **(Native Title and Heritage Claims)**: cessation or suspension of any part of the Services (or a material change in the way the Services are carried out) because of:
 - (i) a Commonwealth, State or NSW Government direction;
 - (ii) an order of a court or tribunal of competent jurisdiction; or
 - (iii) a requirement of Law,in connection with a Heritage Claim or a Native Title Claim (as the case may be), to the extent that the cumulative cessation or suspension (or the material change in the way the Services are carried out) exceeds 10 Business Days;
- (e) **(Project specific industrial action)**: industrial action which occurs only at the Site, or otherwise only in respect of the Project, which is the direct result of an act or omission of the State or any of its Associates at the Site, other than any act or omission which is authorised or permitted under a State Project Document, Policy or Law;
- (f) **(Declaration of the Site under the Corrections Act)**: on the Operational Commencement Date, the Governor has not declared the Site to be a:
 - (i) Correctional Centre for the purposes of section 225 of the Corrections Act; or
 - (ii) Correctional Complex for the purposes of section 224 of the Corrections Act; and

- (g) **(Appointment of a General Manager)**: a General Manager has not been appointed in respect of the Correctional Complex in accordance with the Corrections Legislation on the Operational Commencement Date in circumstances where:
- (i) Project Co has nominated an individual to be appointed as General Manager in accordance with clause 10.5 and the Corrections Legislation at least 6 months prior to the Date of Technical Completion; and
 - (ii) the Commissioner has not responded to Project Co within 40 Business Days of that individual being nominated by Project Co in accordance with the Corrections Legislation.

Compensation Date has the meaning given in the Termination Payments Schedule.

Completion means:

- (a) Technical Completion; and
- (b) Commercial Acceptance,

or the relevant one of these as the case may be.

Completion Payment means each payment to be made in accordance with clause 36A.1 by the State to Project Co of an amount equal to the corresponding Receivables Purchase Payment for the Initial Receivables payable by Finance Co to the State under the Receivables Purchase Deed.

Completion Payment Date means, with respect to each Completion Payment, the date that the corresponding Receivables Purchase Payment for the Initial Receivables payable by Finance Co to the State is required to be made under the Receivables Purchase Deed.

Completion Plan means the:

- (a) Technical Completion Plan; and
- (b) Commercial Acceptance Plan,

or the relevant one of these as the case may be.

Completion Price means the price to be paid by the State to Project Co in accordance with clause 36A.1, being the sum of the Completion Payments, which must equal the aggregate of the amount of the Receivables Purchase Price for the Initial Receivables calculated under the Receivables Purchase Deed.

Completion Requirements means the requirements for:

- (a) Technical Completion set out in the Technical Completion Schedule;
- (b) Commercial Acceptance set out in the Commercial Acceptance Schedule; and
- (c) the Commissioning Activities set out in the Commercial Acceptance Schedule,

or the relevant one of these as the case may be.

Completion Tests means:

- (a) the Technical Completion Tests;
- (b) the Commercial Acceptance Tests; and
- (c) the Post Completion Tests,

or the relevant one of these as the case may be.

Condition Precedent means each condition precedent in the Conditions Precedent Schedule.

Condition Precedent Deadline means the date so specified in the Contract Particulars.

Condition Review Date has the meaning given in clause 37.5(a) as adjusted (if at all) in accordance with clause 37.6(a).

Conditions Precedent Schedule means Schedule 2.

Confidential Design Information means:

- (a) all Design Deliverables; and
- (b) any other information designated by the State Representative to be Confidential Design Information.

Confidential Information means:

- (a) the Project Documents;
- (b) the Project Information;
- (c) any Commercially Sensitive Information;
- (d) information provided by:
 - (i) the State or any of its Associates to Project Co or any of its Associates; or
 - (ii) Project Co or any of its Associates to the State or any of its Associates,in connection with this Deed or the Project, whether provided prior to or after the date of this Deed;
- (e) Project Co Material;
- (f) Confidential Design Information; and
- (g) Personal Information,

but does not include any report prepared by or on behalf of the State in relation to the performance or non-performance by Project Co or its Associates of its obligations pursuant to this Deed (provided that any information contained in any such report which is Commercially Sensitive Information is redacted in such report).

Consent Deed means:

- (a) the D&C Consent Deed; and
- (b) the Operator Consent Deed.

Consequential or Indirect Loss means:

- (a) any loss of opportunity, profit, anticipated profit, business, business opportunities or revenue or any failure to realise anticipated savings; or
- (b) to the extent not prohibited by Law, any penalties payable under agreements other than the State Project Documents or Key Subcontracts.

Consortium means:

- (a) any Project Co Entity;
- (b) the D&C Subcontractor up to the commencement of the CDPD Period;
- (c) the Operator;
- (d) the Parent Guarantor of the D&C Subcontractor up to the commencement of the CDPD Period; and
- (e) the Parent Guarantor of the Operator,

and **Consortium Member** means any of them.

Construction Management Plan means the Delivery Phase Plan of that name.

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

Contamination has the meaning set out in the CLM Act.

Contamination Compensation Event means where Project Co is required under clause 8.4(f) to Remediate Contamination that:

- (a) is on, in, over, under or emanating from the Site; or
- (b) is migrating, or has migrated, onto the Site,

to the extent such Contamination has been caused or contributed to by the State or its Associates after the date of this Deed.

Contamination Remediation Notice means any notice, order or direction issued under Legislation requiring a person to take measures to Remediate any Contamination in, on, under or emanating from the Site, or any other action regarding Contamination including a clean up order or site contamination assessment order.

Contamination Remediation Plan has the meaning given in clause 8.5(a), as may be updated from time to time by Project Co in accordance with this Deed.

Contract Particulars means Schedule 1.

Control means:

- (a) 'Control' as defined in the Corporations Act;
- (b) the ability to control, directly or indirectly, the composition of the board or partnership committee (or if the Entity is a trust, the appointment of a trustee of that trust);
- (c) being in a position to cast, or control the casting of, more than 25% of the maximum number of votes that may be cast at a general meeting or similar (or if the Entity is a trust, a meeting of unit holders); or
- (d) having a relevant interest (as defined in section 608 of the Corporations Act but as if a reference in that section to 'securities' were a reference to Securities as defined in this Deed) in more than 25% of the Securities,

of an Entity (whether alone or together with any Associates). For the purposes of this definition, Associate has the meaning given in the Corporations Act and includes a person deemed to be an associate of a designated body (within the meaning of section 12 of the Corporations Act).

Controlling Entity means, in relation to a Change in Control of a Consortium Member, the person or Entity to whom Control will pass.

Controlling Unit Holder means, in respect of any trust or managed investment scheme, any entity which:

- (a) controls (within the meaning of section 50AA of the Corporations Act) the trust or managed investment scheme (either directly or through one or more intermediary entities or trusts);
- (b) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a meeting of unit holders of the trust or managed investment scheme (either directly or through one or more intermediary entities or trusts or managed investment schemes); or
- (c) holds more than one half of the units in the trust or managed investment scheme.

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

Correctional Centre means a correctional centre within the Correctional Complex which is declared to be a correctional centre by the Governor pursuant to section 225 of the Corrections Act.

Correctional Complex means the correctional complex as declared to be a correctional complex by the Governor pursuant to section 224 of the Corrections Act and includes the Correctional Centres and the whole of the area inside the boundaries of the Operating Phase Site, the physical infrastructure and grounds contained within those boundaries, and all Equipment.

Corrections Act means *Crimes (Administration of Sentences) Act 1999* (NSW).

Corrections Legislation means:

- (a) the Corrections Act; and
- (b) the Corrections Regulations.

Corrections Regulations means *Crimes (Administration of Sentences) Regulation 2014* (NSW).

Correctional Complex Access Protocols means the protocols by which Visitors and others may access a Correctional Centre or the Correctional Complex during the Operating Phase included in the Operating Phase Plans.

Counterparty Details means:

- (a) in connection with each Project Co Entity:
 - (i) a certified copy of its constitution (or other constituent documents);
 - (ii) in the case of a trustee who enters into the State Project Documents on behalf of a trust, a certified copy of the relevant trust deed;
 - (iii) a certified copy of any powers of attorney under which the person executed each State Project Document; and
 - (iv) a certified copy of the extract of minutes evidencing the resolutions of its board of directors, authorising the entry into, delivery and observance of obligations in accordance with each State Project Document to which it is a party; and
- (b) in connection with each other person (other than the State) who is a party to a State Project Document, a certified copy of any powers of attorney under which the person executed each State Project Document.

Critical Incident means any of the following incidents:

- (a) suicide;
- (b) death;
- (c) Escape;
- (d) riot;
- (e) hostage situation;
- (f) siege situation; or
- (g) Staff Misconduct.

CSNSW Employees means any employee of the State who is working at any correctional centre within three months of the Operational Commencement Date.

Custodial Patients means all Inmates.

D&C Consent Deed means the document entitled 'NGCC D&C Subcontract Consent Deed' between Project Co, the Security Trustee, the D&C Subcontractor, the Parent Guarantor of the D&C Subcontractor and others.

D&C Side Deed means the document entitled 'New Grafton Correctional Centre D&C Side Deed' dated on or about the date of this Deed between the State, Project Co, the D&C Subcontractor and the Parent Guarantor of the D&C Subcontractor substantially in the form set out in Schedule 27.

D&C Subcontract means the agreement between Project Co and the D&C Subcontractor to carry out the Delivery Phase Activities, and any other contract between Project Co and a Subcontractor to carry out any part of the Delivery Phase Activities but not including any Subcontract with the Operator.

D&C Subcontractor means, as at the date of this Deed, the party listed as such in the Contract Particulars and any person who in addition or substitution is engaged by Project Co to carry out any part of the Delivery Phase Activities but not including the Operator.

Date for Commercial Acceptance means the date specified as such in the Contract Particulars, as adjusted (if at all) in accordance with this Deed.

Date for Completion means:

- (a) the Date for Technical Completion; and
- (b) the Date for Commercial Acceptance,

or the relevant one of these as the case may be.

Date for Technical Completion means the date specified as such in the Contract Particulars, as adjusted (if at all) in accordance with this Deed.

Date of Commercial Acceptance means the date specified in the Certificate of Commercial Acceptance as the date on which Project Co achieved Commercial Acceptance.

Date of Technical Completion means the date specified in the Certificate of Technical Completion as the date on which Project Co achieved Technical Completion.

Day 1 Uninsurable Risk means:

- (a) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military usurped power, military insurrection, military commotion or other like hostilities (other than where undertaken by, caused by, involving or undertaken for the benefit of Inmates, Visitors, Staff or other users of the Services);
- (b) nuclear or biological contamination;
- (c) ionising radiation or contamination by radioactivity; and
- (d) any act of terrorism occurring at the Site, except to the extent coverage is provided for a declared terrorist incident under the *Terrorism Insurance Act 2003* (Cth),

save to the extent caused or contributed to by a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.

Debt means the principal amounts properly drawn down by any Project Co Entity under the Finance Documents to finance the Project, including accrued interest and fees payable in respect of those principal amounts, and any net amounts payable under any hedging arrangements relevant to those principal amounts deducting all credit balances on all debt reserve and debt service accounts (however named) held by or on behalf of any Project Co Entity or any Financier and related to the Project but does not include default interest, equity shareholder loans, or amounts in the nature of Equity.

Deed has the meaning given in clause 2.2(a).

Default Termination Event means the occurrence of any of the following events:

- (a) **(abandonment)**: Project Co wholly or substantially abandons the Project or any material part of the Project Activities;
- (b) **(Group Member Insolvency Event)**: an Insolvency Event occurs in relation to a Group Member;
- (c) **(Project Co Entity fraud)**: a Project Co Entity or the Operator engages in fraud, collusion or dishonest conduct in performing its obligations under any Project Document;
- (d) **(assignment, transfer or disposal)**: a Project Co Entity assigns, transfers or otherwise disposes of any of its rights, title and interest in or under any Project Document, the whole or any part of the Site or the Relevant Infrastructure in breach of clause 57;
- (e) **(Change in Control)**: a Change in Control (which is not a Permitted Change in Control) occurs in respect of a Project Co Entity other than in accordance with clause 58;
- (f) **(unremedied Major Default)**: a Major Default is capable, or is deemed to be capable, of remedy and Project Co fails to remedy the Major Default within the period set out in the Major Default Notice (as extended, if at all, in accordance with clause 48.4(b));
- (g) **(unremedied Major Default by Sunset Date)**: a Major Default is capable, or is deemed to be capable, of remedy and Project Co fails to remedy the Major Default by the Sunset Date (including a failure to achieve Completion by the applicable Sunset Date);
- (h) **(Major Default not capable of remedy)**: a Major Default is not capable of remedy and Project Co fails to diligently comply with any reasonable requirements of the State to overcome the consequences of the Major Default within the time stated in the Major Default Notice (as extended, if at all, under clause 48.4(b));

- (i) **(repeated Major Default Service Failure):** following [REDACTED] Major Default Service Failures in any [REDACTED] (whether or not they have been cured by Project Co);
- (j) **(Charge Events):** Project Co has accrued a Charge Event liability of greater than [REDACTED] (as defined in the Payment Schedule) in any [REDACTED]. For the purposes of this paragraph only, if [REDACTED] Escapes occur concurrently, Project Co's Charge Event liability will be calculated as if this was [REDACTED] Charge Event;
- (k) **(Total Deductions):** Project Co has incurred Total Deductions (calculated in accordance with section 13 of the Payment Schedule) and Charge Events (as determined under the Performance Regime) with an aggregate value greater than:
 - (i) [REDACTED] of the Base Fee and Volumetric Adjustment (as calculated in accordance with the Payment Schedule) in any [REDACTED] or
 - (ii) [REDACTED] of the Base Fee and Volumetric Adjustment (as calculated in accordance with the Payment Schedule) in any [REDACTED]
- (l) **(Illegality Event):** an Illegality Event occurs;
- (m) **(Probity Event):** Project Co fails to comply with clause 63.1(d), in relation to a Probity Event; or
- (n) **(deemed Default Termination Event):** any other event which is deemed to be a Default Termination Event under clause 44.6(b)(i) or clause 48.2(f).

Default Termination Payment means the payment calculated in accordance with section 3 of the Termination Payments Schedule.

Defect means:

- (a) any defect, shrinkage, expansion, fault or omission in the Relevant Infrastructure (excluding any normal shrinkage or expansion of materials accommodated in accordance with Best Industry Practices); or
- (b) any other aspect of the Relevant Infrastructure which is not in accordance with the requirements of this Deed.

Delivery Phase means the period beginning on the date of this Deed and ending on and including the Date of Commercial Acceptance.

Delivery Phase Activities means:

- (a) all things which Project Co is, or may be, required to carry out or do in connection with the Works; and
- (b) all other things which Project Co is, or may be, required to carry out or do in accordance with the State Project Documents during the Delivery Phase,

but excludes the Services.

Delivery Phase CCE Model Variation Event has the meaning given in clause 59.3(b).

Delivery Phase Insurances means the Insurances referred to in Part A of the Insurance Schedule.

Delivery Phase Plans means each of the plans described in the Delivery Phase Plans and Reports Schedule.

Delivery Phase Plans and Reports Schedule means Schedule 11.

Delivery Phase Program means the Initial Delivery Phase Program, as updated in accordance with clause 16.2(b).

Delivery Phase Reports means each of the reports described in the Delivery Phase Plans and Reports Schedule.

Delivery Phase Quality Assurance Plan means the Delivery Phase Plan of that name and prepared by Project Co in accordance with the Delivery Phase Plans and Reports Schedule.

Delivery Phase Sites means all of the land on which the Works are to be constructed as identified in the Site Plans.

Delivery Phase Sub-Licence means the sub-licence granted under clause 19.1 by the State to Project Co for Project Co and its Associates to enter upon and occupy the Delivery Phase Sites to the extent necessary to carry out the Delivery Phase Activities.

Design Deliverables means all deliverables in respect of the design of the Correctional Complex (including all draft and final design standards, design reports, durability reports, drawings, specifications, manuals, designs, models, samples, patterns and calculations) in computer readable and written forms, or stored by any other means, which Project Co or any of its Associates creates, or are required to, or must necessarily, create, in carrying out the Delivery Phase Activities.

Design Development Change means any element of the design of the Works proposed by Project Co which deviates from, or does not meet or satisfy, the Design Requirements.

Design Development Process means the process for the development of the design of the Correctional Complex which is described in the Design Development Schedule.

Design Development Schedule means Schedule 8.

Design Life Item means an item specified in the Design Life Schedule.

Design Life Schedule means the schedule of design lives included in Output Specification.

Design Management Plan means the Delivery Phase Plan of that name.

Design Proposal means Annexure A.

Design Requirements means requirements for the design of the Correctional Complex as set out in:

- (a) the Output Specification;
- (b) the Design Proposal; and
- (c) the remainder of this Deed.

Design Stage has the meaning given in the Design Development Schedule.

Design Subcontract means the document entitled 'Consultant Services Agreement' dated on or about the date of this Deed between the D&C Subcontractor and the Design Subcontractor.

Design Subcontract Side Deed means the document entitled 'New Grafton Correctional Centre Design Subcontract Side Deed' dated on or about the date of this Deed between the State, Project Co, the D&C Subcontractor and the Design Subcontractor substantially in the form set out in Schedule 26.

Design Subcontractor means, as at the date of this Deed, the party listed as such in the Contract Particulars, and any person who in addition or substitution is engaged by Project Co to design a material part of the Delivery Phase Activities.

Designated Investor means an investor described as such in the Contract Particulars.

Developed IP means any Project Co Material created, developed or produced by or on behalf of Project Co or any of its Associates in the course of carrying out the Project Activities, including:

- (a) all research conducted by Project Co or any of its Associates in relation to the Project, the Inmates, the Correctional Complex, the Inmate programs, any other user of the Services (including former Inmates) or any part of them;
- (b) any data recorded by Project Co or its Associates under this Deed in respect of the management of Inmates or the Correctional Complex;
- (c) Inmates professional management, detention, case, medical and dental files;
- (d) all manuals in respect of the management of Inmates or the Correctional Complex; and
- (e) information about:
 - (i) the management of Inmates produced by Project Co or its Associates; and
 - (ii) Project Co or its Associates obligations under the Deed in respect of the management of Inmates or the Correctional Complex,

but excludes the Project Co Background IP and the Proprietary Software.

Development Consent Authority means the Authority or Authorities with jurisdiction to assess or determine the Stage 1 Development Application and the Stage 2 Development Application (as applicable) in accordance with the EP&A Act.

Development Consent Authority Delay means the following events exceeding an aggregate of 27 weeks:

- (a) the Development Consent Authority preparing for the Exhibition Period following the lodgement of the Stage 2 Development Application with the Development Consent Authority;
- (b) the Exhibition Period; and
- (c) the Assessment Period, as extended on a day for day basis for:
 - (i) any day that occurs between the date of the Development Consent Authority's request for any additional information pursuant to the EP&A Act or the EP&A Regulation due to insufficiency or incompleteness of the Stage 2 Development Application and the date on which the additional information is provided by Project Co; and
 - (ii) to the extent that the Development Consent Authority provides draft Stage 2 Development Consent conditions during the Assessment Period, any day that occurs between the first date the Development Consent Authority or the State (as the case may be) provides the draft Stage 2 Development Consent conditions to Project Co and the last date on which Project Co provides comments on the draft Stage 2 Development Consent conditions to the Development Consent Authority or the State (as the case may be).

Dispute has the meaning given in clause 50.1(a).

Distribution means, without double counting and whether in cash or kind:

- (a) any distribution by any Project Co Entity to its Equity Investors or their Related Bodies Corporate (or any Related Trust Entity of an Equity Investor), or amount available for such distribution, whether by way of dividend, return of capital, redemption, purchase, buy back, cancellation, payment, repayment, loan, contractual arrangement, transfer of assets or rights or otherwise in respect of the share capital of any Project Co Entity, units in any trust or any subordinated debt;
- (b) the receipt from any Project Co Entity by its Equity Investors or their Related Bodies Corporate (or by any Related Trust Entity of an Equity Investor) of any other benefit which is not received in the ordinary course of business or on reasonable commercial terms;
- (c) subject to paragraph (b), any payment by any Project Co Entity to any Equity Investor or Related Body Corporate of any Equity Investor (or any Related Trust Entity of an Equity Investor), which is not received in the ordinary course of business or on reasonable commercial terms; or
- (d) the release by a Group Member of any actual or contingent liability of any Project Co Entity or any Equity Investor (or any Related Body Corporate or Related Trust Entity of an Equity Investor).

Duty has the meaning given in clause 36.7(a).

Duty Estimate has the meaning given in clause 36.7(b)(ii).

Early Warning (Delivery) has the meaning given in clause 38.1.

Early Warning (Operations) has the meaning given in clause 39.1(a).

Easements means all easements, restrictions on use, covenants, agreements, or other similar arrangements together with any leases, sub-leases, licences, rights or privileges, in each case as are granted on or prior to the date of this Deed.

Electronic Security Provider means Saab Australia Pty Ltd (ABN 88 008 643 212).

Electronic Security Provider Side Deed means each of the documents entitled:

- (a) 'New Grafton Correctional Centre Electronic Security Provider Side Deed' dated on or about the date of this Deed between the State, Project Co, the D&C Subcontractor and the Electronic Security Provider; and
- (b) 'New Grafton Correctional Centre Electronic Security Provider Side Deed' dated on or about the date of this Deed between the State, Project Co, the Operator and the Electronic Security Provider,

substantially in the form set out in Schedule 26.

Emergency means any event or circumstance which:

- (a) involves serious personal injury, death or significant damage to or destruction of the Relevant Infrastructure, or any other real or personal property;
- (b) poses a serious risk to:
 - (i) the public interest;
 - (ii) the health or safety of any person;
 - (iii) the Environment;
 - (iv) the Site; or

- (v) the structural integrity of any part of the Relevant Infrastructure;
- (c) poses a serious risk of damaging or destroying the Relevant Infrastructure or any other real or personal property; or
- (d) requires Project Co to manage a disturbance including a Critical Incident.

Employee Checks means the employee checks set out in the Contract Particulars.

Employee Requirements means the employee requirements set out in the Contract Particulars.

Emissions and Energy Data means any data, information, records and reports required to be kept or provided under the NGER Legislation concerning:

- (a) greenhouse gas emissions, energy production or energy consumption;
- (b) reduction of greenhouse gas emissions, removal of greenhouse gases or offsets of greenhouse gas emissions from any greenhouse gas project; or
- (c) environmental emissions or energy production, use, consumption or efficiency,

in connection with the Services.

Entity has the meaning given in section 64A of the Corporations Act, but is also deemed to include a joint venture within the meaning of Australian Accounting Standard 131 (AASB 131).

Environment means the physical factors of the surroundings of humans and other life forms, including the land, soil, plants, habitat, waters, atmosphere, climate, sounds, odours, tastes, biodiversity and the social factor of aesthetics.

Environmental Hazard means a state of danger to human beings or the Environment whether imminent or otherwise resulting from the location, storage, handling or release of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics.

Environmental Management Plan means the Delivery Phase Plan or Operating Phase Plan of that name (as applicable).

Environmental Requirements means all Laws relating to the Environment and the conditions and requirements of any Approval relating to the Environment and all environmental safeguards and measures necessary to avoid, reduce, minimise or mitigate the environmental impacts of the Project Activities, including those identified in the Output Specification.

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW).

EP&A Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

Equipment means all plant, machinery, furniture, fittings and fixtures which:

- (a) are necessary to ensure the Correctional Complex meets the FFP Warranty;
- (b) are referred to in the Design Requirements; or
- (c) without limiting paragraphs (a) and (b) above, Project Co or its Associates installs, constructs or places on the Site and which is, or becomes, part of the Correctional Complex,

but excludes all Temporary Equipment.

Equipment List means the Initial Equipment List as updated in accordance with clause 18.

Equity means all partnership interests and ordinary unit capital and ordinary share capital in, or the subordinated debt which is, in substance, equivalent to ordinary equity of, any Project Co Entity, and includes any securities which are convertible into ordinary partnership interests or ordinary unit capital or ordinary share capital in Project Co.

Equity Documents means each of the documents listed in the Equity Documents Schedule.

Equity Documents Schedule means Schedule 20.

Equity Investor means:

- (a) a person identified as such in the Ownership Schedule (until that person is replaced in accordance with clause 58);
- (b) each person who has provided or has agreed to provide:
 - (i) Equity at the times and in the amounts set out in the Financial Model (whether by way of subscription for units or shares or provision of unitholder or shareholder loans); or
 - (ii) any other equity, financial arrangement, security or option issued by or provided to a Group Member which does not constitute a Refinancing; and
- (c) any person who replaces or is added, in accordance with clause 58, to the persons referred to in paragraphs (a) or (b).

Equity IRR means the nominal blended internal rate of return to Equity Investors (equal to the percentage set out under 'Equity IRR' in the Model Output Schedule) which is calculated after the deduction of tax on project cash flows by any Project Co Entity but before any tax paid or payable by Equity Investors.

Escape has the meaning given in the Performance Regime.

Escrow Agent means the escrow agent appointed pursuant to clause 61.9(a) and the Escrow Deed or any replacement escrow agent appointed pursuant to the Escrow Deed.

Escrow Deed means the document entitled '*New Grafton Correctional Centre – Escrow Deed*' to be entered into between the State, Project Co, the D&C Subcontractor, the Operator, the Electronic Security Provider and the Escrow Agent in accordance with clause 61.9 and substantially in the form of Schedule 32A.

Escrow Material has the meaning given to it in the Escrow Deed.

Essential Service means the provision of:

- (a) accommodation;
- (b) food and water;
- (c) security and supervision; and
- (d) Services which, if not provided, may result in death or serious health problems.

Executive Representatives has the meaning given in clause 51(a).

Exhibition Period means the period commencing on the date that the Development Consent Authority places the Stage 2 Development Application on public exhibition pursuant to part 6, Division 6 of the *Environmental Planning and Assessment Regulation 2000* and ending when the final submission is provided to Project Co by the Development Consent Authority in accordance with clause 85A of the EP&A Regulation.

Exotic Swap means any hedging or swap arrangement that does not satisfy all of the following criteria:

- (a) either:
 - (i) a fixed to floating (and vice versa) interest rate swap; or
 - (ii) a cross-currency swap which swaps payments in respect of the relevant currency of any underlying financial indebtedness that is not denominated in Australian dollars to Australian dollar payments and has a tenor of no longer than five years (or such longer period as agreed by the State in writing);
- (b) does not have any element of accretion or indexation of the notational principal;
- (c) has a tenor of no longer than the tenor of the underlying principal of the Debt and may include forward start swaps provided the termination date of such swaps is no later than the term of the underlying principal of the Debt; and
- (d) together with all other hedging or swap arrangements of any Project Co Entity, has a notional amount that is no more than the underlying principal of the Debt.

Expert Determination Agreement means an expert determination agreement to be entered into between Project Co, the State and an independent expert substantially in the form set out in Schedule 30.

Expiry Date has the meaning given in clause 4.2.

Extension Event means any of the following events occurring during the Delivery Phase:

- (a) **(Compensable Extension Event):** a Compensable Extension Event;
- (b) **(State act or omission):** any act or omission of:
 - (i) the State; or
 - (ii) any Associate of the State,in connection with the Project other than any act or omission which is authorised or permitted under a State Project Document, Policy or Law;
- (c) **(Force Majeure Event):** a Force Majeure Event;
- (d) **(blockade):** a blockade or embargo that directly affects the Delivery Phase Sites or the Delivery Phase Activities (other than industrial action);
- (e) **(Change in Mandatory Requirements):** a Change in Mandatory Requirements which occurs in respect of the Works, for which the State has issued a Modification Order in accordance with clause 40.10;
- (f) **(Modification):** a Modification for which the State has issued a Modification Order;
- (g) **(Loss or Damage):** the State requires Project Co to repair or rebuild the Relevant Infrastructure and clause 44.3(e) applies; and
- (h) **(Agreed Uninsurable Risk):** the State requires Project Co to repair or rebuild the Relevant Infrastructure and clause 47.3(a)(i) applies.

External Infrastructure means infrastructure which is external to, but is to be provided to, the Site, by Project Co or its Associates, and which is used in common with other users, including roads, footpaths, transport facilities and any Utility Infrastructure external to the Site.

Facilitation Works means the Facilitation Works (Power), the Facilitation Works (Roads), the Facilitation Works (Telecommunications) and the Facilitation Works (Water).

Facilitation Works (Power) means the delivery of 12 MVA of permanent electricity supply to the boundary of the Site including the construction of a new 11 kV substation facility on Site at the Facilitation Works (Power) Location.

Facilitation Works (Power) Location means the location of the switchyard as set out in the Proposal.

Facilitation Works (Roads) means upgrade works to Avenue Road (from the intersection of Old 6 Mile Lane to a location approximately in line with the northern boundary of the Site) and 8 Mile Lane to become two way sealed roads with shoulders.

Facilitation Works (Telecommunications) means the delivery of the telecommunications to the Facilitation Works (Telecommunications) Location with a capacity of each fibre connection of 1 Gigabit.

Facilitation Works (Telecommunications) Location means the service provider carrier rack in the 'Training Building'.

Facilitation Works (Water) means the delivery of potable water supply to the boundary of the Site at the Facilitation Works (Water) Location via a 225Dia PVC supply Class 16, with a residual head pressure of 50-60 metres above Australian Height Datum.

Facilitation Works (Water) Location means the eastern boundary of the Site adjacent to the proposed new entrance to the Site on Avenue Road.

Facility Agreement has the meaning given in the Finance Documents Schedule.

FFP Warranty means the warranty given by Project Co in clause 5.4.

Final Expiry Date means the date which is the twentieth anniversary of the earlier of:

- (a) the Date for Commercial Acceptance; and
- (b) the Date of Commercial Acceptance.

Final Refurbishment Works has the meaning given in clause 37.5(b)(i).

Finance Co means NorthernPathways Finance Pty Limited (ACN 615 483 737).

Finance Documents means:

- (a) each of the documents listed in the Finance Documents Schedule;
- (b) any document entered into in relation to a Refinancing of the Debt approved by the State under clause 41; and
- (c) any other document which the parties agree is a Finance Document for the purposes of this Deed.

Finance Documents Schedule means Schedule 21.

Financial Close means the date on which the last Condition Precedent to be satisfied, has been satisfied (or waived in accordance with clause 3.3(b)) as set out in a notice given by the State to Project Co in accordance with clause 3.2(d).

Financial Close Adjustment Protocol means the protocol to:

- (a) update the Base Case Financial Model; and

(b) amend this Deed,

to be applied at Financial Close, in accordance with clause 3.5 and 59 and contained in Annexure C.

Financial Close Financial Model means the Base Case Financial Model as updated and audited in accordance with the Financial Close Adjustment Protocol.

Financial Model means the Financial Close Financial Model as updated from time to time in accordance with clause 59.

Financial Year means each 12 Month period commencing on 1 July and ending on 30 June.

Financiers means the providers of any financing facilities, financial arrangements or accommodation to a Group Member under the Finance Documents from time to time and may, where the context permits, include any agent or trustee of such Financiers (other than Finance Documents solely between Group Members).

Financiers Tripartite Deed means the document entitled 'New Grafton Correctional Centre - Financiers Tripartite Deed' dated on or about the date of this Deed between the State, Project Co, Finance Co and the Security Trustee on behalf of the Financiers.

Financing Delay Costs has the meaning given in the Change Compensation Principles.

First Pre Agreed Modification Works means additional pre cast cell moulds and additional resources and equipment required prior to 2 January 2018 as a result of the Working Hour Restriction.

Fit For Purpose or FFP means the Relevant Infrastructure:

- (a) is fit for its intended purposes, functions and uses specified in, or which can reasonably be ascertained from, clauses 1 to 65, the Output Specification, the Performance Regime or the Payment Schedule;
- (b) otherwise meets the requirements for the Correctional Complex set out in or which can reasonably be ascertained from:
 - (i) the Design Requirements and the Services Requirements; and
 - (ii) all other requirements of this Deed; and
- (c) is fit for the performance of the Services in accordance with the Services Requirements and so as to facilitate and not impair the achievement of the Project Objectives.

For Construction Documentation means all Design Deliverables which are marked 'for construction' and are reviewed or deemed to have been reviewed by the State in accordance with the Design Development Process and the Review Procedures, as amended and updated in accordance with this Deed.

Force Majeure Event means any of the following events occurring:

- (a) a Day 1 Uninsurable Risk or an Uninsurable Risk;
- (b) bushfire, lightning, cyclone, hurricane, tempest, mudslide, landslide, earthquakes, droughts declared as a state of emergency and high seas inundation;
- (c) a flood which might at the date of this Deed be expected to occur no more frequently than once in 100 years;
- (d) fire or explosion caused by events referred to in paragraphs (a) to (c); or

- (e) during the Operating Phase only, Utility Interruption due to an interruption that occurs upstream from the point at which that Utility provider's Utility Infrastructure connects specifically to the Site or the Correctional Complex,

and which:

- (f) save in relation to paragraph (e), occurs at or directly in the vicinity of the Site;
- (g) in:
- (i) respect of a claim for an extension of time pursuant to clause 38 only, prevents or delays Project Co from carrying out all or substantially all of the Project Activities; or
 - (ii) all other circumstances, prevents Project Co from carrying out all or substantially all of the Project Activities;
- (h) was not caused by Project Co or its Associates, or the State or its Associates;
- (i) was beyond the reasonable control of Project Co or its Associates; and
- (j) could not have been prevented, avoided, remedied or overcome by taking those steps which a prudent, experienced and competent designer, constructor, or operator of facilities similar to the Relevant Infrastructure and providing services similar to the Services would have taken using Best Industry Practices (including the expenditure of reasonable sums of money).

Force Majeure Termination Event means:

- (a) either party has been prevented from carrying out all or substantially all of the Project Activities for a continuous period exceeding 180 days as a result of a Force Majeure Event; and
- (b) at least 180 days has elapsed since Project Co gave notice to the State in accordance with clause 38.3 or 39.1(d) (as the case may be) of the Force Majeure Event,

or any other event expressly deemed to be a Force Majeure Termination Event in this Deed.

Force Majeure Termination Payment means the payment calculated in accordance with section 5 of the Termination Payments Schedule.

Forecast Debt means at any time the lesser of:

- (a) the Debt at that time; and
- (b) the amount forecast in the Financial Model to be owing to the Financiers at that time.

General Change in Law means a Change in Law that is not a Project-Specific Change in Law.

General Manager means the person appointed from time to time as the governor of the Correctional Complex pursuant to this Deed and the Corrections Legislation.

GIPA Act means the *Government Information (Public Access) Act 2009* (NSW).

Governor means the Governor of New South Wales from time to time.

Group means Project Co, Finance Co, each Holding Entity and any wholly owned subsidiary of any of them.

Group Member means any of Project Co, Finance Co, each Holding Entity or any wholly owned subsidiary of any of them.

GST means:

- (a) the same as in the GST Act; and
- (b) any other goods and services tax, or any Tax applying to this transaction in a similar way.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Amount has the meaning given in clause 36.8(c)(ii).

GST Law has the meaning given in the GST Act.

Handover means the stage when Project Co has done everything that this Deed requires to enable Project Co to handover the Relevant Infrastructure in the Handover Condition.

Handover Bond means a Performance Bond provided by Project Co in favour of the State in accordance with clause 37.8(b)(ii).

Handover Condition means, if Handover of the Relevant Infrastructure is to occur:

- (a) prior to the Operational Commencement Date, the condition that the Works and the Delivery Phase Sites would be in if Project Co had complied with all of its obligations in connection with the Works, the Delivery Phase Activities and the Delivery Phase Sites under this Deed having regard to the time and circumstances of the termination;
- (b) between the Operational Commencement Date and the date that is 2 years prior to the Final Expiry Date, the condition that the Correctional Complex and the Operating Phase Site would be in if Project Co had complied with all of its obligations in connection with this Deed up to the time of termination having regard to the time and circumstances of the termination; or
- (c) any time after the date that is 2 years prior to the Final Expiry Date, the condition the Correctional Complex would be in:
 - (i) had all the scheduled and unscheduled maintenance of the Relevant Infrastructure been completed as at the Final Expiry Date in accordance with this Deed; and
 - (ii) such that when operated and maintained in accordance with comparable requirements to those in this Deed:
 - A. the relevant components of the Correctional Complex as specified in the Residual Life Schedule can reasonably be expected to:
 - (1) continue to meet their residual lives as specified in the Residual Life Schedule; and
 - (2) be free from Defects and otherwise Fit For Purpose (without any major maintenance or refurbishment works) for the relevant period specified in the Residual Life Schedule; and
 - B. components of the Correctional Complex for which no residual life is specified in the Residual Life Schedule can reasonably be expected to continue to meet the Services Requirements for 5 years after the Expiry Date without any

major maintenance or refurbishment works, other than routine maintenance that Project Co would have had to carry out under this Deed if the expiry of this Deed was in fact 5 years later than the Expiry Date.

Handover Escrow Account has the meaning given in clause 37.8(b)(i).

Handover Package means the Delivery Phase Plan of that name or Operating Phase Plan of that name or both (as applicable).

Handover Reviewer means a person with suitable expertise and experience appointed as the independent certifier for Handover in accordance with clause 37.4.

Hazardous Substance means any substance which would or might reasonably be expected to cause damage or injury to any person, any property or the Environment.

Health Services means those Services described in Section B.5 of the Output Specification.

Heritage Claim means a claim made in connection with a requirement under any Law for the protection, preservation or removal of any Artefact.

Holding Entity means, in the case of each Project Co Entity, each company or trust which, directly or indirectly, holds all of the issued shares or units in any Project Co Entity, and which is not itself wholly owned by any other Entity.

Illegality Event means Project Co or a Key Subcontractor:

- (a) ceases to hold an Approval; or
- (b) breaches applicable Legislation,

and the State forms the view (acting reasonably) that such failure or breach is material to the performance of Project Co's obligations under this Deed and such failure or breach is not remedied within 30 days after the earlier of:

- (c) the date on which the State notifies Project Co of the failure or breach; or
- (d) the date on which Project Co becomes aware of the failure or breach.

Imprest Stock means those Pharmaceuticals held in the Correctional Complex which are to be routinely administered to Inmates as circumstances require (which Pharmaceuticals must have been approved by the State in accordance with clause 29.7).

Increased State Risk Allocation means any increase in the risks for the State in relation to, or in connection with, the Project as a result of entry into or the State performing its obligations pursuant to the Securitised Licence Structure.

Indemnified IP Party has the meaning in clause 45.5(a).

Indemnified Person has the meaning in clause 45.1.

Independent Certifier means the entity appointed as the Independent Certifier under the Independent Certifier Deed, as replaced (if at all) in accordance with clause 14.4.

Independent Certifier Deed means the document entitled 'New Grafton Correctional Centre - Independent Certifier Deed of Appointment' to be entered into between the State, Project Co and the Independent Certifier substantially in the form set out in Schedule 25.

Index means each index set out in the Payment Schedule.

Indexed means the relevant amount as indexed in accordance with the Payment Schedule.

Industries Scheme means the scheme approved by the Commissioner in accordance with the Corrections Act.

Initial Delivery Phase Plans means the version of the Delivery Phase Plans current at the date of this Deed attached as Attachment 2.

Initial Delivery Phase Program means the version of the Delivery Phase Program current at the date of this Deed attached as Attachment 3.

Initial Equipment List means the list of Equipment included in Attachment 4.

Initial Equity Investor means [REDACTED]

Initial Offer has the meaning given in clause 33.4(b).

Initial Operating Phase Plans means the version of the Operating Phase Plans current at the date of this Deed attached as Attachment 5.

Initial Receivables has the meaning given in the Receivables Purchase Deed.

Inmate means those persons from time to time:

- (a) delivered; or
- (b) transferred,

under Legislation into the legal or physical custody of Project Co or its Associates.

Insolvency Event means, in relation to a party, the occurrence of any of the following events:

- (a) an application is made (other than for a frivolous or vexatious reason) for the winding up or deregistration of a party and, where an application has been made for the dismissal or withdrawal of the application for winding up within 10 Business Days, the application is not dismissed or withdrawn within 30 Business Days;
- (b) an order is made for the winding up of a party, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the State before that order is made where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of the approval;
- (c) a party passes a resolution for its winding up or deregistration, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the State before that resolution is passed where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of that approval;
- (d) a receiver, receiver and manager, liquidator, provisional liquidator, compulsory manager, trustee for creditors or in bankruptcy or analogous person is appointed to take possession of, or the holder of a Security Interest takes (or appoints an agent to take) possession of, any property of a party or otherwise enforces its Security Interest;
- (e) a party or any other person appoints an administrator to the party, or takes any step to do so;
- (f) a party:
 - (i) suspends payment of its debts (other than as the result of a failure to pay a debt or claim which is the subject of a good faith dispute);
 - (ii) ceases or threatens to cease to carry on all or a material part of its business;

- (iii) is or states that it is unable to pay its debts; or
- (iv) is taken to have failed to comply with a statutory demand as a result of the operation of section 459F of the Corporations Act;
- (g) a party enters into a readjustment or rescheduling of its indebtedness or makes a general assignment for the benefit of or a composition with its creditors, without the prior consent of the State, except for the purposes of a solvent reconstruction or amalgamation permitted by this Deed; or
- (h) any act is done or event occurs which has an analogous or similar effect to any of the events in paragraphs (a) to (g).

Instalment Date has the meaning set out in the Termination Payment Schedule.

Insurance Component means in relation to a Benchmarked Insurance, the insurance component (being the insurance premiums, statutory charges and fees) of the Monthly Service Payment payable in respect of that Benchmarked Insurance.

Insurance Review Date means:

- (a) the anticipated Operational Commencement Date; and
- (b) each five year anniversary of the Operational Commencement Date.

Insurance Schedule means Schedule 22.

Insurances means the insurances required to be effected and maintained in accordance with this Deed.

Insured means in relation to any Insurance, any person referred to in the Insurance Schedule entitled to coverage under that Insurance.

Insured Risk means a risk which is the subject of the industrial special risks insurance.

Intellectual Property Rights means all present and future rights throughout the world conferred by Law in or in relation to copyright, trademarks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and other results in the industrial, commercial, scientific, literary or artistic fields, including confidential information, whether or not registrable, registered or patentable, including:

- (a) all rights in all applications to register these rights;
- (b) all renewals and extensions of these rights; and
- (c) all rights in the nature of these rights,

but excluding Moral Rights.

Interface Deed has the meaning given to that term in the D&C Subcontract.

Intervening Event means any of the following occurring during the Operating Phase:

- (a) **(Compensable Intervening Event):** a Compensable Intervening Event;
- (b) **(State Act or Omission):** any act or omission of:
 - (i) the State; or
 - (ii) any Associate of the State;

in connection with the Project other than any such act or omission which is authorised or permitted under a State Project Document, Policy or Law;

- (c) **(Force Majeure Event):** a Force Majeure Event;
- (d) **(Loss or Damage):** the State requires Project Co to repair or rebuild the Relevant Infrastructure and clause 44.3(e) applies; or
- (e) **(Emergency and Step-In):** the State exercises its rights under clause 42.1(a) or its step-in rights under clause 42.3(e) to 42.3(h), other than where the event that gives rise to the exercise of the State's rights is a Force Majeure Event or a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.

JHG means John Holland NGCC Custodian Pty Ltd (ABN 86 619 109 509) in its capacity as trustee for the John Holland NGCC Trust (ABN 30 695 789 960).



Justice Health has the meaning given in the Corrections Legislation.

Key People means the people so named in the Contract Particulars as replaced (if at all) in accordance with clauses 10.7(b), 10.7(c) or 10.7(d).

Key Planning Approval means each of those approvals identified as such in the Contract Particulars.

Key Subcontract means:

- (a) the D&C Subcontract;
- (b) the Operator Subcontract; and

- (c) any other Subcontract in respect of the Project Activities identified in the Contract Particulars as a 'Key Subcontract',

as replaced in accordance with clauses 12.2 and 12.3.

Key Subcontractors means:

- (a) the D&C Subcontractor;
- (b) the Operator; and
- (c) any other Subcontractor who is engaged to perform the Project Activities and is referred to in the Contract Particulars as a 'Key Subcontractor',

as replaced in accordance with clauses 12.2 and 12.3.

Law means:

- (a) those principles of common law and equity established by decisions of courts; and
- (b) Legislation.

Legislation means all legislation (including the Corrections Legislation), statutes, rules, regulations, by-laws, ordinances and subordinated legislation of the Commonwealth, the State of NSW or an Authority.

Liability means any debt, obligation, claim, action, cost, (including legal costs, deductibles or increased premiums) expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), whether it is:

- (a) actual, prospective or contingent; or
- (b) currently ascertainable or not,

and whether under or arising out of or in any way in connection with this Deed, any other Project Documents or arising at Law.

Licence means:

- (a) each Delivery Phase Sub-Licence; and
- (b) each Operating Phase Sub-Licence.

Licence Fee has the meaning given in the Operating Phase Sub-Licence.

Licence Fee Payment Dates means the dates the Licence Fees are payable in accordance with the Operating Phase Sub-Licence.

Lifecycle Charge has the meaning given in the Payment Schedule.

Lodgement Due Date has the meaning given in clause 36.7(b)(i).

Major Default means any of the following events:

- (a) **(late Technical Completion)**: Project Co fails to achieve Technical Completion by the Date for Technical Completion;
- (b) **(late Commercial Acceptance)**: Project Co fails to achieve Commercial Acceptance by the Date for Commercial Acceptance;
- (c) **(Finance Documents)**: any event that would restrict or cancel any Project Co Entity's ability to obtain or to have available finance in accordance with the Finance

Documents, except to the extent that immediately after that restriction or cancellation, the funding available to any Project Co Entity is greater than that required to enable Project Co to fully undertake the Project;

- (d) **(fraud)**: an Associate of any Project Co Entity (excluding the Operator) engages in fraud, collusion or dishonest conduct in performing their obligations under the Project Documents;
- (e) **(representations and warranties)**: a representation or warranty given by a Project Co Entity under a State Project Document is found to be materially incorrect or misleading or a financial audit report discloses fraudulent, false, misleading or negligent reporting by any Project Co Entity in respect of any financial statements or invoices or other books or records of any Project Co Entity;
- (f) **(subcontracting and Key People)**: Project Co breaches an obligation in clauses 12.2, 12.3 or 12.4;
- (g) **(Confidential Design Information and Personal Information)**: any failure by Project Co to comply with its obligations under clauses 62.6 or 62.7;
- (h) **(breach of State Project Document)**: any breach of any State Project Document by any Project Co Entity (other than an Unavailability, a Meal Availability Failure, a Quality Failure, any other Major Default or a Default Termination Event) which is not cured within [REDACTED] of Project Co receiving a notice of that breach from the State;
- (i) **(Change in Management)**: as a result of a Change in Management, a Project Co Entity no longer has the same or better management skills available to it as it had prior to the Change in Management;
- (j) **(Change in Control)**: a Change in Control (which is not a Permitted Change in Control) occurs in respect of any Consortium Member other than any Project Co Entity without the consent of the State in accordance with clause 58.4;
- (k) **(Probity Event)**: Project Co fails to remedy a Probity Event in accordance with clause 63;
- (l) **(Refinancing)**: a failure by any Project Co Entity to inform or obtain the prior consent of the State (as the case may be) of a Refinancing or to distribute any State Refinancing Share in accordance with clause 41;
- (m) **(breach of other Project Document)**: a Project Co Entity:
 - (i) breaches any of its obligations under any Project Document or the Interface Deed, which is not a State Project Document (other than where such breach is any other Major Default, a Default Termination Event an Unavailability, a Meal Availability Failure or a Quality Failure);
 - (ii) the breach has or will have a material adverse effect on Project Co's ability to deliver the Project; and
 - (iii) is not diligently pursuing the remedy of the breach;
- (n) **(Total Deductions)**: Project Co has incurred Total Deductions (as calculated in accordance with section 13 of the Payment Schedule) and Charge Events (as determined under the Performance Regime) with an aggregate value greater than:
 - (i) [REDACTED] of the Base Fee and Volumetric Adjustment (as calculated in accordance with the Payment Schedule) in any [REDACTED] or

- (ii) [REDACTED] of the Base Fee and Volumetric Adjustment (as calculated in accordance with the Payment Schedule) in any [REDACTED] or
- (o) **(Level 2 Performance):** Project Co's performance falls within the Level 2 Performance Range for the same Quality Failure for [REDACTED] within a [REDACTED]
- (p) **(Charge Event):** a Charge Event occurs;
- (q) **(Insolvency Event of Consortium Member):** an Insolvency Event occurs in relation to a Consortium Member (excluding a Group Member);
- (r) **(Insurances):** a breach by Project Co of any its obligations under clauses 46.1, 46.2(a), 46.3, 46.5, 46.6, 47.1 or 47.4;
- (s) **(Accreditation):** Project Co or the Operator fails to obtain and maintain those accreditations specified in the Contract Particulars;
- (t) **(Licences):** Project Co or the Operator fails to obtain and maintain those licences specified in the Contract Particulars;
- (u) **(Unsatisfactory professional conduct or professional misconduct):** it is determined by a court or tribunal of competent jurisdiction, or by the applicable professional regulatory body, that any person involved in providing the Health Services has engaged in unsatisfactory professional conduct or professional misconduct (as defined in the *Health Practitioner Regulation National Law (NSW)*);
- (v) **(General Manager):** pursuant to section 240(3) of the Corrections Act the Commissioner revokes the authority issued to the General Manager pursuant to section 240(1)(a) of the Corrections Act; or
- (w) any other event which is deemed to be a Major Default under clause 25.10(e).

Major Default Notice has the meaning given in clause 48.2(b).

Major Default Service Failure means the defaults described in paragraphs (n) and (o) of the definition of Major Default.

Margin has the meaning given in the Change Compensation Principles.

Material means tangible and intangible information, documents (including any document within the meaning of the *Evidence Act 1995 (NSW)*), reports, software (including source and object code), inventions, discoveries, designs, innovations, technology, processes, methods, techniques, know-how, data and other materials in any media whatsoever.

Material Defect means a Defect which the State considers will prevent:

- (a) the Correctional Complex from complying with the FFP Warranty; or
- (b) Project Co from delivering the Services in accordance with the Services Requirements.

Meal Availability Failure has the meaning given in the Payment Schedule.

Methodology Change means any of the following:

- (a) additional fees, charges or contributions payable by Project Co or its Associates pursuant to the Stage 2 Development Consent;
- (b) additional Temporary Equipment or works outside the Site;

- (c) changes to biodiversity requirements;
- (d) a change to working hours, noise or vibration limits at, or adjacent to, the Site or in the direct vicinity of the Site which impacts construction traffic, including haulage routes and restrictions on times of travel; or
- (e) additional requirements to carry out studies, prepare submissions, or conduct additional surveys, monitoring or testing.

Minister has the meaning given in section 15 of the *Interpretation Act 1987* (NSW) in respect of the Corrections Legislation.

Minor Modification means a Modification proposed by either Project Co or the State in accordance with clause 40.12(b):

- (a) in respect of which Project Co will not be entitled to an extension of time to the Date for Completion if it occurs during the Delivery Phase;
- (b) which is minor in respect of its scope and likely impact on the Project Activities; and
- (c) has a price not exceeding [REDACTED] (as Indexed).

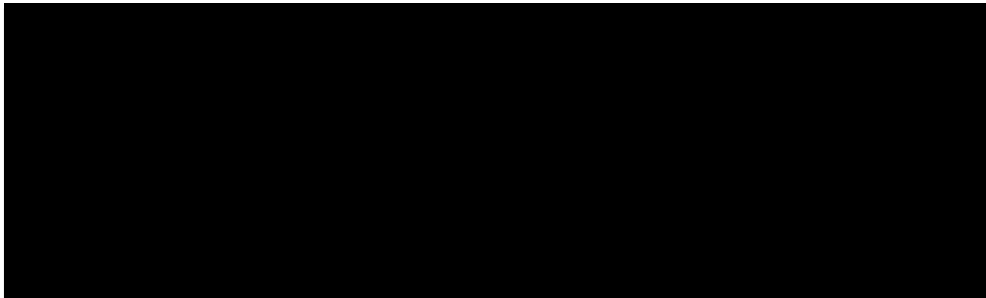
Minor Modification Proposal means a proposal provided in accordance with clause 40.12(b) in respect of a Minor Modification.

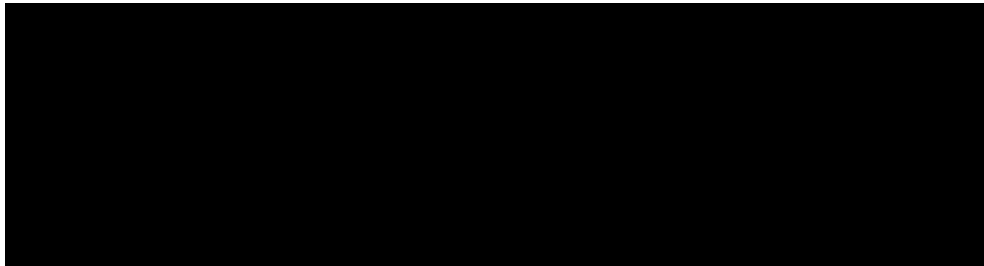
Model Output Schedule means the work sheets in the Financial Close Financial Model identified as the Model Output Schedule, as updated from time to time in accordance with clause 59.

Model Variation Event has the meaning given in clause 59.3(a).

Modification means:

- (a) in the period prior to the Operational Commencement Date, any change to the Works or the Design Requirements including any addition, decrease, omission, deletion, demolition or removal to or from the Works or the Design Requirements;
- (b) after the Date of Commercial Acceptance:
 - (i) a change to the Correctional Complex including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Correctional Complex; or
 - (ii) the State requiring Project Co to accommodate more than:
 - A. 1,000 male maximum security Inmates within the Correctional Complex;
 - B. 1,400 male Inmates within the Correctional Complex; or
 - C. 300 female Inmates within the Correctional Complex;





(c) after the date of this Deed, in respect of the Services, a change to the Services Requirements or the Services including any addition, increase, decrease, omission, deletion, or removal of any part of the Services,

but excluding:

- (d) development and refinement of the Design Deliverables in accordance with the Design Development Process;
- (e) Design Development Changes accepted by the State in accordance with clause 17.3;
- (f) any direction by the State to Project Co to undertake additional or alternative works or services in accordance with clause 42.1(b);
- (g) any change of the type referred to in paragraphs (a) to (c) which is required to ensure that the Relevant Infrastructure or the Services are otherwise in accordance with this Deed;
- (h) Minor Modifications, subject to clauses 40.12(g) and 40.12(h);
- (i) without limiting paragraphs (b)(ii) or (iii) above or any entitlement to payment pursuant to the Payment Schedule, any change in:
 - (i) the number of Inmates; or
 - (ii) the type of Inmate cohort, including changes to the proportion of:
 - A. remand and sentenced Inmates; or
 - B. male and female Inmates; and
- (j) any direction or determination given by the Commissioner in accordance with the Corrections Legislation.

Modification Order means a Change Response entitled "Modification Order" issued in accordance with clause 40.5 or 40.7 and the Change Compensation Principles, requiring Project Co to proceed with the relevant Modification or comply with the Change in Mandatory Requirements (as applicable).

Modification Request has the meaning given in clause 40.1.

Monitor means a person appointed for the purposes of section 242 of the Corrections Act in respect of each Correctional Centre.

Month means a calendar month.

Monthly Performance Report means the Operating Phase Report of that name.

Monthly Service Payment means a monthly service payment payable to Project Co calculated in accordance with the Payment Schedule.

Monthly Works Report means the Delivery Phase Report of that name.

Moral Rights has the meaning given in the *Copyright Act 1968* (Cth) and any corresponding rights granted under any other laws anywhere in the world.

Moral Rights Consent means a consent by the owner of Moral Rights substantially in the form of Schedule 10.

National Police Certificate means a certificate issued by New South Wales Police or such other organisation from time to time authorised to issue such certificates containing details of a person's criminal history.

Native Title Claim means any claim or application under any Law or future Law relating to native title, including any application under section 61 of the *Native Title Act 1993* (Cth).

Negotiated Offer has the meaning given in clause 33.4(d)(ii)A.

NGER Legislation means the *National Greenhouse and Energy Reporting Act 2007* (Cth) and the regulations and any other legislative instruments under that Act.

NSW Code has the meaning given in clause 15.2(a).

NSW Government means the Crown in right of the State of New South Wales and its agencies.

NSW Guidelines has the meaning given in clause 15.1.

NSW PPP Guidelines means the NSW Public Private Partnerships Guidelines dated August 2012, as amended or updated from time to time.

Official Visitor has the meaning given in the Corrections Act.

Operating Phase means the period beginning on the Operational Commencement Date and ending on the Expiry Date.

Operating Phase Insurances means the Insurances referred to in Part B of the Insurance Schedule.

Operating Phase Plans means each of the plans described in the Operating Phase Plans and Reports Schedule.

Operating Phase Plans and Reports Schedule means Schedule 15.

Operating Phase Quality Assurance Plan means the Operating Phase Plan of that name and prepared by Project Co in accordance with the Operating Phase Plans and Reports Schedule.

Operating Phase Reports means each of the reports described in the Operating Phase Plans and Reports Schedule.

Operating Phase Site mean the land on which the Correctional Complex is located and in respect of which the Services are undertaken, as identified in the Site Plans.

Operating Phase Sub-Licence means the sub-licence to be granted by the State to Project Co in accordance with clause 28.1.

Operating Year means:

- (a) for the first Operating Year, the period commencing on the Operational Commencement Date and ending on the next 30 June;
- (b) subject to paragraph (c), each subsequent 12 Month period during the Operating Phase commencing on 1 July and ending on 30 June; and

- (c) for the final Operating Year, the period from the end of the last full Operating Year (as defined in paragraph (b)) to the Expiry Date.

Operational Commencement Date means, subject to clause 26, the day after the Date of Commercial Acceptance.

Operational Readiness Co-ordinator means the person identified as such in the Contract Particulars, subject to replacement, termination or delegation in accordance with clauses 10.4 and 10.7.

Operational Readiness Plan means the Delivery Phase Plan of that name.

Operator means, as at the date of this Deed, the party listed as such in the Contract Particulars and any person who in addition or substitution is engaged by Project Co to carry out any of the Services or any Delivery Phase Activities not performed by the D&C Subcontractor.

Operator Consent Deed means the document entitled 'NGCC Operator Subcontract Consent Deed' between Project Co, the Security Trustee, the Operator, the Parent Guarantor of the Operator and others.

Operator Side Deed means the document entitled 'New Grafton Correctional Centre Operator Side Deed' dated on or about the date of this Deed between the State, Project Co, the Operator and the Parent Guarantor of the Operator substantially in the form set out in Schedule 28.

Operator Subcontract means each agreement between Project Co and the Operator to perform any of the Services or any Delivery Phase Activities not performed by the D&C Subcontractor.

Original Date for Commercial Acceptance means the Date for Commercial Acceptance set out in the Contract Particulars.

Original Reviewable Services Schedule means the component so named in the Model Output Schedule, which contains the information required under clause 33.1(b).

Output Specification means Schedule 3, as may be amended from time to time in accordance with this Deed.

Outstanding Matters Report has the meaning given in clause 37.5(b).

Overdue Rate means 2% per annum above the Bank Bill Rate.

Ownership Schedule means Schedule 19.

PAFA Act means the *Public Authorities (Financial Arrangements) Act 1987* (NSW).

PAFA Act Deed Poll of Guarantee means the guarantee made on or about the date of Financial Close pursuant to section 22B of the PAFA Act in respect of the State's financial obligations under the State Project Documents substantially in the form set out in Schedule 31.

Parent Guarantee means the guarantee:

- (a) given by the Parent Guarantor of the D&C Subcontractor to Project Co in connection with the obligations of the D&C Subcontractor to Project Co under the D&C Subcontract; and
- (b) given by the Parent Guarantor of the Operator to Project Co in connection with the obligations of the Operator to Project Co under the Operator Subcontract.

Parent Guarantor means each person giving a Parent Guarantee, which as at the date of this Deed, means the parties listed as Parent Guarantors in the Contract Particulars.

Parole Authority has the meaning given in the Corrections Act.

Payment Claim means a payment claim submitted by Project Co in accordance with clause 36.2(a) in the form reasonably required by the State.

Payment Directions Deed means the document entitled 'NGCC Payment Directions Deed' between the State, Finance Co, Project Co and the Agent in relation to this Project.

Payment Schedule means Schedule 16.

Payment Statement has the meaning given in clause 36.2(b).

Performance Bond means a bond or bank guarantee which:

- (a) is unconditional, irrevocable and payable on demand;
- (b) is issued by a financial institution that is the holder of a current licence issued by the Australian Prudential Regulation Authority and has the Required Rating;
- (c) specifies a location in Sydney (or any other place that the State approves) where demand is to be given and payment made, without further confirmation from the issuer, on any Business Day;
- (d) is governed by and to be construed according to the Laws applying in New South Wales;
- (e) is, where required, duly stamped; and
- (f) is otherwise on terms and in a form acceptable to the State, acting reasonably.

Performance Regime means the regime set out in Schedule 17.

Permitted Change in Control means in respect of a Change in Control of Project Co, any sale, transfer or other disposal by an Initial Equity Investor (or a Related Body Corporate of an Initial Equity Investor) after the date of this Deed of its interest (whether directly or indirectly) in:

- (a) Project Co; or
 - (b) any company that holds Securities in Project Co,
- to:
- (c) in the case of JLIL, a John Laing Associate;
 - (d) in the case of JHG, a JHG Associate; and
 - (e) in the case of Serco, a Serco Associate.

Permitted Security Interest has the meaning given in the State Security.

Personal Information means personal information, within the meaning given in the *Privacy Act 1988* (Cth), about current or former:

- (a) Inmates;
- (b) Staff;
- (c) Visitors; or
- (d) any other user of the Services, including former Inmates.

Pharmacy Costs has the meaning given in the Payment Schedule.

Pharmaceutical Related Items has the meaning given in the Payment Schedule.

Pharmaceutical Supply has the meaning given in the Payment Schedule.

Pharmaceuticals Reporting Spreadsheet means the Operating Phase Report of that name.

Pharmaceuticals has the meaning given in the Payment Schedule.

Pharmaceuticals Supplier means the entity appointed by Project Co or its Associates in accordance with clause 29.7 to supply Pharmaceuticals for issue or administration to Custodial Patients and any related Pharmaceutical Related Items, Pharmaceutical Supply or Urgent Pharmaceutical Supply.

POEO Act means the *Protection of the Environment Operations Act 1997* (NSW).

Policies means all standards, codes, specifications, policies, requirements, guidelines, procedures, protocols and plans to be complied with in accordance with, and subject to, the terms of this Deed including:

- (a) the standards, codes, specifications, policies, requirements, guidelines, procedures, protocols and plans set out in, or otherwise expressly referred to in, the Output Specification;
- (b) all Approvals (including any conditions or requirements under them);
- (c) all requirements and standards of Authorities; and
- (d) any other policy, guideline, standard, procedure or requirement, which applies in connection with the Project:
 - (i) which is notified to Project Co;
 - (ii) which is publicly available or otherwise available to Project Co; or
 - (iii) with which Project Co is expressly required by the terms of this Deed, by Law or by direction of the State to comply,

unless the State gives notice to Project Co that the policy, guideline, standard, procedure or requirement does not constitute a Policy for the purposes of this Deed.

Pollution has the same meaning as in the *Protection of the Environment Operations Act 1997* (NSW).

Post Completion Report means the Delivery Phase Report of that name.

Post Completion Test means those tests referred to in the Completion Requirements, which, by their nature, are unable to be successfully completed until such time as the Correctional Complex is operational.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Pre-Contract Close Activities has the meaning given to it in the Commitment Deed.

Privacy Legislation means the *Privacy Act 1988* (Cth) as amended by the *Privacy Amendment (Private Sector) Act 2000* (Cth), and any other applicable Commonwealth or NSW Government Legislation or guidelines relating to privacy.

Probity Event includes any event or thing which occurs before or after the date of this Deed which:

- (a) has a material adverse effect on, or on the perception of, the character, integrity or honesty of a Group Member, a Consortium Member or a Relevant Person;
- (b) relates to a Group Member, a Consortium Member or a Relevant Person and has or may have a material adverse effect on the public interest, or public confidence, in the Project; or
- (c) involves a material failure of a Group Member, Relevant Person, Consortium Member or any Subcontractor (who is not a Consortium Member) to achieve or maintain:
 - (i) reasonable standards of ethical behaviour;
 - (ii) the avoidance of conflicts of interest which will have a material adverse effect on the ability of the Group Member, Relevant Person, Consortium Member or Subcontractor (as applicable) to carry out and observe its obligations in connection with the Project; or
 - (iii) other standards of conduct that would otherwise be expected of a party involved in a State or NSW Government project.

Probity Investigation means any probity, criminal or security investigation to report on or check the character, integrity, experience or honesty of a person or Entity, including:

- (a) investigations into commercial structure, business and credit history, prior contract compliance or any criminal records or pending charges; and
- (b) interviews of any person or research into any relevant activity that is or might reasonably be expected to be the subject of criminal or other regulatory investigation.

Programming Requirements means the requirements set out in Schedule 4.

Project means:

- (a) the performance of the Project Activities including:
 - (i) financing the Project Activities;
 - (ii) carrying out the Delivery Phase Activities; and
 - (iii) performing the Services;
- (b) the handover of the Relevant Infrastructure to the State; and
- (c) the performance of all other obligations,

in accordance with, or as contemplated by, any Project Document, or incidental to any Project Document.

Project Activities means all works, things and tasks that Project Co is, or may be, required to do to comply with its obligations in connection with the State Project Documents, including the Delivery Phase Activities and the Services.

Project Co Act or Omission means:

- (a) a breach of this Deed by Project Co; or
- (b) any other act or omission of Project Co or its Associates other than an act or omission undertaken in accordance with the Project Documents and not undertaken fraudulently, recklessly, unlawfully, negligently or maliciously.

Project Co Background IP means any and all Material which is developed:

- (a) outside of the Project; or
- (b) in connection with the Project, to the extent such Material has or may have application for other projects of similar nature to the Project,

by or on behalf of Project Co or any of its Associates and brought to the Project by Project Co or any of its Associates and includes developments, modifications, improvements or additions to, or adaptations, customisations or enhancements of, or deletions or derivatives from, Project Co Background IP that are developed as part of the Project Activities (regardless of whether or not developed prior to the date of this Deed), but excludes the Proprietary Software.

Project Co Entities means:

- (a) Project Co; and
- (b) Finance Co,

or if the context requires, the relevant one of them.

Project Co Material means:

- (a) the Design Deliverables;
- (b) the Delivery Phase Plans and the Delivery Phase Reports;
- (c) the Operating Phase Plans and the Operating Phase Reports; and
- (d) all other Material which Project Co or any of its Associates, or any Related Body Corporate of Project Co or any of its Associates, prepares, uses or provides to the State or any of its Associates in connection with the Project whether before or after the date of this Deed.

Project Co Planning Risk Item means the batch plant and precast yard set out in the Proposal or any Modification to them.

Project Co Representative means the person identified in the Contract Particulars subject to replacement, termination or delegation in accordance with clauses 10.3 and 10.7.

Project Control Group means the group referred to in clause 10.8(a).

Project Documents means:

- (a) this Deed;
- (b) each Licence;
- (c) the Financiers Tripartite Deed;
- (d) the State Security;
- (e) the D&C Subcontract;
- (f) the D&C Side Deed;
- (g) the Operator Subcontract;
- (h) the Operator Side Deed;
- (i) the Design Subcontract Side Deed;

- (j) each other Key Subcontract;
- (k) each other Side Deed;
- (l) each Consent Deed;
- (m) each Parent Guarantee;
- (n) each Significant Subcontract;
- (o) the Independent Certifier Deed;
- (p) the PAFA Act Deed Poll of Guarantee;
- (q) the Equity Documents;
- (r) the Finance Documents;
- (s) the Escrow Deed;
- (t) the Receivables Purchase Deed;
- (u) the Payment Directions Deed; and
- (v) any other document the parties agree is a Project Document.

Project Information means:

- (a) the Site Data; and
- (b) all other Material provided or made available by or on behalf of the State or its Associates to Project Co or its Associates in connection with the Project (which is not incorporated into this Deed).

Project Management Plan means the Delivery Phase Plan of that name.

Project Objectives means the objectives of the Project included in the Contract Particulars.

Project-Specific Change in Law means a Change in Law which, by express reference, applies to:

- (a) the Project;
- (b) Project Co; or
- (c) the Site;

and not to other projects, Entities or sites.

Prolongation Costs has the meaning given in the Change Compensation Principles.

Proposal means the proposal submitted by Project Co in response to the Request for Proposal.

Proposed Early Completion Date means the date (if any) nominated and updated (where applicable) by Project Co in its Delivery Phase Program, by which Project Co proposes to achieve Completion, being a date that is prior to a Date for Completion.

Proposed Early Completion Notice means a notice provided by Project Co to the State in accordance with clause 26.

Proprietary Software means commercially available 'off the shelf' computer software:

- (a) the Intellectual Property Rights in which are not owned by:
 - (i) Project Co or any of its Associates; or
 - (ii) any Related Body Corporate of Project Co or any of its Associates;
- (b) which:
 - (i) is not developed for the specific purpose of the Project; but
 - (ii) is used by Project Co or any of its Associates, or provided to the State or any of its Associates, in connection with the Project; and
- (c) which is available to purchase on standard terms by any person willing to pay the relevant licence fee,

and includes the software listed in Schedule 32.

Quality Assurance Plans means the Operating Phase Quality Assurance Plan and the Delivery Phase Quality Assurance Plan.

Quality Assurance Report means the Delivery Phase Report of that name.

Quality Assurance Representative means the person nominated in the Quality Assurance Plans for each of Project Co and the Key Subcontractors.

Quality Assurance System means a quality assurance system that covers:

- (a) the carrying out of the Delivery Phase Activities;
- (b) performance of the Services; and
- (c) personnel and human resources during the Delivery Phase and the Operating Phase, including recruitment, training, and occupational health and safety management of Project Co and its Associates.

Quality Failure has the meaning given in the Payment Schedule.

Quarter means each three Month period commencing on a Quarterly Date, save that:

- (a) the first Quarter of the Delivery Phase will be the period from Financial Close until the day before the first Quarterly Date during the Delivery Phase;
- (b) the last Quarter of the Delivery Phase will be the period from the last Quarterly Date during the Delivery Phase to the Date of Commercial Acceptance;
- (c) the first Quarter of the Operating Phase will be the period from the Operational Commencement Date until the day before the first Quarterly Date during the Operating Phase; and
- (d) the last Quarter of the Operating Phase will be the period from the last Quarterly Date during the Operating Phase to the Expiry Date.

Quarterly Date means every 1 January, 1 April, 1 July and 1 October.

Ramp-Up Period means the period:

- (a) commencing on the Operational Commencement Date; and
- (b) ending 21 weeks after the Operational Commencement Date.

Ramp-Up Profile Schedule means Schedule 14.

Rates means all municipal rates, water rates, sewerage rates, drainage rates and other rates payable to any Authority in connection with the Site or the Relevant Infrastructure.

Receivables Purchase Deed means the document entitled 'NGCC Receivables Purchase Deed' between the State, Finance Co and Project Co in relation to this Project under which the State agrees to assign to Finance Co each Licence Fee under the Tenure Document.

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

Receivables Purchase Price has the meaning given in the Receivables Purchase Deed.

Recipient has the meaning given in clause 36.8(c)(ii).

Recipient Supply has the meaning given in clause 36.8(e)(i).

Records means comprehensive detailed records and business systems recorded in writing in books or filed in Project Co's or its Associate's computer system:

- (a) in respect of the Project Activities; and
- (b) in the form and encompassing all information required by the State from time to time.

Refinancing means:

- (a) any amendment to, novation or restatement or replacement of, any Finance Document;
- (b) the exercise of any right (including the giving of any waiver or consent) under any Finance Document; or
- (c) any other step, arrangement or new contractual or financing arrangement that has a substantially similar effect to that described in paragraph (a) or (b),

that will or is likely to change the type, amount, pricing, tenor, terms for payment or repayment or hedging of the financial accommodation in connection with the Project, but does not include:

- (d) the syndication or subscription of any debt under the Finance Documents that is contemplated at the date of Financial Close or, following a Refinancing, that is contemplated at the date of that Refinancing;
- (e) the change in control or sell down of any bonds in an arm's length transaction at market value;
- (f) disposals of investments or commitments of debt or equity in an arm's length transaction at market value;
- (g) any amendment to, novation, or restatement or replacement of, or waiver or consent under, any Finance Document which is a direct result of an amendment, novation, restatement, replacement, waiver or consent to cure any actual or potential event of default or review event under any Finance Document; or
- (h) entering into derivative transactions contemplated by the Finance Documents to be entered into on or before Financial Close or, following a Refinancing, contemplated to be entered into in connection with that Refinancing.

Refinancing Gain has the meaning given in clause 41.5.

Refinancing Loss has the meaning given in clause 41.5.

Refinancing Review Period has the meaning given in 41.3(a).

Refurbishment Works means the periodic maintenance, refurbishment or replacement of all elements comprising the Correctional Complex in accordance with the Asset Management Plan, and so that the Correctional Complex meets the FFP Warranty.

Related Body Corporate has the meaning given in the Corporations Act.

Related Trust Entity means with respect to an entity which is a trustee, manager or Responsible Entity of a trust or a managed investment scheme:

- (a) any Related Body Corporate of the trustee, manager or Responsible Entity;
- (b) any other trustee, manager or Responsible Entity of the trust or managed investment scheme (or Related Body Corporate) of such entity; or
- (c) any Controlling Unit Holder of the trust or managed investment scheme (or Related Body Corporate) of such an entity.

Relevant Infrastructure means:

- (a) during the Delivery Phase, the Works; and
- (b) during the Operating Phase, the Correctional Complex.

Relevant Person means:

- (a) a director or secretary of a Consortium Member;
- (b) a director or secretary of a Group Member;
- (c) Key People; or
- (d) an officer, agent, employee or consultant of a Consortium Member or Subcontractor who:
 - (i) has the ability to exercise influence or control over the decisions or actions of the Consortium Member or Subcontractor in relation to the Project other than solely through the exercise of voting rights at a meeting of shareholders or directors of the Consortium Member or Subcontractor;
 - (ii) works on, or at the Correctional Complex during the Operating Phase; or
 - (iii) has access to Confidential Design Information or Personal Information and any other Confidential Information which compromises the security of the Relevant Infrastructure.

Relief Event means any Extension Event, Intervening Event, Change Compensation Event, Compensable Event or other event which entitles Project Co to:

- (a) relief or suspension from performance of its obligations, or to an extension of time, under a State Project Document;
- (b) compensation from the State; or
- (c) bring any other Claim against the State,

in connection with the Project.

Remediate or **Remediation** means to remove, disperse, abate, destroy, dispose of, neutralise, remediate, treat, cap, contain or otherwise test, monitor or assess (as applicable).

Reputable Insurer means an insurance company having the Required Rating.

Request for Proposal means the Request for Proposal for the Project issued by the State on 24 June 2016.

Required Rating means a credit rating of at least A- by Standard and Poor's (Australia) Pty Limited or A3 by Moody's Investors Service, Inc. (or such other credit rating as the State may approve in writing from time to time) or, if no rating is provided by Standard and Poor's (Australia) Pty Limited or by Moody's Investors Service, Inc., an equivalent rating with another reputable rating agency (as the State may approve in writing).

Residual Life Item means an item specified in the Residual Life Schedule.

Residual Life Schedule means Schedule 18.

Responsible Entity has the meaning given in the Corporations Act.

Retail Utility Contract means each contract entered into by Project Co for the supply and provision of each Utility for use at the Correctional Complex during the Operating Phase.

Review Period has the meaning given in the Review Procedures.

Review Procedures means Schedule 9.

Reviewable Services means all Services referred to in the Services Requirements, other than the Building Management Services (as defined in the Output Specification).

Reviewable Services Date means each of the 10th and 15th anniversary of the Date of Commercial Acceptance.

Reviewable Services Plan means the Operating Phase Plan of that name.

Reviewable Services Schedule means Original Reviewable Services Schedule updated under clause 33.1(c).

Reviewable Services Tender Expiry Date means 1 Month after the expiry of the then current Reviewable Services Term.

Reviewable Services Term means each of the following periods:

- (a) the period of ten years commencing on the Date of Commercial Acceptance and ending on the day prior to the tenth anniversary of the Date of Commercial Acceptance;
- (b) the period of five years commencing on the tenth anniversary of the Date of Commercial Acceptance and ending the day prior to the fifteenth anniversary of the Date of Commercial Acceptance; and
- (c) the period commencing on the fifteenth anniversary of the Date of Commercial Acceptance and ending on the Final Expiry Date,

unless otherwise changed by agreement between the parties and in each case subject to any earlier termination of this Deed.

Risk Management Plan means the Delivery Phase Plan of that name.

Savings has the meaning given in the Change Compensation Principles.

Second Pre Agreed Modification Works means additional resources working on Site and equipment required to accelerate the Works so as to overcome the Working Hours Restriction.

Secretary's Environmental Assessment Requirements or SEARS means the environmental assessment requirements issued by the Secretary of the Department of

Planning and Environment in accordance with Part 2 of Schedule 2 of the *Environmental Planning and Assessment Regulation 2000*.

Securities means shares, units, interests in a partnership, and any other interests, which would constitute 'securities' as defined under the Corporations Act.

Securitised Licence Structure means the securitisation structure relating to Licence Fees, as described in clause 36A, the Tenure Document, the Receivables Purchase Deed and the Payment Directions Deed.

Securitised Modification Payment means an amount equal to the corresponding Receivables Purchase Payment in respect of the Additional Receivables purchased by Finance Co from the State under the Receivables Purchase Deed resulting from a Change Compensation Event.

Security Interest means any mortgage, pledge, lien, encumbrance, assignment, charge or any security or preferential interest or arrangement of any kind and includes:

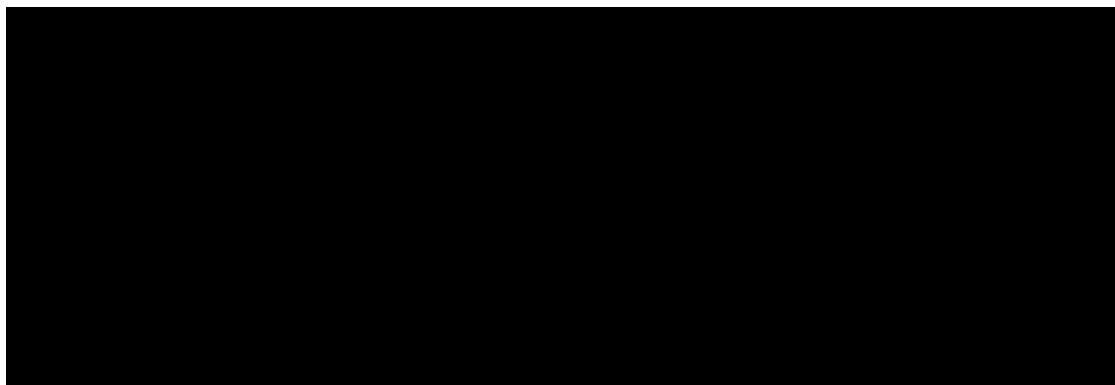
- (a) a 'security interest' as defined in section 12 of the *Personal Property Securities Act 2009* (Cth);
- (b) anything which gives a creditor priority to other creditors with respect to any asset; and
- (c) retention of title (other than in the ordinary course of day-to-day trading) and a deposit of money by way of security.

Security of Payment Act means the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Security Trust Deed means the document entitled '*Security Trust Deed – NGCC PPP Project*' dated on or about the date of this Deed between, among others, Project Co, Finance Co, the Agent and the Security Trustee.

Security Trustee means at the date of this Deed, the party named as such in the Contract Particulars as replaced in accordance with the Security Trust Deed and who is from time to time party to the Financiers Tripartite Deed in that capacity.

Serco means Serco Group Pty Limited (ACN 061 889 763).



Services means:

- (a) the services referred to in the Services Requirements to be undertaken by Project Co during the Operating Phase; and
- (b) all other things Project Co is, or may be, required to provide or undertake during the Operating Phase as set out in the Services Requirements or State Project Documents,

in each case as modified in accordance with this Deed.

Service Failure Default Termination Event means the defaults described in paragraphs (i), (j) and (k) of the definition of Default Termination Event.

Services Proposal means Annexure B.

Services Requirements means the requirements for the provision of the Services as set out in:

- (a) the Output Specification;
- (b) the Services Proposal; and
- (c) the remainder of this Deed.

Side Deed means each of:

- (a) the D&C Side Deed;
- (b) the Operator Side Deed;
- (c) the Design Subcontract Side Deed; and
- (d) where the context permits, any other Subcontract Side Deed executed in accordance with clause 12.2(c).

Significant Subcontract means:

- (a) the Design Subcontract;
 - (b) in respect of the Delivery Phase, the contracts listed as such in the Contract Particulars;
 - (c) in respect of the Operating Phase, the contracts listed as such in the Contract Particulars; and
 - (d) any other Subcontract:
 - (i) the term of which exceeds 5 years; or
 - (ii) relating to the Services which are nominated by the State Representative as being critical works or services; or
 - (iii) in respect of which the total amount payable to the relevant Subcontractor, and its Related Bodies Corporate, under that Subcontract and other Subcontracts exceeds or is likely to exceed:
 - A. in respect of the Delivery Phase, [REDACTED] and
 - B. during the Operating Phase, [REDACTED]
- (each Indexed).

Significant Subcontractor means a party (other than Project Co or a Key Subcontractor) to a Significant Subcontract.

Site means the Delivery Phase Sites or the Operating Phase Site (as the case may be).

Site Access and Interface Protocols means the Delivery Phase Plan of that name.

Site Access and Tenure Schedule means Schedule 7.

Site Conditions means any physical conditions on, under, or over the surface, or in the vicinity of the Site, including:

- (a) **(water and gas)**: ground gases, ground water, ground water hydrology, surface water, water quality, salinity, the existence of any wells and the effects of any de-watering;
- (b) **(physical structures)**: physical and structural conditions above, upon and below the ground including any infrastructure, partially completed structures, Artefacts or in ground works;
- (c) **(vegetation)**: pastures, grasses or other vegetation on the Site;
- (d) **(topography)**: topography, ground surface and sub-surface conditions and geology including rock or other materials;
- (e) **(climate)**: climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand seasons, mud and other effects of climatic and weather conditions;
- (f) **(Contamination)**: any Contamination;
- (g) **(Pollution)**: any Pollution;
- (h) **(physical conditions)**: all other physical conditions and characteristics of, or in the vicinity of the Site, on or below the surface which may affect Project Co's ability to carry out its obligations in accordance with this Deed; and
- (i) **(Adverse Rights)**: all Adverse Rights over or in connection with the Site.

Site Data means the data identified as such in the Contract Particulars.

Site Data Undertaking means the undertaking, in the form attached to the Contract Particulars as Attachment 1, from the author of the Site Data which may be provided to Project Co pursuant to clause 7.2(b).

Site Plans means each of the site plans, which are set out in Schedule 6.

Solvent has the meaning given in the Corporations Act.

Staff means those people engaged by Project Co or any of its Associates to perform any Services at the Correctional Complex.

Stage 1 Development Application means the state significant development application SSD 15_7413 submitted to the Development Consent Authority which seeks concept approval for the Correctional Complex.

Stage 1 Development Consent means the consent or approval granted by the Development Consent Authority under the EP&A Act in respect of the Stage 1 Development Application.

Stage 2 Development Application means the application for Stage 2 Development Consent attached as Annexure D.

Stage 2 Development Application Obligations means Project Co diligently pursuing the Stage 2 Development Consent, including by:

- (a) exercising Best Industry Practices, including by complying with Policies including planning circulars and practice notes;
- (b) diligently progressing the Stage 2 Development Application including:
 - (i) completion of the responses to submissions;

- (ii) provision to the State of the submissions within 2 weeks after receipt by Project Co of the submissions; and
- (iii) regularly assisting the State as the applicant to progress the Stage 2 Development Application;
- (c) regularly liaising with the Development Consent Authority to understand the intent of the obligations in the SEARS and to determine the key issues for assessment;
- (d) promptly responding to any requests for further submissions, documents or other information received from the State;
- (e) proactively managing issues that arise in obtaining the Stage 2 Development Consent;
- (f) ensuring all processes, peer reviews, submissions, documents or other information prepared by it or its Associates are not insufficient or incomplete and are of good quality; and
- (g) keeping the State regularly informed as to the progress of the Stage 2 Development Application.

Stage 2 Development Consent means:

- (a) the consent or approval granted or required to be granted by the Development Consent Authority under the EP&A Act in respect of the Stage 2 Development Application; and
- (b) any modification of it.

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 this Deed and the Operator Side Deed only, the Commissioner.

State Background IP means any and all Material other than Developed IP, which is developed outside of the Project by or on behalf of the State or any of its Associates and brought to the Project by the State or any of its Associates.

State Nominee has the meaning given in clause 57.3(b).

State Project Documents means those Project Documents to which the State is a party.

State Refinancing Share has the meaning given in clause 41.6.

State Representative means the person identified as such in the Contract Particulars, subject to replacement or delegation in accordance with clause 10.2.

State Security means each of:

- (a) the document entitled '*New Grafton Correctional Centre – State Security*' between the State and Project Co; and
- (b) the document entitled '*New Grafton Correctional Centre – State Security*' between the State and Finance Co,

(or either as the context requires).

Step-In Event has the meaning given in clause 42.3.

Step-In Liability means any liability suffered or incurred by the State or any of its Associates in connection with the exercise by the State of its step-in rights.

Subcontract means an agreement which:

- (a) Project Co enters into with a Subcontractor; or
- (b) a Subcontractor enters into with another Subcontractor,

in connection with the Project Activities.

Subcontract Side Deed means a direct deed substantially in the form set out in Schedule 29.

Subcontractor means:

- (a) any person who enters into a contract in connection with the Project Activities with Project Co or any Key Subcontractor and includes the Pharmaceuticals Supplier; or
- (b) for the purposes of the definition of Relevant Person and Probity Event and clauses 12.1(d), 12.3(a), 12.3(b), 12.4 and 13.1 only, any person whose Subcontract is in connection with the Project Activities and is in a chain of contracts where the ultimate contract is with Project Co or any Key Subcontractor or Significant Subcontractor.

Sunset Date means:

- (a) in the context of an event listed in paragraph (a) or (b) of the definition of Major Default, the date that is 12 months from the Date for Technical Completion or the Date for Commercial Acceptance (as applicable);
- (b) in the context of an event listed in paragraph (c) to (p) (inclusive) of the definition of Major Default which occurs during the Delivery Phase, the last day of the period referred to in clause 48.3(d)(i) applicable to the Major Default; or
- (c) in the context of Major Default which occurs during the Operating Phase, the last day of the period referred to in clause 48.3(d)(ii) applicable to the Major Default.

Supplier has the meaning given in clause 36.8(c).

Tax or **Taxes** means any present or future tax, levy, impost, Duty, rate, charge, fee, deduction or withholding of any nature, imposed or levied by an Authority, the State, the NSW Government or the Commonwealth, together with any interest, penalty, charge, fee or other amount imposed or made on, or in connection with, any of the foregoing, but excluding any Rates.

Tax Invoice has the meaning given in the GST Law.

Tax Proceedings has the meaning given in clause 36.7(i)(i).

Taxable Supply has the meaning given in the GST Law, excluding section 84-5 of the GST Act.

Technical Completion means when all the Technical Completion Criteria have been met to the satisfaction of the Independent Certifier (or waived by the State).

Technical Completion Criteria means, in respect of the Works, those criteria identified as such in the Technical Completion Schedule.

Technical Completion Outstanding Item means any act, matter, state of affairs or thing that is required in accordance with this Deed to have been performed, achieved, undertaken,

provided or completed by Project Co as at Technical Completion which has not been so performed, achieved, undertaken, provided or completed by Project Co as at Technical Completion, unless the Independent Certifier has determined such act, matter, state of affairs or thing (or the cumulative impact of multiple acts, matters, state of affairs or things) is likely to prevent:

- (a) the Correctional Complex from meeting the FFP Warranty; or
- (b) Project Co from delivering the Services in accordance with the Services Requirements.

Technical Completion Plan means the Delivery Phase Plan of that name.

Technical Completion Report means the report in respect of Technical Completion required to be submitted by Project Co in accordance with clause 23.7, as amended and updated in accordance with this Deed.

Technical Completion Schedule means Schedule 12.

Technical Completion Tests means, in respect of the Works, all tests required to be carried out in accordance with this Deed to determine that Technical Completion has been achieved, including those tests set out in the Technical Completion Schedule and any Additional Technical Completion Tests.

Temporary Equipment means all plant, machinery and equipment and other items used solely for the purpose of enabling or facilitating delivery of the Works which:

- (a) does not and will not become part of the Correctional Complex; and
- (b) will not be used for performing the Services.

Tenure Document means the Operating Phase Sub-Licence.

Term means the term of this Deed:

- (a) commencing in accordance with clause 4.1; and
- (b) ending on the Expiry Date.

Termination Payment means a termination payment calculated in accordance with the Termination Payments Schedule.

Termination Payment Date means 20 Business Days after the later of:

- (a) the Expiry Date;
- (b) the date on which the amount of the relevant Termination Payment is agreed by the State and Project Co or, failing agreement, is determined by an independent expert in accordance with the Termination Payments Schedule or clause 52; and
- (c) in the case of a Default Termination Payment, the Compensation Date,

or such other date as may be specified in the Termination Payments Schedule for payment of a Termination Payment.

Termination Payments Schedule means Schedule 24.

Threshold Amount has the meaning given in clause 37.8(a).

Training and Apprenticeships Plan means the Delivery Phase Plan of that name.

Training and Apprenticeships Report means the Delivery Phase Report of that name.

Transferring Employees means all CSNSW Employees who accept an offer of employment from Project Co or its Associates.

Unavailability has the meaning given in the Payment Schedule.

Uncleared Personnel has the meaning given in clause 13.6(c).

Uninsurable Risk means a risk that is required to be insured in accordance with this Deed and is insurable at the date of this Deed, but during the Term:

- (a) insurance becomes unavailable in the recognised international insurance market in connection with that risk by Reputable Insurers; or
- (b) the insurance premium payable for insuring that risk with a Reputable Insurer or the terms and conditions of the relevant insurance are such that the risk is no longer generally being insured against by private sector providers of infrastructure similar to the Correctional Complex or activities similar to the Project Activities in Australia or in the United Kingdom,

provided that the uninsurability referred to in paragraphs (a) and (b) is not caused by:

- (c) any Project Co Act or Omission; or
- (d) an act or omission of an Inmate to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.

Urgent Pharmaceutical Supply has the meaning given in the Payment Schedule.

Use means, in relation to any Material, the accessing, possessing, using, storing, reproducing, communicating to the public, copying, translating, adapting, modifying, customising, and enhancing of that Material, and includes the incorporation of that Material with other Material and the creation of new versions of or derivations from that Material.

Utilities Review Date means:

- (a) the anticipated Operational Commencement Date; and
- (b) each five year anniversary of the Operational Commencement Date.

Utility means any utility service, including water, electricity, gas, telephone, drainage, sewerage, stormwater, communications and data services (including telephone, facsimile and internet access).

Utility Infrastructure means any part of the supply, distribution or reticulation network owned, operated or controlled by a Utility provider, including poles, pipes, pipeline, cables, wires, conduits, tunnels, aqueduct, electrical installation, telecommunications plant, water channel, and railway and electronic communications systems, but not including any part of the Relevant Infrastructure.

Utility Interruption means any one or more Utilities not being available for use at the Site (at all or in the necessary quantity).

Visiting Magistrate has the meaning given in the Corrections Legislation.

Visitors has the meaning given in the Corrections Legislation.

Voluntary Termination means the termination of this Deed pursuant to clause 49.2.

Voluntary Termination Payment means the payment calculated in accordance with section 4 of the Termination Payments Schedule.

WHS Act means the *Work Health and Safety Act 2011* (NSW).

WHS Legislation means Legislation relating to health and safety at work including:

- (a) the WHS Act; and
- (b) the WHS Regulation,

and includes industry codes of practice, safety standards, handbooks and guidelines about work health safety and rehabilitation in place from time to time.

WHS Management Plan means the plan of that name included in the Delivery Phase Plans and Reports Schedule and the plan of that name included in the Operating Phase Plans and Reports Schedule.

WHS Management System means a documented work health and safety management system which, at a minimum, complies with Australian Standard 4801 (as amended or replaced from time to time).

WHS Regulation means the *Work Health and Safety Regulation 2011* (NSW).

Working Hours Restriction has the meaning given to that term in clause 6.8(a)(i).

Working Hours Restriction Amount has the meaning given to that term in clause 6.8(a)(iii).

Workplace Relations Management Plan means the Delivery Phase Plan of that name.

Works means, during the Delivery Phase, the physical things and works which Project Co must design, supply, construct, install, produce, commission and complete in accordance with this Deed, including any Equipment and Modifications and any rectification of Defects.

2. General rules of interpretation

2.1 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 means:
- (i) in the case of a Policy in existence as at the date of this Deed, the version of that Policy stated in this Deed, or if no version is stated, the current version as at the date of this Deed; or
- (ii) in the case of new Policy which is introduced after the date of this Deed, the current version as at the date such Policy is introduced,
- in each case, as amended or updated from time to time but in all cases excluding any new Policy or amended Policy which the State notifies or directs Project Co under clause 40.10(c) that Project Co is not required to comply with;
- (i) **(definitions)**:
- (i) 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; and
- (ii) unless the context otherwise requires, terms which are defined in a Schedule of this Deed have the same meaning throughout this Deed (including the Schedules and Annexures to it);
- (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)**: subject to clause 5.6(a)(ii), 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:
 - (i) 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 any Project Co Entity) and the State has no obligation to do so; and
 - (ii) the State may consent or grant any approval as the State (in its absolute and unfettered discretion (and without regard to any Project Co Entity)) thinks fit or may be given subject to any conditions;
- (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 Rights) 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.

2.2 Composition of this Deed and order of precedence

- (a) (**Deed composition**): This Deed comprises:
 - (i) clauses 1 to 65;
 - (ii) Schedule 1 to Schedule 32A; and
 - (iii) Annexure A to Annexure D,
 (the Deed).
- (b) (**Attachments**): The Attachments do not form part of this Deed.
- (c) (**Annexures**): Project Co agrees that to the extent that an Annexure seeks to impose any obligations on the State, Project Co will not be entitled to make any Claim against the State in respect of that obligation (unless that same obligation is expressly imposed on the State in a clause or Schedule).
- (d) (**Notification of ambiguity**): If either party identifies an inconsistency, ambiguity or discrepancy within this Deed, then that party must notify the other party of the inconsistency, ambiguity or discrepancy as soon as possible and, in any case not later than 5 Business Days after becoming aware of the inconsistency, ambiguity or discrepancy.

- (e) **(Resolution of ambiguity):** Within the Review Period, the State will direct Project Co as to how to resolve the inconsistency, ambiguity or discrepancy which is the subject of the notice given under clause 2.2(d) as follows:
- (i) **(Order of precedence):** if the relevant inconsistency, ambiguity or discrepancy is within a document forming part of this Deed, and there is a process for resolving such inconsistencies, ambiguities and discrepancies contained in the relevant document, then, in accordance with that process; or
 - (ii) **(Higher standard):** if the inconsistency, ambiguity or discrepancy is between documents forming part of this Deed or is within a document that forms part of this Deed but does not have a process for resolving the inconsistency, ambiguity or discrepancy, then the State will direct Project Co to adopt the option the State requires Project Co to proceed with, which may be the greater, more onerous to Project Co, or higher requirement, standard, quality, level of service, staffing level, quantum or scope as determined by the State.
- (f) **(Inconsistency between Policies):** Without limiting the remainder of this clause 2.2, to the extent there is any inconsistency, ambiguity or discrepancy between the Policies which Project Co is required to comply with pursuant to this Deed, the standards, codes, specifications, policies and requirements set out in paragraphs (a), (b) and (c) of the definition of Policies will prevail over the standards, codes, specifications, policies and requirements referred to in paragraph (d) of that definition.
- (g) **(Inconsistency between State Project Documents):** If there is an ambiguity, discrepancy or inconsistency between this Deed and any other State Project Document, then the following order of precedence will apply:
- (i) Financiers Tripartite Deed;
 - (ii) this Deed; and
 - (iii) the remaining State Project Documents.
- (h) **(Inconsistency with the Corrections Legislation):** Where there is an ambiguity, discrepancy or inconsistency, or a conflict of Project Co's obligations, between the Corrections Legislation and this Deed, Project Co must:
- (i) notify the State of any such ambiguity, discrepancy, inconsistency or conflict as soon as possible and, in any case, no later than 5 Business Days after becoming aware of the ambiguity, discrepancy, inconsistency or conflict; and
 - (ii) to the extent that compliance with Project Co's obligations under this Deed will give rise to a breach of its obligations under the Corrections Legislation, comply with its obligations under the Corrections Legislation, in which case, Project Co will be deemed to have complied with this Deed to that same extent.

2.3 Plans, Reports and Procedures

A reference to any Delivery Phase Plan, Delivery Phase Report, Operating Phase Plan or Operating Phase Report is a reference to that Delivery Phase Plan, Delivery Phase Report, Operating Phase Plan or Operating Phase Report as amended or updated from time to time under this Deed.

2.4 Version of documents with which Project Co must comply

Where Project Co is required to comply with a document, and that document or any update of that document is required to be submitted for review in accordance with the Review Procedures, Project Co must comply with the version of the document that has been submitted, reviewed and amended (if applicable) in accordance with the Review Procedures.

2.5 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.

2.6 Prior approval or consent

Where Project Co is required by this Deed to obtain the State's or the State Representative's consent or approval to an action, document or thing, unless otherwise expressly stated, that consent or approval must be obtained prior to the action, document or thing occurring or coming into effect.

2.7 Action without delay

Unless there is a provision in this Deed, which specifies a period of time in which the parties must do something, all things must be done without undue delay.

2.8 Provisions limiting or excluding Liability, rights or obligations

- (a) **(Other rights not excluded):** A right or obligation of the State or Project Co under this Deed will not limit or exclude any other right or obligation of the State or Project Co under this Deed unless expressly stated.
- (b) **(Liability only excluded to the extent permitted by Law):** Any provision of this Deed which seeks, either expressly or by implication, to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.

2.9 Relationship of the parties

Nothing in this Deed or any other Project Document:

- (a) **(No additional relationship):** creates a partnership, joint venture or fiduciary, employment or agency relationship between the State and:
 - (i) Project Co; or
 - (ii) any of Project Co's Associates; or
- (b) **(No good faith):** imposes any duty of good faith on the State (unless otherwise expressly provided).

2.10 State's executive rights, duties and functions

- (a) **(State's own interests):** Unless otherwise expressly provided in the State Project Documents, nothing in the State Project Documents gives rise to any duty on the part of the State to consider interests other than its own interests when exercising any of its rights or carrying out any of its obligations in accordance with the State Project Documents.
- (b) **(State's rights):** Notwithstanding anything expressly provided or implied in the State Project Documents to the contrary, the parties acknowledge and agree that (and Project Co must procure Finance Co's agreement that):

- (i) the State and its Associates are not obliged to exercise any executive or statutory right or duty, or to influence, over-ride, interfere with or direct any other government party in the proper exercise and performance of any of its executive or statutory rights or duties; and
 - (ii) nothing expressly provided or implied in the State Project Documents has the effect of constraining the State or any of its Associates, placing any fetter on the State's or any of its Associates discretion to exercise or not to exercise any of its executive or statutory rights or duties.
- (c) **(No Claim):** Subject to clause 2.10(d), Project Co will not be entitled to (and must ensure that Finance Co does not) make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise any of its executive or statutory rights or duties.
- (d) **(Liability for breach):** Clauses 2.10(a) to 2.10(c) (inclusive) do not limit any Liability which the State would have had to any Project Co Entity under any State Project Document as a result of a breach by the State of a term of any State Project Document but for those clauses.

2.11 Reasonable endeavours and obligations to act in good faith

Any statement in a State Project Document providing that the State (or any officer or agent of the State (including the Commissioner)) will use or exercise 'reasonable endeavours', 'act reasonably' or 'act in good faith' in relation to an outcome, means that the State (or any officer or agent of the State (including the Commissioner)):

- (a) **(Relevant steps):** will take steps to bring about the relevant outcome so far as it is reasonably able to do so, having regard to its resources and other responsibilities;
- (b) **(No guarantee):** does not guarantee the relevant outcome will be brought about; and
- (c) **(No obligation):** is not required to:
 - (i) exercise a right of any government party, or to influence, over-ride, interfere with or direct any other government party in the proper exercise and performance of its legal, statutory or executive duties and functions;
 - (ii) exercise a power or discretion or otherwise act in a manner that the State (or the officer or agent of the State (including the Commissioner)) regards as not in the public interest;
 - (iii) develop or implement new policy or a change in policy;
 - (iv) procure any new Legislation or a change in Legislation; or
 - (v) act in any way that the State (or the officer or agent of the State (including the Commissioner)) regards as not in the public interest.

The parties agree that clause 2.11(a) does not apply to any statement in a State Project Document providing that the State will 'act in good faith' in relation to an outcome.

2.12 No State liability for review

- (a) **(No obligation):** The State does not owe any duty of care to Project Co (or any duty of care to Project Co to procure that any of the Associates of the State or the Independent Certifier) to:
 - (i) review Project Co Material submitted by Project Co (including where submitted in accordance with the Review Procedures); or

(ii) inspect or review the Project Activities or the Relevant Infrastructure, for Defects, other errors or omissions or for compliance with the State Project Documents or any Laws or Policies.

(b) **(No relief):** No:

(i) review of, comments upon, acceptance, approval or certification of any Project Co Material by the State or its Associates or the Independent Certifier;

(ii) inspection or review of the Project Activities or the Relevant Infrastructure by the State or its Associates or the Independent Certifier; or

(iii) failure by (or on behalf of) the State or its Associates or the Independent Certifier, to detect any non-compliance by any Project Co Entity with its obligations in accordance with the State Project Documents or any Laws or Policies;

will:

(iv) relieve any Project Co Entity from, or alter or affect, its Liabilities, obligations or responsibilities whether in accordance with the State Project Documents or otherwise according to Law;

(v) evidence or constitute the grant of an extension of time, or a request or direction to accelerate, disrupt, prolong or vary any or all of the Project Activities;

(vi) prejudice the State's rights against any Project Co Entity whether under the State Project Documents or otherwise according to Law; or

(vii) constitute an approval by the State or the Independent Certifier of any Project Co Entity's performance of its obligations in accordance with the State Project Documents.

2.13 Indexation

(a) **(Indexed amounts):** All amounts required to be adjusted under this Deed by an Index will be Indexed in accordance with the Payment Schedule.

(b) **(Changes to indexes):** Any changes to Indexes will be calculated in accordance with the Payment Schedule.

2.14 Cost of carrying out obligations

(a) Each party must carry out its obligations under this Deed at its own cost, unless expressly provided otherwise.

(b) 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.

2.15 Exclusion of Civil Liability Act 2002 (NSW)

(a) **(Excluded operation 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.

- (b) **(Subcontracts must exclude operation of Civil Liability Act):** Project Co must procure that each Subcontract includes provisions that, to the extent permitted by Law, effectively exclude the operation of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all rights, obligations or Liabilities arising under or in relation to that Subcontract howsoever such rights, obligations or Liabilities are sought to be enforced.

2.16 Final and binding

Where a determination, decision, opinion or direction is said in this Deed on any basis to be "final and binding", neither party is entitled to challenge that decision, opinion or direction.

2.17 Governing Law

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

2.18 Entire Agreement

- (a) To the extent permitted by Law and in relation to their subject matter, this Deed and the other State Project Documents:
- (i) **(Entire understanding):** embody the entire understanding of the parties and constitute the entire terms agreed by the parties; and
 - (ii) **(Prior agreements):** supersede any prior agreement of the parties.
- (b) The parties acknowledge and agree that:
- (i) the Pre-Contract Close Activities performed by Project Co or its Associates are deemed to form part of the Delivery Phase Activities under this Deed; and
 - (ii) Project Co and its Associates is responsible for all of the risks and assumes all of the liabilities in relation to the performance of the Pre-Contract Close Activities, in accordance with the terms of this Deed,

regardless of whether the Pre-Contract Close Activities are performed before, on or after the date of this Deed.

2.19 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 both parties) required by Law or reasonably requested by another party to give effect to this Deed.

2.20 Project Co and its Associates

Any obligation of Project Co under a State Project Document is deemed to include an obligation on Project Co to ensure that each of its Associates assume and comply with the corresponding obligation to the extent that the obligation is applicable to that Associate of Project Co under any Law or a Project Document to which that Associate is a party.

2.21 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 Accounts and Records available to the State;
 - (v) any indemnity or financial security given in accordance with this Deed;
 - (vi) the Performance Regime to the extent required to give effect to the State's rights and entitlements under the Performance Regime in respect of any events or circumstances that occurred prior to the rescission, termination or expiration of this Deed;
 - (vii) any limitation or exclusion of Liability; and
 - (viii) 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.

2.22 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.

2.23 Severance

If, at any time, a provision of this Deed or any other State Project Document 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 any other relevant State Project Document; or
- (b) that provision under the Law of any other jurisdiction.

2.24 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.

2.25 Moratorium legislation

A provision of any Law which comes into effect after the date of this Deed and operates to:

- (a) increase or improve any of Project Co'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,

(each matter referred to in (a) and (b), a "Specified Effect") is, to the extent only that the Law has the Specified Effect, expressly waived by Project Co to the extent it is legally able to do so. If a waiver is ineffective the parties will consult in good faith to determine how the parties can be restored to their original position under this Deed.

Part B - Project commencement

3. Conditions Precedent

3.1 Commencement

- (a) This Deed will only come into force and effect (but will do so automatically on the date) when the last of the Conditions Precedent to be satisfied, has been satisfied, (or waived in accordance with clause 3.3) except for the provisions contained in:
- (i) clause 1 (Definitions);
 - (ii) clause 2.1 (Interpretation);
 - (iii) clause 2.9 (Relationship of the parties);
 - (iv) clause 2.10 (State's executive rights, duties and functions);
 - (v) clause 2.11 (Reasonable endeavours and obligations to act in good faith);
 - (vi) clause 2.12 (No State liability for review);
 - (vii) this clause 3 (Conditions Precedent);
 - (viii) clause 4 (Term);
 - (ix) clause 5.3 (All Risks);
 - (x) clause 6.3(b) (Lodgement of Stage 2 Development Application);
 - (xi) clause 7 (Project Information);
 - (xii) clause 8.1 (Project Co to inform itself);
 - (xiii) clause 8.2 (No representations from the State);
 - (xiv) clause 8.11 (General Site undertakings);
 - (xv) clauses 10.2 and 10.3 (Parties' representatives);
 - (xvi) clause 14 (Independent Certifier);
 - (xvii) clause 43 (Relief Events);
 - (xviii) clause 45 (Indemnities and Consequential or Indirect Loss);
 - (xix) clause 46 (Insurance);
 - (xx) clauses 50 to 53 (Dispute resolution);
 - (xxi) clause 54 (Representations and warranties);
 - (xxii) clause 57 (Assignment and amendments);
 - (xxiii) clause 58 (Change in Control);
 - (xxiv) clause 59.1 (Updating the Base Case Financial Model at Financial Close);

- (xxv) clause 61 (Intellectual Property Rights);
- (xxvi) clause 62 (Confidential Information and disclosure);
- (xxvii) clause 62.8 (Privacy);
- (xxviii) clause 63 (Probity Events and Probity Investigations); and
- (xxix) clause 64 (Notices and bar to Claims),

which will commence on the date of this Deed.

3.2 Satisfaction of Conditions Precedent

- (a) **(Conditions Precedent Schedule)** The Conditions Precedent Schedule sets out which party is to satisfy each Condition Precedent.
- (b) **(State to use reasonable endeavours)** The State must use reasonable endeavours to satisfy each Condition Precedent it is obliged to satisfy in accordance with the Conditions Precedent Schedule (or procure its waiver in accordance with clause 3.3) by the Condition Precedent Deadline, and must notify Project Co as each Condition Precedent is satisfied.
- (c) **(Project Co to satisfy)** Project Co must satisfy each Condition Precedent it is obliged to satisfy in accordance with the Conditions Precedent Schedule (or procure its waiver in accordance with clause 3.3) by the Condition Precedent Deadline and must notify the State as each Condition Precedent is satisfied.
- (d) **(Notice at Financial Close)** When the last Condition Precedent to be satisfied has been satisfied or waived, the State must confirm by notice to Project Co that every Condition Precedent has been satisfied or waived, and the date upon which the last of the Conditions Precedent was satisfied or waived.

3.3 Waiver of Conditions Precedent

- (a) **(Conditions Precedent Schedule)** The Conditions Precedent Schedule sets out which party benefits from the satisfaction of each Condition Precedent.
- (b) **(Waiver)** A Condition Precedent is only waived if:
 - (i) where the Condition Precedent is included for the benefit of a particular party as set out in the Conditions Precedent Schedule, that party gives notice of the waiver of the Condition Precedent to the other party; and
 - (ii) where the Condition Precedent is included for the benefit of both parties, both parties agree to waive the Condition Precedent.

3.4 Failure to satisfy by the Condition Precedent Deadline

If any Condition Precedent is not satisfied (or waived in accordance with clause 3.3(b)) by the Condition Precedent Deadline, then:

- (a) **(Option to terminate)** the State may terminate this Deed upon giving not less than 5 Business Days' notice to Project Co;
- (b) **(State Project Documents terminated)** if the State terminates this Deed in accordance with clause 3.4(a), each of the State Project Documents will be taken to have been terminated at the time this Deed is terminated and will be of no further force or effect; and
- (c) **(No claim):** neither party will have any Claim against the other party arising out of or in connection with the Project or the Project Documents, including due to the

failure to satisfy (or procure the waiver of) a Condition Precedent, except in respect of antecedent breaches of the clauses listed in clause 3.1.

3.5 Model Output Schedule

- (a) **(Model Output Schedule):** The parties acknowledge that the Financial Close Financial Model will contain the Model Output Schedule.
- (b) **(Conformed copies):** As soon as practicable after Financial Close, the parties will prepare conformed copies of the Project Documents incorporating relevant data derived from the Model Output Schedule.

4. Term

4.1 Commencement date

Subject to clause 3.1, this Deed commences on the date of Financial Close.

4.2 Expiry Date

This Deed will terminate on the Final Expiry Date unless terminated earlier, in which case this Deed will expire on the date of such earlier termination (in each case an **Expiry Date**).

Part C - General Obligations

5. Overarching obligations

5.1 Project Co's primary obligations

- (a) **(Deliver the Project)** Project Co must:
- (i) carry out the Project Activities in accordance with:
 - A. the Project Documents;
 - B. all applicable Laws and Policies;
 - C. the Delivery Phase Plans and the Operating Phase Plans (as applicable); and
 - D. Best Industry Practices;
 - (ii) ensure that neither it nor any of its Associates cause the State or any of the State's Associates to breach any Law; and
 - (iii) ensure that it manages all risks associated with the Project Activities in accordance with Best Industry Practices.
- (b) **(Comply with directions)** Project Co must comply with:
- (i) all directions given by the State or the State Representative to comply with the terms of the State Project Documents;
 - (ii) all agreements made by the parties in accordance with this Deed;
 - (iii) all Modification Orders and Change Responses issued by the State in accordance with this Deed; and
 - (iv) all directions or determinations given:
 - A. by the State, the State Representative or the Independent Certifier in accordance with State Project Documents;
 - B. in accordance with the Corrections Legislation by the person with the power to give such directions or make such determinations; or
 - C. by the Commissioner in accordance with clause 5.1(b)(iv)B or otherwise in accordance with this Deed,

whether or not Project Co disputes that such direction is a direction or asserts that the direction is or determination is a Modification under this clause, except as required by Law.
- (c) **(Project Co not to act):** Except as otherwise required by Law, Project Co must not accept or act upon directions in connection with the Project Activities from an employee or agent of the State other than:
- (i) the State Representative or a State delegate appointed in accordance with clause 10.2;
 - (ii) the Commissioner or its delegates delegated with the relevant authority in accordance with the Corrections Act; and

- (iii) the Minister or its delegates delegated with the relevant authority in accordance with the Corrections Act.

5.2 Disputed Directions

- (a) **(Comply with direction):** Subject to clause 40, where Project Co disputes that any direction given or determination made has been given or made in accordance with clause 5.1(b) or clause 5.1(c) Project Co must, save where the direction would cause it to breach any Legislation, comply with the direction or determination, but at the same time may refer the Dispute for determination in accordance with clause 50.
- (b) **(Determination of Dispute):** An expert, arbitrator, court or tribunal with power to determine a Dispute under this Deed will have the power to open up and review the direction purported to be given or determination purported to be made under this Deed.

5.3 All Risks

- (a) **(All risks and no claim)** Except as otherwise expressly provided in the State Project Documents, as between the State and the Project Co Entities:
 - (i) Project Co accepts (and must procure Finance Co to accept) all risks (and the cost of such risks) in connection with the Project, the Site, the Site Conditions, the Correctional Complex or the Project Documents; and
 - (ii) Project Co is not entitled to make (and must procure Finance Co does not make) any Claim against the State or any of its Associates in connection with the Site, the Site Conditions, the Correctional Complex, the Project or the Project Documents, including any Claim for breach of contract, misrepresentation or negligence (other than a Claim for breach of contract where the State fails to make any payment properly due to Project Co under this Deed).
- (b) **(Liability exceptions)** Clause 5.3(a) does not:
 - (i) limit any Project Co Entity's right to raise any defence in relation to a Claim made by the State against any Project Co Entity;
 - (ii) exclude or limit any Liability the State or any of its Associates may have to Project Co or any of its Associates under this Deed or at Law in respect of any Project Co Entity's liability to a third party in respect of death, personal injury or damage to property to the extent that the Liability of Project Co or its Associates is a consequence of:
 - A. a breach by the State of a State Project Document; or
 - B. a fraudulent, reckless, unlawful, negligent or malicious act or omission of the State or a State Associate; or
 - (iii) subject to and without limiting clause 5.3(c), exclude or limit any Liability the State may have to any Project Co Entity under the State Project Documents or at Law in respect of Liability incurred by any Project Co Entity as a result of a breach by the State of any State Project Document.
- (c) **(Project Co acknowledgement):** Project Co acknowledges and agrees that its sole financial entitlement and the State's sole financial Liability:
 - (i) for delay, disruption or disturbance to the progress of any part of the Works, including by reason of an Extension Event, a Change in

Mandatory Requirements, a Compensable Event, a Contamination Compensation Event or a Modification, is limited:

- A. to the amount payable by the State to Project Co in accordance with clauses 8.6, 38.14, 38.7, 38A, 40 and 40.10 (as applicable) and the Change Compensation Principles; and
 - B. to the extent resulting from a breach by the State of clause 38.12(b), damages claimed by Project Co from the State as compensation for the costs of such delay, disruption or disturbance provided any Claim is notified to the State in accordance with clause 64 within 20 Business Days after Project Co becomes aware of the breach by the State; and
- (ii) for prevention, delay, hindrance or disruption to the performance of the Services arising out of or in connection with an Intervening Event, including any Compensable Intervening Event, is limited to the amount payable by the State to Project Co in accordance with clauses 39.6, 39.7 and 39.8 (as applicable) and the Change Compensation Principles.

5.4 Fit For Purpose Warranty

Project Co warrants that at all times on and from the Date of Commercial Acceptance until the end of the Term the Correctional Complex will:

- (a) **(Fit for Purpose)**: be Fit For Purpose, by reference to the purposes, function, uses and requirements which are current and apply as at the Date of Commercial Acceptance;
- (b) **(Handover Condition)**: meet the relevant Handover Condition; and
- (c) **(Compliance)**: comply with:
 - (i) all applicable Laws; and
 - (ii) all applicable Policies.

5.5 Minimum requirements not sufficient

Project Co acknowledges and agrees that to the extent that the Design Requirements or Services Requirements specify or prescribe a minimum requirement, the delivery of the Correctional Complex or the performance of Services (as applicable) in compliance with those minimum requirements may not of itself be sufficient for Project Co to discharge its obligations pursuant to this Deed.

5.6 Corrections Legislation

- (a) **(Status of this Deed and the Commissioner)**: The parties agree that:
 - (i) this Deed is a management agreement entered into by the Commissioner, inter alia, under section 238 of the Corrections Act; and
 - (ii) the Commissioner:
 - A. is bound by the obligations and Liabilities assumed by; and
 - B. is entitled to exercise the rights conferred on,
- the State pursuant to this Deed to the extent only of the Commissioner's delegated or Legislative functions.

- (b) **(Corrections Legislation and other Law):** Project Co must, and must ensure that its Associates, at all times comply with:
- (i) the Corrections Legislation, including:
 - A. any directions of the Commissioner or any authorised person given under the Corrections Legislation; and
 - B. any functions pursuant to the Corrections Legislation delegated to Project Co or its Associates or the subject of an authority issued by the Commissioner, including any such functions conferred or imposed on the Commissioner, a governor or a correctional officer; and
 - (ii) any other Law, so far as that Law affects the Correctional Complex or the welfare of Inmates.
- (c) **(Sufficient Staff):** Project Co must, or must ensure that the Operator, employs sufficient Staff, including custodial and paramedical Staff, to enable Project Co to discharge its obligations under this Deed.
- (d) **(Reports):** Project Co must submit to the Commissioner periodic reports (including those reports required to be submitted by Project Co in accordance with the Output Specification) and audited accounts in relation to the management of the Correctional Complex.
- (e) **(Minimum standard):** The parties agree that Parts B1 to B4 (inclusive) of the Output Specification comprises the written statement setting out minimum standards in relation to the exercise of any functions by Project Co in relation to the management of the Correctional Complex for the purpose of section 248(1) of the Corrections Act.
- (f) **(Declaration of the Correctional Complex and Correctional Centres):** No later than 30 Business Days prior to the date on which Project Co anticipates that it will achieve Technical Completion, Project Co must provide to the State a detailed survey prepared by a registered surveyor showing the boundaries of:
- (i) the Correctional Complex; and
 - (ii) each Correctional Centre,
- within the Site.
- (g) **(The Commissioner):** The Commissioner acknowledges and agrees:
- (i) that the Minister for Corrections on behalf of the Crown in the right of the State of New South Wales and Infrastructure New South Wales have together entered into the State Project Documents (other than this Deed and the Operator Side Deed) as the "State"; and
 - (ii) the exercise of its rights under this Deed and the Operator Side Deed are subject to the terms of the other State Project Documents as if it were also a party to those documents.

6. Approvals and consents

6.1 Key Planning Approvals

- (a) **(State obtained Key Planning Approvals):** Prior to the date of this Deed, the State obtained the Key Planning Approvals.

- (b) **(Compliance):** Project Co must:
 - (i) comply with; and
 - (ii) ensure that the Relevant Infrastructure complies with,
all Key Planning Approvals, including all conditions and requirements of the Key Planning Approvals.

6.2 Other Approvals

- (a) **(General):** Without limiting clauses 6.1(b) and 6.3, Project Co must:
 - (i) obtain (other than the Key Planning Approvals and the Stage 2 Development Consent), maintain and comply with; and
 - (ii) ensure that the Relevant Infrastructure satisfies and complies with,
all Approvals (including any modifications to any Approvals) necessary for the Project, including all conditions and requirements of those Approvals.
- (b) **(Copies and evidence of compliance):** Project Co must promptly provide to the State:
 - (i) copies of all Approvals when they are obtained, amended or renewed; and
 - (ii) upon request, evidence that the conditions or requirements of all Approvals have been complied with.

6.3 Stage 2 Development Consent

- (a) **(Preparation):** Project Co:
 - (i) has prepared the Stage 2 Development Application; and
 - (ii) must comply with the Stage 2 Development Application Obligations.
- (b) **(Lodgement of Stage 2 Development Application):** Subject to receipt by the State of a complete copy of the Stage 2 Development Application, the State will submit, as applicant, the Stage 2 Development Application with the Development Consent Authority.
- (c) **(State's obligations):** Notwithstanding that the State is the named applicant in respect of the Stage 2 Development Application and as such the Stage 2 Development Consent will be granted in favour of the State, Project Co acknowledges and agrees that the State's only obligations in respect of the Stage 2 Development Application are set out in clauses 6.3(b), 6.4(a) and 6.4(c).
- (d) **(Statutory discretion):** Project Co acknowledges and agrees that the terms of the Stage 2 Development Consent arise from the exercise of a statutory discretion by the Development Consent Authority in accordance with the terms of the EP&A Act.

6.4 Information and notification

- (a) **(Notification):** The State must:
 - (i) ensure that Project Co is promptly notified of and provided copies of:
 - A. the contents of any communication or notice from any Authorities (and any submission or objections by any third party) in respect of the Stage 2 Development Application; and

- B. the grant of the Stage 2 Development Consent, including details of any conditions or requirements to which the Stage 2 Development Consent is subject;
 - (ii) advise Project Co promptly of any proposed meeting with any Authority in relation to the Stage 2 Development Application so that Project Co may be present at the meeting; and
 - (iii) keep Project Co regularly informed of the progress of the Stage 2 Development Application.
- (b) **(Information to be available upon request of State Representative):** Project Co must:
- (i) ensure that the State is promptly notified of and provided with copies of the contents of any communication or notice from any Authority (and any submission or objections by any third party) in respect of the Stage 2 Development Application; and
 - (ii) make available such further information regarding the Stage 2 Development Application and its progress as the State Representative may reasonably request and in such form as the State Representative may reasonably request.
- (c) **(Information to be available upon request of Project Co):** If the Development Consent Authority requires any additional information directly from Project Co solely in relation to the Facilitation Works which Project Co is not able to provide (exercising Best Industry Practices):
- (i) Project Co must promptly request such information from the State with copies of all relevant correspondence, notice of minutes, the reasonable time period required for response (having regard to the Delivery Phase Program) and any other information; and
 - (ii) the State must make available to Project Co such further information regarding the Facilitation Works within the time specified in Project Co's request pursuant to clause 6.4(c)(i).

Upon receipt of such information from the State, Project Co must promptly provide such information to the Development Consent Authority.

6.5 Appealing the Stage 2 Development Consent

- (a) **(State Representative may notify Project Co):** Without limiting clause 6.6, where the Development Consent Authority grants, or indicates that it will grant, the Stage 2 Development Consent (and any modifications to the Stage 2 Development Consent granted by the Development Consent Authority) subject to conditions or requirements which the State wishes to challenge, the State Representative may give Project Co a written direction within 10 Business Days after the State Representative becomes aware of the grant or proposed grant of the Stage 2 Development Consent subject to the relevant condition or requirement to appeal the imposition of that condition or requirement and Project Co must appeal the imposition of that condition or requirement.
- (b) **(Project Co's right to appeal a Stage 2 Development Consent):** Where the Development Consent Authority grants, or indicates that it will grant, the Stage 2 Development Consent subject to conditions or requirements which Project Co wishes to appeal, Project Co may appeal the imposition of such conditions by exercising an appeal right available to it under the EP&A Act or any applicable Law, but only if such appeal:
 - (i) is made in good faith by the commencement of appropriate proceedings;

- (ii) is made at no cost to the State and does not expose Project Co or the State to any potential Liability or Claim;
- (iii) is permitted by, and is conducted in accordance with, applicable Law;
- (iv) does not materially prejudice the conditions of the Stage 2 Development Consent; and
- (v) is conducted by and in the name of Project Co,

and provided that Project Co will have no Claim against the State in connection with the appeal or the outcome of the appeal.

- (c) **(Project Co to continuously inform):** Project Co must keep the State informed of the progress and nature of any appeal to a condition or requirement of the Stage 2 Development Consent under this clause 6.5 and must consult in good faith with the State Representative regarding the conduct of any such appeal.
- (d) **(No relaxation or waiver):** Except as expressly provided in this clause 6.5, Project Co must not (and will procure that any Project Co Associate does not) apply for or agree to any change, relaxation or waiver of the Stage 2 Development Consent, or of any condition or requirement of it without the prior written consent of the State Representative.

6.6 Modification to the Stage 2 Development Consent

Project Co acknowledges and agrees that nothing in clause 6.3 to 6.5 will limit the State's right to seek an amendment or modification to the Stage 2 Development Consent.

6.7 Other Approvals

Where any Approval is issued with conditions which would or could have a material adverse effect on the ability of Project Co to carry out the Project Activities under this Deed, or otherwise affects Project Co's ability to meet its obligations under this Deed, Project Co must:

- (a) **(notification):** notify the State that those conditions would or could have such an effect; and
- (b) **(State's right to review):** provide to the State for review in accordance with the Review Procedures, a copy of the relevant Approvals issued with conditions, together with Project Co's detailed proposal for satisfying those Approvals in a manner that would not have a material adverse effect.

For the avoidance of doubt, this clause 6.7 does not apply to the Stage 2 Development Consent to the extent that clause 6.5 applies.

6.8 Working Hours Restriction

- (a) The parties:
 - (i) acknowledge condition C1.b in Schedule 3, Part C of the Stage 1 Development Consent which restricts the working hours on the Site on Saturdays during the Delivery Phase to between 8am and 1pm **(Working Hours Restriction)**;
 - (ii) agree that, after Financial Close, they will use reasonable endeavours to apply to modify the Working Hours Restriction so that the restriction is deleted from the condition or modified so as to permit working hours between 8am and 3pm on Saturdays; and
 - (iii) acknowledge that Project Co will incur costs of [REDACTED] prior to any opportunity to modify the Working Hours Restriction in

accordance with clause 6.8(a)(ii) (**Working Hours Restriction Amount**).

- (b) If the parties are unable to modify or remove the Working Hours Restriction in the manner proposed by clause 6.8(a)(ii) by:
 - (i) Financial Close, then Project Co may, by notice in writing to the State within 20 Business Days after Financial Close elect to exercise its rights under clause 6.8(c); and
 - (ii) 2 January 2018, then Project Co may, by notice in writing to the State within 20 Business Days after 2 January 2018 elect to exercise its rights under clause 6.8(d).
- (c) If Project Co gives a notice in accordance with clause 6.8(b)(i) then:
 - (i) Project Co may elect to perform the First Pre Agreed Modification Works; and
 - (ii) if Project Co elects to perform the First Pre Agreed Modification Works, the State will pay Project Co the Working Hours Restriction Amount within 45 Business Days of Project Co giving notice in accordance with clause 6.8(b)(i).
- (d) If Project Co gives a notice in accordance with clause 6.8(b)(ii) then:
 - (i) Project Co may elect to perform the Second Pre Agreed Modification Works; and
 - (ii) if Project Co elects to perform the Second Pre Agreed Modification Works, the State will pay Project Co the amount calculated in accordance with the Change Compensation Principles up to a maximum of [REDACTED]
- (e) Project Co acknowledges and agrees that:
 - (i) its only claim for additional costs arising out of or in connection with the Working Hours Restriction is in accordance with this clause 6.8; and
 - (ii) it has no right to bring any other Claim (including a claim for an extension of time) arising out of or in connection with the Working Hours Restriction.

7. Project Information

7.1 No representations from the State

Subject to clause 8.2(b), Project Co acknowledges and agrees that the State, its Associates and the author of any report provided in the Project Information have not made and make no representations (express or implied), and give no warranties or guarantees (express or implied), and owe no duty of care (express or implied), in respect of:

- (a) (**Project information**): the accuracy, suitability, adequacy, completeness of, or any omissions from, the Project Information; or
- (b) (**Proposal**): the feasibility or fitness for purpose of the Proposal (or any part of it).

7.2 Site Data

The State will either:

- (a) **(Assignment)**: assign to Project Co the benefit of any warranties provided to the State in respect of the Site Data by the author of the Site Data; or
- (b) **(Site Data Undertaking)**: procure that the author of the Site Data provide Project Co with the Site Data Undertaking on or about the date of this Deed.

7.3 Project Information under this Deed

Nothing in this Deed limits or excludes the State's liability to Project Co under any State Project Document or for breach of any State Project Document for any failure of the State to give any notice or direction that the State is required to give to Project Co or its Associates, in accordance with that State Project Document.

7.4 Project Information representations and warranties by Project Co

Without limiting clauses 7.1 or 8.1, Project Co acknowledges and agrees that:

- (a) **(Entry into Deed)**: it enters into this Deed based on its own investigations, interpretations, deductions, information and determination;
- (b) **(Opportunity to investigate)**: it was given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:
 - (i) relating to the subject matter of any Project Information; and
 - (ii) of the Site and its surroundings;
- (c) **(Project Information)**: the Project Information does not form part of this Deed and was provided by the State, its Associates and the author of the Site Data for the information only of Project Co;
- (d) **(Adequacy of Output Specification etc)**: it has satisfied itself that there is nothing in the Design Requirements or the Services Requirements which would prevent:
 - (i) the Correctional Complex from being Fit For Purpose; or
 - (ii) the Services being carried out in accordance with this Deed;
- (e) **(No reliance)**: it did not rely upon any Project Information or the accuracy, adequacy, suitability or completeness of the Project Information for the purposes of entering into this Deed or delivering the Project;
- (f) **(State entry into Deed)**: the State has entered into this Deed relying upon the warranties, acknowledgements, representations and agreements of Project Co as set out in this Deed; and
- (g) **(Intellectual Property Rights)**: all Intellectual Property Rights in the Project Information remain the property of the State, any of its Associates or the author of the Site Data (as the case may be).

8. The Site

8.1 Project Co to inform itself

Without limiting clause 7 or this clause 8, Project Co warrants that it has, and will be deemed to have, done everything (including all assessments, tests or studies of the Site and its surroundings and enquiries of Authorities) that would be expected of a prudent, competent and experienced contractor in the position of Project Co exercising Best Industry Practices:

- (a) in assessing the risks regarding Site Conditions;

- (b) in ensuring that this Deed contains allowances to protect it against any of these risks eventuating; and
- (c) in order to determine the suitability of the Site and its surroundings for the Project.

8.2 No representations from the State

- (a) Project Co acknowledges and agrees that, except as expressly provided by this Deed, the State, its Associates and the author of the Site Data have not made and make no representation, and give no warranty or guarantee and owe no duty of care or other responsibility in respect of:
 - (i) **(Site):** the Site Conditions, title to the Site or adequacy of or access to the Site and its surroundings for the Project;
 - (ii) **(Utility Infrastructure and External Infrastructure):** the existence, location, condition or availability of any Utility Infrastructure or External Infrastructure; or
 - (iii) **(Adverse Rights etc):** any Adverse Rights or rights of way.
- (b) **(Site Data):** Clauses 7.1, 7.4(c) or 8.2(a) do not:
 - (i) exclude any liability that the author of the Site Data may have to Project Co in respect of the Site Data under the Site Data Undertaking; or
 - (ii) reduce any warranty that the author of the Site Data may give to Project Co in respect of Site Data.

8.3 Environmental issues

Project Co must:

- (a) **(Obligation):** not and must procure that its Associates do not:
 - (i) cause, contribute to or exacerbate any Contamination;
 - (ii) except where it is authorised pursuant to any Approval, cause any Pollution on, in, under or emanating from the Site;
 - (iii) abandon or dump any Hazardous Substance at the Site; or
 - (iv) except as authorised by Law or an Approval, handle, disturb, discharge or release any Hazardous Substance at the Site or cause any Hazardous Substance to migrate from the Site in a manner which is likely to cause or contribute to an Environmental Hazard;
- (b) **(Environmental responsibility):** and must procure that its Associates, at all times carry out the Project Activities in accordance with the Environmental Requirements, in an environmentally responsible manner and in accordance with the Environmental Management Plan and Best Industry Practices and so as to protect the Environment;
- (c) **(Notification):** immediately notify the State of any non-compliance or alleged or potential non-compliance with the conditions or requirements of any Environmental Requirements or the Environmental Management Plan;
- (d) **(Manage waste disposal):** manage, remove and dispose of all waste, rubbish, debris, redundant materials, spoil and Hazardous Substances produced by the Project Activities in accordance with Best Industry Practices, any Environmental Requirements and this Deed; and

- (e) **(Assist the State):** assist the State to comply with its obligations under all Environmental Requirements and the requirements of any Authority in relation to matters relating to the Environment at the Site or in connection with the Project.

8.4 Contamination

- (a) **(Prevent or minimise Contamination):** Without limiting clause 8.3(a), Project Co must prevent or minimise any Contamination occurring on, or emanating from, the Site, in accordance with Best Industry Practices and any Environmental Requirements.
- (b) **(Monitoring and testing):** Project Co must conduct any monitoring, testing or investigations of any Contamination in, on, over or under the Site, or which has emanated or is emanating from the Site, in accordance with:
 - (i) the Environmental Requirements;
 - (ii) the Environmental Management Plan; and
 - (iii) Best Industry Practices.
- (c) **(Contamination Remediation Notice):** Each party must promptly provide the other with a copy of any Contamination Remediation Notice served on it, and of all related correspondence which precedes or follows the issue of the Contamination Remediation Notice.
- (d) **(Notification):** If Project Co discovers any Contamination in, on, over, under or emanating from the Site (whether or not Project Co has caused or contributed to that Contamination), it must notify the State as soon as practicable, and in any event within 5 Business Days after it discovers the Contamination.
- (e) **(Notification Requirements):** Project Co's notice under clause 8.4(d) must contain all relevant details in relation to the Contamination, including:
 - (i) the type of Contamination;
 - (ii) the location of the Contamination;
 - (iii) the nature and extent of the Contamination; and
 - (iv) whether it considers the Remediation of the Contamination will give rise to a Contamination Compensation Event,

to the extent such details are known at the time the notice is provided.

- (f) **(Remediation):** Project Co must:
 - (i) Remediate:
 - A. any Contamination in, on, over or under the Site; or
 - B. any Contamination that is emanating, or has emanated, from the Site, or that is migrating, or has migrated, onto the Site,where such Remediation is necessary to:
 - C. comply with any Environmental Requirements or any Contamination Remediation Notice, regardless of whether:
 - 1) the Contamination Remediation Notice is addressed to the State, Project Co or any other person; or

- 2) the Contamination occurred before or after Project Co or any other person was given access to the Site;
- D. ensure that there is no unacceptable risk of harm to human health or the Environment as a consequence of the Contamination, having regard to Best Industry Practice;
- E. render the Site suitable for the Project; or
- F. prevent the migration of Contamination from the Site to Adjoining Properties or other sites; and
- (ii) comply with all requirements of any Authority in connection with any Contamination referred to in clause 8.4(f)(i) or the Remediation of that Contamination.
- (g) **(Disputing a Contamination Remediation Notice):** Nothing in this clause 8.4 prevents Project Co from disputing the issue of a Contamination Remediation Notice with any Authority or taking an action against a third party with respect to the Contamination.

8.5 Contamination Remediation Plan

- (a) **(Discovery of Contamination):** Promptly on discovering, or becoming aware of, any Contamination in, on, over, under or emanating from the Site which Project Co is required to Remediate in accordance with clause 8.4(f), Project Co must submit to the State a plan for the Remediation of that Contamination (**Contamination Remediation Plan**) for review in accordance with the Review Procedures.
- (b) **(Contamination Remediation Plan details):** A Contamination Remediation Plan submitted in accordance with clause 8.5(a) must include details of:
 - (i) all investigations carried out, or to be carried out, in relation to the Contamination;
 - (ii) to the extent that any details were not known at the time of the notice given under clause 8.4(d), the details required under clause 8.4(e);
 - (iii) any proposed works to effect the Remediation;
 - (iv) the proposed timeframe for executing the proposed Remediation works; and
 - (v) the estimated cost of executing the Contamination Remediation Plan.
- (c) **(Remediate any contamination):** Project Co must Remediate any Contamination it is required to Remediate under clause 8.4 in accordance with the relevant Contamination Remediation Plan that has been reviewed in accordance with the Review Procedures and the Environmental Requirements.

8.6 Project Co's entitlement to compensation for Remediation

- (a) **(Contamination Compensation Event):** If the requirement to Remediate Contamination under clause 8.4 is a Contamination Compensation Event then to claim an extension of time, relief from performance or compensation Project Co must issue a Change Notice within 20 Business Days after discovering, or becoming aware of, the Contamination and, subject to clause 8.6(b), the Change Compensation Principles will apply.
- (b) **(Change Notice):** If Project Co considers it is entitled to:

- (i) an extension to a Date for Completion or other relief from performance of the Delivery Phase Activities as a result of a Contamination Compensation Event, Project Co must include in its Change Notice its claim for an extension of time, and clause 38 will apply in respect of the relief or extension of time claim (unless the State and Project Co can agree on an extension of time within 20 Business Days after the State receives the relevant Change Notice, in which case the agreed extension of time will apply); or
 - (ii) relief from performance of the Services as a result of a Contamination Compensation Event, Project Co must include in its Change Notice its claim for relief and clause 39 will apply in respect of the relief from performance of the Services claim.
- (c) **(Change Responses):** The parties acknowledge and agree that the State may issue separate Change Responses for the non-time related aspects of the relevant Contamination Compensation Event.

8.7 Liability under the NGER Legislation

Project Co acknowledges and agrees that if:

- (a) the Services constitute a "facility" within the meaning of the NGER Legislation, then for the purposes of the NGER Legislation, it has operational control of that facility or facilities and will comply with any obligations arising in respect of the Services under the NGER Legislation; or
- (b) Project Co is part of a group (as defined in the NGER Legislation), the controlling corporation (as defined in the NGER Legislation) of which is registered under the NGER Legislation, Project Co will use reasonable endeavours to procure that the relevant controlling corporation complies with the NGER Legislation in relation to the Services.

8.8 Reporting Emissions and Energy Data

- (a) **(Application of this clause):** This clause 8.8 only applies if, despite the operation of clause 8.7(a), the State incurs a Liability under or in connection with the NGER Legislation as a result of or in connection with the Services.
- (b) **(Transfer of Liability):** If the State incurs, or but for this clause would incur, a Liability under or in connection with the NGER Legislation as a result of or in connection with the Services, and the NGER Legislation provides that such Liability can be transferred by the State to Project Co, Project Co must, upon the written request of the State, do all things reasonably necessary to transfer the Liability to Project Co.
- (c) **(Compliance):** Project Co must assist the State to comply with the NGER Legislation in relation to any aspect of the Services.
- (d) **(Provision of Emissions and Energy Data to the State):** Project Co must:
 - (i) provide Project Co's Emissions and Energy Data to the State in the same manner, form and level of detail, based on the same methods and at the same times:
 - A. as if Project Co were obliged under the NGER Legislation or any other applicable law to provide the Emissions and Energy Data to an Authority and the State was that Authority;
 - B. in accordance with the requirements or approvals of any Authority and any directions given by the State; and

- C. without limiting clauses 8.8(d)(i)A or 8.8(d)(i)B, as may be required to enable the State:
- 1) to discharge, as and when they fall due, any obligations that it may have to provide Project Co's Emissions and Energy Data to any Authority; and
 - 2) to provide to any Authority any of Project Co's Emissions and Energy Data concerning any greenhouse gas project;
- (ii) keep all such Project Co's Emissions and Energy Data as may be required to enable it to discharge its obligations under clause 8.8(d)(i);
- (iii) retain records of its activities that are the basis of Project Co's Emissions and Energy Data for any financial year, for a period of not less than 7 years from the end of the year in which the relevant activities take place; and
- (iv) permit Project Co's Emissions and Energy Data to be examined, monitored, measured, copied, audited and verified by any persons appointed or authorised for that purpose by the State or any Authority, and co-operate with and provide all reasonable assistance to any such persons, including giving access to premises, plant and equipment, producing and giving access to documents (including any records kept and retained under clauses 8.8(d)(ii) and 8.8(d)(iii)) and answering questions.
- (e) **(Acknowledgement):** Project Co acknowledges and agrees that Project Co's Emissions and Energy Data is provided to the State:
- (i) to discharge any obligations that the State may have to provide such Emissions and Energy Data to an Authority; and
 - (ii) so that the State may provide to any Authority any of Project Co's Emissions and Energy Data concerning any greenhouse gas project.

8.9 Provision of Emissions and Energy Data to the State

- (a) **(Project Co to provide):** Project Co must provide Project Co's Emissions and Energy Data to the State Representative:
- (i) at such times as may be agreed by the State and Project Co or, if no such agreement is reached, within 10 Business Days of receiving written notice from the State indicating that it requires Project Co's Emissions and Energy Data to be provided; and
 - (ii) on each occasion that Project Co is required to provide Project Co's Emissions and Energy Data to an Authority under the NGER Legislation or any other applicable Law.
- (b) **(Use of Emissions and Energy Data):** Project Co acknowledges and agrees that the State may use Project Co's Emissions and Energy Data for any purpose as it sees fit, including providing or otherwise disclosing Project Co's Emissions and Energy Data to any Authority.

8.10 Native Title Claims, Heritage Claims and Artefacts

- (a) **(Native Title Claims):** As between the State and Project Co, the State is responsible for:

- (i) dealing with any Native Title Claim in connection with any part of the Site; and
 - (ii) the payment of any compensation or other moneys required to be paid to the native title holders of any part of the Site as a consequence of a successful Native Title Claim.
- (b) **(Artefacts):** If an Artefact is discovered on or under the surface of the Site:
- (i) as between the State and Project Co, it will be the absolute property of the State; and
 - (ii) Project Co must:
 - A. immediately notify the State of the discovery;
 - B. permit the State to watch or examine any excavation on the Site; and
 - C. take every reasonable precaution in carrying out the Project Activities so as to prevent Artefacts being damaged, removed, disturbed or destroyed until appropriate arrangements for dealing with, or removing, the Artefacts have been made.
- (c) **(Project Co must continue to perform):** If there is a:
- (i) Native Title Claim or Heritage Claim in connection with; or
 - (ii) discovery of Artefacts on, under or over, any part of the Site, Project Co must:
 - (iii) continue to carry out its obligations under this Deed, except to the extent otherwise:
 - A. directed by the State;
 - B. ordered by an Authority; or
 - C. required by Law; and
 - (iv) provide all reasonable assistance to the State in connection with dealing with the Native Title Claim, Heritage Claim or Artefact.

8.11 General Site undertakings

- (a) **(Make good):** Except to the extent expressly provided otherwise in this Deed but without limiting this clause 8, Project Co must make good, if applicable, in accordance with this Deed, any disturbance or damage caused to any part of the Site or the Relevant Infrastructure in connection with Project Co or its Associates entry, occupation or use of the Site or the Relevant Infrastructure.
- (b) **(Other undertakings):** Except to the extent expressly provided otherwise in this Deed but without limiting this clause 8, Project Co:
 - (i) must take all measures necessary to protect and ensure the safety of people and property at the Site or in connection with the Project in accordance with Best Industry Practices;
 - (ii) except to the extent required for public health or safety purposes, must avoid or minimise:

- A. unreasonable interference with the passage of people and vehicles;
 - B. obstruction to any property; and
 - C. the operations or activities carried out on, or adjacent to, the Site;
- (iii) must prevent nuisance including any nuisance caused by unreasonable Pollution, noise, dust, light emission, vibration or disturbance, air pollution, odour on or adjacent to the Site or Adjoining Property above the levels specified in the Project Management Plan, Environmental Management Plan or such lower levels as may be required by Law or an Approval;
 - (iv) must ensure the safety of people and property in connection with the Project or Site in accordance with Best Industry Practice;
 - (v) must promptly deliver to the State a copy of every notice received by Project Co or any of its Associates which affects the Site or any Adjoining Property;
 - (vi) is solely responsible for any person who enters the Site or the Correctional Complex;
 - (vii) must not do or permit to be done on any part of the Site anything which may:
 - A. interfere with the State's or any of the State's Associate's access to the Site; or
 - B. cause the State to breach any of its obligations in connection with any Adverse Rights to which the Delivery Phase Sub-Licence or the Operating Phase Sub-Licence is subject;
 - (viii) must not without the prior written consent of the State, exhibit on any part of the exterior of any part of the Site or the Correctional Complex any notice, sign, signboard or advertisement;
 - (ix) must not enter into or grant or agree to enter into or grant any rights or other arrangements with any person or persons relating to all or any part of the Site or the Relevant Infrastructure except as permitted by this Deed; and
 - (x) on completion of any Delivery Phase Activities, must remove all temporary protection or other structures or equipment erected in connection with those Delivery Phase Activities as soon as practicable, and in accordance with Best Delivery Practices.
- (c) **(Remedy of nuisance and interference):** If, in the reasonable opinion of the State or the Independent Certifier, Project Co has failed to meet its obligations under clause 8.11(b)(ii), 8.11(b)(iii) or 8.11(b)(iv), Project Co must comply with any reasonable direction of the State or the Independent Certifier to:
- (i) stop or change the manner of carrying out the Project Activities; and
 - (ii) amend any applicable Delivery Phase Plan or Operating Phase Plan to remedy the nuisance or interference and submit to the State and the Independent Certifier for review in accordance with the Review Procedures.

9. Facilitation Works, Utilities Infrastructure and Utilities

9.1 Facilitation Works

- (a) **(Execution of Facilitation Works):** The parties acknowledge and agree that the State will be executing the Facilitation Works on the Site and land adjacent to the Delivery Phase Site at the same time as Project Co is carrying out the Works.
- (b) **(Project Co acknowledgements):** Project Co acknowledges and agrees that:
 - (i) delays in carrying out the Works or a failure to comply with Project Co's other obligations under this Deed may impact on, interfere with or delay the execution of the Facilitation Works; and
 - (ii) it has taken the Facilitation Works into account in preparing the Delivery Phase Program.
- (c) **(Project Co obligations):** Project Co must:
 - (i) without limiting clause 20, permit the State and its Associates to access the Delivery Phase Sites to the extent necessary to perform the Facilitation Works;
 - (ii) cooperate with the State and its Associates in relation to the performance of the Facilitation Works;
 - (iii) coordinate the performance of the Works with the State's performance of the Facilitation Works; and
 - (iv) not do anything that will cause or contribute to the Facilitation Works being delayed or damaged.
- (d) **(Facilitation Works (Power) Modification):** The parties acknowledge and agree that:
 - (i) the final Facilitation Works (Power) Location has not been determined as at the date of this Deed; and
 - (ii) to the extent that, after the date of this Deed, the location changes from the Facilitation Works (Power) Location (other than following a request from Project Co), the State will issue a written notice to Project Co specifying the new location and if such notice is given:
 - A. [REDACTED] the State will pay Project Co the amount calculated in accordance with the Change Compensation Principles; or
 - B. [REDACTED] the State will issue a Modification in accordance with this Deed.

9.2 Utilities Infrastructure and Utilities

- (a) **(No representations):** Without limiting Project Co's entitlement to Claim under clause 38 in respect of limbs (a) – (c) (inclusive) of the definition of Compensable Event and limb (j) of the definition of Compensable Extension Event, Project Co is not entitled to make any Claim, and the State makes no warranty or representation, and gives no advice as to the availability, adequacy, location or completeness of any existing Utility Infrastructure above or below the surface of the Site.

- (b) **(Project Co assumes risk):** Project Co assumes the risk of the existence, location, condition and availability of Utility Infrastructure and the continuous supply of Utilities in connection with the Project Activities.
- (c) **(Project Co obligations):** Project Co must:
- (i) **(Enquiries):** make enquiries as to the location of existing Utility Infrastructure and liaise with the owner of that Utility Infrastructure and the relevant Utility provider as to the need for any potential relocation, protection or decommissioning of the Utility Infrastructure (as applicable);
 - (ii) **(External Infrastructure):** ensure that all External Infrastructure is provided to the boundary of the Site and is designed and constructed in accordance with Best Delivery Practices and in a manner and in a condition which ensures that:
 - A. Technical Completion will occur by the Date for Technical Completion;
 - B. Commercial Acceptance will occur by the Date for Commercial Acceptance; and
 - C. the Correctional Complex meets the FFP Warranty;
 - (iii) **(Utility works):** undertake, or procure that a Utility provider undertakes, all work in connection with Utility Infrastructure within the Delivery Phase Sites which is required to deliver the Works and ensure a continuous supply of Utilities to the Correctional Complex;
 - (iv) **(Decommissioning):** decommission, in consultation with the relevant Utility provider, any Utility Infrastructure located above or below the surface of the Site which is redundant or will be redundant at Commercial Acceptance, or is otherwise required to be decommissioned in accordance with this Deed;
 - (v) **(Notice):** notify the State at least 10 Business Days before any planned connection, disconnection or interference with existing Utility Infrastructure and liaise with the State as to how best to manage the disconnection or interference taking into account the nature and requirements of the Site;
 - (vi) **(Supply):** ensure the continuous supply of Utilities to the Correctional Complex;
 - (vii) **(Agreements):** enter into all agreements for the supply of Utilities to the Site and the Correctional Complex;
 - (viii) **(Access):** give all Utility providers reasonable access to any part of the Site to undertake any work or provide any service in respect of the Utilities;
 - (ix) **(No damage):** not damage or destroy Utility Infrastructure;
 - (x) **(No disruption):** not unreasonably disrupt or interfere with any Utility Infrastructure or the supply of Utilities;
 - (xi) **(Payment):** arrange and pay for all Utilities consumed or used at the Site or the Correctional Complex in accordance with the agreements entered into with the Utility providers; and
 - (xii) **(Efficiency):** use the Utilities provided to the Site or the Correctional Complex;

- A. efficiently; and
- B. solely for the provision of the Project Activities.

10. Parties, personnel and community

10.1 Authorities

Project Co acknowledges and agrees that:

- (a) **(Jurisdiction)**: there are Authorities with jurisdiction over aspects of the Project Activities and the Site;
- (b) **(Authorities)**: those Authorities may, from time to time and at any time, exercise their statutory functions and powers in a way which disrupts, interferes with or otherwise affects the Project Activities; and
- (c) **(Co-operation)**: it will co-operate with and co-ordinate its Project Activities with those Authorities as is required by them.

10.2 State Representative

- (a) **(Natural person)**: The State will ensure that at all times throughout the Term there is a natural person appointed by it as the State Representative for the Project.
- (b) **(Identity)**: As at the date of this Deed, the State Representative is the party nominated as such in the Contract Particulars.
- (c) **(Agent of the State)**: The State Representative will administer this Deed on behalf of the State and will exercise all rights, powers, authority and functions of the State under this Deed as the State's agent.
- (d) **(Oral directions)**: The State Representative may give a direction orally but will as soon as practicable confirm that direction in writing.
- (e) **(Replacement)**: The State may at any time replace the State Representative, in which event the State will appoint another person as the State Representative and notify Project Co of that appointment.
- (f) **(Delegation)**: The State may at any time delegate the exercise of any power or authority of the State Representative to a person other than the then appointed State Representative and may terminate or vary that delegation.
- (g) **(Notification of delegation)**: The State will promptly notify Project Co of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power).
- (h) **(Vary or terminate delegation)**: The State may vary or terminate any delegated power or authority of the State Representative but must promptly notify Project Co of any such variation or termination.

10.3 Project Co Representative

- (a) **(Natural person)**: Project Co must ensure that at all times throughout the Term there is a natural person appointed by it as Project Co Representative in respect of the Project.
- (b) **(Identity)**: As at the date of this Deed, the Project Co Representative is the party nominated as such in the Contract Particulars.

- (c) **(Employee):** The Project Co Representative must be an officer or employee of Project Co or a Related Body Corporate of Project Co and must be employed full time on the Project.
- (d) **(Replacement):** The Project Co Representative is one of the Key People and can accordingly only be replaced in accordance with clause 10.7.
- (e) **(Contact):** The Project Co Representative must act as the principal point of contact between Project Co and the State in respect of the administration of this Deed, and be available to the State as and when required.
- (f) **(Directions):** A direction is given to Project Co if it is given to the Project Co Representative.
- (g) **(Authority and skills):** Project Co must ensure that at all times during his or her appointment, Project Co Representative has:
 - (i) the authority to perform its role and duties and discharge its obligations under this Deed; and
 - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Project Co Representative.
- (h) **(Duties during the Term):** The Project Co Representative must perform the duties of the Project Co Representative under this Deed, including to:
 - (i) **(spokesperson):** act as the spokesperson for Project Co;
 - (ii) **(partnership):** ensure the ongoing implementation of a partnership with the State;
 - (iii) **(liaison):** liaise and generally deal with stakeholders;
 - (iv) **(manage):** represent the views of Project Co and manage and co-ordinate issues with any Project Co Associate prior to presentation to the State;
 - (v) **(presence):** ensure a strong presence and consistent project management role for Project Co in the implementation of the Project; and
 - (vi) **(appoint temporary replacement):** appoint a person with the equivalent qualification, experience, ability and expertise to temporarily act as Project Co Representative before taking any annual or other leave.

10.4 Operational Readiness Co-ordinator

- (a) **(Natural person):** Project Co must ensure that from Financial Close until at least 12 Months after the Date of Commercial Acceptance, there is a natural person appointed by it as the Operational Readiness Co-ordinator in respect of the Project.
- (b) **(Replacement):** The Operational Readiness Co-ordinator is one of the Key People and can accordingly only be replaced in accordance with clause 10.7.
- (c) **(Contact):** The Operational Readiness Co-ordinator must be available to the State as and when required.
- (d) **(Presence):** Project Co must ensure that the Operational Readiness Co-ordinator is present at the Site at such times as are necessary to ensure that Project Co is complying with its obligations under this Deed and upon reasonable request by the State.

- (e) **(Reporting):** The Operational Readiness Co-ordinator must report directly to the Project Co Representative.
- (f) **(Authority and skills):** Project Co will ensure that at all times during his or her appointment, the Operational Readiness Co-ordinator has:
 - (i) the authority to perform its role and duties and discharge its obligations in accordance with 10.4(g) and elsewhere in this Deed; and
 - (ii) a detailed knowledge of the Project and sufficient experience and skills to undertake the role of Operational Readiness Co-ordinator.
- (g) **(Role of the Operational Readiness Co-ordinator):** The role of the Operational Readiness Co-ordinator under this Deed includes the following functions:
 - (i) **(Co-ordinate Works):** ensure that operational requirements are appropriately considered for the purposes of designing and constructing the Correctional Complex;
 - (ii) **(Manage transition process):** manage and be heavily engaged in the process of preparing for the Correctional Complex to become operational and for commencement of the Services;
 - (iii) **(Co-ordinate Subcontractors):** co-ordinate and liaise with the Subcontractors and oversee the performance by the Operator and other Subcontractors of their Subcontracts during the term of the Operational Readiness Co-ordinator's appointment;
 - (iv) **(Certification):** certify, in respect of all Operating Phase Plans prior to submission to the State, that it is not aware of any non-compliance with the relevant requirements in the Operating Phase Plans and Reports Schedule;
 - (v) **(Meetings with State):** convene and attend regular co-ordination meetings with the State in relation to the transition from the Delivery Phase to the Operating Phase;
 - (vi) **(Liaison):** attend on and liaise with the persons performing the testing (including the Completion Tests) and commissioning of the Works;
 - (vii) **(Co-ordinate transition):** co-ordinate the execution of the Operational Readiness Plan in order to facilitate achievement of Completion by the Date for Completion and delivery of the Services; and
 - (viii) **(appoint temporary replacement):** appoint a person with the equivalent qualification, experience, ability and expertise to temporarily act as the Operational Readiness Co-ordinator before taking any annual or other leave.

10.5 General Manager

- (a) **(General Manager competent):** The General Manager must be competent to exercise the functions and to perform the duties of the General Manager of the Correctional Complex.
- (b) **(Appointment under Corrections Act):** Project Co acknowledges that the appointment or engagement by Project Co of a General Manager is subject to the authorisation of the Commissioner under section 240 of the Corrections Act.
- (c) **(Restrictions on replacement):** The General Manager will be one of the Key People and accordingly can only be replaced in accordance with clause 10.7 and the Corrections Legislation.

- (d) **(Duties):** The General Manager will carry out all powers, functions and duties he or she is required to carry out in accordance with the Corrections Legislation and as otherwise delegated to him or her by Commissioner.
- (e) **(Corrections Legislation):** Project Co must ensure the proper performance by the General Manager of any powers, authorities, duties and functions imposed or conferred on the General Manager by the Corrections Legislation or this Deed.
- (f) **(Termination):** Project Co must, if directed by the Commissioner, terminate the appointment of the General Manager.

10.6 Operations Manager

Project Co must ensure that at all times during the Operating Phase, Project Co has a competent and appropriate person holding the position of "Operations Manager" who is available to the person from time to time holding the position of "General Manager - Operational Performance Review Branch Corrective Services - NSW Department of Justice" (or equivalent thereof from time to time) to discuss the operation and management of the Correctional Complex and the Inmates.

10.7 Key People

Project Co must:

- (a) **(Requirement to employ or engage):** ensure that the Key People are employed or engaged in the roles specified in the Contract Particulars;
- (b) **(Restrictions on replacement):** subject to clause 10.7(c), not replace the Key People or delegate the functions of the Key People without the State's prior written approval (which will not be unreasonably withheld);
- (c) **(Replacement in certain circumstances):** if any of the Key People die, become seriously ill or resign from the employment of Project Co or any of its Associates or receive a promotion, replace the relevant Key People with persons approved by the State (such approval not to be unreasonably withheld) of at least equivalent qualification, experience, ability and expertise; and
- (d) **(Corrections Legislation):** in relation to the General Manager, only replace the General Manager in accordance with the Corrections Legislation.

10.8 Project Control Group

- (a) **(Establishment):** The parties will establish a group consisting of the following members (together the **Project Control Group**):
 - (i) the State Representative;
 - (ii) the Project Co Representative;
 - (iii) until the end of the Ramp-Up Period, the Operational Readiness Co-ordinator;
 - (iv) the General Manager (or a delegate of the General Manager), or if the General Manager is not yet appointed, a representative of the Operator;
 - (v) two other representatives that the State nominates from time to time; and
 - (vi) two other representatives that Project Co nominates from time to time.
- (b) **(Chairperson):** The State Representative will be the chairperson of the Project Control Group.

- (c) **(Functions):** The functions of the Project Control Group will be to:
- (i) monitor the overall progress of the Project Activities and compliance with this Deed;
 - (ii) assist in the resolution of any matters referred to the Project Control Group by a party including Disputes in accordance with clause 50;
 - (iii) review all reports and plans provided by Project Co, its Subcontractors and the Independent Certifier during the Term;
 - (iv) discuss stakeholder and community engagement; and
 - (v) discuss and address such other matters as the members of the Project Control Group may agree from time to time in connection with the Project.
- (d) **(Meetings):** The Project Control Group must:
- (i) meet:
 - A. during the Delivery Phase and until the first anniversary of the Operational Commencement Date, monthly (not later than 15 Business Days after the end of each Month);
 - B. following the first anniversary of the Operational Commencement Date, quarterly (not later than 15 Business Days after the end of each Quarter); and
 - C. when otherwise called to meet on 10 Business Days' notice by the State or Project Co. Without limiting this clause 10.8(d)(i)C, Project Co acknowledges and agrees that the State may call a meeting if the State is dissatisfied with Project Co's performance,unless agreed otherwise by the State and Project Co; and
 - (ii) conduct its meetings in the manner agreed from time to time between the State and Project Co.
- (e) **(Reports):** Project Co must, no later than 5 Business Days before each meeting of the Project Control Group convened in accordance with clause 10.8(d), give each member of the Project Control Group and the Independent Certifier (for the duration only of the Independent Certifier's term in accordance with the Independent Certifier Deed):
- (i) prior to the Operational Commencement Date, the Monthly Works Report for the previous Month and the latest Delivery Phase Program; and
 - (ii) thereafter, the Monthly Performance Report.
- (f) **(Independent Certifier):** The State or Project Co may require the Independent Certifier attend any meeting of the Project Control Group.
- (g) **(Subcontractors):** The State may direct Project Co to procure the attendance of senior representatives of any of the Subcontractors (not forming part of the Project Control Group), Financiers or any of their respective Associates at any meeting of the Project Control Group.

10.9 General requirements for meetings

- (a) **(Meeting agendas):** The State will determine the agenda for each meeting of the Project Control Group, and in determining each agenda:
 - (i) will seek input from Project Co; and
 - (ii) include any items notified to it by any other member received no later than 10 Business Days prior to the date of the meeting.
- (b) **(Minutes):** The State will take minutes of each Project Control Group meeting and distribute such minutes prior to the next relevant meeting.
- (c) **(Continuity of membership):** The parties acknowledge the importance of the Project Control Group having a continuity of membership in order to successfully carry out its functions.
- (d) **(Changes to membership):** The people who are required to attend the Project Control Group meetings under this Deed may, where strictly necessary, be changed by the party they are representing, from time to time on notice to the other parties, together with details of the reason for the change.
- (e) **(Liability of Project Control Group):** The Project Control Group:
 - (i) is advisory only and its decisions or recommendations are not binding on the parties; and
 - (ii) does not have any legal responsibilities, Liability or right to require any of the parties to act or refrain from acting in any way.
- (f) **(No limitation):** The parties' involvement in the Project Control Group does not affect their respective rights and obligations under this Deed.
- (g) **(Further information):** The State may require Project Co to provide information on matters discussed at any Project Control Group meeting and Project Co must provide that information in a timely manner.
- (h) **(No reliance or Claim):** Neither the State nor Project Co will be entitled to:
 - (i) rely on any statement, opinion, advice, representation, warranty, promise or undertaking made or given by or on behalf of or any member of the Project Control Group (in its capacity as a member); or
 - (ii) make any Claim against any such group or committee or any member of the Project Control Group (in its capacity as a member),arising in connection with anything, which any such member does or fails to do in its capacity as a member of the Project Control Group.
- (i) **(Conduct at meetings):** The parties must to the greatest extent possible, freely and openly discuss the Project Activities at all meetings (including the meetings of the Project Control Group), and Project Co must procure that its Associates fully respond to any questions which the State may ask Project Co at any meetings conducted under this Deed within 5 Business Days.

10.10 Communications and Community Relations

- (a) **(Project Co acknowledgement):** Project Co acknowledges that the areas where Project Activities are being carried out are of great importance to many people, including local residents and businesses.

- (b) **(Community relations):** Project Co must manage and participate in all community relations programs and activities as:
 - (i) required by the Design Requirements and the Services Requirements;
 - (ii) required by any Approvals;
 - (iii) contained in the Communications and Community Relations Plan;
 - (iv) reasonably requested by the State from time to time.
- (c) **(Communications approach):** Without limiting the generality of clause 10.10(a), Project Co must:
 - (i) prepare and comply with, implement (in conjunction with the State) and fund the preparation of, consultations on and implementation of the Communications and Community Relations Plan; and
 - (ii) not, and must procure that its Associates do not, communicate with the media or communicate any information publicly with regard to the Project without the prior written consent of the State Representative.
- (d) **(Community obligations):** Project Co must (to the extent not otherwise addressed in the Communications and Community Relations Plan):
 - (i) unless otherwise advised by the State Representative, organise and chair all stakeholder group and community meetings, workshops and other stakeholder and community involvement events relating to the Project Activities;
 - (ii) promptly notify the State Representative of any protests, requests, problems and complaints in connection with the Project and not liaise directly with members of the community in relation to protests, requests, problems and complaints without the prior written consent of the State Representative;
 - (iii) consult with the State Representative with a view to agreeing a plan to manage community and political protests, requests, problems and complaints; and
 - (iv) engage directly with Clarence Valley Council in relation to matters in connection with traffic management, staff recruitment and economic opportunities in the area.

10.11 Conflicts of Interest

Project Co must:

- (a) **(Avoid conflict):** avoid any conflicts of interest that might arise in relation to the exercise or performance by Project Co or any of its Associates of any power, duty or function conferred or imposed by or under this Deed or by or under any Law; and
- (b) **(Notify State):** must notify the State immediately of any conflict of interest which does arise, and act in accordance with any direction given by the State to the extent that it is able to do so in accordance with Law and this Deed.

10.12 Aboriginal participation (construction)

(a) Project Co must:

- (i) **(NSW Government Aboriginal Participation Plan):** comply with the NSW Government Policy on Aboriginal Participation in Construction as

amended from time to time, as at the date of this Deed, the edition dated 1 May 2015, as updated on 1 August 2016 (**NSW Government Aboriginal Participation Plan**); and

- (ii) (**Submission of Aboriginal Participation Plan**): prepare and submit to the State Representative and the NSW Procurement Board (nswbuy@finance.nsw.gov.au) its Aboriginal Participation Plan (Construction) in accordance with section 2.1 of the Delivery Phase Plans and Reports Schedule, showing how Project Co intends to direct the target project spend to appropriate Aboriginal education and employment opportunities during the Delivery Phase, which must, as a minimum, meet the standards set out in the Contract Particulars.
- (b) (**Management of Aboriginal Participation Plan**): Project Co must systematically manage its Aboriginal participation processes and implement its Aboriginal Participation Plan (Construction) in accordance with the NSW Government Aboriginal Participation Plan.
- (c) Project Co must:
 - (i) (**Preliminary Aboriginal Participation Report**): when the Works reach a stage which is 90% complete and as a condition precedent to Technical Completion, provide to the State Representative and the NSW Procurement Board (nswbuy@finance.nsw.gov.au), its Aboriginal Participation Report (Construction) which explains how the Aboriginal Participation Plan (Construction) has been implemented and what outcomes have been achieved; and
 - (ii) (**Final Aboriginal Participation Report**): at the end of the 12 Month period after the Date of Technical Completion, provide to the State Representative its final Aboriginal Participation Report (Construction) which includes the details of actual expenses incurred from the date of this Deed up to 12 Months after the Date of Technical Completion. Details included in the final Aboriginal Participation Report (Construction) must explain how the Aboriginal Participation Plan (Construction) has been implemented within the specified period and what actual outcomes have been achieved.
- (d) (**Format of plan and report**): The Aboriginal Participation Plan (Construction) and the Aboriginal Participation Reports (Construction) must be prepared in accordance with the NSW Government Aboriginal Participation Plan and in the format prescribed by the NSW Procurement Board (<https://www.procurepoint.nsw.gov.au/aboriginal-participation-construction-information-contractors>)
- (e) (**Compliance**): Project Co must demonstrate to the State, whenever requested, that it has met and is meeting at all times its obligations under clauses 10.12(a) to 10.12(d).

10.13 Aboriginal participation (operations)

- (a) (**Submission of Aboriginal Participation Plan (Operations)**): Project Co must prepare and submit to the State Representative its Aboriginal Participation Plan (Operations) in accordance with section 2.1 of the Operating Phase Plans and Reports Schedule, showing how Project Co intends to direct the planned project spend to appropriate Aboriginal education and employment opportunities during the Operating Phase, which will target the standards set out in the Contract Particulars.
- (b) (**Management of Aboriginal Participation Plan (Operations)**): Project Co must systematically manage its Aboriginal participation processes and implement its Aboriginal Participation Plan (Operations) in accordance with the Aboriginal Participation Plan (Operations).

- (c) **(Reporting):** Project Co must on an annual basis, provide to the State Representative, its Aboriginal Participation Report (Operations) which explains how the Aboriginal Participation Plan (Operations) has been implemented and what outcomes have been achieved.
- (d) **(Compliance):** Project Co must demonstrate to the State, whenever requested, that it has implemented and is continuing to manage and implement its Aboriginal participation processes in accordance with the Aboriginal Participation Plan (Operations).

10.14 Training and apprenticeships

- (a) **(Submission of Training and Apprenticeships Plan):** Project Co must prepare and submit to the State Representative, its Training and Apprenticeships Plan, in accordance with section 2.1 of the Delivery Phase Plans and Reports Schedule showing how Project Co intends to engage trainees and apprentices in respect of the Works which must, as a minimum, meet the standards set out in the Contract Particulars.
- (b) **(Management of trainees and apprenticeships):** Project Co must systematically manage its trainees and apprentices in accordance with the Training and Apprenticeships Plan.
- (c) **(Reporting):** Project Co must, in accordance with section 1 of the Delivery Phase Plans and Reports Schedule, provide to the State Representative, its Training and Apprenticeships Report which explains how the Training and Apprenticeships Plan has been implemented and what outcomes have been achieved.
- (d) Project Co must:
 - (i) **(Preliminary Training and Apprenticeships Report):** when the Works reach a stage which is 90% complete and as a condition precedent to Technical Completion, provide to the State Representative, its Training and Apprenticeships Report which explains how the Training and Apprenticeships Plan has been implemented and what outcomes have been achieved; and
 - (ii) **(Final Training and Apprenticeships Report):** at the end of the 12 Month period after the Date of Technical Completion, provide to the State Representative its final Training and Apprenticeships Report which includes the details of actual expenses incurred from the date of this Deed up to 12 Months after the Date of Technical Completion. Details included in the final Training and Apprenticeships Report and must explain how the Training and Apprenticeships Plan has been implemented within the specified period and what actual outcomes have been achieved.
- (e) **(Compliance):** Project Co must demonstrate to the State, whenever requested, that it has met and is meeting at all times its obligations under clauses 10.14(a) to 10.14(d).

11. Quality Assurance

11.1 General Obligations

- (a) **(Quality Assurance System – Project Co):** As soon as practicable after Financial Close, Project Co must develop, maintain and comply with a Quality Assurance System.
- (b) **(Quality Assurance System – Key Subcontractors):** Project Co must procure that:

- (i) as soon as practicable after Financial Close, the D&C Subcontractor develop, implement, maintain and comply with a Quality Assurance System which covers all Delivery Phase Activities which it carries out;
 - (ii) to the extent that the Operator is carrying out Delivery Phase Activities, the Operator acts consistently with a Quality Assurance System; and
 - (iii) as soon as practicable after the Operator commences the provision of the Services, the Operator develop, implement, maintain and comply with a Quality Assurance System.
- (c) **(Minimum standard):** Project Co's, and the Key Subcontractors', Quality Assurance System must:
- (i) be at least to the standard set out in Australian/New Zealand Standards AS/NZS ISO 9001 'Quality systems - model for quality assurance in design, development, production, installation and servicing' or an accepted international equivalent; and
 - (ii) have been certified by a JASANZ accredited certifying body, as complying with the requirements of AS/NZS ISO 9001 must remain current from when the Quality Assurance System is first certified until the end of the Term.
- (d) **(Subcontractors to have Quality Assurance Representative):** Project Co must have or must ensure that the Key Subcontractors have a suitably qualified Quality Assurance Representative to ensure that its Quality Assurance System is developed, implemented and maintained in accordance with this Deed.
- (e) **(Details of authority):** Details of the Quality Assurance Representative's authority to oversee and resolve quality related issues (including in respect of Subcontracts) must be included in Project Co's Quality Assurance System.

11.2 Audits and Rectification of non-conformance

- (a) **(Audit of performance):** The State may, as part of the audits it conducts under this Deed, audit the performance of the relevant Project Activities against the relevant Quality Assurance Plans and Quality Assurance Systems, including those of the Key Subcontractors.
- (b) **(Rectification of non-conformance):** Project Co and each Key Subcontractor must immediately rectify any non-conformance with its Quality Assurance Plan or Quality Assurance System as soon as it is notified of any such non-conformance.

11.3 Audits for compliance with this Deed

- (a) **(State may procure Associate):** The State may undertake or procure an Associate to undertake at any time up to 6 Months after the last day of the Term, audits of the Project Activities or the Relevant Infrastructure to verify Project Co's compliance with the State Project Documents, including the WHS Management Plan (as applicable).
- (b) **(Notice of audit):** Where it is reasonably able to do so, the State will provide Project Co with no less than 10 Business Days' notice of any audit under this clause 11.3.
- (c) **(Minimisation of disruption):** Where the State carries out or procures the carrying out of an audit under this clause 11.3, the State will use reasonable endeavours to minimise any disruption caused to the Project Activities.
- (d) **(Audit obligations):** Without limiting clause 28.2, Project Co must:

- (i) provide all Project Co Material requested by the State or any Associates of the State undertaking the audit that is relevant to the conduct of the audit; and
 - (ii) arrange for those undertaking the audit on behalf of the State to meet with any of Project Co's Associates and have access to users of the Relevant Infrastructure, including Inmates.
- (e) **(Audit scope):** An audit may include examination of:
- (i) any part of the Relevant Infrastructure;
 - (ii) the carrying out of any Project Activities;
 - (iii) the Accounts and Records;
 - (iv) Project Co Material; and
 - (v) any Project Co Entities' and its Associates' processes and methodologies.
- (f) **(State may provide report and request meeting):** The State may provide a copy of any report prepared as a consequence of the audit to Project Co and its Associates and may require Project Co and its Associates to attend a meeting to discuss the audit report.
- (g) **(Discussion of audit):** The Project Control Group must discuss the contents of any audit when required by the State and seek to agree:
- (i) any action Project Co must undertake to ensure that it addresses any failure by any Project Co Entity to comply with the requirements of the State Project Documents; and
 - (ii) the time in which any such action must be undertaken.
- (h) **(Implementation of actions):** To the extent that:
- (i) the parties reach agreement in accordance with clause 11.3(g), Project Co must, at its own cost, implement the actions as agreed between the parties; or
 - (ii) the parties are unable to reach an agreement in accordance with clause 11.3(g), the State may (acting reasonably but without limiting the State's rights under this Deed) direct Project Co as to:
 - A. any action Project Co must (or which Project Co must procure Finance Co to) undertake to meet the requirements referred to in clause 11.3(g)(i); and
 - B. the time in which any such action must be undertaken by a Project Co Entity,

and Project Co must (and must procure Finance Co to), at its own cost, implement such actions.
- (i) **(Liability for cost of audit):** Project Co will not be liable for any costs incurred by the State performing audits under this clause 11.3, unless an audit establishes that any Project Co Entity is in material breach of a State Project Document, or has acted negligently or fraudulently in the carrying out of the Works or the performance of any of the Services, in which case the State's reasonable costs of performing the audit are to be paid by Project Co as a debt due and payable by Project Co to the State.

- (j) **(Audit during Delivery Phase):** If the State conducts an audit in accordance with this clause 11.3 during the Delivery Phase, the State will, and will procure that its Associates, comply with the Site Access and Interface Protocols and do not otherwise unreasonably delay Project Co in achieving Completion.
- (k) **(Expert determination of Dispute):** Any Dispute by Project Co as to the accuracy of any audit report may be referred by either party for expert determination in accordance with clause 52.
- (l) **(Auditor-General not limited):** Without limiting this clause 11.3, the parties acknowledge and agree that, notwithstanding any provision of this Deed to the contrary:
 - (i) the powers and responsibilities of the Auditor-General for the State of New South Wales under the *Public Finance and Audit Act 1983 (NSW)* (or any substituted legislation) are not limited or affected by the terms of this Deed and each party submits to those powers and responsibilities;
 - (ii) the State or any Project Co Entity may be the subject of an audit by the Auditor-General pursuant to the *Public Finance and Audit Act 1983 (NSW)*; and
 - (iii) without limiting clause 11.3(l)(i), Project Co undertakes to the State that it will (and will procure Finance Co to), at its own cost, cooperate and fully comply with the directions of the Auditor-General and the State in relation to any audit referred to in clause 11.3(l)(ii).

12. Subcontracting and third party arrangements

12.1 Subcontracting

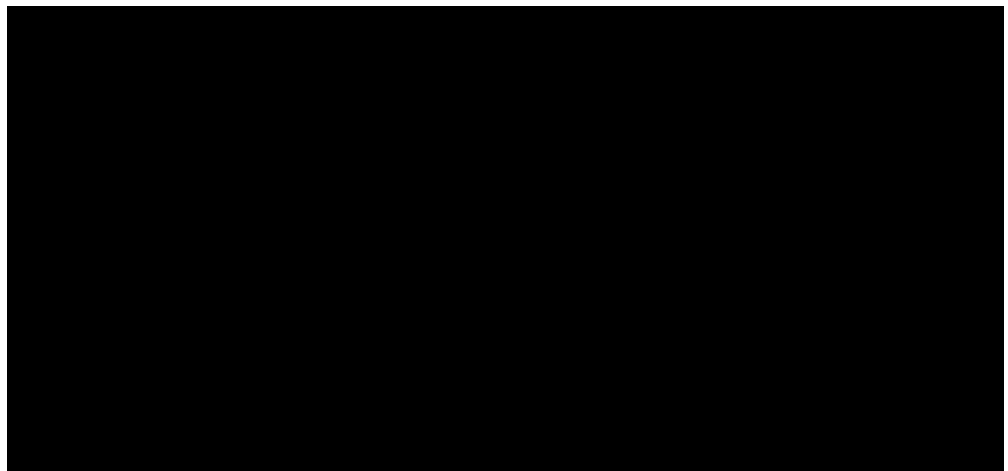
Project Co:

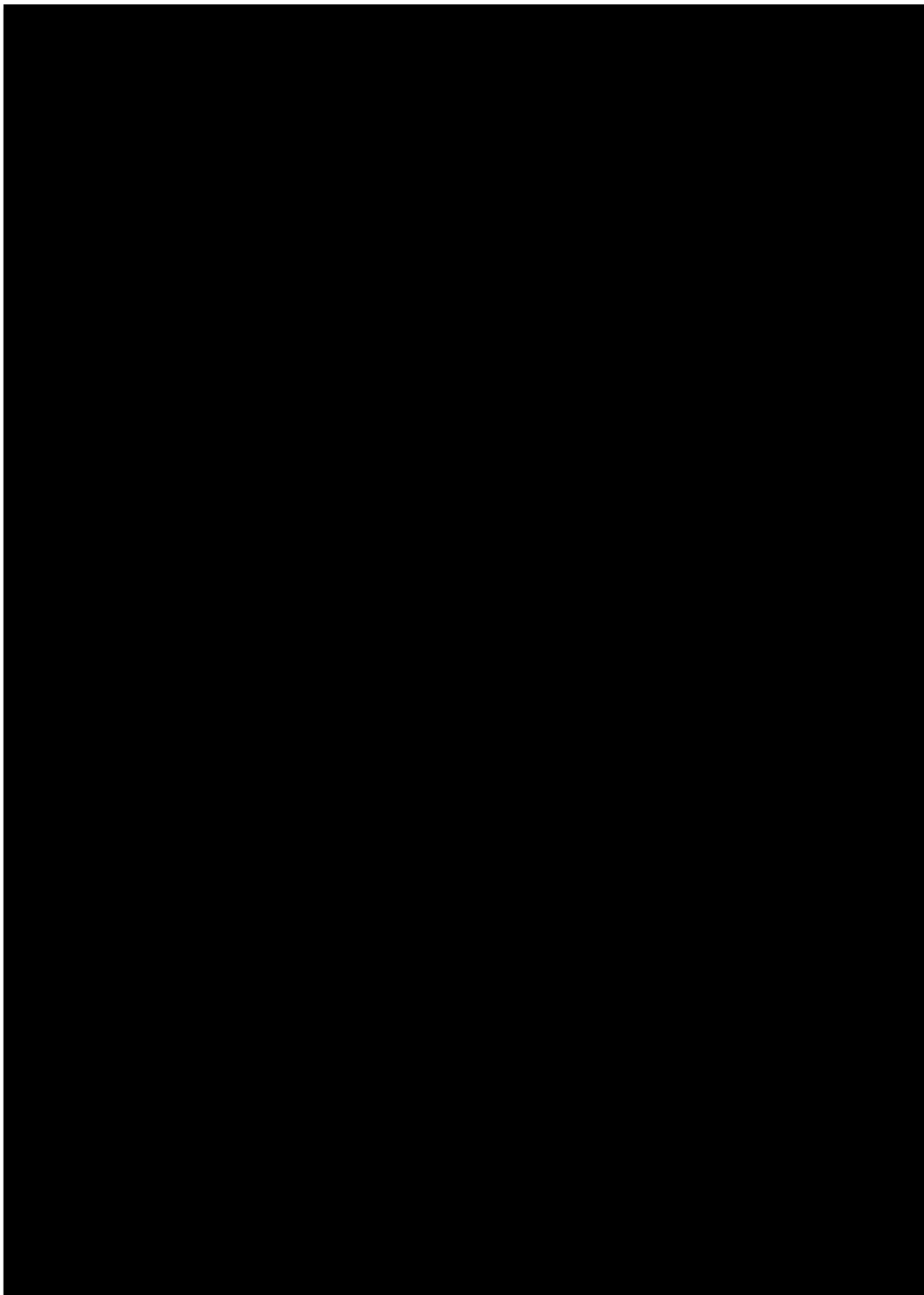
- (a) **(Notification):** must notify the State of all Subcontractors it intends to engage to undertake the Project Activities;
- (b) **(Project Activities):** must not subcontract the performance of the Project Activities or any part of them except:
 - (i) in accordance with this clause 12; and
 - (ii) in respect of any Subcontract in respect of the management of the Correctional Complex or a Correctional Centre only (including the Operator Subcontract or any subcontractor to the Operator), with the prior written approval of the Commissioner under the Corrections Act and on such conditions at the Commissioner thinks fit;
- (c) **(State Project Documents):** is not relieved from any or all of its obligations or Liabilities under the State Project Documents as a result of subcontracting any of those obligations or Liabilities;
- (d) **(Responsible for subcontractors):** will be responsible for the acts and omissions of any Subcontractor and their respective Associates in carrying out the Project Activities as if such acts or omissions were Project Co Acts or Omissions; and
- (e) **(Provide copies of subcontracts):** must promptly provide to the State a copy of:
 - (i) each Significant Subcontract; and
 - (ii) any other Subcontract requested by the State,

entered into or proposed to be entered into involving any of the Project Activities (regardless of whether Project Co is a party to that contract) and, where requested, all plans, specifications and drawings related to those Subcontracts.

12.2 Key Subcontracts and Significant Subcontracts

- (a) **(Employment):** Project Co must employ the Key Subcontractors and Significant Subcontractors as specified in the Contract Particulars in the relevant roles specified in the Contract Particulars.
- (b) **(Restrictions):** Project Co must not, and must ensure none of its Associates:
- (i) amend or agree to amend, grant an indulgence, waive or accept any waiver, release or adjustment of any rights to or under any Key Subcontract, any Significant Subcontract or the Interface Deed in a way that would:
 - A. have a material adverse effect on the ability of Project Co to perform and observe its obligations under any Project Document; or
 - B. have a material adverse effect on the rights, or increase the Liabilities or obligations of, the State under any Project Document or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document; or
 - (ii) terminate, rescind, novate or assign, or agree to any termination, rescission, novation or assignment of any of the Key Subcontracts, any Significant Subcontract or the Interface Deed,
- without the prior consent of the State (which will not be unreasonably withheld).
- (c) **(Side Deed):** Project Co must procure from:
- (i) each Key Subcontractor; and
 - (ii) any Significant Subcontractor (if required by the State),
- an executed deed substantially in the form of the Side Deed applicable to that Subcontractor or, if none is applicable, in accordance with the form of the Subcontract Side Deed.
- (d) **(Prescribed terms):** Project Co must ensure that each Key Subcontract and Significant Subcontract includes a clause which provides that, if this Deed is terminated in accordance with clause 49:





12.3 Requirements for subcontracting

- (a) **(Engagement of subcontractors):** Without limiting clause 12.2, Project Co must not engage any Subcontractor, or allow any Subcontractor to be engaged, in connection with the Project, unless:
 - (i) if the State requires Probity Investigations to be carried out in respect of that Subcontractor, the State's probity requirements as described in clause 63 are satisfied;
 - (ii) the proposed Subcontractor has the financial capacity, applicable registrations and certifications, experience and capability to perform the

subcontracted obligations to at least the standards required by this Deed; and

- (iii) in respect of a Key Subcontract or Significant Subcontract, the Key Subcontract or Significant Subcontract contains further provisions expressly recognising and permitting the exercise by the State of its rights under and contains all relevant provisions prescribed by (if applicable) clauses 12.1, 17.2, 20.1, 28.2, 42, 48, 57, 58, 61, 62 and 63.

(b) **(Occurrence of Probity Event):** If, following a Probity Investigation in respect of a proposed Subcontractor, the State:

- (i) determines that a Probity Event has occurred in respect of a Subcontractor or a Relevant Person engaged by that Subcontractor; and
- (ii) is of the opinion that it is consequently not desirable for that Relevant Person to take part in the management or performance of the Subcontract, or for the Subcontractor to be engaged in connection with the Project,

the State may (as the case may be):

- (iii) direct Project Co that the Subcontractor must not be engaged in connection with the Project; or
- (iv) approve the Subcontract on condition that the Relevant Person:
 - A. not take part in the management or performance of the Subcontract;
 - B. not be allowed to access the Site; or
 - C. not be given Confidential Design Information or Personal Information,

or such other conditions as the State Representative considers necessary to quarantine that Relevant Person from the Project and on conditions that the Subcontractor provides its written undertaking to the State Representative to comply with such conditions.

(c) **(Compliance with Subcontractor obligations):** Project Co must, and must procure that all Key Subcontractors and Significant Subcontractors, comply with their respective obligations under each Subcontract they enter into.

12.4 Payment of amounts owed to Subcontractors

(a) **(Copies of notices under Security of Payment Act):** Project Co must ensure that, within:

- (i) 5 Business Days after any notice or document under the Security of Payment Act (excluding any 'payment claim' or 'payment schedule' as those terms are defined under the Security of Payment Act) is given to, or received by, Project Co or any Subcontractor; or
- (ii) 2 Business Days after notice of a Subcontractor's intention to suspend work under a Subcontract in accordance with the Security of Payment Act is given to, or received by, Project Co or any Subcontractor,

a copy of that notice is given to the State.

(b) **(Suspension under Security of Payment Act):** If a Subcontractor has become entitled to suspend work under a Subcontract in accordance with the Security of

Payment Act because of a failure by Project Co or any Subcontractor to pay moneys due and payable to that Subcontractor, the State may pay to the Subcontractor the amount owing to the Subcontractor in connection with that work, and any amount so paid by the State will be a debt due and payable by Project Co to the State. Where practicable, the State will provide prior written notice to Project Co prior to paying the relevant Subcontractor.

- (c) **(State may pay Subcontractors):** Notwithstanding clause 12.4(b), if any amount is:
- (i) certified as payable; or
 - (ii) otherwise due and payable,

to a Subcontractor under a Subcontract, and Project Co or the relevant Subcontractor does not pay such amount to that Subcontractor in accordance with that Subcontract, then, without limiting any provision of the Financiers Tripartite Deed, the State may pay such amount to that Subcontractor provided it has given Project Co 10 Business Days' notice of its intention to do so, and any amount so paid by the State to that Subcontractor will be a debt due and payable by Project Co to the State.

12.5 Obligations as to Claims made on pass-through basis

Project Co must, in circumstances where it makes any Claim against the State as a consequence of a Claim that has been made by a Subcontractor against Project Co, take reasonable steps to ensure that any such Claim made by the Subcontractor is bona fide, prior to making any related Claim against the State, and must notify the State of the steps it has taken prior to, or at the same time as, it makes the Claim against the State.

12.6 Industrial issues

Project Co:

- (a) **(Solely responsible):** has sole responsibility for, and must manage, all aspects of industrial relations in connection with the Project; and
- (b) **(To inform State):** must keep the State fully and immediately informed of industrial relations issues or action which affect or are likely to affect the carrying out of the Project Activities and what action or measures (including settlements) Project Co has taken or proposes to take to overcome the effects of such industrial relations issues or action.

12.7 Competence

- (a) **(Project Co to ensure competence):** Project Co must ensure that all persons employed or engaged on the Project Activities hold appropriate qualifications and have received appropriate training for their intended duties, and provide evidence of such qualifications and training to the State as reasonably requested.
- (b) **(Incompetence):** If the State notifies Project Co of any person employed or engaged to carry out the Project Activities who, in the State's reasonable opinion, is incompetent, does not meet the standard required by clause 12.7(a), or is negligent, dishonest or guilty of misconduct, then Project Co must promptly:
 - (i) remove the person or ensure that such person is promptly removed from carrying out the Project Activities;
 - (ii) replace the person or ensure that such person is promptly replaced; and
 - (iii) ensure that the person is not again employed or engaged to carry out the Project Activities.

13. Workforce

13.1 Employee Requirements

- (a) **(Training and checks):** Project Co must ensure that each employee of Project Co and each Subcontractor engaged to provide any Project Activities:
- (i) completes the training detailed in the Employee Requirements for those particular types of employee; and
 - (ii) prior to being engaged to provide the Project Activities, passes the relevant Employee Checks.
- (b) **(Availability of results):** Project Co must:
- (i) promptly make the results of:
 - A. any Employee Checks; or
 - B. any Probity Investigation that Project Co is required to undertake in accordance with clause 63.2,

available to the State.
- (c) **(Denial of employment):** Without prejudice to clause 63.2(d), the State may require Project Co to deny or procure that the Subcontractors deny employment to a prospective employee and refuse to engage any person or discontinue the employment or engagement of any person if the:
- (i) Probity Investigation reveals information indicating that that person does not comply with the requirements of this Deed;
 - (ii) Employee Requirements are not met at all times by that person;
 - (iii) employee fails an Employee Check; or
 - (iv) State considers that that person is unsuitable or unqualified to provide the Project Activities assigned to that person.

13.2 Principal contractor

- (a) **(Definitions):** In this clause 13.2 and 13.3, the terms 'construction project', 'construction work', 'principal contractor', 'workplace' and 'WHS management plan' have the same meanings given to those terms under the WHS Act and WHS Regulations. For the purposes of the WHS Act and WHS Regulations and this Deed, the work under this Deed and the work under any Subcontract are taken to be part of the same 'construction project'.
- (b) **(Side Deeds):** The parties acknowledge and agree that under the Side Deeds, from the date on which any Side Deed is entered into, the State:
- (i) engages the Appointed Principal Contractor as the principal contractor for any construction project forming that part of the Project Activities for which the relevant Appointed Principal Contractor will be engaged; and
 - (ii) authorises the Appointed Principal Contractor to have management or control of that part of the workplace to which any construction project for which they are engaged relates and to discharge the duties of a principal contractor under the WHS Regulation in relation to the construction project forming that part of the Project Activities for which they are engaged.

- (c) **(D&C Subcontractor's engagement and appointment):** The D&C Subcontractor's engagement and appointment as principal contractor by the State in respect of any construction project in relation to the Delivery Phase Sites will continue until the earlier of:
- (i) the Date of Technical Completion;
 - (ii) the termination of the D&C Side Deed in relation to that D&C Subcontractor; and
 - (iii) the termination of this Deed.
- (d) **(Operator's engagement and appointment):** The Operator's engagement and appointment as principal contractor by the State in respect of any construction project in relation to the Project Activities during the period after the Date of Technical Completion will continue until the earlier of:
- (i) that relevant construction project being complete;
 - (ii) the termination of the Operator Side Deed in relation to that Operator;
 - (iii) the termination of this Deed; and
 - (iv) the Expiry Date.
- (e) **(Appointed Principal Contractor):** Project Co:
- (i) must procure and ensure that each Appointed Principal Contractor accepts the engagement in clause 13.2(b) and agrees to discharge the duties imposed on a principal contractor under the WHS Legislation, the Side Deeds and the State Project Documents (as applicable) and the Appointed Principal Contractor's WHS management plan for the construction project;
 - (ii) must not do anything which would result in either Appointed Principal Contractor being in breach of its obligations as principal contractor under the WHS Regulation; and
 - (iii) agrees to comply, and to ensure that its personnel comply, with all lawful directions relating to health and safety given by each Appointed Principal Contractor and if it believes that it is unable to do so, agree to notify and provide details to the Appointed Principal Contractor immediately.
- (f) **(Ineffective or no appointment of Appointed Principal Contractor):** If the State's appointment of the Appointed Principal Contractor as principal contractor is not effective for any reason, or, for any period, the State has not appointed a principal contractor for any Project Activities:
- (i) Project Co agrees that Project Co is appointed by the State as principal contractor in respect of the Project Activities for which the Appointed Principal Contractor was engaged to perform as principal contractor (albeit that the appointment as principal contractor is not effective) or for which the State has not appointed a principal contractor;
 - (ii) the State authorises Project Co to have management or control of that part of the workplace to which the construction project for which the Appointed Principal Contractor was engaged as principal contractor (albeit, ineffectively) relates or for which the State has not appointed a principal contractor and to discharge the duties of a principal contractor under the WHS Regulation in relation to the construction project forming the whole or part of the applicable Project Activities; and

- (iii) without limiting clauses 13.2(f)(i) and 13.2(f)(ii), if Project Co is being appointed principal contractor under this clause 13.2(f) because the appointment of the Appointed Principal Contractor by the State has been ineffective, Project Co agrees that it will ensure that the Appointed Principal Contractor exercises and fulfils the functions and obligations of the principal contractor under the WHS Regulation, the WHS management plan for the construction project and this Deed and the Side Deeds and State Project Documents (as applicable) as if the Appointed Principal Contractor had been validly engaged and authorised as principal contractor for the construction project under the WHS Regulation.

- (g) **(Failure to comply):** If an Appointed Principal Contractor or Project Co (if appointed principal contractor) fails to comply with any of its obligations as principal contractor under the WHS Regulation, this Deed, the Side Deed and any State Project Document (as applicable) and the WHS management plan for the construction project, the State may:
 - (i) direct Project Co (if the Appointed Principal Contractor is the principal contractor) to carry out the obligations of principal contractor and the cost incurred in carrying out these obligations will be the responsibility of Project Co; or
 - (ii) if Project Co is appointed the principal contractor for the construction project, carry out the obligations of principal contractor itself or have them carried out by a third party, and the cost incurred by the State in having those obligations carried out will be a debt due and payable by Project Co to the State.

- (h) **(Documents to be provided):** Without limiting Project Co's reporting or other obligations elsewhere under this Deed, Project Co must procure that each Appointed Principal Contractor will:
 - (i) as soon as reasonably practicable, provide Project Co with access to any registers, records and documents relating to work health safety and rehabilitation, including their WHS management plan, subcontractors' safe work method statements, records of persons carrying out construction work, and any register of hazardous substances that each Appointed Principal Contractor is required to prepare and maintain in connection with its obligations as principal contractor; and
 - (ii) at all reasonable times and at the request of Project Co, provide Project Co with access to such documents or records as may be necessary to establish the compliance by each Appointed Principal Contractor with its obligations under the Side Deeds and State Project Documents (as applicable), the WHS Legislation and its WHS management plan,

and allow Project Co to make copies of such documents or records.

Where Project Co is appointed the principal contractor under clause 13.2(f), the obligations of the principal contractor in this clause 13.2(h) will apply to Project Co and information will be provided to the State or such other third party nominated by the State.

13.3 Work Health and Safety

- (a) **(Performance of Services and Project Activities):** Project Co must perform the Services and carry out the other Project Activities:
 - (i) safely and in a manner that, so far as it is reasonably practicable, does not put at risk the health and safety of persons; and

- (ii) in a manner that protects property.
- (b) Project Co must:
 - (i) **(Compliance with WHS obligations):** in carrying out the Project Activities:
 - A. ensure that it complies with all Laws and other requirements of this Deed, the Side Deeds and State Project Documents (as applicable) and the WHS Management Plan, in respect of work health, safety and rehabilitation management; and
 - B. require all Subcontractors to comply with their obligations referred to in this Deed, the Side Deeds and State Project Documents (as applicable), the WHS Legislation and the WHS management plan applicable to the Project Activities they are undertaking;
 - (ii) **(WHS Management System and Plan):** have in place, and comply with a WHS Management System and WHS Management Plan. Project Co must prepare and provide a WHS Management Plan to the State:
 - A. before commencement of the Works, in relation to the Delivery Phase; and
 - B. prior to the Operational Commencement Date, in relation to the Operating Phase,and, if the State has any comments about the WHS Management Plan, Project Co must take those into account and prepare an amended WHS Management Plan. Project Co must ensure the WHS Management Plan is fit for purpose, including that the content of the WHS Management Plan is accurate, appropriate and up to date (taking into account changes in the Project Activities) at all times;
 - (iii) **(Notification of matters and incidents):** notify the State immediately (and in any event within 12 hours of such matter arising) of:
 - A. all work health, safety and rehabilitation matters in connection with the performance of the Project Activities that are required to be notified to an Authority under the WHS Legislation (whether required to be notified by a Subcontractor or other party performing the Project Activities); and
 - B. all major injury incidents sustained at the Site;
 - (iv) **(Notices issued by Authorities):** notify the State within 1 Business Day of receipt of any safety related prohibition notice, improvement notice, correspondence or other notice issued by an Authority or other person in connection with the Project Activities (whether issued to a Subcontractor or other party performing the Project Activities);
 - (v) **(Written assurances from Subcontractors):** institute systems to obtain regular written assurances from all Subcontractors about their ongoing compliance with WHS Legislation, their obligations under the Side Deeds and State Project Documents (as applicable) in relation to work health safety and rehabilitation matters, and the WHS management plan applicable to the Project Activities they are undertaking;
 - (vi) **(Provision of written assurances to the State):** provide the written assurances referred to in clause 13.3(b)(v), together with written assurances from Project Co about Project Co's ongoing compliance with

the WHS Legislation their obligations under this Deed, the Side Deeds and the State Project Documents (as applicable) in relation to work health safety and rehabilitation matters, and its WHS Management Plan to the State. Project Co's assurance must be based on auditing and monitoring conducted under clause 13.3(c);

- (vii) **(Directions):** comply with any direction about work health safety and rehabilitation matters from an Authority or the State (which may include a direction to issue a direction to a Subcontractor);
 - (viii) **(Not to breach WHS Legislation):** ensure that it does not do anything or fail to do anything that would cause the State or any of its Associates to be in breach of the WHS Legislation;
 - (ix) **(Cooperate in discharge of obligations):** cooperate with the State in respect of the discharge of any work health and safety obligations of the State in connection with the Project under the WHS Act and WHS Regulations and:
 - A. comply with all reasonable requests of the State to assist it to discharge its obligations; and
 - B. refrain from doing anything that may impede the State in discharging its obligations; and
 - (x) **(Equivalent Subcontract clause):** procure that each Subcontract includes provisions equivalent to clauses 13.3(a) to 13.3(c).
- (c) **(Auditing and monitoring):** Project Co must:
- (i) regularly audit and monitor its compliance with the WHS Legislation, the WHS Management Plan and its obligations under this Deed, the Side Deeds and the State Project Documents (as applicable) in relation to work health safety and rehabilitation matters;
 - (ii) immediately undertake any corrective work or action identified in the audit as a departure from the WHS Legislation, the WHS Management Plan and its obligations under this Deed, the Side Deeds and the State Project Documents (as applicable) in relation to work health safety and rehabilitation matters, at its expense; and
 - (iii) report to the State about the outcome of any auditing and monitoring under this clause 13.3(c), as required by the State.
- Project Co must, at the State's direction, conduct auditing or monitoring as provided for in this sub-clause. Any such auditing or monitoring must be conducted within the time specified by the State.
- (d) **(Project Co Responsible):** Except in relation to the obligations of any principal contractor under the WHS Legislation appointed in accordance with this clause 13, Project Co accepts that it is:
- (i) **(Health and Safety):** responsible for all aspects of health and safety relating to the Relevant Infrastructure, the Site and the Project Activities from Financial Close until the Expiry Date and it cannot delegate or assign this responsibility to a third party without the prior approval of the State; and
 - (ii) **(Employment and conditions):** entirely responsible for the employment and conditions of service of Project Co's employees and must procure that each Subcontractor is likewise responsible for its employees, and

that each Subcontractor complies with the same obligations and requirements as required of Project Co under this clause 13.

13.4 State may act if Project Co fails to comply

To the extent that Project Co fails to comply with any obligation under this clause 13, the State may, in addition to any other remedies under this Deed or at Law, on reasonable prior notice to Project Co, do all things, or engage a third party to do all things, necessary to rectify the failure and the reasonable costs of doing so will be a debt due and payable by Project Co to the State.

13.5 Long service leave levy

Before commencing construction of the Works, Project Co must:

- (a) **(Payment of long service levy):** pay (or procure payment) to the Building and Construction Industry Long Service Payments Corporation, or its agent, the amount of the long service levy payable in respect of the building or construction work under the *Building and Construction Industry Long Service Payments Act 1986* (NSW) (**Levy**); and
- (b) **(Evidence of payment):** produce to the State Representative the document evidencing payment of the Levy.

13.6 Security clearances

- (a) **(National Police Certificate):** Project Co:
 - (i) must obtain a National Police Certificate for all Relevant Persons who carry out Project Activities at the Correctional Complex prior to them commencing such Project Activities or will otherwise have access to Confidential Design Information or Personal Information;
 - (ii) is not obliged to obtain a National Police Certificate for a Relevant Person pursuant to clause 13.6(a)(i) if Project Co can provide to the State a National Police Certificate in relation to that Relevant Person which is dated no more than 12 months before the date on which the Relevant Person will commence the Project Activities;
 - (iii) without limiting clause 13.6(a)(iv), must obtain an updated National Police Certificate for any Relevant Person to which clause 13.6(a)(i) or 13.6(a)(ii) apply every 5 years throughout the Term for so long as any such Relevant Person continues to carry out any Project Activities or otherwise continues to have access to any Confidential Design Information or Personal Information; and
 - (iv) if requested by the State, must obtain a further National Police Certificate for any Relevant Person to which clause 13.6(a)(i) or 13.6(a)(ii) apply from time to time throughout the Term.
- (b) **(Further security clearances):** If the State, acting reasonably, decides that a further security clearance is required in relation to any Relevant Persons referred to in 13.6(a), then Project Co must ensure that any such Relevant Person, as may be requested by the State from time to time throughout the Term, undergoes such security clearance, as reasonably required by the State.
- (c) **(Uncleared Personnel):** If:
 - (i) Project Co does not obtain a National Police Certificate for a Relevant Person in accordance with clause 13.6(a), or the State, acting reasonably, has concerns in relation to the results of a National Police Certificate obtained for a Relevant Person; or

- (ii) if any Relevant Person referred to in clause 13.6(a) is required by the State to undergo a security clearance pursuant to clause 13.6(b) and does not undergo the requested security clearance, or does not meet the relevant clearance requirements,

then Project Co must not, except to the extent expressly authorised by the State, permit the Relevant Person (**Uncleared Personnel**) to undertake any Project Activities or have access to any Confidential Design Information or Personal Information.

- (d) (**Ongoing notification**): Without limiting Project Co's obligations under clause 63.1(a), it is Project Co's responsibility to notify the State of any behaviour by any Relevant Person, or of any other circumstances, which come to Project Co's attention that may cast doubt on that Relevant Person's fitness to be involved in any way with the Project.
- (e) (**State rights**): If the State, in its absolute discretion, considers that any Relevant Person:
 - (i) has misconducted him or herself;
 - (ii) is or becomes incapable of efficiently performing his or her duties;
 - (iii) is or becomes a person whom it would not be in the public interest for Project Co to engage or be associated with;
 - (iv) has, or becomes likely to have, a criminal history; or
 - (v) is not, or becomes a person who is not, in the State's opinion, suitable to be involved in providing any of the Project Activities,

the State may give to Project Co notice and Project Co must without delay remove such person from the performance of any of the Project Activities. The State has no obligation to disclose to Project Co the reasons for a decision made under this clause 13.6(e).

13.7 Employment of CSNSW Employees

- (a) Project Co, Project Co's Associates and the State will cooperate in the identification of any CSNSW Employee that Project Co or any of its Associates wishes to make an offer employment to in connection with the provision of the Services.
- (b) Any offer of employment by Project Co or any of its Associates to a CSNSW Employee must include the following terms:
 - (i) the CSNSW Employee's employment cannot be terminated for one year from the date of commencement except:
 - A. for serious misconduct;
 - B. pursuant to the proper application of reasonable disciplinary procedures;
 - C. if the employee is no longer able to perform the inherent requirements of the position; or
 - D. by agreement with the employee;
 - (ii) any annual leave and extended leave that is accrued and untaken as at the date the CSNSW Employee ceased employment with the State that is not 'cashed out' by the employee at that time will be recognised by Project Co or its Associate; and

- (iii) the CSNSW Employee can continue to contribute to the superannuation fund that he or she contributed to immediately prior to ceasing employment with the State.

13.8 Compensation for transfer of accrued annual leave and extended leave

The State will pay Project Co an amount in consideration for the assumption by Project Co or an Associate of the accrued and untaken leave entitlements of any Transferring Employee, as referred to in clause 13.7(b)(ii). The amount will be calculated in accordance with any applicable industrial instrument or legislation, and will not include any amount for any annual leave or extended leave the Transferring Employee cashes out on the termination of their employment with the State.

13A Superannuation for Transferring Employees

13A.1 Definitions

In this clause 13A:

Acceptable Credit Rating means a credit rating of at least BBB minus by Standard and Poor's (Australia) Pty Limited or, if no rating is provided by Standard and Poor's (Australia) Pty Limited, an equivalent rating with another reputable rating agency (as the State may approve in writing), provided that if the relevant rating agency changes the manner in which its credit ratings are calculated or derived, then the Acceptable Credit Rating will be deemed to be the credit rating recognised by that rating agency which most closely corresponds to an Standard and Poor's (Australia) Pty Limited credit rating of at least BBB minus as at the date of this Deed.

DB Contribution means, in respect of a DB Employee, the contributions that the STC Actuary determines are payable in respect of the DB Employee on and from the Transfer Date, having regard to the New Employers' Employer Reserve in the Defined Benefit Scheme at the time.

DB Employee means a Transferring Employee who is a member of a Defined Benefit Scheme.

Defined Benefit Scheme means each of:

- (a) the State Superannuation Scheme or SSS, as constituted pursuant to the *Superannuation Act 1916* (NSW);
- (b) the State Authorities Superannuation Scheme or SASS, as constituted pursuant to the *State Authorities Superannuation Act 1987* (NSW); and
- (c) the State Authorities Non-Contributory Superannuation Scheme or SANCS, as constituted pursuant to the *State Authorities Non-Contributory Superannuation Act 1987* (NSW).

Employer has the meaning given to that term in the governing rules of a Defined Benefit Scheme.

Employer Admission Date has the meaning given to it in clause 13A.7(a).

Employer Reserve has the meaning given to that term in the governing rules of the Defined Benefit Scheme.

Minimum Superannuation Contribution means the 'charge percentage' of an employee's 'ordinary time earnings' (as those expressions are defined in the Superannuation Guarantee Legislation) or such other amount as is required to:

- (a) avoid the imposition of the superannuation guarantee charge under the Superannuation Guarantee Legislation; or

- (b) comply with any other legal obligation pertaining to employee superannuation contributions (including, but not limited to, under a contract of employment, an industrial instrument such as an award or agreement or any other Law).

New Employer means the Entity nominated by Project Co pursuant to clause 13A.2(c)(i) who will be the employer of any Transferring Employee.

New Employers' Employer Reserve has the meaning given to it in clause 13A.4(a)(ii)(A).

Past Service Assets has the meaning given to it in clause 13A.4(a)(ii)(B)2).

Past Service Liabilities has the meaning given to it in clause 13A.4(a)(ii)(B)1).

Post-transfer DB Amount has the meaning given to it in clause 13A.7(b).

Post-transfer DB Statement has the meaning given to it in clause 13A.7(b).

Post-transfer Transferring DB Employees has the meaning given to it in clause 13A.9.

STC means the SAS Trustee Corporation, the trustee of each Defined Benefit Scheme.

STC Actuary means the actuary or firm of actuaries as may be appointed as the actuary for the Defined Benefit Scheme by STC from time to time.

Superannuation Guarantee Legislation means:

- (a) the *Superannuation Guarantee Charge Act 1992* (Cth); and
- (b) the *Superannuation Guarantee (Administration) Act 1992* (Cth).

Transfer Date means the date on a Transferring Employee commences employment with the New Employer.

Transfer of Work means transferring work in connection with a transfer of business, as those terms are defined by the *Fair Work Act 2009* (Cth).

Transferring Employee's Superannuation Scheme has the meaning given to it in clause 13A.2(a)(i).

Treasurer means the treasurer of the State of New South Wales.

13A.2 Objectives

- (a) The parties acknowledge and agree that from the Transfer Date:
 - (i) under the terms of this Deed, a Transferring Employee will be entitled to continue as a contributor, member or employee for the purposes of any superannuation scheme in respect of which the Transferring Employee was a contributor, member or employee immediately before the Transfer Date (**Transferring Employee's Superannuation Scheme**) and will remain so entitled subject to any variation to that entitlement made by agreement or otherwise in accordance with Law; and
 - (ii) the continuity of the Transferring Employee's contract of employment is taken not to have been broken by the transfer of the Transferring Employee's employment, and service of the Transferring Employee with the State (including any deemed service with the State) that is continuous service up to the Transfer Date is taken for all purposes to be service with the New Employer.

- (b) The parties intend that in respect of a Transferring Employee, subject to the prior occurrence of the matters set out in clause 13A.4(a)(i), with effect on and from the Transfer Date:
- (i) the State will cease to contribute to the Transferring Employee's Superannuation Scheme;
 - (ii) the New Employer will contribute to the Transferring Employee's Superannuation Scheme, and be responsible for fully funding all benefits provided by that scheme in relation to each Transferring Employee in that scheme on and after the Transfer Date in place of the State; and
 - (iii) the State will cease to be responsible for funding any superannuation benefits accruing to the Transferring Employee in respect of periods of service, on and after the Transfer Date.
- (c) Project Co must:
- (i) notify the State, in writing, of the New Employer not less than 20 Business Days prior to the Operational Commencement Date;
 - (ii) procure that the New Employer comply with its obligations pursuant to this clause 13A.

13A.3 Continuation of membership

With effect on and from the Transfer Date, each Transferring Employee will remain a member of the Transferring Employee's Superannuation Scheme of which the Transferring Employee was a member immediately before the Transfer Date, except as otherwise required by Law (such as, for example, where the Transferring Employee chooses another fund in accordance with the Superannuation Guarantee Legislation or any applicable industrial award).

13A.4 New Employer to become a participating employer or contributor of the Transferring Employee's Superannuation Scheme

- (a) The State must use reasonable endeavours to:
- (i) enable the New Employer to become, with effect on and from the Transfer Date, a participating employer or contributor of each Transferring Employee's Superannuation Scheme (including applying for an appropriate order to schedule the New Employer as an Employer under the relevant Legislation governing each Defined Benefit Scheme);
 - (ii) procure that:
 - A. STC establish a new Employer Reserve in each Defined Benefit Scheme attributable to the New Employer which relates to the Transferring Employees who are members of that Defined Benefit Scheme (each such account to be known as the **New Employer's Employer Reserve**);
 - B. the STC Actuary calculates:
 - 1) the aggregate of the past service liabilities of the State attributable to the Transferring Employees as at the Transfer Date (**Past Service Liabilities**); and
 - 2) an asset amount equal to the amount calculated in clause 13A.4(a)(ii)(B)1) (**Past Service Assets**); and

- C. STC transfers from the State's Employer Reserve to the New Employer's Employer Reserve in each Defined Benefit Scheme, the Past Service Liabilities and the Past Service Assets in accordance with the relevant Legislation governing the Defined Benefit Scheme.
- (b) Subject to the prior occurrence of the matters set out in clause 13A.4(a)(i), Project Co must do all things necessary to ensure that, with effect on and from the Transfer Date:
 - (i) the New Employer becomes a participating employer or contributor of each Transferring Employee's Superannuation Scheme (including becoming an Employer of a Defined Benefit Scheme unless the State fails to discharge its obligations under clause 13A.4(a)(i)); and
 - (ii) each Transferring Employee is able to continue as a contributor, member or employee of the Transferring Employee's Superannuation Scheme as contemplated by clause 13A.3.
 - (c) Upon admission by the New Employer as a participating employer or contributor of a Transferring Employee's Superannuation Scheme, the New Employer will be bound by the governing rules of the Transferring Employee's Superannuation Scheme for as long as the New Employer is a participating employer or contributor of the Transferring Employee's Superannuation Scheme for the purposes of those rules.
 - (d) Subject to clause 13A.7, with effect on and from the Transfer Date, the New Employer will contribute to the Transferring Employee's Superannuation Scheme, and be responsible for fully funding all benefits provided by that scheme in relation to each Transferring Employee in that scheme on and after the Transfer Date in place of the State.
 - (e) The State shall request the Treasurer to make any orders as are necessary to give effect to the transactions contemplated by this clause 13A.4.
 - (f) The New Employer will not be responsible for the Past Service Liability attributable to a DB Employee unless the Past Service Assets attributable to that DB Employee as at the Transfer Date have been transferred to the New Employer's Employer Reserve in that scheme.

13A.5 State responsible for superannuation benefits for service up to the Transfer Date

The State must, up to the Transfer Date:

- (a) make Minimum Superannuation Contributions on behalf of each Transferring Employee (other than in relation to a DB Employee);
- (b) comply with the obligations with respect to superannuation under any contract or award in relation to any Transferring Employee covered by that contract or award; and
- (c) in respect of a DB Employee, contribute at a rate required by the governing rules of the Defined Benefit Scheme to fund the benefits provided by that scheme in respect of any period of service up to the Transfer Date; and
- (d) meet the costs associated with making the contributions referred to in clause 13A.5(a) or 13A.5(c).

13A.6 New Employer to fund superannuation benefits for service from the Transfer Date

- (a) Subject to clause 13A.7, the New Employer will be responsible for funding, and will fund, any superannuation benefits accruing to Transferring Employees in place of the State on and from the Transfer Date. For the avoidance of doubt, the New Employer must:
- (i) make Minimum Superannuation Contributions on behalf of each Transferring Employee (other than in relation to a DB Employee);
 - (ii) comply with the obligations with respect to superannuation under any contract or award in relation to any Transferring Employee covered by that contract or award; and
 - (iii) at any time that a DB Employee is a member of a Defined Benefit Scheme (including as a recipient of a pension payable under the Defined Benefit Scheme), that any surviving spouse or other beneficiary of the DB Employee is entitled to a benefit from the Defined Benefit Scheme, or that any other benefit otherwise remains payable from the Defined Benefit Scheme in respect of the DB Employee's membership of the Defined Benefit Scheme:
 - A. contribute at a rate required by the governing rules of the Defined Benefit Scheme to fund the benefits provided by the Defined Benefit Scheme in relation to the DB Employee on and from the Transfer Date; and
 - B. meet the costs associated with making the contributions referred to in clause 13A.6(a)(iii)(A).
- (b) Subject to clause 13A.7, the State will cease to be responsible for funding any superannuation benefits accruing to the Transferring Employee in respect of periods of service, on and after the Transfer Date.

13A.7 Delayed scheduling of the New Employer

If, despite Project Co discharging its obligations under clause 13A.4(b)(i), the New Employer does not become a participating employer or contributor of a Transferring Employee's Superannuation Scheme that is a Defined Benefit Scheme by the Transfer Date:

- (a) the State will, in respect of each Transferring Employee who is a member of the Defined Benefit Scheme, contribute at a rate required by the governing rules of the Defined Benefit Scheme to fund the benefits provided by that scheme during the period between the Transfer Date and the date the New Employer becomes a participating employer or contributor of that scheme (**Employer Admission Date**) and meet the costs associated with making those contributions;
- (b) the State may provide to the New Employer one or more statements (each a **Post-transfer DB Statement**) showing the amount of any contributions and costs paid by the State pursuant to clause 13A.7(a) (**Post-transfer DB Amount**); and
- (c) the New Employer will, within five Business Days after receiving a Post-transfer DB Statement from the State, pay to the State an amount equal to the Post-transfer DB Amount shown in the statement.

13A.8 No interest in the State's Employer Reserve in a Defined Benefit Scheme

- (a) Project Co:

- (i) acknowledges that none of Project Co or its Associates (including the New Employer) have any interest in the State's Employer Reserve in a Defined Benefit Scheme;
 - (ii) must not, and must procure that its Associates (including the New Employer) do not, make a claim on any part of the State's Employer Reserve in a Defined Benefit Scheme;
 - (iii) and its Associates (including the New Employer) release the State and STC from any claim on the State's Employer Reserve in a Defined Benefit Scheme that Project Co or its Associates (including the New Employer) may have;
 - (iv) indemnifies the State and STC against any claim that Project Co or its Associates (including the New Employer) may make on the State's Employer Reserve in a Defined Benefit Scheme; and
 - (v) acknowledges that the State's Employer Reserve in a Defined Benefit Scheme remains available for the sole use and benefit of the State subject to the governing rules of the Defined Benefit Scheme.
- (b) If at any time after the Transfer Date, the STC Actuary determines that the State's Employer Reserve in a Defined Benefit Scheme is in surplus:
- (i) the State may procure that STC allocates such surplus as agreed between the State and STC, including to the State's Employer Reserve or to the Employer Reserve of any other Employer within the Defined Benefit Scheme; and
 - (ii) the New Employer must nonetheless continue to contribute to the Defined Benefit Scheme in accordance with clause 13A.6.

13A.9 If the New Employer ceases to be the employer - DB Employees

The New Employer must not enter into an arrangement with another entity under which there is a Transfer of Work in respect of any DB Employee who is an employee of the New Employer at the relevant time (**Post-transfer Transferring DB Employees**) to that entity, unless:

- (a) the Transferring Employee's contract of employment is taken not to have been broken by the transfer of the Transferring Employee's employment, and service of the Transferring Employee with the State (including any deemed service with the State) and the New Employer that is continuous service up to the time of transfer is taken for all purposes to be service with the new employer;
- (b) the new employer of that DB Employee agrees to be responsible for funding, and to fund, the Defined Benefit Schemes at the rate required by the governing rules of the Defined Benefit Scheme to fund the benefits provided by the Defined Benefit Scheme in relation to the Post-transfer Transferring DB Employees, and otherwise as required to be assumed and funded by the New Employer under this clause 13A.9;
- (c) subject to receiving the reasonable assistance of the State, does all things necessary to:
 - (i) become a participating employer or contributor in respect of the Defined Benefit Scheme of each Post-transfer Transferring DB Employee; and
 - (ii) ensures that each Post-transfer Transferring DB Employees is entitled to continue as a contributor, member or employee in respect of such Defined Benefit Schemes; and

- (d) has an Acceptable Credit Rating or provides the State with a guarantee in a form acceptable to the Treasurer in respect of the new employer's obligations under this clause 13A.9 by a person having an Acceptable Credit Rating.

13A.10 Transferring Employees who are not DB Employees

The New Employer must not enter into an arrangement with another entity under which there is a Transfer of Work in respect of any Transferring Employee (who is not a DB Employee), unless the new employer takes whatever steps are necessary to make contributions to the relevant employee's superannuation fund on the same basis that the New Employer was making contributions when it was the employer, except as otherwise required by Law.

14. Independent Certifier

14.1 Appointment of Independent Certifier

- (a) **(Appointment):** The State will appoint, and the State and Project Co must jointly engage, the Independent Certifier to act as Independent Certifier:
 - (i) in accordance with the terms of this Deed and the Independent Certifier Deed; and
 - (ii) independently and not as agent of either party.
- (b) **(Costs):**
 - (i) The costs and expenses of the Independent Certifier (including the Independent Certifier's professional fees and costs incurred in exercising or purporting to perform its obligations under the Independent Certifier Deed but not including any payment due to the Independent Certifier in respect of any functions not associated with this Deed) will be paid by the State to the Independent Certifier.
 - (ii) Subject to clause 14.1(b)(iii), Project Co must pay to the State, on demand, from time to time, 50% of the costs and expenses of the Independent Certifier paid by the State under clause 14.1(b)(i).
 - (iii) To the extent that the Independent Certifier considers that the parties (as a result of their respective conduct) have a proportionate responsibility for the costs and expenses of the Independent Certifier paid by the State under clause 14.1(b)(i) that would result in each party bearing a proportion other than 50% of the costs and expenses of the Independent Certifier, Project Co must pay to the State, on demand, the relevant proportion of the costs and expenses of the Independent Certifier paid by the State under clause 14.1(b)(i) that the Independent Certifier determines Project Co is responsible for, as stated in a notice from the Independent Certifier to the parties.
- (c) **(Role):** The role, functions, rights and liabilities of the Independent Certifier and the parties' rights and obligations in connection with the Independent Certifier are set out in the Independent Certifier Deed.

14.2 Other Project roles of Independent Certifier

- (a) **(No ability to act for Financiers):** Project Co must ensure that no Financier, nor the Financiers together, appoints the Independent Certifier to act in any role in connection with the Finance Documents or Subcontracts (as applicable), without the prior consent of the State and on such terms approved by the State.
- (b) **(Independent certifier role):** The State consents to the Independent Certifier acting as the sub independent certifier under the D&C Subcontract, subject to

Project Co notifying the State of this and ensuring that any agreement pursuant to which Project Co and the D&C Subcontractor engage the Independent Certifier as independent certifier for the purposes of the D&C Subcontract:

- (i) includes an acknowledgment and agreement by the parties to the paramountcy of the role of the Independent Certifier under this Deed; and
 - (ii) does not contain terms which otherwise prejudice or compromise the paramountcy of the Independent Certifier role under this Deed.
- (c) **(Copy to be provided):** Project Co must promptly provide the State with a copy of any agreement which appoints the Independent Certifier as the independent certifier under the D&C Subcontract in relation to the Project.
- (d) **(No cross-subsidisation):** Project Co must at all times ensure that the amounts being paid by the State to the Independent Certifier under the Independent Certifier Deed are not cross-subsidising any other services which the Independent Certifier is performing in relation to the Project and must provide evidence to that effect to the State Representative.
- (e) **(Separation of roles):** Subject to clause 14.2(b), if the Independent Certifier is appointed to act as the sub independent certifier under the D&C Subcontract, Project Co must put in place and ensure the Independent Certifier puts in place appropriate arrangements to provide for the separation of the Independent Certifier's roles under this Deed and the D&C Subcontract.
- (f) **(No compromise):** Project Co must not, and must ensure that its Associates do not, do anything which would prejudice or compromise the paramountcy of the Independent Certifier's role under this Deed.
- (g) **(No other roles):** Save as expressly stated in this Deed, neither party may engage the Independent Certifier in respect of any other role in connection with the Project without the prior consent of the other party.

14.3 Determinations of Independent Certifier

Determinations of the Independent Certifier will be final and binding on the State and Project Co except:

- (a) **(Manifest error or fraud):** in the case of manifest error or fraud; or
- (b) **(Express provision):** if there is an express provision in this Deed to the contrary; or
- (c) **(Expert determination):** where the Independent Certifier is acting as an expert under clause 52, in which case the parties' rights in respect of the determination of the Independent Certifier will be as set out in that clause.

14.4 Replacement of Independent Certifier

- (a) **(Replacement):** If:
 - (i) the Independent Certifier Deed is terminated in accordance with its terms; or
 - (ii) the Independent Certifier is, for any reason, not appointed or ceases to act as the Independent Certifier in accordance with the State Project Documents,

the State will appoint and the State and Project Co will jointly engage another person to act as Independent Certifier on substantially the same terms as the

Independent Certifier Deed, provided that the Independent Certifier to be engaged must:

- (iii) be reasonably acceptable to the State and Project Co;
 - (iv) have appropriate qualifications and experience; and
 - (v) have no interest or duty which conflicts or may conflict with its functions as the Independent Certifier.
- (b) **(New Independent Certifier bound):** The new Independent Certifier appointed in accordance with clause 14.4(a) is bound by the exercise of any functions exercised or decisions made by the State and Project Co where such functions were exercised or decisions were made under this Deed or the Independent Certifier Deed.

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 in 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.

15.2 Primary obligation

- (a) **(NSW Code):** In carrying out the Project Activities, Project Co must at all times comply with, and meet any obligations imposed by, the NSW Government's Code of Practice for Procurement (**NSW Code**) and the NSW Guidelines.
- (b) **(Notification of Construction Compliance Unit):** Project Co 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 bound by NSW Code):** Where Project Co engages a Subcontractor or consultant, Project Co must ensure that Subcontract 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) **(Engagement of other parties):** Project Co must not appoint or engage another party in relation to the Project 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):** Project Co must maintain adequate records of compliance with the NSW Code and the NSW Guidelines by it, its subcontractors, consultants and related entities.
- (b) **(Facilitation of authorised personnel):** Project Co 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 Project Co, including but not limited to the Site and the Correctional Complex;
- (ii) inspect any work, material, machinery, appliance, article or facility;
- (iii) access information and documents;
- (iv) inspect and copy any record relevant to 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 Project Co, its subcontractors, consultants, and related entities.

- (c) **(Production of documents):** Project Co, 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) **(Project Co not subject to a sanction):** Project Co 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) **(Sanctions may be imposed):** If Project Co 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) **(Disclosure of sanctions):** Where a sanction is imposed on Project Co or its Associates:
 - (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 Project Co, or its related entities, in respect of work to which the NSW Code and the NSW Guidelines apply.

15.5 Compliance

- (a) **(Cost of compliance):** Project Co 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. Project Co is not entitled to make any Claim against the State or the NSW Government for such costs.
- (b) **(Responsibility to perform):** Compliance with the NSW Code and the NSW Guidelines does not relieve Project Co from responsibility to perform the Project

Activities and any other obligation under this Deed, or from Liability for any Defect in the Works or from any other legal liability, whether or not arising from its compliance with the NSW Code and the NSW Guidelines.

- (c) **(Proposed Modification):** Where a Modification is proposed, and that Modification may, or may be likely to, affect compliance with the NSW Code or the NSW Guidelines, Project Co must immediately notify the State of the Modification:
- (i) the extent to which compliance with the NSW Code or the NSW Guidelines will be, or is likely to be, affected by the Modification; and
 - (ii) what steps Project Co proposes to take to mitigate any adverse impact of the Modification (including any amendments it proposes to the WHS Management Plan),

and the State will direct Project Co as to the course it must adopt within 10 Business Days of receiving notice.

Part D - Delivery Phase obligations

16. Delivery Phase Plans and Reports and Delivery Phase Program

16.1 Delivery Phase Plans and Reports

- (a) **(Initial Delivery Phase Plans):** The parties acknowledge that the Initial Delivery Phase Plans are included as Attachment 2.
- (b) **(Preparation):** Project Co must prepare (where there are no relevant Initial Delivery Phase Plans), and otherwise update each Delivery Phase Plan:
 - (i) in accordance with the Delivery Phase Plans and Reports Schedule and the other requirements of this Deed relevant to that Delivery Phase Plan; and
 - (ii) to ensure each Delivery Phase Plan contains complete and accurate information in respect of the relevant aspects of the Project.
- (c) **(Submission):** Project Co must submit each Delivery Phase Plan to the State (and, where required under the Delivery Phase Plans and Reports Schedule, the Independent Certifier) for review in accordance with the Review Procedures.
- (d) **(Delivery):** Unless otherwise agreed by the State, Project Co must carry out the Delivery Phase Activities in accordance with the Delivery Phase Plans.
- (e) **(Authority Approval):** If a Delivery Phase Plan is required to be approved by an Authority, Project Co must ensure that it has obtained that Approval prior to submitting the relevant Delivery Phase Plan to the State for review.
- (f) **(Delivery Phase Reports):** Project Co must prepare and submit the Delivery Phase Reports to the State in accordance with the Delivery Phase Plans and Reports Schedule.
- (g) **(Additional information):** Project Co must promptly provide to the State and, where applicable, the Independent Certifier, any additional information in connection with the Delivery Phase Plans and the Delivery Phase Reports reasonably requested by the State or, where applicable, the Independent Certifier.
- (h) **(Warranty):** Project Co warrants that:
 - (i) each Delivery Phase Plan and each Delivery Phase Report is complete and correct, and not false or misleading in any material respect, at the time it is provided to the State; and
 - (ii) each Delivery Phase Plan will, at all times during the Delivery Phase, be fit for purpose.

16.2 Delivery Phase Program

- (a) **(Initial Delivery Phase Program):** The Initial Delivery Phase Program is included in Attachment 3 and does not form part of this Deed.
- (b) **(Update):** Project Co must update the Delivery Phase Program:
 - (i) within 20 Business Days after Financial Close to reflect the date of Financial Close, the Date for Technical Completion (as at Financial Close) and the Original Date for Commercial Acceptance;

- (ii) at least Monthly (and no later than 10 Business Days prior to each meeting of the Project Control Group) to accurately reflect:
 - A. the actual status and progress of the Delivery Phase Activities; and
 - B. any other changes to the activities, times, durations or other information contained in the Delivery Phase Program and any sub-programs;
- (iii) within 5 Business Days of Project Co being:
 - A. granted an extension to any Date for Completion; or
 - B. instructed to accelerate the Delivery Phase Activities, in accordance with this Deed; and
- (iv) otherwise, within 5 Business Days of:
 - A. deciding to depart in a material way from the then current Delivery Phase Program; or
 - B. any request by the State or Independent Certifier at any time,

and the updates must comply with the Programming Requirements and must not adjust any Date for Completion (unless an extension of time has been granted in accordance with this Deed).

(c) **(Departure):** Project Co:

- (i) acknowledges and agrees that the Delivery Phase Program does not form part of this Deed;
- (ii) must not depart from the Delivery Phase Program without reasonable cause and must give notice to the State and the Independent Certifier promptly upon becoming aware of any proposed or likely departure from the critical path in the Delivery Phase Program, together with the reasons why it is necessary to do so to comply with this Deed; and
- (iii) acknowledges and agrees that any such departure does not relieve Project Co from its obligations under this Deed, including under clause 19.2(e) or to achieve Completion by the relevant Date for Completion.

(d) **(Assessing Claims):** Neither:

- (i) the State; nor
- (ii) without limiting the Independent Certifier's obligation pursuant to clause 5.1 of the Independent Certifier Deed, the Independent Certifier,

is required to use the Delivery Phase Program for any purpose, including for the purpose of assessing:

- (iii) the impact of any delay event or any extension of time; or
- (iv) any Claim made by Project Co,

but may do so in their sole and absolute discretion.

17. Design

17.1 Design warranties

In addition to its obligations under clause 5, Project Co must design the Correctional Complex and develop the Design Deliverables in accordance with the Design Requirements and so that the Correctional Complex, when constructed in accordance with the For Construction Documentation, satisfies the FFP Warranty.

17.2 Purpose of Design Development Process

- (a) **(Design Development Process):** Project Co agrees that:
 - (i) it must comply with the Design Development Process in developing the Design Deliverables;
 - (ii) the purpose of the Design Development Process is to develop, refine and finalise the Design Deliverables through to For Construction Documentation in accordance with the Design Development Schedule and this Deed so as to meet the requirements of this Deed; and
 - (iii) the Design Development Process itself does not constitute a Modification or otherwise entitle Project Co to make any Claim against the State or its Associates for any Liabilities incurred by Project Co in connection with the conduct of the Design Development Process.
- (b) **(Design Development Process):** Project Co must conduct and manage all aspects of the Design Development Process in accordance with clause 5.1(a), the Design Development Schedule and as otherwise required under this Deed.
- (c) **(Submission):** Project Co must submit the Design Deliverables to the State and the Independent Certifier for review in accordance with the Design Development Schedule and the Review Procedures.

17.3 Design Development Changes

- (a) **(Full details):** When submitting any Design Deliverable for review under this Deed, Project Co must clearly identify, and give full details of, any proposed Design Development Changes, including:
 - (i) designs and detailed explanations of all consequential changes to the Design Requirements and Project Co's obligations and warranties under this Deed; and
 - (ii) any Savings as a consequence of the proposed Design Development Change.
- (b) **(State discretion):** The State may accept or reject any proposed Design Development Change in its absolute discretion.
- (c) **(Consequence of acceptance):** If the State accepts a proposed Design Development Change and the Design Development Change results in a Saving, Project Co must pay to the State the State's share of the Saving (calculated in accordance with the Change Compensation Principles).
- (d) **(Consequence of rejection):** If the State rejects the proposed Design Development Change, Project Co must amend the relevant Design Deliverable to comply with the relevant Design Requirements.
- (e) **(Deemed variation):** To the extent that the State accepts a proposed Design Development Change in accordance with clause 17.3(b), the Design Requirements

and the Design Deliverables are deemed to be varied to reflect the Design Development Change, so that Project Co's obligations and warranties under this Deed will not be breached by implementation of that Design Development Change.

18. Equipment during Delivery Phase

18.1 Equipment Schedule

The parties acknowledge and agree that:

- (a) **(Equipment List prepared in advance)**: the Initial Equipment List has been prepared prior to the completion of the design of the Correctional Complex and significantly in advance of when Project Co is required to select and procure Equipment in accordance with this clause 18;
- (b) **(Equipment List indicative)**: given clause 18.1(a), the Initial Equipment List is indicative only and must be updated by Project Co to meet the requirements of this clause 18; and
- (c) **(Change to Equipment List not a Modification)**: any change to the Equipment List to meet the requirements of this clause 18, will not give rise to a Modification or entitle Project Co or its Associates to make any Claim against the State.

18.2 Equipment selection

During the Delivery Phase:

- (a) **(Selection and purchase)**: Project Co must select Equipment for the Correctional Complex:
 - (i) which:
 - A. is necessary to ensure the Correctional Complex meets the FFP Warranty;
 - B. is set out in the Equipment List or which has at least the equivalent standard, quantity, quality and functionality as the corresponding items of equipment listed in the Equipment List;
 - C. is referred to or required by the Design Requirements; and
 - D. where none of A, B or C above apply, in such quantities and of such standard, quality and functionality to meet Best Industry Practices and as is necessary for the Correctional Complex to satisfy the FFP Warranty; and
 - (ii) so that the Correctional Complex at Commercial Acceptance will meet the FFP Warranty; and
- (b) **(Review Procedures)**: Project Co must update the Equipment List to reflect the Equipment selected by Project Co in accordance with clause 18.2(a) and submit it to the State for review in accordance with the Review Procedures.

18.3 Equipment procurement and installation

- (a) **(Equipment procurement)**: Project Co must not procure Equipment until such time as the Equipment List that includes that Equipment has been reviewed by the State in accordance with the Review Procedures.

- (b) **(Equipment Installation):** Project Co must procure, connect, install or locate (as applicable depending on whether the item of Equipment is loose or fixed) and commission all items of Equipment:
 - (i) in accordance with the Completion Requirements and to the satisfaction of the Independent Certifier;
 - (ii) in the locations designated in the For Construction Documentation or, if not designated in the For Construction Documentation, as otherwise required by Project Co so that the Correctional Complex meets the FFP Warranty; and
 - (iii) as otherwise required under this Deed.

19. Construction

19.1 Delivery Phase Sub-Licence

- (a) **(Sub-Licence for Delivery Phase Activities):** The State grants to Project Co a non-exclusive sub-licence to allow Project Co and its Associates to enter upon and occupy the Delivery Phase Sites to the extent necessary to carry out the Delivery Phase Activities:
 - (i) commencing on Financial Close; and
 - (ii) terminating on the grant of the Operating Phase Sub-Licence in accordance with clause 28.1, or on earlier termination of this Deed.
- (b) **(Terms of Delivery Phase Sub-Licence):** The Delivery Phase Sub-Licence granted under clause 19.1(a):
 - (i) is a personal right in contract, does not create any estate or interest in the Delivery Phase Sites, does not confer exclusive possession on Project Co or its Associates and does not create the relationship of tenant and landlord between any of them and the State; and
 - (ii) is given subject to the Adverse Rights and the rights of the State, any of its Associates and any other person authorised by it (including the Independent Certifier), to access and occupy the Delivery Phase Sites, in accordance with this Deed or any other State Project Document.
- (c) **(Other access):** Except as set out in clause 19.1(a), Project Co is solely responsible for obtaining access to and from the Delivery Phase Site, and to and from any land outside the Delivery Phase Sites to which access is required to carry out the Delivery Phase Activities.
- (d) **(Coordination):** Project Co bears the risk of coordinating its access to the Delivery Phase Site with any other person that uses the access ways to the Delivery Phase Site.

19.2 Construction

In addition to the obligations set out in clause 5, Project Co must:

- (a) **(Delivery Phase Activities):** perform the Delivery Phase Activities:
 - (i) in accordance with the Design Requirements; and
 - (ii) so that the Correctional Complex satisfies the FFP Warranty;

- (b) **(For Construction Documentation)**: construct the Works in accordance with the For Construction Documentation;
- (c) **(Delivery Phase Sites)**: meet the obligations set out in clause 8.11 in respect of the Delivery Phase Sites and otherwise keep the Delivery Phase Sites:
 - (i) safe, clean and tidy at all times; and
 - (ii) secure and free from all unauthorised access;
- (d) **(Use of Delivery Phase Activities)**: not use the Delivery Phase Sites for any purpose other than the Project Activities; and
- (e) **(Progress of Delivery Phase Activities)**: regularly, expeditiously and diligently carry out and progress the Delivery Phase Activities to achieve Completion by the Date for Completion.

19.3 Proceed at risk

- (a) **(Right to proceed)**: Project Co is only entitled to proceed:
 - (i) from one Design Stage (**First Design Stage**) to the next Design Stage without the Design Deliverables for the First Design Stage having been reviewed by the State in accordance with the Design Development Schedule and the Review Procedures; or
 - (ii) with the construction of any part of the Works prior to the review of the For Construction Documentation for that part of the Works in accordance with the Design Development Schedule and the Review Procedures,

where it is expressly entitled to do so in accordance with the Review Procedures.
- (b) **(Risk)**: If Project Co proceeds with the design or construction of the Works in accordance with clause 19.3(a):
 - (i) this will not:
 - A. prejudice the State's rights against Project Co whether under the State Project Documents or otherwise according to Law; or
 - B. relieve Project Co from, or alter or affect, its Liabilities, obligations or responsibilities whether in accordance with the State Project Documents or otherwise according to Law; and
 - (ii) Project Co will not be entitled to make any Claim against the State arising out of or in connection with such design or construction; and
 - (iii) the State may, in addition to its rights under clause 17, the Design Development Schedule and the Review Procedures, direct Project Co to amend, rectify, change or modify any Design Deliverables or partially constructed Works to resolve any issues identified by the State or the Independent Certifier as part of its review under clause 17 and the Review Procedures.

19.4 Corrective Action Plan

- (a) **(Review by Independent Certifier)**: Project Co acknowledges and agrees that the Independent Certifier will (including where directed to by the State) continually review the design and construction of the Works to ensure that Project Co is complying with its obligations in clauses 19.2(e), 23.1 and 25.1.

- (b) **(Notice of non-compliance):** If the Independent Certifier forms the view that Project Co is not complying with its obligation in clause 19.2(e) the Independent Certifier must give notice to the State and Project Co of its opinion, together with its reasons for forming that opinion.
- (c) **(Corrective action plan):** If the Independent Certifier issues a notice pursuant to clause 19.4(b), Project Co must, promptly, and in any event within 20 Business Days, issue a corrective action plan to the State and the Independent Certifier which complies with the requirements of clauses 19.4(d) to 19.4(g).
- (d) **(Requirements for corrective action plan):** Each corrective action plan which Project Co must provide pursuant to clause 19.4(c) must show how Project Co proposes to avoid, mitigate or minimise the consequences of the delay consistent with its obligation under clause 19.2(e) and contain a proposed updated Delivery Phase Program.
- (e) **(Comments):** The Independent Certifier may, within 20 Business Days of receipt of a corrective action plan, give Project Co any comments on the corrective action plan (which may include comments provided to the Independent Certifier by the State) provided that such comments are consistent with the requirements of clause 19.4(d).
- (f) **(Response):** If the Independent Certifier gives Project Co any comments under clause 19.4(e), Project Co must amend and, within 10 Business Days of receipt of the Independent Certifier's comments, resubmit the corrective action plan to the Independent Certifier and the State to address the Independent Certifier's comments, after which clause 19.4(e) and this clause 19.4(f) will re-apply until the Independent Certifier does not issue any further comments.
- (g) **(Compliance):** Project Co must comply with a corrective action plan for which the Independent Certifier does not issue any comments under clause 19.4(e).
- (h) **(Liability):** Project Co will not be relieved of any Liability or responsibility under this Deed or otherwise at Law arising out of or in connection with:
 - (i) any comments given by the Independent Certifier under clause 19.4(e);
or
 - (ii) the implementation of any corrective action plan in respect of which the Independent Certifier has or has not given comments under clause 19.4(e).
- (i) **(No claim):** Project Co will not be entitled to make any Claim against the State or the Independent Certifier arising out of or in connection with any comments by the State or the Independent Certifier under clause 19.4(e) or any Liability suffered or incurred by Project Co in preparing, or complying with, a corrective action plan.

20. State access during the Delivery Phase

20.1 State's right to enter, inspect and test

The State, any of its Associates and any other person authorised by it (including the Independent Certifier) may, during the Delivery Phase:

- (a) **(Site Access):** access the Delivery Phase Sites, and any other site where the Delivery Phase Activities are being carried out, in accordance with the Site Access and Interface Protocols to exercise their rights, powers and functions and to perform their obligations under any State Project Document and to discharge their statutory duties, powers, rights and obligations (including pursuant to the Corrections Legislation);

- (b) **(Inspection of Works):** inspect, observe or test any part of the Works or the Delivery Phase Activities (whether or not such inspections, observations or tests are otherwise required under any State Project Document); or
- (c) **(Examine and copy):** examine and make copies of, and retain copies of, any Project Co Material.

20.2 Site Access and Interface Protocols

- (a) **(Access to sites):** Project Co must allow the State, any of the State's Associates and any other person authorised by the State (including the Independent Certifier) access to the Delivery Phase Sites, any other site where the Delivery Phase Activities are being carried out, and any Project Co Material in accordance with clause 20.1.
- (b) **(Compliance with protocols):** The State will, and will procure that its Associates, comply with the Site Access and Interface Protocols during the Delivery Phase when the State or its Associates access the Delivery Phase Sites or any other site where the Delivery Phase Activities are being carried out.

20.3 Project Co to assist

If requested by the State, Project Co must assist the State in connection with any inspection or testing in accordance with clause 20.1 and under the Corrections Legislation, including by:

- (a) **(Access to Works):** providing access to any part of the Works and Project Co Materials that the State requires;
- (b) **(Preparation of samples):** preparing samples of materials used in connection with the Works as required by the State;
- (c) **(Forwarding samples):** forwarding the samples prepared in accordance with clause 20.3(b) to the State or such other place or person notified by the State; and
- (d) **(Carrying out tests):** if requested by the State, carrying out any tests (including tests not otherwise required by this Deed) and providing the results of those tests to the State.

20.4 Costs of inspection or testing

The State will bear the reasonable costs incurred by Project Co in connection with any inspection or test conducted at the State's direction in accordance with this clause 20, unless:

- (a) **(Defect):** the inspection or test reveals any Defect or failure to comply with this Deed, save where the Defect or failure is minor in nature and will not prevent:
 - (i) the Correctional Complex from being lawfully used in accordance with its intended purpose or from otherwise meeting the FFP Warranty; or
 - (ii) Project Co from delivering the Services in accordance with the Services Requirements;
- (b) **(Inaccessible):** the test is in connection with Works covered up or made inaccessible without the State's prior approval where that approval was required; or
- (c) **(Required tests):** the inspection or test was otherwise required by this Deed to be carried out by Project Co, or should have been carried out by Project Co in accordance with Best Industry Practices,

in which case Project Co must pay its own costs and all reasonable costs incurred by the State, as a debt due and payable by Project Co to the State.

21. Testing and comments

21.1 Testing

During the Delivery Phase:

- (a) **(Notice):** Project Co must give the State and the Independent Certifier not less than 10 Business Days prior written notice of the date, time and place for the conduct of every test to be undertaken by Project Co in respect of the Delivery Phase Activities;
- (b) **(Postponement of test):** Project Co may postpone a test in respect of which it has given the State and the Independent Certifier notice in accordance with clause 21.1(a);
- (c) **(Rescheduled date):** if Project Co postpones a test in accordance with clause 21.1(b), Project Co must give the State and the Independent Certifier at least 5 Business Days' notice of the rescheduled date, time and place for the conduct of that test;
- (d) **(Attendance):** the State (and its nominees) and the Independent Certifier may, but are not obliged to, attend and witness the conduct of all tests; and
- (e) **(Submission of report):** irrespective of the outcome of the test, Project Co must, within 10 Business Days of carrying out a test in respect of the Delivery Phase Activities, submit a report to the State and the Independent Certifier setting out the outcome of the test.

21.2 Right to comment

- (a) **(Right to give comments):** Based on the information provided to the State in accordance with this Deed or any inspection carried out in accordance with clause 20.1, the State may give the Independent Certifier written comments regarding the Works, provided that such comments are limited to matters impacting upon the compliance of the Works with the requirements of this Deed.
- (b) **(Meeting):** If the State gives the Independent Certifier written comments pursuant to clause 21.2(a), the State, the Independent Certifier and Project Co must meet to discuss and establish the rectifications or changes required to the Works.
- (c) **(Disputes):** If the State, the Independent Certifier and Project Co are unable to agree to appropriate rectifications or changes pursuant to clause 21.2(b), such Dispute will be dealt with in accordance with clause 50.

22. Quality Assurance during the Delivery Phase

- (a) **(Certification of Subcontractor):** In addition to the obligations in clause 11.1, Project Co must ensure that the:
 - (i) D&C Subcontractor is certified to AS/NZS ISO 9001 and AS/NZS ISO 14001 at all times during the Delivery Phase; and
 - (ii) Operator complies with a Quality Assurance System which is certified to AS/NZS ISO 9001 and AS/NZS ISO 14001 when carrying out any Delivery Phase Activities.
- (b) **(Quality Assurance Plan):** Project Co must provide the State with the Quality Assurance Plan for the Delivery Phase in accordance with the Delivery Phase Plans and Reports Schedule.

- (c) **(Proof of accreditations):** At the same time it submits its Quality Assurance Plan under clause 22(b), Project Co must submit proof of the D&C Subcontractor's quality assurance accreditations required by this Deed.

23. Technical Completion

23.1 Requirement

Project Co must achieve Technical Completion of the Works by the Date for Technical Completion.

23.2 Notice before Technical Completion

- (a) **(Notice timeline):** Project Co must give the State and the Independent Certifier separate notices:
- (i) 12 Months;
 - (ii) 6 Months;
 - (iii) 3 Months;
 - (iv) 30 Business Days; and
 - (v) 15 Business Days,
- prior to the date upon which it reasonably expects to achieve Technical Completion.
- (b) **(Notice of revised date):** If, after Project Co gives the State and the Independent Certifier a notice in accordance with clause 23.2(a), the expected Date of Technical Completion changes, Project Co must notify the State and the Independent Certifier promptly of the revised date.

23.3 Notice of Technical Completion Tests

- (a) **(Submission of Technical Completion Plan):** Project Co must submit the Technical Completion Plan to the State and the Independent Certifier in accordance with the Delivery Phase Plans and Reports Schedule and for review in accordance with the Review Procedures.
- (b) **(Update and submit for review):** At the same time as Project Co submits the Technical Completion Plan under clause 23.3(a), Project Co must:
- (i) update the Technical Completion Schedule and the Delivery Phase Program to include the Technical Completion Tests necessary to demonstrate that each of the Technical Completion Criteria have been met; and
 - (ii) submit these to the State and the Independent Certifier for review in accordance with the Review Procedures.

23.4 Additional Technical Completion Tests

- (a) **(Notification):** At any time up to the date that is 30 Business Days before the anticipated Date of Technical Completion, the Independent Certifier or the State may notify Project Co of additional tests that are necessary to demonstrate that the Correctional Complex satisfies the Technical Completion Criteria (**Additional Technical Completion Tests**).

- (b) **(Completion of tests):** The Independent Certifier or the State (as applicable) must direct whether the Additional Technical Completion Tests are required to be completed:
- (i) prior to Technical Completion;
 - (ii) prior to Commercial Acceptance; or
 - (iii) as a Post Completion Test.
- (c) **(Review):** Project Co must update the Technical Completion Plan and the Technical Completion Schedule to include the Additional Technical Completion Tests and submit these to the Independent Certifier and the State for review in accordance with the Review Procedures.
- (d) **(Costs):** The State will bear the reasonable costs incurred by Project Co in connection with any Additional Technical Completion Tests conducted at the State's direction in accordance with this clause 23.4, unless:
- (i) the Additional Technical Completion Test reveals any Defect or failure to comply with this Deed, save where the Defect or failure is minor in nature and will not prevent:
 - A. the Correctional Complex from being lawfully used in accordance with its intended purpose or from otherwise meeting the FFP Warranty; or
 - B. Project Co from delivering the Services in accordance with the Services Requirements;
 - (ii) the Additional Technical Completion Test is undertaken to correct a Defect, save where the Defect or failure is minor in nature and will not prevent:
 - A. the Correctional Complex from being lawfully used in accordance with its intended purpose or from otherwise meeting the FFP Warranty; or
 - B. Project Co from delivering the Services in accordance with the Services Requirements;
 - (iii) the Additional Technical Completion Test is in the nature of a test otherwise required by this Deed to be carried out by Project Co, or should have been carried out by Project Co in accordance with Best Industry Practices; or
 - (iv) the Additional Technical Completion Test is:
 - A. in respect of a matter where Project Co has failed a Technical Completion Test; or
 - B. required as a result of a Technical Completion Test not carried out in accordance with Best Industry Practice or the Output Specification,

in which case Project Co must pay its own costs and all reasonable costs incurred by the State, as a debt due and payable by Project Co to the State.

23.5 Technical Completion Testing

- (a) **(Testing requirements):** Project Co must carry out all Technical Completion Tests in accordance with the Technical Completion Plan.

- (b) **(Notice):** In addition to updating the Delivery Phase Program in accordance with clause 23.3(b), Project Co must give the State and the Independent Certifier not less than 20 Business Days prior notice of each Technical Completion Test.
- (c) **(Obligations):** Project Co must:
 - (i) allow the Independent Certifier and the State to attend, take samples, make measurements and otherwise carry out whatever tests, checks and investigations they may reasonably require in order to ensure that any Technical Completion Test has been successfully carried out;
 - (ii) conduct the Technical Completion Tests to the satisfaction of the Independent Certifier; and
 - (iii) comply with all reasonable directions of the Independent Certifier in relation to the conduct of any Technical Completion Tests.
- (d) **(Test failure):** If a test fails, Project Co must immediately inform the Independent Certifier and the State Representative and carry out rectification works to enable retesting to occur as soon as possible.

23.6 Unsuccessful Technical Completion Test

- (a) **(Powers of Independent Certifier):** If Project Co fails to successfully complete any Technical Completion Tests (which must be successfully completed prior to Technical Completion), the Independent Certifier may:
 - (i) refuse to issue the Certificate of Technical Completion in accordance with clause 23.9; or
 - (ii) provided the other Technical Completion Criteria have been satisfied, issue a Certificate of Technical Completion, in accordance with clause 23.9 identifying the unsuccessful Technical Completion Tests as Technical Completion Outstanding Items in accordance with clause 23.10.
- (b) **(State may waive requirement):** The State may waive the requirement for Project Co to satisfy a Technical Completion Test or require the Technical Completion Test to be satisfied as a Commercial Acceptance Test or as a Post Completion Test.

23.7 Technical Completion Report

- (a) **(Draft report):** Project Co must submit to the Independent Certifier for review in accordance with the Review Procedures (and provide a copy to the State), a draft Technical Completion Report, not earlier than 30 Business Days, and not later than 20 Business Days, prior to the date on which Project Co expects to achieve Technical Completion, which draft Technical Completion Report must contain all information necessary to demonstrate that Project Co has met the Completion Requirements relevant to Technical Completion.
- (b) **(Further draft report):** Project Co must submit to the Independent Certifier (for review in accordance with the Review Procedures) and provide a copy to the State, a further draft Technical Completion Report not later than 10 Business Days prior to the date on which Project Co expects to achieve Technical Completion. The further draft Technical Completion Report must reflect all Technical Completion Tests undertaken to the date of that further draft report.
- (c) **(Compliance with directions):** Project Co must take into account and comply with any directions given by the Independent Certifier (acting reasonably) in connection with preparing for Technical Completion.

23.8 Notice of Technical Completion

- (a) **(Notice by Project Co):** When Project Co is of the reasonable opinion that it has achieved Technical Completion, Project Co must provide to the State and the Independent Certifier:
- (i) notice of its opinion;
 - (ii) a detailed list of the work (including minor Defect correction) remaining to be undertaken in its opinion to achieve Commercial Acceptance; and
 - (iii) the final Technical Completion Report.
- (b) **(Notice by the State):** Notwithstanding that Project Co may not have issued a notice under clause 23.8(a), when the State considers that Project Co has achieved Technical Completion, the State may:
- (i) notify Project Co and the Independent Certifier of its opinion; and
 - (ii) request the Independent Certifier determine whether Technical Completion has been achieved.

23.9 Determination of Technical Completion

- (a) If, in the opinion of the Independent Certifier:
- (i) **(Issuing of certificate):** Technical Completion has been achieved, the Independent Certifier must issue the certificate of Technical Completion to the State and Project Co within 5 Business Days after receipt of a notice under clause 23.8, which certificate must:
 - A. state the Date of Technical Completion;
 - B. list any Defects which must be rectified prior to Commercial Acceptance; and
 - C. set out details of the Independent Certifier's opinion of the work remaining to be undertaken to achieve Commercial Acceptance,**(Certificate of Technical Completion); or**
 - (ii) **(Issuing of notice):** Technical Completion has not been achieved, the Independent Certifier must, by not later than 5 Business Days after receipt of the notice issued in accordance with clause 23.8, issue to Project Co and the State a notice either:
 - A. containing details of the outstanding Technical Completion Criteria that must be satisfied by Project Co as a condition precedent to achieving Technical Completion; or
 - B. stating that Technical Completion is so far from being achieved that it is not practicable to provide details of the type referred to in clause 23.9(a)(ii)A,after which Project Co must continue to expeditiously and diligently progress the Delivery Phase Activities to achieve Technical Completion.
- (b) **(Consequence of issuing notice):** If the Independent Certifier issues a notice under clause 23.9(a)(ii), the process in clauses 23.2 to 23.9(a) will commence again in respect of those outstanding Technical Completion Criteria set out in the Independent Certifier's notice.

- (c) **(No restriction on Independent Certifier):** The Independent Certifier, in making its determination as to whether Technical Completion has been achieved:
 - (i) will not be restricted by any notice, list or opinion which it previously provided to Project Co under clause 23.9(a)(ii); and
 - (ii) is entitled to raise any other items of work as a ground for determining that Technical Completion has not been achieved.
- (d) **(Consequence of issuing certificate):** The issue of a Certificate of Technical Completion in accordance with this clause 23.9 does not constitute:
 - (i) evidence that Project Co has satisfied the FFP Warranty;
 - (ii) an approval by the State of the completion or acceptance of the Works under this Deed; or
 - (iii) evidence that all or any other obligations under this Deed have been satisfied.
- (e) **(Binding determination by Independent Certifier):** Subject to resolution of any Dispute in relation to an Additional Technical Completion Test in accordance with clause 23.4, a determination made by the Independent Certifier as to whether or not the Works have reached Technical Completion is final and binding.

23.10 Technical Completion Outstanding Items

- (a) **(Outstanding items):** The Independent Certifier may issue a Certificate of Technical Completion with:
 - (i) an attached list of Technical Completion Outstanding Items; and
 - (ii) a timeframe within which each Technical Completion Outstanding Item must be rectified,as determined by the Independent Certifier.
- (b) **(Program):** Within 5 Business Days after the issue of a Certificate of Technical Completion, Project Co must submit to the State and the Independent Certifier (for review in accordance with the Review Procedures) a program for the completion of the Technical Completion Outstanding Items that complies with the timeframe determined in accordance with clause 23.10(a).
- (c) **(Outstanding items to be completed):** Project Co must complete or remedy any Technical Completion Outstanding Items within the timeframe determined in accordance with clause 23.10(a) to the satisfaction of the Independent Certifier.
- (d) **(Commercial Acceptance Report):** Project Co must ensure that the Technical Completion Outstanding Items and, where they are required to be rectified prior to Commercial Acceptance, details of their rectification, form part of the Commercial Acceptance Report.
- (e) **(Commercial Acceptance Outstanding Item):** If a Technical Completion Outstanding Item is not required to be completed prior to Commercial Acceptance and is not completed prior to Commercial Acceptance, it will be deemed to be a Commercial Acceptance Outstanding Item.
- (f) **(State may agree):** If a Technical Completion Outstanding Item that is due to be completed prior to Commercial Acceptance is not capable of being completed prior to Commercial Acceptance, the State (acting reasonably and in consultation with the Independent Certifier), may agree that the Technical Completion Outstanding Item will be a Commercial Acceptance Outstanding Item.

24. Commissioning Period

During the period between Technical Completion and Commercial Acceptance, Project Co must:

- (a) **(Operational Readiness Plan):** comply with its obligations under the Operational Readiness Plan;
- (b) **(Commissioning Requirements):** carry out all Commissioning Requirements in accordance with the Commercial Acceptance Schedule; and
- (c) **(Commercial Acceptance Criteria):** allow the Independent Certifier and the State to attend, take samples, take measurements and otherwise carry out whatever tests, checks and investigations they may require in order to ensure that any Commissioning Activities, the Commercial Acceptance Criteria and any other obligations Project Co is required to meet during the Commissioning Period have been complied with and Project Co is ready and able to commence providing the Services in accordance with this Deed.

25. Commercial Acceptance

25.1 Requirement

Project Co must achieve Commercial Acceptance of the Works by the Date for Commercial Acceptance.

25.2 Notice before Commercial Acceptance

- (a) **(Notice timeline):** Project Co must give the State Representative and the Independent Certifier separate notices:
 - (i) 9 Months;
 - (ii) 6 Months;
 - (iii) 3 Months;
 - (iv) 30 Business Days; and
 - (v) 15 Business Days,prior to the date upon which it reasonably expects to achieve Commercial Acceptance.
- (b) **(Notice of revised date):** If, after Project Co gives the State and the Independent Certifier a notice in accordance with clause 25.2(a), the expected Date of Commercial Acceptance changes, Project Co must notify the State and the Independent Certifier promptly of the revised date.

25.3 Notice of Commercial Acceptance Tests

- (a) **(Submission of Commercial Acceptance Plan):** Project Co must submit the Commercial Acceptance Plan to the State and the Independent Certifier in accordance with the Delivery Phase Plans and Reports Schedule and for review in accordance with the Review Procedures.
- (b) **(Update for submission and review):** At the same time as Project Co submits the Commercial Acceptance Plan under clause 25.3(a), Project Co must:
 - (i) update the Commercial Acceptance Schedule and the Delivery Phase Program to include the Commercial Acceptance Tests necessary to

demonstrate that each of the Commercial Acceptance Criteria have been met; and

- (ii) submit these to the State and the Independent Certifier for review in accordance with the Review Procedures.

25.4 Additional Commercial Acceptance Tests

- (a) **(Notification):** At any time up to the date that is 30 Business Days before the anticipated Date of Commercial Acceptance, the State or Independent Certifier may notify Project Co of additional tests that are necessary to demonstrate that the Correctional Complex satisfies the Commercial Acceptance Criteria (**Additional Commercial Acceptance Tests**).
- (b) **(State to direct test timeframe):** The State must direct whether the Additional Commercial Acceptance Tests are required to be completed:
 - (i) prior to Commercial Acceptance; or
 - (ii) as a Post Completion Test.
- (c) **(Review Procedures):** Project Co must update the Commercial Acceptance Plan and the Commercial Acceptance Schedule to include the Additional Commercial Acceptance Tests and submit these to the State and the Independent Certifier for review in accordance with the Review Procedures.
- (d) **(State to bear costs):** The State will bear the reasonable costs incurred by Project Co in connection with any Additional Commercial Acceptance Tests conducted at the State's direction in accordance with this clause 25.4, unless:
 - (i) the Additional Commercial Acceptance Test reveals any Defect or failure to comply with this Deed, save where the Defect or failure is minor in nature and will not prevent:
 - A. the Correctional Complex from being lawfully used in accordance with its intended purpose or from otherwise meeting the FFP Warranty; or
 - B. Project Co from delivering the Services in accordance with the Services Requirements;
 - (ii) the Additional Commercial Acceptance Test is undertaken to correct a Defect, save where the Defect or failure is minor in nature and will not prevent:
 - A. the Correctional Complex from being lawfully used in accordance with its intended purpose or from otherwise meeting the FFP Warranty; or
 - B. Project Co from delivering the Services in accordance with the Services Requirements;
 - (iii) the Additional Commercial Acceptance Test is in the nature of a test otherwise required by this Deed to be carried out by Project Co, or should have been carried out by Project Co in accordance with Best Industry Practices; or
 - (iv) the Additional Commercial Acceptance Test is:
 - A. in respect of a matter where Project Co has failed a Commercial Acceptance Test; or

- B. required as a result of a Commercial Acceptance Test not carried out in accordance with Best Industry Practice or the Output Specification,

in which case Project Co must pay its own costs and all reasonable costs incurred by the State, as a debt due and payable by Project Co to the State.

25.5 Commercial Acceptance Testing

- (a) **(Test requirements):** Project Co must carry out all Commercial Acceptance Tests in accordance with the Commercial Acceptance Plan.
- (b) **(Test notice):** In addition to updating the Delivery Phase Program in accordance with clause 25.3(b), Project Co must give the State and the Independent Certifier not less than 10 Business Days prior notice of each Commercial Acceptance Test.
- (c) **(Obligations):** Project Co must:
 - (i) allow the Independent Certifier and the State to attend, take samples, make measurements and otherwise carry out whatever tests, checks and investigations they may reasonably require in order to ensure that any Commercial Acceptance Test has been successfully carried out;
 - (ii) conduct the Commercial Acceptance Tests to the satisfaction of the Independent Certifier and the State (acting reasonably); and
 - (iii) comply with all reasonable directions of the Independent Certifier and the State in relation to the conduct of any Commercial Acceptance Tests.
- (d) **(Test failure):** If a test fails, Project Co must immediately inform the Independent Certifier and the State and carry out rectification works to enable retesting to occur as soon as possible.

25.6 Unsuccessful Commercial Acceptance Test

If Project Co fails to successfully complete any Commercial Acceptance Tests (which must be successfully completed prior to Commercial Acceptance), the State may:

- (a) **(Refuse to issue certificate):** refuse to issue the Certificate of Commercial Acceptance in accordance with clause 25.9; or
- (b) **(Commercial Acceptance Outstanding Item):** issue a Certificate of Commercial Acceptance in accordance with clause 25.9 and identify any unsuccessful Commercial Acceptance Tests as Commercial Acceptance Outstanding Items in accordance with clause 25.10 and require the Commercial Acceptance Tests to be satisfied as a Post Completion Test.

25.7 Commercial Acceptance Report

- (a) **(Draft report):** Project Co must submit to the Independent Certifier and the State (for review in accordance with the Review Procedures) a draft Commercial Acceptance Report not earlier than 30 Business Days, and not later than 20 Business Days, prior to the date on which Project Co expects to achieve Commercial Acceptance, which draft Commercial Acceptance Report must contain all information necessary to demonstrate that Project Co has met the Completion Requirements relevant to Commercial Acceptance.
- (b) **(Further draft report):** Project Co must submit to the State and the Independent Certifier (for review in accordance with the Review Procedures) a further draft Commercial Acceptance Report not later than 10 Business Days prior to the date on which Project Co expects to achieve Commercial Acceptance. The further draft

Commercial Acceptance Report must reflect all Commercial Acceptance Tests undertaken to the date of that further draft report.

- (c) **(Compliance with directions):** Project Co must take into account and comply with any directions reasonably given by the State (acting reasonably) or the Independent Certifier in connection with preparing for Commercial Acceptance.

25.8 Notice of Commercial Acceptance

- (a) **(Notice by Project Co):** When Project Co is of the reasonable opinion that it has achieved Commercial Acceptance, Project Co must provide to the State and the Independent Certifier:
 - (i) notice of its opinion; and
 - (ii) the final Commercial Acceptance Report.
- (b) **(Notice by the State):** Notwithstanding that Project Co may not have issued a notice under clause 25.8(a), when the State considers that Project Co has achieved Commercial Acceptance, the State may notify Project Co and the Independent Certifier of its opinion.

25.9 Determination of Commercial Acceptance

- (a) If, in the opinion of the State (acting reasonably):
 - (i) **(Issue Certificate):** Commercial Acceptance has been achieved, the State must issue the certificate of Commercial Acceptance to Project Co (with a copy to the Independent Certifier) within 5 Business Days after receipt of the notice under clause 25.8, which certificate must state the Date of Commercial Acceptance (**Certificate of Commercial Acceptance**); or
 - (ii) **(Issue notice):** Commercial Acceptance has not been achieved, the State must, by not later than 5 Business Days after receipt of the notice issued in accordance with clause 25.8, issue to Project Co (with a copy to the Independent Certifier) a notice either:
 - A. containing details of the outstanding Commercial Acceptance Criteria that must be satisfied by Project Co as a condition precedent to achieving Commercial Acceptance; or
 - B. stating that Commercial Acceptance is so far from being achieved that it is not practicable to provide details of the type referred to in clause 25.9(a)(ii)A,

after which Project Co must continue to expeditiously and diligently progress the Delivery Phase Activities to achieve Commercial Acceptance.
- (b) **(Consequence of notice):** If the State issues a notice under clause 25.9(a)(ii), the process in clauses 25.2 to 25.9(a) will commence again in respect of those outstanding Commercial Acceptance Criteria set out in the State's notice.
- (c) **(State discretion):** The State, in making its determination as to whether Commercial Acceptance has been achieved:
 - (i) will not be restricted by any notice, list or opinion which it previously provided to Project Co under clause 25.9(a)(ii); and
 - (ii) is entitled to raise any other items of work as a ground for determining that Commercial Acceptance has not been achieved.

- (d) **(Consequence of certificate):** The issue of a Certificate of Commercial Acceptance in accordance with this clause 25.9 does not constitute:
 - (i) evidence that Project Co has satisfied the FFP Warranty;
 - (ii) an approval by the State of the completion or acceptance of the Works under this Deed; or
 - (iii) evidence that all or any other obligations under this Deed have been satisfied.

25.10 Commercial Acceptance Outstanding Items

- (a) **(Outstanding Items):** The State may issue a Certificate of Commercial Acceptance with a list of Commercial Acceptance Outstanding Items and the time within which they must be rectified.
- (b) **(Items to be included):** Any Technical Completion Outstanding Items that are deemed under clause 23.10(e), or agreed under clause 23.10(f), to be Commercial Acceptance Outstanding Items will be included in the Commercial Acceptance Outstanding Items, together with the time within which they must be rectified as determined in accordance with clause 23.10.
- (c) **(Program for completion to be submitted):** Within 5 Business Days after the issue of a Certificate of Commercial Acceptance, Project Co must submit to the State (for review in accordance with the Review Procedures) a program for the completion of the Commercial Acceptance Outstanding Items, which complies with clause 25.10(a).
- (d) **(Complete within timeframe):** Project Co must complete or remedy each Commercial Acceptance Outstanding Item in the relevant timeframe determined in accordance with clause 25.10(c) to the satisfaction of the State (acting reasonably).
- (e) **(Failure to complete):** A Major Default will occur if a Commercial Acceptance Outstanding Item is not completed or remedied within the timeframe determined in accordance with clause 25.10(c).

25.11 Post Completion

- (a) **(Post Completion Tests):** Project Co must conduct all Post Completion Tests in accordance with the Completion Requirements and the relevant Completion Plan.
- (b) **(Requirements):** Project Co must:
 - (i) prior to Commercial Acceptance, give the State and the Independent Certifier a notice setting out the anticipated dates on which all Post Completion Tests will be performed which must be as soon as reasonably practicable after Commercial Acceptance and promptly notify the State and the Independent Certifier if any of those dates change;
 - (ii) allow the Independent Certifier and the State to attend, take samples, make measurements and otherwise carry out whatever checks and investigations they may reasonably require in order to ensure that any Post Completion Test has been successfully carried out;
 - (iii) conduct the Post Completion Tests to the satisfaction of the Independent Certifier and the State (acting reasonably);
 - (iv) comply with all reasonable directions of the Independent Certifier and the State in relation to the conduct of any Post Completion Tests; and

- (v) if a test fails, immediately inform the Independent Certifier and the State Representative and carry out rectification works to enable retesting to occur as soon as possible.
- (c) **(Failure to complete or remedy):** If a Post Completion Test is not completed or remedied within the timeframe required by clause 25.11(b)(i), the failure to do so will be a breach of this Deed.
- (d) **(Post Completion Report):** After the completion of all Post Completion Tests, Project Co must submit to the State a Post Completion Report.

25.12 Release after Completion

On and from the date which is 6 Months after the Date of Commercial Acceptance, Project Co releases the State from all Claims in connection with any fact, matter or thing arising out of, or in connection with the carrying out of the Delivery Phase Activities which existed or occurred prior to the Date of Commercial Acceptance, except for any Claim notified to the State in accordance with this Deed prior to that date.

26. Early Completion

- (a) **(Proposed Early Completion Date):** Project Co must, as part of its Delivery Phase Program, identify as soon as reasonably practicable, any Proposed Early Completion Date.
- (b) **(Notification and consent):** Project Co must not achieve Commercial Acceptance earlier than the Original Date for Commercial Acceptance unless:
 - (i) Project Co has provided the State with at least 9 Months written notice (or another period as agreed by the parties) that Project Co anticipates it will achieve Commercial Acceptance on the Proposed Early Completion Date;
 - (ii) if the Proposed Early Completion Date is in a different financial year to the Original Date for Commercial Acceptance, Project Co has provided the State with a Proposed Early Completion Notice by 31 January of the financial year prior to the financial year in which the Proposed Early Completion Date falls; and
 - (iii) the State has consented in writing to Project Co achieving Commercial Acceptance on the Proposed Early Completion Date.
- (c) **(Performance of Services):** If Project Co achieves Commercial Acceptance prior to the Date for Commercial Acceptance, Project Co must start performing the Services on the date that is the later of:
 - (i) the day after the Proposed Early Completion Date; and
 - (ii) the day after the Date of Commercial Acceptance.
- (d) **(State not obliged assist):** The State may assist Project Co, but will not be obliged to take any action to assist or enable Project Co, to achieve early Completion.
- (e) **(Operational Commencement Date):** If Project Co achieves early Completion, the Operational Commencement Date is deemed to be the date on which Project Co starts performing the Services in accordance with clause 26(c), provided the State has consented in accordance with clause 26(b)(iii).

Part E - Operating Phase obligations

27. Operating Phase Plans and Operating Phase Reports

- (a) **(Initial Operating Phase Plans):** The parties acknowledge that the Initial Operating Phase Plans are included as Attachment 5.
- (b) **(Submission and Update):** Project Co must:
 - (i) prepare and update the Operating Phase Plans and the Operating Phase Reports:
 - A. in accordance with the relevant requirements of the Operating Phase Plans and Reports Schedule;
 - B. to the extent applicable, to align with and be consistent with the Delivery Phase Plans; and
 - C. to ensure they contain complete and accurate information in respect of the relevant aspects of the Project;
 - (ii) update all Operating Phase Plans and Operating Phase Reports as necessary to reflect any changes to the nature, understanding or status of the Services; and:
 - (iii) submit to the State all Operating Phase Plans and Operating Phase Reports, when prepared and updated, for review in accordance with the Review Procedures.
- (c) **(Performance):** Unless otherwise agreed by the State, Project Co must perform the Services in accordance with the Operating Phase Plans.
- (d) **(Authority Approval):** If an Operating Phase Plan is required to be approved by an Authority, Project Co must ensure that it has obtained that Approval prior to submitting the relevant Operating Phase Plan to the State for review.
- (e) **(Additional information):** Project Co must promptly provide to the State any additional information that the State requests in connection with the Operating Phase Plans and the Operating Phase Reports.
- (f) **(Warranty):** Project Co warrants that:
 - (i) each Operating Phase Plan and Operating Phase Report is complete and correct, and not false or misleading in any material respect, at the time it is provided to the State; and
 - (ii) each Operating Phase Plan will, at all times during the Operating Phase, be fit for purpose.

28. Operating Phase Site Access

28.1 Operating Phase Sub-Licence

- (a) **(Operating Phase Sub-Licence):** Subject to Commercial Acceptance having occurred, the State will procure the grant to Project Co of a non-exclusive sub-licence to enter upon, and occupy the Operating Phase Site to the extent necessary to carry out the Services on the terms set out in this clause 28.1.
- (b) **(Terms of Operating Phase Sub-Licence):** The Operating Phase Sub-Licence procured under clause 28.1(a) will be:

- (i) for a term which will:
 - A. commence on the Operational Commencement Date; and
 - B. end on the Expiry Date; and
 - (ii) on the terms of the form of sub-licence set out in the Site Access and Tenure Schedule.
- (c) **(Personal Right):** The Operating Phase Sub-Licence granted under clause 28.1(a):
 - (i) is a personal right in contract, does not create any estate or interest in the Operating Phase Site, does not confer exclusive possession on Project Co or its Associates and does not create the relationship of tenant and landlord between any of them and the State; and
 - (ii) is given subject to the Adverse Rights and the rights of the State, any of its Associates and any other person authorised by it (including the Independent Certifier), to access and occupy the Operating Phase Site in accordance with this Deed and any other State Project Document.
- (d) **(Other access):** Except as set out in clause 28.1(a), Project Co is solely responsible for obtaining access to and from the Operating Phase Site, and to and from any land outside the Operating Phase Site to which access is required to carry out the Services.
- (e) **(Delivery of Operating Phase Sub-Licence):** Not later than 60 Business Days prior to the expected Date of Commercial Acceptance, Project Co must prepare and deliver to the State for review in accordance with the Review Procedures three counterparts of the Operating Phase Sub-Licence which:
 - (i) must be on the terms of the form of sub-licence set out in the Site Access and Tenure Schedule and include as an annexure, the site plans for the Operating Phase Site prepared and certified by a licensed surveyor; and
 - (ii) are:
 - A. executed by Project Co; and
 - B. complete, except for those matters that the State is authorised to complete in accordance with clause 28.1(f).
- (f) **(State to complete):** Project Co authorises the State to complete the Operating Phase Sub-Licence by inserting:
 - (i) the Operational Commencement Date as the commencement date of the Operating Phase Sub-Licence; and
 - (ii) any other particulars necessary to complete the Operating Phase Sub-Licence including updating the amounts in Schedule 2 of the Operating Phase Sub-Licence to each Licence Fee applicable as at Commercial Acceptance for each relevant Licence Fee Payment Date.
- (g) **(Execution):** Subject to Project Co complying with its obligations under clause 28.1(e), the State must complete the counterparts of the Operating Phase Sub-Licence in accordance with clause 28.1(f), execute each counterpart and return 2 of the completed and executed counterparts to Project Co as soon as reasonably practicable, and in any event prior to the Operational Commencement Date.

- (h) **(Comply with Operating Phase Sub-Licence):** The parties must comply with the terms of the Operating Phase Sub-Licence from the Operational Commencement Date.
- (i) **(General obligations)** Project Co must:
 - (i) meet its obligations in clause 8.11 in respect of the Operating Phase Site; and
 - (ii) not use the Operating Phase Site for any purpose other than the Project Activities.

28.2 State access to the Correctional Complex, records and Inmates

- (a) **(Access):** At all times during the Operating Phase, Project Co must ensure that the State, any of its Associates and any other person either:
 - (i) authorised by the State or under the Corrections Legislation (including Official Visitors and members of the Community Advisory Council); or
 - (ii) otherwise requiring access to perform a function contemplated by Law in connection with the Correctional Complex, Inmates or Staff,
 has free and unfettered access:
 - (iii) to the Correctional Complex:
 - A. as required in accordance with the State Project Documents;
 - B. to review, inspect, test and monitor the provision of the Services;
 - C. to attend any test or investigation that is being carried out at the Correctional Complex;
 - D. in accordance with the Services Requirements, any Laws or any Policies;
 - E. to undertake any audits in accordance with clause 11.3; and
 - F. in connection with any matter which the State deems relevant to the performance of the Services; and
 - (iv) to all Project Co Material or other records in respect of Inmates, including medical records;
 - (v) to all Staff (in accordance with the Output Specification or Law); and
 - (vi) to any Inmate (in accordance with the Output Specification, Law or under delegation of the State Representative or the Commissioner).
- (b) **(Right to visit):** Project Co must procure that the State, any Associate of the State and any other person authorised by the State or under the Corrections Legislation has, at all reasonable times during the Operating Phase, the right to visit any property, site or workshop outside the Operating Phase Site:
 - (i) where materials, plant or Equipment are being manufactured, prepared or stored for use in the Correctional Complex, for the purposes of general inspection and testing; or
 - (ii) used by Project Co for the provision of any Services.

- (c) **(Parties to bear own costs):** Each party will bear its own costs in respect of any rights of access exercised under this clause 28.2, except:
 - (i) where a Defect is revealed (other than a minor Defect), Project Co must pay as a debt due and payable by Project Co to the State the costs and expenses of any inspection, testing or investigation which revealed that Defect; or
 - (ii) in respect of any audit undertaken in accordance with clause 11.3 to which clause 11.3(i) applies.
- (d) **(Facilities):** Project Co must, at its own cost, provide persons requiring access to the Correctional Complex or Inmates to perform a function contemplated by Law with the use of appropriate facilities at the Correctional Complex when required to fulfil their functions.

28.3 Access to the Correctional Complex and Inmates by third parties

Without limiting clause 28.2, during the Operating Phase, Project Co must only permit access to the Correctional Complex and Inmates in accordance with the Correctional Complex Access Protocols to a person who is:

- (a) **(Project Co Associate):** a Project Co Associate, to the extent required to discharge Project Co's obligations under this Deed and provided they otherwise satisfy the requirements of this Deed;
- (b) **(Required by Law):** a person who is required by Law to be given access to the Correctional Complex (but only in accordance with such Law);
- (c) **(Corrections Legislation):** a Visitor entitled to have access to the Correctional Complex under the Corrections Legislation (but only in accordance with the Corrections Legislation); or
- (d) **(Required by Deed):** any other person Project Co is required by this Deed to provide with access to the Correctional Complex (but only to the extent required by and otherwise under this Deed),

and must not permit or allow any other person access to the Correctional Complex or any Inmate.

28.4 Correctional Complex Access Protocols

- (a) **(Access Protocols requirements):** Project Co must:
 - (i) develop and update the Correctional Complex Access Protocols in accordance with the relevant requirements of the Operating Phase Plans and Reports Schedule, for those people entitled to access the Correctional Complex and any Inmates under this Deed; and
 - (ii) ensure that all people who access the Correctional Complex and any Inmates as referred to in clauses 28.2 and 28.3 (other than those people referred to in clause 28.4(b)) do so in accordance with the Correctional Complex Access Protocols.
- (b) **(State access):** Subject to any applicable Laws but notwithstanding the State's rights in accordance with this Deed (including pursuant to clause 42), if the State wishes to access the Correctional Complex or any Inmates, it must and must ensure that its Associates, and any other person authorised by the State (in its capacity as a party to this Deed) under clause 28.2(a)(i) does so in accordance with the Correctional Complex Access Protocols.

29. Obligation to perform the Services

29.1 General

In addition to the obligations set out in clause 5, during the Operating Phase, Project Co must continuously perform the Services in accordance with the Services Requirements.

29.2 Material Defects

- (a) **(Defects to be rectified):** Project Co must rectify all Defects during the Operating Phase regardless of whether or not such Defects are the subject of a notice under this clause 29.
- (b) **(State may give notice):** If, during the Operating Phase, the State is of the opinion that a Material Defect exists, then the State may give a notice to Project Co:
 - (i) specifying the Material Defect;
 - (ii) requiring Project Co to rectify the Material Defect; and
 - (iii) specifying a reasonable time within which this must occur, which period must not, if the Material Defect also gives rise to an Unavailability, a Meal Availability Failure or a Quality Failure, be less than any applicable rectification period specified in the Performance Regime or the Payment Schedule.
- (c) **(Timeframe to rectify):** If a notice is given under clause 29.2(b), Project Co must rectify the Material Defect within the time specified in the State's notice.
- (d) **(State entitled to rectify):** If the Material Defect is not rectified by Project Co within the time specified in the State's notice, then the State is entitled to rectify the Material Defect itself or engage a third party to rectify the Material Defect and the cost of any such rectification work will be a debt due and payable by Project Co to the State.
- (e) **(Rights at Law):** Neither the State's rights, nor Project Co's Liability, whether in accordance with this Deed or otherwise at Law in connection with Defects will be:
 - (i) affected or limited by the rights conferred upon the State by this clause 29 or any other provision of this Deed; or
 - (ii) affected or limited by the failure of the State to exercise any such rights.
- (f) **(Rights unaffected):** Nothing in this clause 29, or any other clause of this Deed in connection with Defects, limits Project Co's obligations in respect of Unavailability, Meal Availability Failures or Quality Failures under the Performance Regime, Payment Schedule or the Output Specification.
- (g) **(Referral of Dispute):** Any Dispute as to whether a defect in the Relevant Infrastructure constitutes a Defect for the purposes of this Deed must be referred for dispute resolution in accordance with clause 50.

29.3 Applicable Laws

- (a) **(Compliance with Law):** Project Co must:
 - (i) ensure that, where any Law requires that a right or entitlement be granted to an Inmate, Project Co grants the right or entitlement to the Inmate; and

- (ii) not, and must procure that none of Project Co's Associates, cause the State or any of the State's Associates to breach any Law.
- (b) **(Notification):** If, after the date of this Deed, either party becomes aware of an international policy, obligation or standard in relation to the management or operation of an Australian prison, that comprises or may reasonably be expected to comprise a Policy, it will notify the other party of the same as soon as reasonably practicable and clause 40.10 shall apply.

29.4 Emergency Services Costs

Project Co must pay:

- (a) **(False alarm):** any costs for false alarms or unnecessary attendance at the Site at any time during the Term by any emergency services; and
- (b) **(NSW Fire and Police):** any costs for NSW Fire and Rescue or NSW Police attendance at the Site at the time during the Term where such attendance is requested by Project Co or its Associates,

and any payments made by the State in relation to such costs shall be a debt due and payable by Project Co to the State.

29.5 Industries

- (a) **(Opportunity to work):** Throughout the Operating Phase, Project Co must offer Inmates the opportunity to work in industries (**Correctional Industries**).
- (b) **(Draft Industries Scheme):** Project Co must submit a draft Industries Scheme to the Commissioner for review in accordance with the Review Procedures prior to the Date of Commercial Acceptance.
- (c) **(Work performed by Inmates):** Any work performed by Inmates in Correctional Industries must comply with:
 - (i) all relevant Laws and Policies;
 - (ii) the Operating Phase Plans; and
 - (iii) the Industries Scheme.
- (d) **(Profits and payments):** Project Co must:
 - (i) account for profits derived from work performed by Inmates in accordance with the Output Specification;
 - (ii) reinvest, and must ensure that its Associates reinvest, any profits derived from the work performed by Inmates back into those industries throughout the Operating Phase; and
 - (iii) subject to clause 29.5(e), make all payments to Inmates for work performed in accordance with the Industries Scheme.
- (e) **(Financial Statements):** Project Co must provide the State with quarterly audited statements of income (in the form specified by the State) in respect of income derived from the industries for the purpose of inspection, copying or auditing by the State.
- (f) **(Victims support levies):** Project Co must deduct from payments to be made to Inmates for work performed victims support levies in accordance with the *Victims Rights and Support Act 2013* (NSW) and forward such deductions to the State.

- (g) **(Inmates):** Without limiting clause 5.3(a), the State accepts no risks in connection with any use by Project Co, or any of its Associates, of Inmates to provide labour at the Correctional Complex.

29.6 Available Inmate Places

- (a) **(Available Inmate Places):** Project Co must, at all times on and from the Operational Commencement Date, provide to the State 1,700 Available Inmate Places at the Correctional Complex.
- (b) **(Ramp-Up Period):** Notwithstanding clause 29.6(a), during the Ramp-Up Period, Project Co is only required to accommodate the number of Inmates in the Correctional Complex and provide the Services in respect of those Inmates in accordance with the Ramp-Up Profile Schedule.
- (c) **(Monthly Service Payment):** Without limiting its rights under this Deed on and from the Operational Commencement Date, the State will pay Project Co the Monthly Service Payment in accordance with the Payment Schedule notwithstanding that, in accordance with the Ramp-Up Profile Schedule, there are less than 1,700 Inmates accommodated at the Correctional Complex.
- (d) **(Performance Regime adjustments):** If at any time during the Ramp-Up Period, the Commissioner is of the opinion (acting reasonably) that Project Co is unable to provide the Services to the number of Inmates proposed in the Ramp-Up Profile Schedule having regard to Project Co's performance of the Services (including reference to any Unavailability, Meal Availability Failures or Quality Failures) then, the Performance Regime will apply and the Monthly Service Payments will be adjusted to the extent and in the manner described in the Performance Regime and Payment Schedule.

29.7 Pharmaceutical Supply arrangements

- (a) **(Prior to Commercial Acceptance):** Prior to Commercial Acceptance, Project Co must conduct a tender process for the appointment of a Pharmaceuticals Supplier.
- (b) **(Tender process):** Project Co must ensure that the tender process for the appointment of the Pharmaceuticals Supplier is conducted consistently with New South Wales Government procurement principles including the principles of value for money, open and fair competition, accountability, risk management and probity and transparency.
- (c) **(Form of tender):** Prior to conducting the tender process for the appointment of the Pharmaceuticals Supplier, Project Co must, in consultation with the State, prepare and submit to the State a copy of the proposed form of tender to be used to appoint a Pharmaceuticals Supplier.
- (d) **(State review):** The proposed form of tender submitted by Project Co in accordance with clause 29.7(c) will be reviewed by the State in accordance with the Review Procedures.
- (e) **(Pricing):** As a tender condition, Project Co must require tenderers to provide unit prices, rates or charging formulas (as applicable) for:
 - (i) each Pharmaceutical Item;
 - (ii) each Pharmaceutical Related Item;
 - (iii) Pharmaceutical Supply; and
 - (iv) Urgent Pharmaceutical Supply,

which Project Co reasonably anticipates would be required in relation to the issue or administration of Pharmaceuticals to Custodial Patients at the Correctional Complex.

- (f) **(Copies):** Project Co must provide the State with copies of all tenders received from the tenderers for the role of the Pharmaceuticals Supplier as requested by the State.
- (g) **(Consent of the State):** Neither Project Co nor an Associate of Project Co may appoint or replace a Pharmaceuticals Supplier without the prior written consent of the State (which will not be unreasonably withheld).
- (h) **(Imprest Stock):** Any Pharmaceuticals that are intended by Project Co or an Associate of Project Co to be administered to Inmates as Imprest Stock are subject to the prior approval of the State from time to time.
- (i) **(Changes in price):** Project Co or an Associate of Project Co must obtain the prior written consent of the State (which will not be unreasonably withheld) for any increase to:
 - (i) any fixed unit price or rate (where a charging formula does not otherwise apply); and
 - (ii) any percentage increase against the base cost for any charging formula, which would be payable in relation to any Pharmaceuticals, Pharmaceutical Related Items, Pharmaceutical Supply or Urgent Pharmaceutical Supply contained in the Pharmaceuticals Supplier's appointment.
- (j) **(Changes in appointment):** Subject to clauses 29.7(h) and 29.7(i), Project Co may, from time to time during the Operating Phase, notify the State of changes made to the terms of the Pharmaceuticals Supplier's appointment, to ensure the availability of Pharmaceuticals necessary for the provision of the Health Services at the Correctional Complex.
- (k) **(Branding):** Project Co will:
 - (i) order and administer the best value generic equivalent of branded Pharmaceuticals; and
 - (ii) where a patent for a branded patented Pharmaceutical expires and a generic competitor or a biosimilar product enters the market, order and administer a generic Pharmaceutical equivalent to, or biosimilar of, the relevant patented Pharmaceutical within one month of the expiry of the patent, other than where:
 - (iii) the generic brand does not provide the best value for money to the State; or
 - (iv) there is a clinical reason to not prescribe a generic equivalent of the branded Pharmaceutical or the previously patented Pharmaceutical (as the case may be).
- (l) The obligations of Project Co under this clause 29.7 are without limitation to the requirements in clause 12.

30. Equipment during the Operating Phase

30.1 Title and responsibility for risk

- (a) **(Ownership):** Project Co must ensure that the State (or a nominee of the State) owns all Equipment during the Operating Phase.
- (b) **(Transfer of title):** To the extent not already owned by the State (or a nominee of the State), Project Co must transfer title to all Equipment which is procured by Project Co:
 - (i) during the Delivery Phase, on the Operational Commencement Date; and
 - (ii) during the Operating Phase, at the time of procurement,to the State (or a nominee of the State), free from any encumbrances.
- (c) **(Obligations):** Project Co must maintain, replace and repair all items of Equipment until the end of the Operating Phase in accordance with the Asset Management Plan, the Services Requirements and its other obligations under this Deed.

30.2 Replacement

- (a) **(Equipment replacement):** In addition to its obligations in clauses 5 and 29, when Project Co is required to replace an item of Equipment, it must do so with Equipment that:
 - (i) is in at least the same position in the market in respect of functionality, standard, quality and level of technological advancement as the Equipment that it is replacing was at the time the replaced Equipment was procured; and
 - (ii) has a design life equal to or greater than the Equipment it is replacing, as specified in the Design Life Schedule.
- (b) **(New Equipment):** If there is a new item of Equipment readily available in the market that:
 - (i) has better functionality;
 - (ii) has a better standard relative to the market;
 - (iii) has a higher level of quality;
 - (iv) has a design life, as specified in the Design Life Schedule, equal to or greater; or
 - (v) is more technically or technologically advanced,than the Equipment it is replacing and the new item of Equipment:
 - (vi) does not materially increase operating or maintenance costs of the State, the cost of any Reviewable Services or any other costs payable by the State; and
 - (vii) has a whole of life cost to Project Co less than or equal to 110% of the Indexed whole of life cost to Project Co of the item of Equipment it is replacing,

Project Co must use that new item of Equipment to replace the relevant item of Equipment.

- (c) **(Notification of State):** If Project Co considers that a new item of Equipment does not meet the requirements set out in clause 30.2(b)(vi), Project Co must promptly notify the State in writing (giving reasons).
- (d) **(State may waive requirement):** Following receipt of a notice from Project Co in accordance with clause 30.2(c), the State may, in its absolute discretion, elect to waive such requirement in which case, Project Co must use that new item of Equipment to replace the relevant item of Equipment.

30.3 Computer requirement

- (a) During the Operating Phase, Project Co shall maintain access to the State's corporate information system known as the Offender Integrated Management System.
- (b) During the Operating Phase, Project Co shall:
 - (i) establish a link from Project Co's computer system; and
 - (ii) use software which is either:
 - A. compatible with the Commissioner's computer system; or
 - B. supplied by the State,so that the Commissioner:
 - (iii) has on-line 24 hour access to the Records; and
 - (iv) can print out and store the Records on the Commissioner's computer system.
- (c) During the Operating Phase, Project Co must continually, as appropriate, upgrade the software and systems on Project Co's computer system.
- (d) When Project Co undertakes a software upgrade in accordance with clause 30.3(c), Project Co must immediately:
 - (i) notify the Commissioner in writing; and
 - (ii) undertake the work and provide the facilities to ensure that any computer terminal which is linked to Project Co's computer system provided by Project Co to the State or any of its Associates is similarly upgraded.

31. Quality Assurance during the Operating Phase

- (a) **(Certification of Subcontractors):** In addition to its obligations in clause 11.1, Project Co must ensure that all Key Subcontractors or Significant Subcontractors engaged to perform any of the Services are certified to AS/NZS ISO 9001 as soon as practicable after the commencement of the provision of the Services and thereafter at all times during the Operating Phase.
- (b) **(Additional certification):** Project Co must ensure that the relevant Key Subcontractors or Significant Subcontractors engaged to perform the relevant Services are also certified to:
 - (i) ISO 55001 - quality assurance for asset management;

- (ii) AS/NZS ISO 4801 - quality assurance for occupational health & safety management systems;
- (iii) AS/NZS ISO 14001 - quality assurance for environmental management systems; and
- (iv) ISO 22000 – quality assurance for food safety.

32. Asset Ownership and Condition

32.1 Fixtures

All fixtures affixed to the Site, including the Correctional Complex, will be owned by the owner of the relevant part of the Site from the time they are affixed free from any encumbrance.

32.2 Refurbishment Works

In addition to its obligations in clause 30 to replace Equipment, Project Co must carry out Refurbishment Works using materials, finishes and other items that:

- (a) **(Quality)**: have the same or higher levels of quality as that which would be used in accordance with Best Industry Practice; and
- (b) **(Costs)**: do not materially increase operating or maintenance costs to the State, the cost of any Reviewable Services or any other costs payable by the State.

32.3 Deferral of Refurbishment Works by Project Co

- (a) **(Deferral)**: Project Co may only defer any Refurbishment Works:
 - (i) in accordance with this clause 32.3;
 - (ii) if, notwithstanding the deferral, Project Co will continue to satisfy the FFP Warranty; and
 - (iii) the deferral will not result in a breach of clause 32.3(e).
- (b) **(Proposal)**: Subject to clause 32.3(e), if Project Co proposes to defer any Refurbishment Works, it must identify in the Asset Management Plan submitted for review in accordance with the Review Procedures:
 - (i) the details of each proposed deferral;
 - (ii) the period of time of deferral; and
 - (iii) whether that deferral would:
 - A. entitle the State to reject the Asset Management Plan in accordance with clause 32.3(c); or
 - B. breach clause 32.3(e).
- (c) **(State may reject)**: The State may reject any Asset Management Plan submitted in accordance with clause 32.3(b):
 - (i) if the State considers, acting reasonably, that the submitted Asset Management Plan will not enable Project Co to meet its obligations under clause 32.3(a); or
 - (ii) for the reasons set out in clause 32.3(d); or

- (iii) if the proposed deferral in the submitted Asset Management Plan would result in a breach of clause 32.3(e).
- (d) **(Reasons for rejection):** The State may reject any Asset Management Plan submitted in accordance with clause 32.3(b) if Project Co's proposed deferral of Refurbishment Works would result in the relevant Refurbishment Works being deferred by a period (measured in Operating Years) equal to or greater than 30% of the period of the relevant replacement or refurbishment cycle shown in:
 - (i) the Asset Management Plan current as at the Date of Commercial Acceptance where the item has not been subject to any Refurbishment Works;
 - (ii) if the item the subject of the Refurbishment Works was not included in the Asset Management Plan current as at the Date of Commercial Acceptance, the Asset Management Plan in which the relevant item and the replacement cycle for the relevant item was first shown; or
 - (iii) if the item has been the subject of Refurbishment Works, the Asset Management Plan that first included the Refurbishment Works.
- (e) **(Project Co may not defer):** Project Co must not defer, or propose to defer, any Refurbishment Works scheduled in the then current Asset Management Plan to take place during the five years prior to the Final Expiry Date.
- (f) **(Permanently deferred Refurbishment Works):** If, at the Expiry Date, there are any Refurbishment Works set out in the Asset Management Plan which have not been performed by Project Co, Project Co must pay to the State the State's share of the Saving (calculated in accordance with the Change Compensation Principles).

32.4 Residual life and Design Life

- (a) **(Fit for purpose):** Project Co represents and warrants that each:
 - (i) Residual Life Item will be, at the Expiry Date, capable of being Fit for Purpose at all times during its residual life as specified in the Residual Life Schedule, provided that after the Expiry Date it is operated and maintained in accordance with Best Services Practices; and
 - (ii) Design Life Item with a specified design life in excess of the Expiry Date will, at the Expiry Date, continue to meet the applicable design life specified in the Design Life Schedule.
- (b) **(Representations and warranties):** The representations and warranties made by Project Co under clause 32.4(a) are made, and will be deemed to have been made, on the Expiry Date.
- (c) **(Survival):** This clause 32.4 will survive rescission, termination or expiration of this Deed.

33. Repricing Reviewable Services

33.1 Reviewable Services Schedule

- (a) **(Original Reviewable Services Schedule):** For the purposes of the Proposal and to assist in the repricing of the Reviewable Services, Project Co has prepared the Original Reviewable Services Schedule and the Reviewable Services Plan.
- (b) **(Status and content of Original Reviewable Services Schedule):** The Original Reviewable Services Schedule sets out the basis on which Project Co has priced the Reviewable Services for the first Reviewable Services Term, including:

- (i) details of relevant margins;
 - (ii) details in respect of the allocation of responsibilities and risks between Project Co, the Operator and any other Subcontractors in respect of the performance of the Reviewable Services; and
 - (iii) the staffing profiles and shift patterns in respect of the performance of the Reviewable Services, including details of the number of full time equivalent positions involved in performing the Services, consistent with the Financial Model.
- (c) **(Reviewable Services Schedule updated):** The Original Reviewable Services Schedule (in the case of the first Reviewable Services Term), and then, in the case of each subsequent Reviewable Services Term, the then current Reviewable Services Schedule and Reviewable Services Plan:
- (i) will be updated at the commencement of the subsequent Reviewable Services Term to reflect:
 - A. the terms and prices agreed or determined for that subsequent Reviewable Services Term; and
 - B. the information required under clause 33.1(b) for that subsequent Reviewable Services Term; and
 - (ii) as updated in accordance with clause 33.1(c)(i), will be used for the purposes of pricing the Reviewable Services for the following Reviewable Services Term.
- (d) **(Overarching principles for repricing Reviewable Services):** Unless otherwise agreed in writing by the State, Project Co must price the provision of each Reviewable Service for the ensuing Reviewable Services Term in accordance with the following pricing principles and otherwise in accordance with this clause 33:
- (i) Project Co must include all efficiencies, innovations and continuing improvements so as to reduce or minimise the cost of delivering the Reviewable Services for the next Reviewable Services Term in its offer under clause 33.4;
 - (ii) there must be no new margins and no increase to any margins, from those margins identified in the Original Reviewable Services Schedule;
 - (iii) there must be no net increase to the Monthly Service Payment from the previous Reviewable Services Term as a result of any reallocation of poor performance risk as between Project Co and any Subcontractors following the pricing of each Reviewable Service for an ensuing Reviewable Services Term; and
 - (iv) unless otherwise agreed by the State (acting reasonably), there must be no increase in the aggregate number of full time equivalent positions involved in performing the Reviewable Services, from the Original Reviewable Services Schedule including those involved in "Management and Administration" other than:
 - A. where necessary due to:
 - 1) any changes under clause 33.3(a); or
 - 2) any Modification implemented under this Deed; or
 - B. where Project Co can demonstrate to the satisfaction of the State (acting reasonably) that such changes in the aggregate

number of full time equivalent positions are required to meet the requirements of this Deed for the next Reviewable Services Term.

33.2 State benchmarking

Project Co acknowledges that the State may, at any time in its discretion:

- (a) **(State benchmarking)**: benchmark the pricing for the Reviewable Services against other correctional centres in New South Wales for any purpose including to inform its decision whether to proceed to make a request for Project Co to submit an offer in accordance with clause 33.4(a);
- (b) **(Information)**: provide Project Co with information obtained by the State arising out of the benchmarking of the Reviewable Services undertaken by the State; and
- (c) **(Meeting)**: request that Project Co:
 - (i) meet with the State to discuss the outcome of any benchmarking undertaken by the State and Project Co must attend such meetings; and
 - (ii) procure the attendance of a representative of the Operator or any other Subcontractor at such meetings.

33.3 Preparation for repricing

Not later than 18 Months before each Reviewable Services Date, the State will consult with and notify Project Co of:

- (a) **(Reviewable Services)**: changes to be made to the Services or Services Requirements and any terms of this Deed for the Reviewable Services for the purposes of the next Reviewable Services Term, which may include a change to the Services or the Services Requirements;
- (b) **(Timetable)**: a timetable for the repricing of the Reviewable Services;
- (c) not used; and
- (d) **(Amendments)**: any required amendments to the then current Reviewable Services Plan.

33.4 Request for offer to reprice

- (a) **(Request for offer)**: The State may request Project Co to submit an offer for the provision of the Reviewable Services for the next Reviewable Services Term.
- (b) **(Project Co offer)**: Whether or not the State has made a request in accordance with clause 33.4(a), not later than 15 Months before the Reviewable Services Date, Project Co may (and if the State has made a request in accordance with clause 33.4(a), Project Co must) submit an offer for the provision of the Reviewable Services for the next Reviewable Services Term on the terms notified by the State under clause 33.3 **(Initial Offer)**.
- (c) **(Offer detail)**: Project Co's Initial Offer must:
 - (i) contain an overarching explanation and details of any proposed changes to the price of the Reviewable Services;
 - (ii) be priced in accordance with the pricing principles set out in clause 33.1(d);

- (iii) break down the price for each of the Reviewable Services for the next Reviewable Services Term;
 - (iv) include the staffing profiles and shift patterns in respect of the performance of the Reviewable Services for the next Reviewable Services Term, including the number of full time equivalent positions involved in "Management and Administration" compared with the then current Reviewable Services Schedule;
 - (v) detail all of the relevant factors and inputs into the proposed price including proposals in connection with labour and materials required to perform the Services;
 - (vi) clearly identify the allocation of responsibility for the performance of obligations where such obligations may be provided pursuant to two or more Services (including Services which do not constitute Reviewable Services); and
 - (vii) provide details of any changes that may have been made to their subcontracting arrangements for the Reviewable Services during the previous Reviewable Services Term.
- (d) **(Offer submitted):** If Project Co submits an Initial Offer, then:
- (i) for a period of 4 Months after the Initial Offer is submitted (or such longer period agreed between the parties), the State agrees to negotiate exclusively with Project Co for the provision of the Reviewable Services during the next Reviewable Services Term; and
 - (ii) the State will, by a date not later than 1 Month after the expiration of that 4 Month period, advise Project Co whether:
 - A. Project Co's Initial Offer or Project Co's final negotiated offer (**Negotiated Offer**) is acceptable to the State for the provision of the Reviewable Services; or
 - B. the State requires Project Co to conduct a competitive tender under clauses 33.6 to 33.8 (inclusive) in respect of the Reviewable Services.
- (e) **(Offer remains open):** Notwithstanding that the State may require Project Co to conduct a competitive tender, Project Co's Initial Offer and Negotiated Offer (if any) must remain open for subsequent acceptance by the State until the Reviewable Services Tender Expiry Date.

33.5 No offer made

- (a) If Project Co does not submit an offer under clause 33.4(b), then, the State may:
 - (i) **(Current terms):** require Project Co to continue to provide the Reviewable Services on the then current terms and pricing for the next Reviewable Services Term; or
 - (ii) **(Require competitive tender process):** require Project Co to conduct a competitive tender to be conducted in accordance with clauses 33.6 to 33.8 (inclusive).

33.6 Competitive tender

- (a) **(Project Co to conduct tender process):** If the State requires Project Co to conduct a competitive tender pursuant to clause 33.4(d)(ii)B or 33.5(a)(ii), Project

Co must conduct a competitive tender in accordance with this clause 33.6 and the Reviewable Services Plan.

- (b) **(No delegation):** Project Co may not subcontract or otherwise delegate any aspect of a competitive tender conducted under this clause 33.6 without the prior consent of the State.
- (c) **(Initial meeting):** Promptly, and in any event within 1 Month, after receipt of the State's request under clause 33.4(d)(ii)B or clause 33.5(a)(ii) for a competitive tender to be conducted under this clause 33.6, Project Co must commence the competitive tender process by convening an initial meeting with the State and the probity officer (if applicable).
- (d) **(Consultation):** At the initial meeting convened under clause 33.6(c) (and any subsequent meetings agreed between them), Project Co, the State and the probity officer (if applicable) will work collaboratively, having regard to the Reviewable Services Plan, to seek to agree on:
 - (i) the appropriate timetable for conducting the tender by Project Co for the Reviewable Services, including the proposed date for releasing the tender to the market and identifying all activities that involve the State, including the dates for:
 - A. any submission of documents to the State (including any revisions or resubmissions); and
 - B. any review, comment, outcomes or actions required to be performed by the State,all of which must be consistent with this clause 33 and the Reviewable Services Plan;
 - (ii) the appropriate manner of advertising the tender for the Reviewable Services and the means of identifying prospective tenderers;
 - (iii) evaluation criteria, evaluation plan and evaluation panel (which may, at the State's discretion, include a representative of the State), which will include those set out in clause 33.6(h); and
 - (iv) the draft tender documentation which must:
 - A. provide such information concerning the Project, the Reviewable Services and the Project Documents as the State reasonably requires to ensure the tenderers are fully informed of the opportunity tendered (including details of the evaluation criteria set out in clause 33.6(d)(iii));
 - B. impose a duty of confidentiality on tenderers;
 - C. require tenders to be conforming, and irrevocable until one Month after the relevant current Reviewable Services Term;
 - D. require tenderers to comply with the Subcontracting requirements set out in clause 12.3 including providing consents to the conduct of any Probity Investigations which may be required by the State;
 - E. attach a draft Subcontract:
 - 1) substantially on the same terms (other than price and term and any amendments required in accordance with clause 33.3) as the current

Subcontract for the provision of the tendered Reviewable Services; and

2) which provides for the review of the Reviewable Services in accordance with the terms of this clause 33;

F. include a reasonable transition plan for the prompt transfer of the Services from the Operator to that successful third party tenderer;

G. require tenderers to accept the terms of the draft Subcontract; and

H. enable Project Co to prepare a proposed updated Reviewable Services Schedule in accordance with the pricing principles set out in clause 33.1(d) (provided that this does not require the disclosure of any current pricing information, including margins, Monthly Service Payments or full-time equivalents, to tenderers); and

(v) whether Project Co or the State should manage the tender process.

(e) **(Review of request for tender):** Not later than 30 Business Days prior to the proposed date for releasing the tender to the market, Project Co must provide to the State:

(i) the final request for tender prepared by Project Co which is proposed to be issued to prospective tenderers;

(ii) the list of proposed tenderers; and

(iii) Project Co's proposed evaluation plan in respect of the request for tender,

for the Reviewable Services for review in accordance with the Review Procedures.

(f) **(Collaboration with the State):** Subject to clause 33.6(i), Project Co must:

(i) actively manage the tender process;

(ii) keep the State regularly informed as to the progress of the tender;

(iii) during the tender process, give the State reasonable prior written notice of any interviews or meetings with the tenderers and the State may, in its discretion, attend such interviews or meetings; and

(iv) during the tender process, give the State copies of all correspondence or documents received by Project Co from the tenderers or provided by Project Co to the tenderers.

(g) **(Offers):** Subject to clause 33.6(i), Project Co must seek offers by competitive tender on the basis of the tender approved by the State in accordance with clause 33.6(e), from at least three experienced and capable service providers with the financial capacity to provide the Reviewable Services over the remainder of the Term (or if there are not three such service providers active in the market and if approved by the State pursuant to clause 33.6(e), such lesser number) for the Reviewable Services which must not include (without the consent of the State) offers from:

(i) Project Co or any Associate of Project Co;

- (ii) any more than one Related Body Corporate of any Associate of Project Co; or
 - (iii) any service provider that has not received the prior approval of the State (which must not be unreasonably withheld).
- (h) **(Content of offers):** Subject to clause 33.6(i), Project Co must procure that each offer obtained under clause 33.6(g) addresses the following criteria:
- (i) details of the contract price, which reflect a competitive pricing of the Reviewable Services in the then current market;
 - (ii) current capacity and capability to carry out the Reviewable Services over the Reviewable Services Term, including current workload and resources plans, key people, subcontractors and consultants;
 - (iii) previous performance of services similar to the Reviewable Services together with referees;
 - (iv) financial capacity to provide the Reviewable Services;
 - (v) demonstration that Project Co will be able to continue to meet the performance standards in the Output Specification relevant to the Reviewable Services; and
 - (vi) value for money delivered to the State.
- (i) **(State to manage the tender process):** Within 15 Business Days after receipt of the documentation in accordance with clause 33.6(e), the State may notify Project Co that it wishes to manage the tender process. If the State notifies Project Co that it wishes to manage the tender process:
- (i) Project Co must:
 - A. comply with all reasonable requests of the State to assist with that competitive tender process; and
 - B. refrain from doing anything that may impede the State in conducting that competitive tender process;
 - (ii) the State must:
 - A. keep Project Co regularly informed as to the progress of the tender;
 - B. during the tender process, give Project Co reasonable prior written notice of any interviews or meetings with the tenderers and Project Co may, in its discretion, attend such interviews or meetings; and
 - C. provide Project Co with a copy of all offers received by the State; and
 - (iii) the State must use the list of proposed tenderers prepared by Project Co in accordance with clause 33.6(e) and (g), as approved by the State or as amended by agreement between the State and Project Co.

Project Co acknowledges and agrees that the State's management of the tender process pursuant to this clause 33.6(i) is an administrative function only and does not relieve Project Co from, or alter or affect, Project Co's obligations, Liabilities or responsibilities.

33.7 Outcome of competitive tender process

Project Co must, within 6 Months after the notice from the State under clause 33.4(d)(ii)B or 33.5(a)(ii) (or if the State has managed the tender process in accordance with clause 33.6(i), within 1 Month of receipt by Project Co of the offers received by the State in accordance with clause 33.6(i)(ii)C):

- (a) provide to the State copies of all offers Project Co has procured (including procured through the State in accordance with clause 33.6(i)) which meet the requirements set out in clauses 33.6(g) and 33.6(h); and
- (b) any further details as the State reasonably requires in relation to the tender and the offers,

so that the State and Project Co can collaboratively work together, in accordance with clause 33.8 to seek to reach agreement on the appointment of one of the tenderers to provide the Reviewable Services for the next Reviewable Services Term.

33.8 Consultation

- (a) **(Reviewable Services):** During the period of 1 Month following provision of the information under clause 33.7, Project Co and the State must regularly and collaboratively consult with each other concerning those offers which comply with clauses 33.6(g) and 33.6(h), to seek to reach agreement on:
 - (i) the evaluation report in connection with each offer; and
 - (ii) the appointment of one of the tenderers to provide the Reviewable Services for the next Reviewable Services Term having regard to:
 - A. the experience, capability and financial capacity of each tenderer;
 - B. the extent to which each offer provides value for money to the State when compared with each of the other offers; and
 - C. the ability of Project Co to continue to meet the Output Specification and otherwise comply with this Deed on subcontracting the Reviewable Service to any of the tenderers.
- (b) **(State agreement):** Project Co must not enter into any contract with any tenderer for the provision of the Reviewable Services without the prior agreement of the State.
- (c) **(Probity Investigations):** Project Co must ensure that each of the tenderers for the Reviewable Services, and any persons likely to be associated with the provision of the Reviewable Services, provide their consent to the carrying out of any Probity Investigations required by the State.

33.9 Appointment and Payment

- (a) **(Successful tenderer):** If an offer made by a tenderer is acceptable to the State (whether or not the tender process was conducted by the State or Project Co), Project Co must subcontract the provision of the Reviewable Services for the next Reviewable Services Term to the successful tenderer, pursuant to a Subcontract which complies with clause 33.6(d)(iv)E.
- (b) **(Deemed approval):** A Subcontract entered into in accordance with this clause 33.9 will be deemed to be approved by the State for the purposes of clause 12.2.
- (c) **(Adjustments):** The parties must adjust:

- (i) the Monthly Service Payment (and the Financial Model); and
- (ii) the terms of this Deed (including any changes to be made to the Services or Services Requirements made by the State pursuant to clause 33.3(a)),

for the balance of the Operating Phase to reflect:

- (iii) Project Co's offer accepted by the State; or
- (iv) the Subcontract entered into in accordance with clause 33.9(a),

(as applicable), unless clause 33.10(a) or 33.10(b) applies, in which case the parties must adjust the Monthly Service Payment (and the Financial Model) for the balance of the Operating Phase to reflect the circumstances described in clause 33.10(a) or 33.10(b) (as applicable).

33.10 Failure to agree

If none of the offers made by the tenderers are acceptable to the State (whether or not the tender process was managed by the State or Project Co), the State may:

- (a) **(Acceptance)**: accept Project Co's Initial Offer or Negotiated Offer (if any);
- (b) **(Current terms)**: require Project Co to proceed to provide the Reviewable Services under:
 - (i) the current terms; and
 - (ii) pricing in accordance with clause 33.11; or
- (c) **(Modification)**: omit the Reviewable Services from the Services by way of a Modification and carry out the Reviewable Services itself or procure a third party to carry out the Reviewable Services (in which case the Monthly Service Payment will be adjusted and this Deed amended as necessary in accordance with the Change Compensation Principles for the omission of the Reviewable Services).

33.11 Continued provision of Reviewable Services

- (a) **(Appointment of Subcontractor)**: Subject to clause 33.11(b), without limiting the State's rights under this Deed, if a Subcontractor is intended by the State to be appointed to carry out the Reviewable Services in the next Reviewable Services Term but has not yet been appointed under clause 33.9 by the date of commencement of the next Reviewable Services Term, Project Co must continue to provide the Reviewable Services on the terms and pricing for the immediately prior Reviewable Services Term and in accordance with the Output Specification, until such time as a Subcontractor is appointed under clause 33.9 and commences provision of those Reviewable Services.
- (b) **(Backdated price)**: If the period for provision of the Reviewable Services by Project Co under clause 33.11(a) extends beyond the Reviewable Services Tender Expiry Date, the State will pay the price offered by Project Co (if any) in Project Co's Initial Offer for the continued provision of the Reviewable Services backdated to the Reviewable Services Tender Expiry Date.

33.12 Probity of process

The State may, at any time, appoint a probity officer to, or have the State Representative, oversee the whole or any part of the process referred to in this clause 33 and Project Co must:

- (a) **(Provide assistance)**: provide all assistance and information required by; and

- (b) **(Comply with directions):** comply with all directions of, the probity officer or State Representative, in connection with that process.

34. Benchmarking of Utilities

- (a) Project Co must, for each Utility:
- (i) not less than three months prior to each Utilities Review Date, commence a tender process acceptable to the State (without limiting clause 34(b)) to obtain separate tenders for the Utility from no fewer than three retailers (or, to the extent that there are fewer than three retailers able to supply or provide the required Utility, Project Co must use reasonable endeavours to obtain quotations from as many retailers as possible):
 - A. providing price quotations:
 - 1) of the price per unit of volume for the Utility or where the price per unit of volume for the Utility varies depending on usage or time of usage, the applicable prices per unit of volume for the Utility for each usage or time of usage range; and
 - 2) to the extent it is market practice to include fixed components of pricing, fixed component pricing, provided that the fixed component is included in the Model Output Schedule as part of the Financial Close Financial Model,and, in each case, which price must be:
 - 3) inclusive of all costs, charges, fees and loss adjustment factors which the Utility retailer proposes to pass on to the purchaser;
 - 4) valid for a nominated period acceptable to the State; and
 - 5) based upon consumption of the Utility which does not exceed the "Maximum Units" for each Utility specified in the Model Output Schedule as part of the Financial Close Financial Model;
 - (ii) demonstrate to the reasonable satisfaction of the State that the Utility retailer it intends to select and engage is the best choice having regard to:
 - A. the price quoted in the prevailing market conditions; and
 - B. the experience, capability, financial and regulatory standing of the Utility retailer in the context of the Project; and
 - (iii) select a Utility retailer acceptable to the State from the Utility retailers who have provided tenders to Project Co pursuant to this clause 34(a).
- (b) For the purposes of any tender process required under clause 34(a)(i):
- (i) Project Co must permit the State to review all materials that are prepared or received in the process of obtaining tenders and provide any other information that the State reasonably requires. This includes any

consumption data for the Correctional Complex, which if requested by the State, must be provided at the end of each Operating Year;

- (ii) the State may (but is not obliged to) specify the information that tenderers are required to provide in their responses to a request for tender;
- (iii) Project Co will retain responsibility for undertaking the tender process including retaining primary responsibility for:
 - A. the preparation of the tender documents and collation of the information required to be provided to prospective tenderers;
 - B. general management of the tender process such as co-ordinating meetings and advertising or compiling the list of prospective tenderers and notifying tenderers to be invited to submit tenders; and
 - C. evaluating the tender responses received by Project Co; and
- (iv) the State will have the right to object to the selection of any person as a prospective tenderer if the State reasonably believes:
 - A. that person does not (or could not reasonably be considered to) comply with any of the criteria referred to in this clause 34; or
 - B. the selection of that person as a prospective tenderer would give rise to a potential or perceived conflict of interest.
- (c) On or prior to each Utilities Review Date, Project Co must select, and enter into, a Retail Utility Contract acceptable to the State with a Utility retailer in accordance with clause 34(a)(iii).
- (d) By no later than 1 month after each Utilities Review Date, Project Co must provide the State with the Retail Utility Contracts it has entered into in accordance with this clause 34.
- (e) Project Co must provide the State with a statement from each provider under each Retail Utility Contract it has entered into identifying the forecast maximum demand or capacity on which the pricing in each Retail Utility Contract is based. This will include, as applicable, any notification under the terms of the Retail Utility Contract by Project Co or any of its Associates to the retailer on its expected, forecast or anticipated demand (**Maximum Demand**).
- (f) On each Utilities Review Date, the relevant price inputs for each Utility will be updated in the Model Output Schedule to reflect the relevant prices in the Retail Utility Contract as deflated by the CPI Annual Multiplier and expressed in 30 June 2017 dollars. The Maximum Units for each Utility which will not be adjusted and will remain equal to the "Maximum Units" specified in the Model Output Schedule as part of the Financial Close Financial Model until the Expiry Date.

Part F - Payment Provisions

35. Conditional Debt Pay Down

35.1 CDPD Conditions

The State's obligation to pay the CDPD Amount is subject to the following conditions precedent (**CDPD Conditions**):

- (a) (**Commencement**): the CDPD Period has commenced and not expired;
- (b) (**Default of termination**): there is no subsisting Major Default or Default Termination Event;
- (c) (**Major Default**): no Major Default (other than a Major Default occurring under paragraph (h) or (m) of the definition of Major Default) has occurred in the 6 month period immediately prior to the CDPD Notice Date;
- (d) (**Multiple defaults**): not more than one Major Default (other than a Major Default occurring under paragraph (h) or (m) of the definition of Major Default) has occurred in the 18 month period immediately prior to the CDPD Notice Date;
- (e) (**Default Termination Event**): no Default Termination Event has occurred in the 12 month period immediately prior to the CDPD Notice Date;
- (f) (**Single cost of rectifying**): the costs of rectifying any single subsisting Defect will not exceed [REDACTED] and
- (g) (**Aggregate cost of rectifying all**): the aggregate cost of rectifying all subsisting Defects will not exceed [REDACTED]

35.2 CDPD Payment Date

- (a) (**CDPD Amount**): Subject to clause 35.1, the State must pay the CDPD Amount on the CDPD Payment Date in accordance with the Receivables Purchase Deed.
- (b) (**Outstanding Debt**): Project Co must apply or procure the application of the CDPD Amount in partial repayment of the then outstanding Debt and ensure that the repaid amount is not available to be redrawn at any time under the Finance Documents.

35.3 Satisfaction of CDPD Conditions

- (a) (**Best endeavours**): Project Co must use its best endeavours to procure the satisfaction of the CDPD Conditions prior to expiry of the CDPD Period.
- (b) (**Single conditions**): When Project Co considers that a CDPD Condition has been satisfied, Project Co must promptly and in any event within 5 Business Days give the State:
 - (i) a written notice stating that it considers that the CDPD Condition has been satisfied; and
 - (ii) reasonable evidence that the CDPD Condition has been satisfied.
- (c) (**All conditions**): When Project Co considers that all of the CDPD Conditions have been satisfied (or waived by the State), Project Co must:

- (i) give the State a written notice stating that it considers that all of the CDPD Conditions have been satisfied (or waived by the State); and
 - (ii) provide the State with the documents and information required under clause 59 and the CDPD Adjustment Protocol.
- (d) **(State notice):** Within 10 Business Days after receiving a notice under clause 35.3(c)(i), the State will give Project Co:
- (i) written notice:
 - A. that the State agrees that all of the CDPD Conditions have been satisfied (or waived by the State);
 - B. that the State accepts Project Co's calculation of the CDPD Amount; and
 - C. confirming the CDPD Payment Date,**(CDPD Satisfaction Notice); or**
 - (ii) written notice:
 - A. that the State does not agree that all of the CDPD Conditions have been satisfied (or waived by State);
 - B. that the State does not accept Project Co's calculation of the CDPD Amount; and
 - C. the reasons for the State's determination.
- (e) **(Outstanding CDPD Conditions):** If the State gives a notice under clause 35.3(d)(ii)A, Project Co must continue to use its best endeavours to procure the satisfaction of the outstanding CDPD Conditions and this clause 35.3 will re-apply.
- (f) **(Breach):** A breach of clause 35.3(a) by Project Co will not, of itself, be a Major Default or a Default Termination Event.
- (g) **(Payment):** The payment of the CDPD Amount does not constitute approval by the State of the completion or acceptance of the Delivery Phase Activities in accordance with the State Project Documents, or evidence that the Correctional Complex is Fit for Purpose or constitute evidence that all or any other obligations of Project Co under the State Project Documents have been satisfied.

35.4 Waiver of CDPD Conditions

- (a) **(State may waive):** The State may waive one or more of the CDPD Conditions in its absolute discretion by giving written notice to Project Co, except that the State cannot waive the requirement that the CDPD Period has commenced.
- (b) **(Consequence of waiver):** Any waiver by the State of a CDPD Condition does not constitute a waiver by the State of any of its rights, powers or discretions in respect of any subsisting breach of this Deed, a Major Default, a Default Termination Event or Defect (as may be relevant).
- (c) **(CDPD Payment Date):** The State may specify the CDPD Payment Date in the notice under clause 35.4(a).

36. Payments Adjustments & Taxes

36.1 State's payment obligations

- (a) **(Payment obligations):** In consideration of Project Co providing the Services, the State will pay Project Co the Monthly Service Payment:
- (i) calculated in accordance with the Payment Schedule; and
 - (ii) in arrears,
- during the Operating Phase from the end of the first Month of the Operating Phase.
- (b) **(Other payments):** Other than the Monthly Service Payment and the CDPD Amount the State will pay any payment that is due and payable to Project Co, and Project Co must pay any payment that is due and payable to the State:
- (i) at the time specified in this Deed or the relevant State Project Document for the particular payment; or
 - (ii) if no time is specified for the payment of the relevant amount, the payment will be made:
 - A. by the State, in the case of a payment to Project Co:
 - 1) during the Delivery Phase, 20 Business Days after a written demand is made for payment of the amount; and
 - 2) during the Operating Phase, at the same time as the next Monthly Service Payment is made by the State to Project Co after the relevant amount becomes due and payable and a written demand is made for payment of the amount; and
 - B. by Project Co in the case of a payment to the State, within 20 Business Days after a written demand being made by the State for payment of the relevant amount.

36.2 Monthly Service Payments

- (a) **(Payment Claims):** Within 5 Business Days after the end of each Month during the Operating Phase, Project Co must prepare and provide to the State a Payment Claim for:
- (i) the Monthly Service Payment for that Month; and
 - (ii) any other amounts then due and payable by the State to Project Co or by Project Co to the State under this Deed (other than the CDPD Amount).
- (b) **(Payment Statement):** The State will, within the later of:
- (i) 5 Business Days after receipt by the State of a Payment Claim; and
 - (ii) 5 Business Days after receipt by the State of the relevant Monthly Performance Report,

provide to Project Co a statement (**Payment Statement**) stating the amount payable to or by Project Co (which may be more or less than the amount set out in

the Payment Claim) and the reasons for any difference to the amount in the Payment Claim.

- (c) **(No Payment Claim):** If Project Co does not issue a Payment Claim or Monthly Performance Report, the State may still issue a Payment Statement setting out the amount payable to or by Project Co.
- (d) **(Registered):** Each of the State and Project Co acknowledges that it (or in the case of the State, an entity on behalf of the State) is registered for GST when it enters into this Deed and that each party will notify the other party if it (or the relevant entity) ceases to be registered.
- (e) **(Tax Invoice):** Without limiting Project Co's right to dispute the amount for payment stated in the Payment Statement, Project Co or the State (as applicable) will provide to the other party a Tax Invoice in connection with any supplies the subject of the Payment Statement for the amount stated in the Payment Statement within 2 Business Days of receipt of the Payment Statement.
- (f) **(Failure to provide Tax Invoice):** Without limiting clause 36.2, if Project Co or the State (as applicable) fails to provide a Tax Invoice in the time required, the State or Project Co (as the case may be) may prepare the Tax Invoice on behalf of Project Co or the State (as applicable) and provide that Tax Invoice to Project Co or the State (as applicable).
- (g) **(Timing of payment):** Subject to clause 36.6, payment of the amount stated to be payable to or by Project Co in the Payment Statement will be made by the State to Project Co or by Project Co to the State (as the case may be) within 10 Business Days of receipt of the Tax Invoice provided under clause 36.2(e) or clause 36.2(f).
- (h) **(Payment not evidence of proper performance):** Neither payment of Monthly Service Payments by the State to Project Co nor the issuing of any Payment Statement is:
 - (i) evidence that the Project Activities have been carried out by Project Co in accordance with the State Project Documents; or
 - (ii) an admission of liability,and is only to be taken as payment on account.
- (i) **(Correction of previous Payment Statement):** The State may, in any Payment Statement, correct any error in any previous Payment Statement issued by the State.

36.3 Payment adjustments under the Performance Regime and Payment Schedule

- (a) **(Performance Regime applies):** The Monthly Service Payments will be adjusted to the extent and in the manner described in the Performance Regime and the Payment Schedule to reflect the agreed principle that the State will only pay for the quantum and quality of the Services actually provided. If a Charge Event occurs, the State may elect to:
 - (i) adjust the Monthly Service Payment in accordance with this clause 36.3(a); or
 - (ii) require Project Co to pay to the State the corresponding 'charge' as specified in the Performance Regime within 20 Business Days of demand by the State.
- (b) **(Payments):** To the extent that Project Co must pay the State for any Liabilities contemplated by the exclusions in clause 36.3(e) and those Liabilities are in excess

of the Monthly Service Payments, then in addition to any other remedies of the State or its Associates under this Deed or at Law, the future Monthly Service Payments will be reduced to the extent necessary for the State or its Associates to be compensated for those Liabilities in full. To the extent that the State and its Associates are unable to recover such compensation by the reduction of future Monthly Service Payments, any shortfall in such compensation will be a debt due and payable by Project Co to the State.

- (c) **(Project Co acknowledgements):** Project Co acknowledges and agrees that if clause 36.3(a), or any adjustment under the Performance Regime or Payment Schedule pursuant to that clause, is held to be void or unenforceable, other than a challenge to the Performance Regime or Payment Schedule initiated by the State or its Associates, clause 36.3(a), the Performance Regime and the Payment Schedule will not limit Project Co's Liability to the State under this Deed or otherwise at Law for any Liability suffered by the State up to an amount equal to the amount that would have been applied as a consequence of the Unavailability, Meal Availability Failure or Quality Failure had it not been held to be void or unenforceable.
- (d) **(Sole remedy):** Subject to clauses 36.3(c) and 36.3(e), adjustment of the Monthly Service Payments by application of the Performance Regime or Payment Schedule under clause 36.3(a), will be the only monetary consequence for Project Co for any Unavailability, Meal Availability Failure or Quality Failure to which the Performance Regime or Payment Schedule applies.
- (e) **(Exclusions to sole remedy):** Clause 36.3(d) does not limit or affect:
- (i) any other right or remedy under this Deed or at Law (other than, subject to this clause 36.3(e), for monetary compensation to the extent such right or remedy applies to the same events as the Unavailability, Meal Availability Failure or Quality Failure to which the Performance Regime or Payment Schedule applies);
 - (ii) the State's right to recover in respect of loss or damage caused by an Unavailability, Meal Availability Failure or Quality Failure under clauses 45 (other than clause 45.1), to the extent that the State has not been fully compensated for that loss or damage;
 - (iii) the State's rights under clause 45.5;
 - (iv) the State's entitlement to recover any costs, expenses or Liabilities incurred by the State as a consequence of exercising its rights under clause 42;
 - (v) the State's rights under this Deed or any other State Project Document in respect of the event that caused or contributed to the Unavailability, Meal Availability Failure or Quality Failure (as opposed to the Unavailability, Meal Availability Failure or Quality Failure itself);
 - (vi) any payment on termination of this Deed (including a Termination Payment); or
 - (vii) any Liability of Project Co to the State or an Associate of the State suffered or incurred by the State or any Associate of the State as a result of any:
 - A. fraudulent, unlawful or criminal act or omission; or
 - B. any wilful breach of a Project Document,by Project Co or any of its Associates where the State has not been completely compensated for that Liability by the adjustment in accordance with clause 36.3(a).

36.4 Refund

If:

- (a) **(Payment):** the State pays Project Co, or Project Co pays the State any amount under clause 36.2(g) or otherwise; and
- (b) **(Entitlement):** it is subsequently agreed or determined for any reason that the recipient was not entitled to that payment under this Deed,

the recipient will immediately refund to the party which made the payment, that payment plus interest at the Overdue Rate from the day the payment was paid under clause 36.2(g) or otherwise to (and including) the date of repayment under this clause 36.4.

36.5 Interest

- (a) **(Interest):** Subject to clause 36.6, and other than where Section 2.2 of the Termination Payments Schedule applies in relation to a Termination Payment if a party fails to pay any amount due and payable by that party to the other party within the time required under this Deed, then it must pay interest on that amount:
 - (i) from the date on which payment was due and payable until the date on which payment is made;
 - (ii) calculated on daily balances at the Overdue Rate; and
 - (iii) capitalised monthly.
- (b) **(Sole entitlement):** The amount specified in this clause 36.5 will be a party's sole entitlement to interest including damages for loss of, use of, or the cost of borrowing, money.

36.6 Set-off

- (a) **(State's payments):** Without limiting the State's rights at Law, the State may deduct from any moneys due and payable to Project Co under the State Project Documents or otherwise at Law:
 - (i) any moneys due and payable by any Group Member to the State;
 - (ii) any Liabilities contemplated by the exclusions in clause 36.3(e); and
 - (iii) the amount of any Claim that the State may make in good faith against any Group Member.
- (b) **(Details of set-off):** The State must provide Project Co with reasonable details of the basis on which it is setting off any amount pursuant to clause 36.6(a).
- (c) **(Project Co's payments):** Project Co must make all payments to the State free from any set-off or counterclaim and without deduction or withholding for or on account of any present or future Tax, unless Project Co is compelled by Law to make such a deduction or withholding.
- (d) **(Deduction or withholding):** If a party is compelled by Law to make a deduction or withholding for the benefit of an Authority, it must:
 - (i) remit the deducted or withheld amount to the relevant Authority within the time required by Law; and
 - (ii) provide to the other party all information and documentation relating to that deduction or withholding, including any information or

documentation required to obtain a credit for or repayment of the deducted or withheld amount from an Authority.

36.7 Liability for Taxes

- (a) **(Project Co to Indemnify):** Subject to clause 36.8, Project Co must indemnify the State against, and must pay the State on demand the amount of, all Taxes (excluding Rates, land tax and any stamp or like duty (**Duty**), and any penalty, fine, charge or interest in respect of any Rates, land tax or Duty) incurred in connection with:
- (i) the negotiation, preparation, execution and registration of this Deed or any other Project Document;
 - (ii) the transactions that this Deed or any other Project Document contemplates; and
 - (iii) any amendment to, or any consent, approval, waiver, release or discharge of or under, this Deed or any other Project Document.
- (b) Project Co must:
- (i) **(Timely lodgement):** attend to the timely lodgement for stamping of the State Project Documents and the Finance Documents on or before the due date for lodgement prescribed by Law (**Lodgement Due Date**);
 - (ii) **(Duty Estimate):** at least 20 Business Days prior to the Lodgement Due Date give the State an estimate of the Duty payable (**Duty Estimate**) and an opportunity to review and comment on all submissions, correspondence and other materials before they are provided to the NSW Office of State Revenue and not refuse to adopt any changes to the contents of those documents or to the Duty Estimate that are reasonably requested by the State provided that any changes are requested within 10 Business Days prior to the Lodgement Due Date; and
 - (iii) **(Correspondence, notices and assessments):** give the State a copy of all correspondence, notices and assessments issued by the NSW Office of State Revenue in connection with Duty payable in respect of the State Project Documents, the Finance Documents or any transaction contemplated by any of them, within 5 Business Days after Project Co receives the relevant correspondence, notices or assessments.
- (c) **(State to indemnify):** The State will pay and indemnify Project Co and any parties to the Finance Documents against, and reimburse Project Co and any parties to the Finance Documents for, all Duty (including any penalty, fine, charge or interest payable in respect of Duty) in respect of the State Project Documents, the Finance Documents or any document or transaction expressly contemplated by, any of them which is payable to the NSW Government, the Chief Commissioner of State Revenue or the NSW Office of State Revenue, provided that the State will not pay, indemnify or reimburse Project Co for any Duty, penalty, fine, charge or interest payable in respect of Duty:
- (i) which results from any failure or any delay by any Project Co Entity:
 - A. in lodging a document required to be lodged with the NSW Office of State Revenue by the due date for lodgement prescribed by Law; and
 - B. in paying an amount to the NSW Office of State Revenue, for which Project Co has been put in immediately available funds

by the State, by the due date for payment prescribed by Law;
or

- (ii) arising from any Refinancing, a change to financiers or any change in the equity interest of Project Co or a Group Member.
- (d) **(Available funds):** Without limiting clause 36.7(c), the State must put Project Co in immediately available funds to pay the amount of the Duty Estimate to the NSW Office of State Revenue at least 5 Business Days prior to the Lodgement Due Date and Project Co must pay the amount of the Duty Estimate to the NSW Office of State Revenue by the Lodgement Due Date. Project Co must provide evidence of payment having been made (such as a copy of the stamped page of a document or a receipt) to the State within 5 Business Days after receipt of such evidence.
- (e) **(Reassessment):** If the NSW Office of State Revenue issues an assessment or reassessment for an amount greater than the Duty Estimate then, without limiting clause 36.7(c), Project Co must promptly notify the State and the State must put Project Co in immediately available funds to pay the amount due to the NSW Office of State Revenue within the earlier of 10 Business Days after notification and at least 5 Business Days prior to the due date and Project Co must pay the amount due to the NSW Office of State Revenue by the due date.
- (f) **(Refund):** If the amount of Duty assessed by the NSW Office of State Revenue is less than the Duty Estimate, Project Co must, to the extent permitted by Law, promptly seek a refund of the amount overpaid and pass any refund on to the State within 5 Business Days of receipt.
- (g) **(Rates and land tax):** The State must pay Project Co, and indemnify Project Co against, all Rates and land tax, if any, in respect of the Site until the end of the Term.
- (h) **(Prompt notice):** Project Co must promptly provide to the State a copy of any notices, assessments or correspondence which it receives in relation to any Rates and land tax to which the indemnity in clause 36.7(g) applies.
- (i) **(State dissatisfaction with assessment):** In the event that the State is dissatisfied with any assessment, or threatened assessment, or notice in relation to the calculation of, any Duty, Rates or land tax which the State is required to pay under this clause 36.7(i):
 - (i) the State may notify Project Co that it wishes to take carriage of negotiations with the relevant Authority in respect of the assessment, threatened assessment or notice (**Tax Proceedings**);
 - (ii) the State will be responsible for all costs in relation to the conduct, defence or settlement of the Tax Proceedings (including the costs of Project Co in providing any co-operation or assistance);
 - (iii) subject to the State complying with its obligations under this clause 36.7(i), Project Co must provide all reasonable assistance to the State in relation to the conduct, defence or settlement of the Tax Proceedings, including, if requested by the State, to be named as the taxpayer in any objections or appeals;
 - (iv) the State must act in good faith at all times;
 - (v) the State must not take any action which it is objectively unreasonable to take in all the circumstances;
 - (vi) the State must pay to Project Co so much of any Tax as is required by the relevant Authority to be paid in relation to the Tax Proceedings;

- (vii) the State must provide to Project Co an indemnity in a form agreed to by Project Co (such agreement to not be unreasonably withheld or delayed) against all liability, loss, damage, cost, expense, judgment, charge, diminution in value or deficiency which may result from any action taken at the request of the State by Project Co in connection with the conduct of the Tax Proceedings; and
- (viii) the State will liaise with and keep Project Co informed of its negotiations, and provide copies of all relevant correspondence to Project Co on a timely basis.

36.8 GST

(a) (Interpretation):

- (i) Except where the context suggests otherwise, terms used in this clause 36.8 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 36.8.
- (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 36.8.
- (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 36.8(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 36.8), 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 36.8(c)(ii).

(d) (Variation of GST):

- (i) If the GST Amount properly payable in relation to a supply (as determined in accordance with clause 36.8(c) and clause 36.8(e)), varies from the additional amount paid by the Recipient under clause 36.8(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 36.8(d) is deemed to be a payment, credit or refund of the GST Amount payable under clause 36.8(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 36.8(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 36.8(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 36.8(c) (or the time at which such GST Amount would have been payable in accordance with clause 36.8(c) but for the operation of clause 36.8(e)(i)).
- (f) **(No merger):** This clause 36.8 will not merge on completion or termination of this Deed.

36A. Securitised Licence Structure

36A.1 Completion Price and Completion Payment

- (a) **(Payment of Completion Price):** Subject to clause 36A.1(b), in consideration for Project Co progressively undertaking the Works and carrying out the other Delivery Phase Activities, the State agrees to pay the Completion Price to Project Co (or as Project Co directs) by paying each Completion Payment on each Completion Payment Date.
- (b) **(Corresponding Receivables Purchase Payment):** The State has no obligation to pay a Completion Payment unless, and its obligation is limited to the extent that, the State receives the corresponding Receivables Purchase Payment for the Initial Receivables from Finance Co under the Receivables Purchase Deed.
- (c) **(Adjustments):** The amount of the Completion Price (and the corresponding Receivables Purchase Price for the Initial Receivables) may only be adjusted as follows:
 - (i) to reflect a decrease in the Completion Payment in accordance with clause 36A.3; or
 - (ii) to reflect a decrease in the Completion Payment as agreed in writing by the parties on or before the Date of Commercial Acceptance,provided that no adjustment to the Completion Price or a corresponding Receivables Purchase Price for the Initial Receivables will affect the limitation referred to in clause 36A.1(b).
- (d) **(Licence Fee adjustment)** If the Completion Price (and the corresponding Receivables Purchase Price for the Initial Receivables) is adjusted in accordance with clause 36A.1(c), the State and Project Co agree to adjust the Licence Fee payable under the Operating Phase Sub-Licence in accordance with the Change Compensation Principles.

- (e) **(No set-off):** Notwithstanding any other clause of any State Project Document, the State may not set off any amount due and payable by Project Co or Finance Co to the State under the State Project Documents against any Completion Payment.
- (f) **(Right, title and interest):** To the extent it has not already passed, all right, title and interest of Project Co in the Works to which a Completion Payment applies passes to the State on payment by the State under clause 36A.1(a).
- (g) **(Relief is sole remedy):** Notwithstanding any other clause of any State Project Document, the State acknowledges that, if a Receivables Purchase Payment for the Initial Receivables is not received in full or at all from Finance Co under the Receivables Purchase Deed, the State's only right or remedy in respect of such non-payment is the relief from payment of the corresponding Completion Payment under clause 36A.1(b).

36A.2 Securitised Modification Payment

- (a) **(Payment of Securitised Modification Payment):** If:
 - (i) a Change Compensation Event occurs and the State and Project Co agree that Finance Co will provide additional financing for that event under the Change Compensation Principles; or
 - (ii) the parties agree in writing that Finance Co will provide additional financing in relation to the Project which is to be reflected in the Securitised Licence Structure,

the State must pay a Securitised Modification Payment to Project Co on the Additional Payment Date.
- (b) **(Corresponding Receivables Purchase Payment):** The State has no obligation to pay a Securitised Modification Payment unless, and its obligation is limited to the extent that, it receives the corresponding Receivables Purchase Payment for the relevant Additional Receivables from Finance Co under the Receivables Purchase Deed in relation to that Change Compensation Event or that additional financing which the parties have agreed in writing pursuant to clause 36A.2(a)(ii) that Finance Co will provide in relation to the Project.
- (c) **(No set-off):** Notwithstanding any other clause of any State Project Document, the State may not set off any amount due and payable by Project Co or Finance Co to the State under the State Project Documents against a Securitised Modification Payment.
- (d) **(Right, title and interest):** To the extent it has not already passed, all right, title and interest of Project Co in the Works to which a Securitised Modification Payment applies passes to the State on payment by the State under clause 36A.2(a).
- (e) **(Relief is sole remedy):** Notwithstanding any other clause of any State Project Document, the State acknowledges that, if the additional Receivables Purchase Payment for the relevant Additional Receivable is not received in full or at all under the Receivables Purchase Deed, the State's only right or remedy in respect of such non-payment is the relief from payment of the corresponding Securitised Modification Payment under clause 36A.2(b).

36A.3 Reduction in debt finance requirements

- If:
- (a) a Change Compensation Event:
 - (i) occurs prior to the Date of Commercial Acceptance; and

- (ii) results in a reduction in the cost of undertaking the Works or other Delivery Phase Activities (calculated in accordance with the Change Compensation Principles) in respect of which debt finance was to have been provided under the Finance Documents,

and as a result of that Change Compensation Event there is a corresponding reduction in the debt finance procured by Finance Co under the Finance Documents and reflected in the Securitised Licence Structure; or

- (b) prior to the Date of Commercial Acceptance, the parties otherwise agree pursuant to clause 36A.1(c)(ii) to any arrangement that results in a reduction in the debt finance procured by Finance Co under the Finance Documents and reflected in the Securitised Licence Structure,

then in each case on the next Completion Payment Date:

- (c) the Completion Payment payable by the State on that and on each subsequent Completion Payment Date will be reduced by amounts calculated with reference to the reduction in the debt finance procured by Finance Co under the Finance Documents as a result of that Change Compensation Event or agreed pursuant to clause 36A.1(c)(ii) and reflected in the Securitised Licence Structure; and
- (d) the Receivables Purchase Payments for the Initial Receivables payable by Finance Co on that and on each subsequent Completion Payment Date under the Receivables Purchase Deed will be reduced by the same amount as calculated at clause 36A.3(c); and
- (e) the Licence Fee payable by Project Co on the Licence Fee Payment Dates under the Tenure Document will be reduced by an amount that is calculated with reference to the amount calculated at clause 36A.3(c).

36A.4 No Change in Risk Allocation

- (a) **(No Increased State Risk Allocation):** The parties acknowledge and agree that the Securitised Licence Structure is not intended to result in an Increased State Risk Allocation.
- (b) **(No Claim):** Project Co undertakes not to make any Claim inconsistent with the acknowledgement in clause 36A.4(a) and to procure that neither Finance Co nor any of Project Co's or Finance Co's Related Bodies Corporate will make any such Claim.
- (c) **(If Increased State Risk Allocation):** If the State believes (on reasonable grounds supported by external advice) that the Securitised Licence Structure results or is likely to result in an Increased State Risk Allocation, then it may give Project Co a notice stating that the Securitised Licence Structure is to be amended to the extent necessary to ensure there is no Increased State Risk Allocation.
- (d) **(Necessary amendments):** Following receipt of a notice given by the State under clause 36A.4(c), Project Co agrees to do anything requested by the State in that notice or otherwise reasonably necessary to modify the State Project Documents and the Securitised Licence Structure to ensure that there is no Increased State Risk Allocation.
- (e) **(Damages not adequate):** Project Co acknowledges and agrees that:
 - (i) damages may not be an adequate remedy for the State for any failure by Project Co to comply with the undertakings in this clause 36A.4; and
 - (ii) if there is a breach or purported breach by Project Co of its obligations in this clause 36A.4, the State may seek and is entitled to injunctive or declaratory relief.

36A.5 Indemnity

Project Co indemnifies the State for:

- (a) **(All costs or loss):** all Liability incurred by the State as a result of any Increased State Risk Allocation to the extent that it is not removed or remedied by changes to the Securitised Licence Structure agreed in accordance with clause 36A.4; and
- (b) **(Any Claim):** any Claim brought against the State by Project Co or Finance Co or any Related Body Corporate of either Project Co or Finance Co which is inconsistent with the acknowledgement in clause 36A.4(a).

Part G - Expiry and Handover obligations

37. Expiry obligations

37.1 Assistance in securing continuity

- (a) **(Transfer of responsibility):** Subject to clause 37.1(b), Project Co must:
- (i) in respect of the obligations set out in clause 37.1(a)(iii), 37.1(a)(iv), 37.1(a)(v) and 37.1(a)(ix), in the period commencing 2 years prior to the Final Expiry Date; and
 - (ii) without limiting clause 37.1(a)(i), in respect of all of the obligations set out in this clause 37.1(a), in the period which is not less than:
 - A. 6 Months before the Final Expiry Date; or
 - B. where Project Co is given less than 6 Months' notice of an Expiry Date, during the relevant notice period,

do all things reasonably required by the State to ensure the smooth and orderly transfer of responsibility for delivering the Project to the State or its nominee including:

- (iii) meeting with the State and such other persons notified by the State to discuss delivery of the Project on reasonable notice by the State;
- (iv) providing access to its operations for managers and supervisors of the State or its nominee for the purpose of familiarisation;
- (v) providing sufficient information to the State or its nominee to determine the status and condition of the Project, including the Final Refurbishment Works;
- (vi) providing sufficient resources, including personnel, for the time required to facilitate the transfer of the Project to the State or its nominee;
- (vii) procuring the novation or, if such novation cannot be procured, the assignment to the State or its nominee of:
 - A. such Subcontracts as the State may nominate;
 - B. any leases, subleases and licences requested by the State; and
 - C. any warranties (provided in respect of the Project that are capable of assignment);
- (viii) subject to clause 61, grant or procure the grant to the State or its nominee of such Intellectual Property Rights, including an assignment or sub-licence of all licences relating to any software belonging to any third party used in connection with the Services or any other aspect of the Relevant Infrastructure, as will enable the State or its nominee to deliver the Project to the standards specified in, and in accordance with, this Deed;
- (ix) assisting in the transfer of any employees of Project Co or any Subcontractor who agree with the State to be employed by the State or its nominee after the Expiry Date;

- (x) training personnel nominated by the State in all aspects of the operation, maintenance and repair of the Relevant Infrastructure to a level of competency that will allow those personnel to operate, maintain and repair the Relevant Infrastructure to the standards required of Project Co under this Deed from the relevant Expiry Date; and
 - (xi) doing all other acts and things to enable the State (or its nominee) to be in a position to deliver the Project to the standards specified in this Deed, with minimum disruption.
- (b) **(Expiry Date):** Where the Expiry Date is prior to the Final Expiry Date, Project Co must meet the requirements under clause 37.1(a) unless the State, acting reasonably, determines such requirements cannot be met within the required time due to the limited notice period Project Co has received of the Expiry Date, in which case, Project Co must meet such requirements as soon as practicable after the Expiry Date.
- (c) **(Adjustments and payments):** Where any employees of Project Co or a Subcontractor are to be transferred to the State or its nominee, unless otherwise agreed, Project Co or the relevant Subcontractor will make adjustments and payment to the State or its nominee in respect of all actual or contingent liability for annual leave, accrued rostered days off, sick leave, long service leave and all other employee entitlements which are not to be paid out to the relevant transferring employees at the time of transfer of employment.

37.2 Dedicated Transition Person

Without limiting its obligations under clause 37.1:

- (a) **(Expiry of Project):** for not less than 6 Months before the expiry of the Project in accordance with clause 37.1; or
- (b) **(Notice period):** where the Expiry Date is prior to the Final Expiry Date and Project Co is given less than 6 Months' notice of the Expiry Date, during the relevant notice period,

Project Co must provide a dedicated person, with appropriate expertise and experience, to manage the transition out and handover of the Project.

37.3 Handover

- (a) Subject to clause 37.3(b), by the Expiry Date, Project Co must have:
 - (i) **(Handover of Relevant Infrastructure and Site):** handed over the Relevant Infrastructure and the Site (including all rights, title and interest in them) to the State or its nominee free from any encumbrances and in the Handover Condition;
 - (ii) **(Handover Package):** delivered to the State all items required as contemplated by the Handover Package (as updated in accordance with the Delivery Phase Plans and Reports Schedule, the Operating Phase Plans and Reports Schedule, the Output Specification and any other requirements of this Deed);
 - (iii) **(Transfer of rights):** transferred to the State or its nominee all rights, title and interest, free from any encumbrances, in Equipment used by Project Co or its Associates predominantly or exclusively for the delivery of the Services, required by the State to allow the State or its nominee to provide the Services to the standards required of Project Co under this Deed;

- (iv) **(Delivery of information):** delivered to the State or its nominee, all Project Co Material not previously delivered to the State as required by the State or its nominee;
 - (v) **(Payment of insurance proceeds):** paid to the State or its nominee, any insurance proceeds Project Co has received from any Insurances for the reinstatement or replacement of the Relevant Infrastructure to the extent not already reinstated or replaced, and assigned to the State any rights available to Project Co under the Insurances in respect of the reinstatement or replacement of the Relevant Infrastructure; and
 - (vi) **(Transfer of approvals):** done all acts and things necessary to enable the State (or its nominee) to have transferred to it or to obtain all Approvals necessary to deliver the Project.
- (b) **(Expiry Date):** Where the Expiry Date is prior to the Final Expiry Date, Project Co must meet the requirements under clause 37.3(a) unless the State, acting reasonably, determines such requirements cannot be met within the required time due to the limited notice period Project Co has received of the Expiry Date, in which case Project Co must meet such requirements as soon as practicable after the Expiry Date.

37.4 Appointment of Handover Reviewer

- (a) **(Handover Reviewer):** No later than 12 Months before the inspections to be undertaken in accordance with clause 37.5 (or where clause 37.5(a)(ii) applies, within such shorter period as is required by the State), Project Co and the State must meet to determine the identity of a Handover Reviewer to be engaged jointly by Project Co and the State to perform the tasks identified in clause 37.5.
- (b) **(State Representative to appoint):** If Project Co and the State Representative are unable to agree on the appointment of the Handover Reviewer within 3 Months before the Condition Review Date, the Handover Reviewer will be appointed by the State and the State and Project Co will jointly engage the Handover Reviewer, provided that the Handover Reviewer to be engaged must:
 - (i) be reasonably acceptable to the State and Project Co;
 - (ii) have appropriate qualifications and experience; and
 - (iii) have no interest or duty which conflicts or may conflict with its functions as the Handover Reviewer.
- (c) **(Terms of engagement):** The Handover Reviewer will be appointed on similar terms to the Independent Certifier Deed, taking into account any changes required to reflect the different role and the effluxion of time since the engagement of the Independent Certifier.

37.5 Handover Reviewer Role

- (a) **(Joint inspection):** Project Co, the State and the Handover Reviewer appointed under clause 37.4 must carry out joint inspections of the Relevant Infrastructure:
 - (i) at least:
 - A. 3 years before the Final Expiry Date; and
 - B. every 6 Months after that initial inspection until the Final Expiry Date; or

- (ii) where the Expiry Date is earlier than the Final Expiry Date, within any shorter period before the date of termination the State reasonably requires,

(each a **Condition Review Date**).

- (b) (**Program to achieve proper Handover**): Following the first Condition Review Date in accordance with clause 37.5(a), the Handover Reviewer must give to the State and Project Co a written report specifying:

- (i) the details of the maintenance and repair work (if any) required to be carried out by Project Co to meet the Handover Condition and a program for undertaking those works (**Final Refurbishment Works**); and
- (ii) an estimate of the total costs of carrying out the Final Refurbishment Works,

(the **Outstanding Matters Report**).

- (c) (**Update of Outstanding Matters Report**): The Handover Reviewer must give to the State and Project Co an updated Outstanding Matters Report after each Condition Review Date subsequent to the first one, which includes details of:

- (i) the Final Refurbishment Works that have been completed;
- (ii) the Final Refurbishment Works still to be completed; and
- (iii) the itemised estimate of the total costs of carrying out the remaining Final Refurbishment Works at that point in time.

- (d) (**Disputing Outstanding Matters Report**): If Project Co or the State do not agree with any aspect of the Outstanding Matters Report:

- (i) they must give details of such objections to the Project Co Representative or the State Representative (as the case may be) and the Handover Reviewer, within 10 Business Days of receipt of that Outstanding Matters Report; and
- (ii) the parties must confer in good faith with each other and the Handover Reviewer with a view to reaching agreement on the scope, program and cost of the Final Refurbishment Works,

and if the parties cannot reach agreement on the relevant aspect of the Outstanding Matters Report within a further 10 Business Days of the date on which the details of the objections are provided under clause 37.5(d)(i), the Dispute may be referred by either party to expert determination in accordance with clause 52.

37.6 State election

- (a) (**State discretion**): Notwithstanding the terms of this clause 37, the State may, by giving notice to Project Co:
 - (i) adjust any Condition Review Date to an alternative date which may not be earlier than 3 years before the Final Expiry Date;
 - (ii) relieve Project Co from any obligation to undertake any of the Final Refurbishment Works in any Operating Year; or
 - (iii) acting reasonably, increase the number of times and frequency with which the Handover Reviewer must inspect and assess the condition of the Relevant Infrastructure, assess any Final Refurbishment Works or prepare or update the Outstanding Matters Report.

- (b) **(Variation and cost):** If the State exercises its rights under clause 37.6(a)(ii):
 - (i) the Output Specification, the relevant Operating Phase Plans and any other relevant parts of this Deed will be varied; and
 - (ii) any subsequent Monthly Service Payment will be reduced by the cost of the relevant Final Refurbishment Works,

as agreed by the parties or, where not agreed within 5 Business Days after the date on which the State gives the relevant notice under clause 37.6(a)(ii), as determined by expert determination under clause 52.

37.7 Implementing Final Refurbishment Works

- (a) **(Operating Phase Plans):** Project Co must:
 - (i) within 1 Month after the Handover Reviewer has delivered each Outstanding Matters Report:
 - A. amend the relevant Operating Phase Plans to include details of the Final Refurbishment Works that Project Co is required to undertake in accordance with the then current Outstanding Matters Report or as otherwise determined in accordance with clause 37.5; and
 - B. submit the updated Operating Phase Plans to the State for review in accordance with the Review Procedures; and
 - (ii) undertake the Final Refurbishment Works in accordance with the updated Operating Phase Plans.
- (b) **(Debt due):** After the Expiry Date the State may undertake and complete (or engage others to undertake and complete) any Final Refurbishment Works which have not been completed by Project Co to the satisfaction of the Handover Reviewer, and all costs incurred by the State in doing so will be a debt due and payable by Project Co to the State.

37.8 Security for Final Refurbishment Works

- (a) **(Security threshold):** After a Condition Review Date, if the aggregate of the remaining Monthly Service Payments is equal to or less than [REDACTED] of the estimated total cost of the remaining Final Refurbishment Works specified in the then current Outstanding Matters Report (**Threshold Amount**) Project Co must make an election under clause 37.8(b).
- (b) **(Project Co election):** If so required under clause 37.8(a), Project Co must, within 10 Business Days of the Condition Review Date either elect to:
 - (i) notify the State that the State may deposit into a registered bank account opened by the State in the State's name (the **Handover Escrow Account**) each subsequent Monthly Service Payment until the balance of the Handover Escrow Account equals or exceeds the Threshold Amount (in which case the State must proceed accordingly); or
 - (ii) provide to the State a Handover Bond having a face value equal to the Threshold Amount,as security for the performance of Project Co's obligations under this clause 37.
- (c) **(Project Co makes no election):** If Project Co fails to make an election in accordance with clause 37.8(b) within 20 Business Days of the Condition Review Date, Project Co will be deemed to have elected that clause 37.8(b)(i) will apply.

- (d) **(Changes to Outstanding Matters Report):** If the scope or estimated cost of the Final Refurbishment Works are amended in accordance with clause 37.5 or clause 37.6, the Threshold Amount will be adjusted accordingly.

37.9 Handover Escrow Account

Where the State opens a Handover Escrow Account in accordance with clause 37.8(b)(i):

- (a) **(Interest earned):** interest earned on money in the Handover Escrow Account must be deposited into the Handover Escrow Account and Project Co is entitled, on request, to receive copies of the statements for the Handover Escrow Account;
- (b) **(Cost of Final Refurbishment Works):** the State must draw upon the Handover Escrow Account to pay Project Co:
 - (i) the cost of the Final Refurbishment Works completed by Project Co, where the Handover Reviewer determines (following a Condition Review Date) that the relevant Final Refurbishment Works required to be performed by Project Co by the date of the review have been satisfactorily performed, provided that after drawing such amount the balance of the Handover Escrow Account equals or exceeds the then current Threshold Amount; or
 - (ii) if any Final Refurbishment Works have not been satisfactorily completed as at the Expiry Date, as determined by the Handover Reviewer, the balance of the Handover Escrow Account less the aggregate of the total cost of carrying out the remaining Final Refurbishment Works as set out in the then current Outstanding Matters Report and any interest earned on that amount in the Handover Escrow Account; and
- (c) **(State benefit):** the State may draw upon the Handover Escrow Account for its own benefit where there are moneys remaining in the Handover Escrow Account after all amounts have been drawn and paid to Project Co in accordance with clause 37.9(b).

37.10 Handover Bond

- (a) **(Expiry date):** Any Handover Bond, including any replacement Handover Bond provided under clause 37.10(d), must have an expiry date no earlier than 1 year after the end of the Term.
- (b) The State:
 - (i) **(Return after completion):** must return the Handover Bond to Project Co 10 Business Days after completion of all Final Refurbishment Works to the satisfaction of the Handover Reviewer; and
 - (ii) **(Drawing on bond):** may draw on the Handover Bond for the full amount of the Handover Bond remaining after the Expiry Date to the extent required to perform the Final Refurbishment Works.
- (c) **(One annual reduction):** Project Co may reduce the amount of the Handover Bond in the manner stated in clause 37.10(d) no more than once an Operating Year and then at the Expiry Date to account for Final Refurbishment Works completed to the satisfaction of the Handover Reviewer, provided that the amount of the Handover Bond is no less than the then current Threshold Amount.
- (d) **(Replacement Handover Bond):** Where the amount of the Handover Bond is reduced pursuant to clause 37.10(c), subject to any right of the State to have recourse to the existing Handover Bond, the State must return that Handover Bond to Project Co in exchange for the delivery to the State by Project Co of a

replacement Handover Bond that complies in all respects with this Deed and is for an amount which is not less than the relevant reduced amount.

(e) **(Notice and replacement):** If:

- (i) the issuer of a Handover Bond ceases to hold a current licence issued by the Australian Prudential Regulation Authority or have the Required Rating; or
- (ii) the specified location within Sydney (or such other place as approved by the State) is no longer available for demand to be given or for payment to be made under a Handover Bond,

then Project Co must:

- (iii) promptly notify the State of that circumstance; and
- (iv) within 5 Business Days after being requested to do so, procure the issue to the State of a replacement Handover Bond that complies in all respects with this Deed and is for the same amount.

Part H - Change in Circumstances

38. Delivery Phase - delay

38.1 Delay to Completion

- (a) **(Early Warning):** If Project Co becomes aware of an Extension Event or any other matter which will, or is likely to:
- (i) give rise to a delay in achieving Completion; or
 - (ii) prevent Project Co from performing the Delivery Phase Activities,
- it must promptly give the State and the Independent Certifier notice of the matter and the delay or effect it is likely to cause (**Early Warning (Delivery)**).
- (b) **(Prevent):** In this clause 38, 'prevent' or 'prevented' does not mean that Project Co is permanently prevented from performing its obligations.

38.2 Entitlement to Claim

If, during the Delivery Phase, Project Co:

- (a) has been or will be delayed in achieving Completion; or
 - (b) is otherwise prevented from performing the Delivery Phase Activities,
- by an Extension Event, Project Co will be entitled to claim:
- (c) an extension of time to the relevant Date for Completion for the period of the delay; and
 - (d) relief from any of its other Delivery Phase Activities,
- in accordance with this clause 38.

38.3 Change Notice

- (a) **(Claiming relief):** Subject to clauses 38.3(b) and 38.3(c), to claim an extension of time to the relevant Date for Completion or relief from its other Delivery Phase Activities (or both), Project Co must submit a Change Notice (with reference to the Early Warning (Delivery), if relevant) which includes the estimated period of time of the delay, within 20 Business Days after the date on which it first became aware of the occurrence of the relevant Extension Event.
- (b) **(Extended delay):** Where the delay extends beyond the period set out in the Change Notice submitted in accordance with clause 38.3(a), and Project Co wants to claim an extension of time in respect of the further delay or relief from its other Delivery Phase Activities (or both), Project Co must notify the State and, once the consequences of the Extension Event have ceased, promptly (and in any event, within 10 Business Days), submit an updated Change Notice.
- (c) **(Contamination or Modifications):** In order to claim:
 - (i) an extension of time to the relevant Date for Completion; or
 - (ii) relief from its other Delivery Phase Activities,(or both) for an Extension Event which is:

- (iii) a Contamination Compensation Event, Project Co must submit its initial Change Notice under the Change Compensation Principles and clause 8.6; and
- (iv) a Modification or a Change in Mandatory Requirements, Project Co must submit its initial Change Notice under Change Compensation Principles and clause 40.

38.4 Conditions precedent to extension of time or relief

Subject to clause 38.6, it is a condition precedent to Project Co's entitlement to an extension of time or relief from its other Delivery Phase Activities (or both) that:

- (a) **(Change Notices):** Project Co submits to the State and the Independent Certifier Change Notices in accordance with clauses 38.3(a) and 38.3(b);
- (b) **(Extension of time):** with respect to a claim for an extension of time, Project Co can demonstrate that:
 - (i) it has actually been or will be delayed by the relevant Extension Event in a manner which will delay the achievement of Completion; and
 - (ii) the Extension Event has caused or will cause activities on the critical path contained and shown in the then current Delivery Phase Program to be delayed;
- (c) **(Relief):** with respect to a claim for relief from its other Delivery Phase Activities, Project Co's performance of all or any part of the Delivery Phase Activities is actually prevented by the relevant Extension Event; and
- (d) **(Delivery Phase Program):** Project Co is, at the time it submits the relevant Change Notice and any updated Change Notice, complying with its obligations in connection with the Delivery Phase Program in accordance with clause 16.2(b)(ii).

38.5 Extension of time and relief determined by Independent Certifier

- (a) **(State right to provide information):** The State may provide any evidence to the Independent Certifier and Project Co it considers relevant to the Independent Certifier's consideration of Project Co's Change Notice submitted in accordance with clause 38.3.
- (b) **(Independent Certifier determination):** If the conditions precedent in clause 38.4 have been satisfied, the Independent Certifier will, subject to clause 38.5(c):
 - (i) with respect to a claim for an extension of time, extend the relevant Date for Completion by a reasonable period of time;
 - (ii) with respect to a claim for relief from Project Co's other Delivery Phase Activities, grant Project Co such other reasonable relief from the Delivery Phase Activities; or
 - (iii) with respect to a claim for an extension of time and for relief from Project Co's other Delivery Phase Activities, extend the relevant Date for Completion by a reasonable period of time and grant Project Co such other reasonable relief from the Delivery Phase Activities,

taking into account all relevant evidence presented by the parties but subject to clause 16.2(d).
- (c) **(Limitations):** Notwithstanding anything in clause 38.5(b), the Independent Certifier may not:

- (i) extend the relevant Date for Completion by a period of time longer than the period of time claimed by Project Co; or
 - (ii) grant Project Co relief from any Delivery Phase Activity from which Project Co has not claimed relief.
- (d) **(Notice of determination):** The Independent Certifier must provide notice of its determination under clause 38.5(b) to Project Co and the State within 20 Business Days after the later of:
- (i) the date on which Project Co submits its Change Notice pursuant to clause 38.3(a); and
 - (ii) where Project Co has submitted an updated Change Notice in accordance with clause 38.3(b), the date on which that updated Change Notice is submitted.
- (e) **(Interim determinations):** In the circumstances contemplated by clause 38.5(d)(ii), the Independent Certifier may, in its absolute discretion, give interim determinations of Project Co's entitlement to an extension of time notwithstanding that the effects of the relevant Extension Event are continuing.

38.6 Unilateral extensions

- (a) **(Unilateral extensions):** Whether or not Project Co has made, or is entitled to make, a claim for, or is entitled to, an extension of time under this clause 38, the State may, in its absolute discretion at any time and from time to time, by notice to Project Co and the Independent Certifier, unilaterally extend any Date for Completion following the occurrence of an Extension Event.
- (b) **(Acknowledgements):** The parties acknowledge that:
- (i) the State is not required to exercise the State's discretion under clause 38.6(a) for the benefit of Project Co; and
 - (ii) the exercise or failure to exercise the State's discretion under this clause 38.6 is not capable of being the subject of a dispute for the purposes of clause 50 or otherwise subject to review.
- (c) **(Compensation):** In circumstances where the State exercises its power under this clause 38.6 as a consequence of a delay to Completion caused by a Compensable Extension Event for which Project Co is entitled to an extension of time in accordance with this Deed, the State must pay compensation to Project Co in accordance with clause 38.7.

38.7 Entitlement to Costs

- (a) **(Compensable Extension Event):** Subject to clause 38.7(b) and 38.7(c), to the extent that Project Co is granted an extension of time to the Date for Completion under clause 38.5(b)(i) or 38.6 for a Compensable Extension Event, the State will pay Project Co the amount calculated in accordance with the Change Compensation Principles, other than in connection with any costs of repairing or rebuilding the Relevant Infrastructure which will be determined under clause 44 provided that Project Co has complied and continues to comply with the requirements under clause 38.4.
- (b) **(Relief from obligations):** If the Date for Completion is not extended under clause 38.5(b)(i) but Project Co is granted relief from its other Delivery Phase Activities in accordance with clause 38.5, Project Co will not be entitled to any compensation, including any Prolongation Costs or Financing Delay Costs.

- (c) **(Agreed Uninsurable Risk):** If the Compensable Extension Event for which Project Co is entitled to compensation under clause 38.7(a) arises from a risk that is an Agreed Uninsurable Risk, then:
- (i) clause 47.3 applies to the extent the Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure; and
 - (ii) in all other circumstances, this clause 38.7 applies unless the parties have otherwise agreed the means by which the risk should be managed under clause 47.1, in which case the agreed means will apply.

38.8 Not used

38.9 Concurrent delays

Project Co is not entitled to an extension of time under clause 38.3 or compensation under clause 38.7 in respect of a delay to Completion caused by an Extension Event to the extent that an event which is not an Extension Event causes a delay to Completion contemporaneous, concurrent or overlapping with the delay to Completion caused by the relevant Extension Event.

38.10 Acceleration by Project Co

If Project Co chooses to compress the Delivery Phase Activities or otherwise accelerate progress other than in accordance with a direction of the State under clause 38.11:

- (a) **(No obligation to assist):** the State is not obliged to take any action to assist or enable Project Co to achieve any particular sequencing or rate of progress of the Project Activities; and
- (b) **(State's obligations):** the time for the carrying out of the State's obligations is not affected by the acceleration or compression.

38.11 Acceleration Notice

- (a) **(Delivery Phase Activities):** Whether or not Project Co makes a claim under clause 38.3, if:
 - (i) any part or the whole of the Delivery Phase Activities are delayed by an Extension Event; and
 - (ii) Project Co would have been entitled to an extension of time to a Date for Completion for the cause of delay in accordance with this clause 38,

the State may direct Project Co to submit a Change Notice setting out the estimated time and cost consequences of accelerating any part, or the whole, of the Delivery Phase Activities to overcome or minimise the extent and effect of some or all of the delay including, if required, in order to achieve Completion by the relevant Date for Completion.

- (b) **(Submission of Change Notice):** Project Co must submit a Change Notice within 10 Business Days of the State's direction under 38.11(a) and the Change Compensation Principles will apply.

38.12 Reasonably achievable

- (a) **(Change Notice to consider):** In any Change Notice submitted in response to a direction under clause 38.11 Project Co must identify whether and to what extent the acceleration is reasonably achievable in the circumstances.

- (b) **(State not to direct unreasonable acceleration)**: If some or all of the acceleration is not reasonably achievable in the circumstances then the State must not direct the acceleration to the extent that it is not reasonably achievable.

38.13 Acceleration

If the State gives Project Co a Change Response to accelerate in response to a Change Notice submitted by Project Co under clause 38.11:

- (a) **(Accelerate as directed)**: Project Co must accelerate the Delivery Phase Activities as directed;
- (b) **(Extra actual costs)**: if Project Co would, but for the direction, have been entitled to an extension of time to the Date for Completion for the cause of the delay, the State must pay Project Co the amount calculated in accordance with the Change Compensation Principles in respect of those extra costs properly and reasonably incurred by Project Co and directly attributable to accelerating the Delivery Phase Activities; and
- (c) **(Delay not subject to State's direction)**: Project Co's rights under clause 38.3 will not be affected for that part of any delay that is not the subject of the State's direction to accelerate.

38.14 Force Majeure during Delivery Phase

- (a) **(Project Co's obligations)**: If:
 - (i) an Extension Event is a Force Majeure Event;
 - (ii) the Force Majeure Event prevents Project Co from performing the Delivery Phase Activities; and
 - (iii) Project Co has been granted relief from its obligation to perform the relevant Delivery Phase Activities under clause 38.5,then, the obligations of Project Co under this Deed which are affected by the Force Majeure Event and which are the subject of the relief granted under clause 38.5 will be suspended, but only to the extent that and for so long as, Project Co has been granted relief from its obligation to perform the relevant Delivery Phase Activities under clause 38.5.
- (b) **(State's obligations)**: The obligations of the State under this Deed which are affected by the Force Majeure Event will be suspended, but only to the extent that, and for so long as, the Force Majeure Event prevents the State from meeting its obligations under this Deed.
- (c) **(Party not in breach)**: A party's failure to perform its obligations under this Deed which are suspended under clause 38.14(a) or 38.14(b) (as the case may be) will not be a breach of this Deed, a Major Default or a Default Termination Event during that period of suspension.
- (d) **(Uninsured Force Majeure Event)**: If:
 - (i) the suspension of Project Co's obligations in accordance with clause 38.14(a) results in a Date for Completion being extended to such an extent that Project Co is not able to fully pay its scheduled repayments of principal and interest in accordance with the Project Documents; and
 - (ii) the Force Majeure Event is also a Day 1 Uninsurable Risk or an Agreed Uninsurable Risk and does not give rise to loss or damage to the Works,

(Uninsured Force Majeure Event) then Project Co will be entitled to payment of an amount calculated in accordance with the Change Compensation Principles, provided that Project Co is meeting the conditions precedent set out in clause 38.4.

- (e) **(Exceptions):** If the Force Majeure Event for which Project Co is entitled to relief under this clause 38.14 arises from a risk that is an Agreed Uninsurable Risk, then:
- (i) clause 47.3 applies to the extent the Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure; and
 - (ii) in all other circumstances, this clause 38.14 applies unless the parties have otherwise agreed the means by which the risk should be managed under clause 47.1, in which case the agreed means will apply.

38.15 Time not at large

None of:

- (a) **(Breach):** a breach of this Deed or any other State Project Document by the State or any of its Associates;
- (b) **(Modification):** a Modification directed, or Modification Order issued, by the State or the State Representative;
- (c) **(Act or omission):** an other act or omission of the State, the Independent Certifier or any of the State's Associates;
- (d) **(Failure to grant extension):** a failure by the Independent Certifier to grant an extension of time under clause 38.5 or to do so within the time required by that clause;
- (e) **(State discretion):** a failure by the State to exercise its discretion pursuant to clause 38.6;
- (f) **(Time bar):** the operation of any time bar, including clause 38.4(a); or
- (g) **(Other default):** other default, act or omission of the State, the Independent Certifier or any of the State's Associates,

sets the Date for Completion, or any other time, at large.

38.16 Not used

38A. Compensable Events – Delivery Phase

38A.1 Applicability

This clause 38A does not apply in respect of any Compensable Extension Event which is also a Compensable Event for which Project Co is entitled to make a claim for an extension of time pursuant to clause 38 and all relief in respect of such Compensable Extension Event must be claimed and will be determined pursuant to clause 38.

38A.2 Early Warning

If Project Co becomes aware of a Compensable Event which will, or is likely to, result in Project Co incurring additional costs in carrying out the Project Activities or overcoming the consequences of such Compensable Event, it must promptly give the State and the Independent Certifier notice of the matter and the additional costs likely to be incurred as a result (**Early Warning (Compensable Event)**).

38A.3 Entitlement to Costs

- (a) **(Entitlement to Claim):** If, during the Delivery Phase, a Compensable Event occurs and results in Project Co incurring additional costs in carrying out the Project Activities or overcoming the consequences of such Compensable Event, Project Co will be entitled to claim compensation in accordance with this clause 38A.
- (b) **(Compensable Event):** Subject to clause 38A.3(c), to the extent that Project Co is determined to be entitled to additional costs under clause 38A.6(b) as a consequence of a Compensable Event, the State will pay Project Co the amount calculated in accordance with the Change Compensation Principles, other than in connection with any costs of repairing or rebuilding the Relevant Infrastructure which will be determined under clause 44.
- (c) **(Agreed Uninsurable Risk):** If the Compensable Event for which Project Co is entitled to compensation under clause 38A.3(b) arises from a risk that is an Agreed Uninsurable Risk, then:
 - (i) clause 47.3 applies to the extent the Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure; and
 - (ii) in all other circumstances, this clause 38A.3 applies unless the parties have otherwise agreed the means by which the risk should be managed under clause 47.1, in which case the agreed means will apply.

38A.4 Change Notice

- (a) **(Claiming relief):** Subject to clause 38A.4(b), to claim compensation, Project Co must submit a Change Notice (with reference to the Early Warning (Compensable Event), if relevant) which includes the estimated amount of compensation, within 20 Business Days after the date on which it first became aware of the occurrence of the relevant Compensable Event.
- (b) **(Additional compensation):** Where the amount of compensation exceeds the amount set out in the Change Notice submitted in accordance with clause 38A.4(a), and Project Co wants to claim additional compensation, Project Co must notify the State and, once the consequences of the Compensable Event have ceased, promptly (and in any event, within 10 Business Days), submit an updated Change Notice.

38A.5 Conditions precedent to a claim for compensation

It is a condition precedent to Project Co's entitlement to compensation under this clause 38A that:

- (a) **(Change Notices):** Project Co submits to the State and the Independent Certifier Change Notices in accordance with clauses 38A.4(a) and 38A.4(b); and
- (b) **(Compensation):** Project Co actually incurs additional costs in carrying out the Project Activities as a result of the Compensable Event or overcoming the consequences of such Compensable Event.

38A.6 Compensation determined by Independent Certifier

- (a) **(State right to provide information):** The State may provide any evidence to the Independent Certifier and Project Co it considers relevant to the Independent Certifier's consideration of Project Co's Change Notice submitted in accordance with clause 38A.4.
- (b) **(Independent Certifier determination):** If the conditions precedent in clause 38A.5 have been satisfied, the Independent Certifier will determine the additional costs for which Project Co is entitled to be compensated in accordance with the

Change Compensation Principles, taking into account all relevant evidence presented by the parties.

- (c) **(Notice of determination):** The Independent Certifier must provide notice of its determination under clause 38A.6(b) to Project Co and the State within 20 Business Days after the later of:
 - (i) the date on which Project Co submits its Change Notice pursuant to clause 38A.4(a); and
 - (ii) where Project Co has submitted an updated Change Notice in accordance with clause 38A.4(b), the date on which that updated Change Notice is submitted.
- (d) **(Interim determinations):** In the circumstances contemplated by clause 38A.6(c)(ii), the Independent Certifier may, in its absolute discretion, give interim determinations of Project Co's entitlement to additional costs notwithstanding that the effects of the relevant Compensable Event are continuing.

38B. Sole remedy

38B.1 Sole remedy (Project Co)

Subject to clauses 5.3(b) and 5.3(c):

- (a) **(Delay during the Delivery Phase):** Project Co's sole remedy for a delay or disruption during the Delivery Phase is as set out in clauses 38 and 38A; and
- (b) **(State Liability):** Project Co will not be entitled to make, and the State will have no liability for, any Claim made by Project Co (including for damages for breach):
 - (i) for any compensation as a consequence of any delay or disruption during the Delivery Phase (including any delay to Completion) other than for compensation which is determined in accordance with clauses 38 and 38A; and
 - (ii) for any delay during the Delivery Phase (including any delay to Completion) other than:
 - A. a claim for an extension of time;
 - B. a claim for relief from Project Co's other Delivery Phase Activities; and
 - C. a claim for Prolongation Costs and Financing Delay Costs, each of which is determined in accordance with clause 38.

38B.2 Sole remedy (State)

- (a) **(Monthly Service Payment):** Except if the State elects to terminate this Deed, the State acknowledges and agrees that the State's sole financial remedy, and Project Co's sole financial Liability, for failure to achieve Completion by the Date for Completion is limited to the amount of the Monthly Service Payment not required to be paid by the State in those circumstances.
- (b) **(Acknowledgement):** Project Co acknowledges and agrees that nothing in clause 38B.2(a) limits the State's right with respect to an event giving rise to delay or the consequences of such event (as opposed to the delay itself).

39. Operating Phase – Intervening Events

39.1 Intervening Events entitling Claim

- (a) **(Notification):** If Project Co becomes aware of an Intervening Event or any other matter which has prevented, or will prevent it from performing any of the Services in accordance with this Deed, Project Co must promptly notify the State of that Intervening Event, its then current effect, and any likely further effect (**Early Warning (Operations)**).
- (b) **(Prevent):** In this clause 39, 'prevent' or 'prevented' does not mean that Project Co is permanently prevented from performing its obligations.
- (c) **(Relief):** If, during the Operating Phase, an Intervening Event prevents Project Co from meeting any of the Services Requirements in accordance with this Deed, Project Co will be entitled to claim relief from performance in accordance with this clause 39.
- (d) **(Claim for relief):** Subject to clause 39.1(e), in order to claim relief from performance under this clause, Project Co must submit an initial Change Notice to the State:
 - (i) if the Intervening Event is a Contamination Compensation Event, in accordance with clause 8.6(a); and
 - (ii) for all other Intervening Events, within 20 Business Days after the date upon which it became aware of the first occurrence of the Intervening Event.
- (e) **(Updates):** Where:
 - (i) the period for which Project Co is prevented from performing any of the Services in accordance with this Deed, extends beyond the period of time specified in the Change Notice submitted in accordance with clause 39.1(d); and
 - (ii) Project Co wants to claim relief from performance in respect of that further period,

Project Co must notify the State and, once the consequences of the Intervening Event have ceased, promptly (and in any event, within 10 Business Days), submit an updated Change Notice.

39.2 Conditions precedent to relief

It is a condition precedent to the State granting any relief or Project Co having any entitlement in connection with an Intervening Event that:

- (a) **(Change Notice):** Project Co submits to the State:
 - (i) its initial Change Notice in accordance with clause 39.1(d); and
 - (ii) any updated Change Notice in accordance with clause 39.1(e); and
- (b) **(Actual prevention):** Project Co's performance of all or any part of the Services under this Deed is actually prevented by the relevant Intervening Event.

39.3 Services suspended and no breach

Subject to clause 39.5, to the extent that:

(a) an Intervening Event prevents Project Co from meeting any of the Services Requirements in accordance with this Deed; and

(b) the conditions precedent in clause 39.2 have been satisfied,

then:

(c) the relevant obligation of Project Co will be suspended; and

(d) the failure to perform the affected Services will not be a breach of this Deed by Project Co, a Project Co Act or Omission, a Major Default or a Default Termination Event,

but only until the earlier of:

(e) the date the Intervening Event and its consequences cease to prevent performance of the relevant Services; and

(f) the date on which the Intervening Event and its consequences would have ceased to prevent performance, had Project Co or any of its Associates not failed to do any of the things contemplated by clause 43.1(b).

39.4 Continue to provide Services

Subject to clause 39.5, if an Intervening Event prevents Project Co from meeting any of the Services Requirements in accordance with this Deed, then Project Co:

(a) **(Perform obligations)**: must, subject to clause 39.3 and unless it is actually or practically impossible to do so at the Correctional Complex given the nature of the Intervening Event, continue to provide the Services and otherwise perform its obligations under this Deed;

(b) **(Amend its methodology)**: must use all reasonable endeavours to amend its methodology for performing the Services as necessary to continue to provide the Services during the Intervening Event; and

(c) **(Best Services Practices)**: must perform the Services in accordance with Best Services Practices.

39.5 Essential Services

(a) **(Provision of Essential Services)**: Notwithstanding the occurrence of an Intervening Event, Project Co must continue to perform the Essential Services except to the extent and for the duration that the State exercises its rights under clause 42.3 to perform the Essential Services as a consequence of a Step-in Event.

(b) **(Physical damage)**: If the Correctional Complex is physically damaged such that it is actually or practically impossible to provide accommodation to some or all of the Inmates (having regard to mitigation measures that can be undertaken by Project Co including relocating Inmates within the Correctional Complex), the parties will meet in good faith within 2 Business Days of a request by either party to discuss alternative arrangements to accommodate those Inmates, including the ability of the State to transfer Inmates to any available places at other correctional facilities in New South Wales.

39.6 Intervening Events other than Insured Risks or Force Majeure Events

(a) **(Payment of Monthly Service Payment)**: Subject to clause 39.6(c), 39.7 and 39.8, notwithstanding that Project Co's obligations to perform the Services affected by any Intervening Event that are suspended in accordance with clause 39.3 for the period of the suspension:

- (i) the State must continue to pay Project Co the Monthly Service Payment in connection with the Services affected by the Intervening Event which are suspended in accordance with clause 39.3 for the period of the suspension;
- (ii) the Monthly Service Payment will not be subject to Abatement in accordance with the Performance Regime and the Payment Schedule in connection with the Intervening Event; and
- (iii) the State will deduct from the Monthly Service Payment, the amounts of any recurrent and other costs which are permanently avoided by Project Co because the obligation to carry out the relevant Services has been suspended,

provided that Project Co has complied and continues to comply with clause 39.2.

- (b) **(Compensation for Costs):** If Project Co's obligation to perform the Services is suspended in accordance with clause 39.3 because of a Compensable Intervening Event, to which clause 39.6(a) applies, then the State will, in addition to the amounts referred to in clause 39.6(a), pay Project Co an amount calculated in accordance with the Change Compensation Principles, other than in connection with any costs of repairing or rebuilding the Correctional Complex which will be determined under clause 44 provided that Project Co has complied and continues to comply with the requirements under clause 39.2.
- (c) **(Agreed Uninsurable Risk):** If the Intervening Event for which Project Co is entitled to relief from performance in accordance with clause 39.6(a) is an Agreed Uninsurable Risk, then:
 - (i) clause 47.3 applies to the extent the Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure; and
 - (ii) in all other circumstances, this clause 39.6 applies, unless the parties have otherwise agreed the means by which the risk should be managed in accordance with clause 47.1, in which case the agreed means will apply.

39.7 Intervening Event which is an Insured Risk

- (a) **(Abatement of Monthly Service Payment):** Subject to clause 39.8, if the Intervening Event in respect of which Project Co is entitled to relief under this clause 39 is an Insured Risk, notwithstanding that Project Co's obligations to perform the Services are suspended in accordance with clause 39.3, the Monthly Service Payment will be adjusted in accordance with the Performance Regime and the Payment Schedule to the extent the Services are not being provided in accordance with this Deed.
- (b) **(Abatement not to constitute Major Default or Default Termination Event):** Any Abatement of the Monthly Service Payment in accordance with clause 39.7(a), will not be included in calculating any Major Default Service Failure or Service Failure Default Termination Event, provided that Project Co is complying with its obligations under clause 39.2.
- (c) **(Compensation for Costs):** If Project Co's obligation to perform the Services is suspended in accordance with clause 39.3 because of a Compensable Intervening Event, to which clause 39.7(a) applies, then the State will pay Project Co an amount calculated in accordance with the Change Compensation Principles, other than in connection with any costs of repairing or rebuilding the Correctional Complex which will be determined under clause 44, provided that Project Co has complied and continues to comply with the requirements under clause 39.2.

39.8 Intervening Event which is a Force Majeure Event

- (a) **(Adjustment of Monthly Service Payment):** Subject to clause 39.8(d), if the Intervening Event in respect of which Project Co is entitled to performance relief under this clause 39 is a Force Majeure Event, for the period of suspension under clause 39.3, the Monthly Service Payment will be adjusted in accordance with the Performance Regime and the Payment Schedule to the extent the Services are not being provided in accordance with this Deed.
- (b) **(Adjustment not to constitute Major Default):** Any adjustment of the Monthly Service Payment in accordance with clause 39.8(a) will not be included in calculating any Major Default Service Failure or Service Failure Default Termination Event, provided that Project Co is complying with its obligations under clause 39.2.
- (c) **(Minimum Payment):** If any adjustment of the Monthly Service Payment in accordance with clause 39.8(a) results in Project Co:
 - (i) not being able to fully pay its scheduled repayments of principal and interest in accordance with its Forecast Debt obligations from the Monthly Service Payment;
 - (ii) Project Co not receiving the Lifecycle Charge for the relevant Month that otherwise would have been due and payable to Project Co by the State; or
 - (iii) not receiving the amount of the Monthly Service Payment referable to the Services that Project Co continues to deliver under this Deed, notwithstanding the Force Majeure Event,

then Project Co will be entitled to payment of an amount calculated in accordance with the Change Compensation Principles, provided that Project Co has complied and continues to comply with the requirements under clause 39.2.

- (d) **(Agreed Uninsurable Risk):** If the Intervening Event for which Project Co is entitled to relief from performance in accordance with clause 39.8(a) is an Agreed Uninsurable Risk, then:
 - (i) clause 47.3 applies to the extent the Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure; and
 - (ii) in all other circumstances, clause 39.6 or this 39.8 (as applicable) applies, unless the parties have otherwise agreed the means by which the risk should be managed in accordance with clause 47.1, in which case the agreed means will apply.

39.9 Alternative arrangements

- (a) **(Alternative arrangements or method):** Without limiting clause 42, during the period of suspension of any Services as a result of an Intervening Event, the State may:
 - (i) make alternative arrangements for the performance of those Services at no cost to Project Co, and without the State incurring any Liability to Project Co in respect of those alternative arrangements; or
 - (ii) direct Project Co to deliver those Services by an alternative method or 'work around' from that contemplated in the then current Operating Phase Plans and the Output Specification to the extent that it is reasonably possible for Project Co to do so.
- (b) **(Payment):** If the State requires Project Co to perform those Services by an alternative method or 'work around' in accordance with clause 39.9(a)(ii), the State

must pay Project Co an amount calculated in accordance with the Change Compensation Principles in respect of such alternative method or 'work around'.

39.10 Cessation of Intervening Event

Project Co must:

- (a) **(Notification)**: notify the State; and
- (b) **(Performance of Services)**: recommence performing all Services suspended as a result of the Intervening Event;

immediately after it ceases to be prevented from performing those Services as a result of the relevant Intervening Event or its consequences.

39.11 Sole Remedy

Subject to clause 5.3(b) and 5.3(c):

- (a) **(Intervening Event)**: if Project Co is prevented from performing the Services in accordance with this Deed as a consequence of an Intervening Event, Project Co's sole remedy during the Operating Phase is as set out in this clause 39; and
- (b) **(Relief and compensation)**: Project Co will not be entitled to make any Claim, and the State will have no Liability for, any Claim made by Project Co (including for damages for breach) for Project Co being prevented from providing the Services in accordance with this Deed other than for the relief and compensation in accordance with this clause 39.

40. Modifications

40.1 Modification Request by the State

The State may at any time issue to Project Co a notice entitled "Modification Request" which must include details of:

- (a) **(Proposed Modification)**: the proposed Modification which the State is considering;
- (b) **(Preferred financing)**: the State's preferred financing for the proposed Modification in accordance with the Change Compensation Principles (where the Modification will result in an increase to the cost of the Relevant Infrastructure or the Services); and
- (c) **(Specific information)**: any specific information that the State requires Project Co to include in its Change Notice or that may be relevant to the preparation of the Change Notice,

(Modification Request).

40.2 Estimate of cost of Change Notice

If Project Co needs to engage a third party other than any Consortium Member to provide design, engineering or quantity surveying or other services to assist in the preparation of the Change Notice for a proposed Modification requested under clause 40.1, Project Co must provide the State with a capped price for those costs within 5 Business Days after receiving the Modification Request.

40.3 Modification Proposal

Unless the State withdraws the Modification Request, Project Co must submit a Change Notice entitled "Modification Proposal" in accordance with the Change Compensation Principles:

- (a) within 20 Business Days after the receipt of the Modification Request; or
- (b) at such later time as agreed by the State (acting reasonably, taking into account the size and complexity of the proposed Modification and the information to be included in a Modification Proposal).

40.4 Payment for Change Notice prepared by Project Co

If:

- (a) Project Co prepares a Modification Proposal in accordance with clause 40.3; and
- (b) the State does not issue a Modification Order in respect of the proposed Modification,

then the State must reimburse the reasonable third party costs of the type described in clause 40.2 incurred by Project Co in preparing the Modification Proposal, capped at the price provided by Project Co for the Modification Proposal under clause 40.2.

40.5 Change Response

- (a) **(State to Issue):** The State must issue a Change Response to a Modification Proposal in accordance with the Change Compensation Principles and the Change Compensation Principles will apply.
- (b) **(Modification Order):** Subject to clauses 40.4 and 40.10(c)(iii), Project Co must not begin any work or incur any cost, and will not have any entitlement to make any Claim in respect of a Modification unless a Change Response entitled "Modification Order" requiring Project Co to proceed with the Modification has been issued by the State.
- (c) **(State may withdraw):** Subject to clause 40.10, the State may withdraw a Modification Request at any time prior to issuing a Modification Order, in which case Project Co must not proceed with the Modification.

40.6 Omission by State

- (a) **(Omitted Project Activities):** The parties acknowledge and agree that:
 - (i) the State may issue a Modification Request that seeks to decrease, omit, delete or remove any part of the Project Activities (**Omitted Project Activities**); and
 - (ii) if the State has issued a Change Response entitled "Modification Order" in accordance with the Change Compensation Principles in respect of such Omitted Project Activities, the State may itself or may engage an Associate of the State to undertake any Omitted Project Activities.
- (b) **(Coordination with Project Activities):** Project Co must:
 - (i) permit the State or any of the State's Associates to carry out any Omitted Project Activities;
 - (ii) co-operate with the State and any of the State's Associates in carrying out any Omitted Project Activities (as applicable); and

- (iii) co-ordinate the Project Activities with the work carried out or to be carried out by the State or any of the State's Associates in connection with any Omitted Project Activities (as applicable).

40.7 Instruction to proceed

- (a) **(Instruction):** Whether or not:
 - (i) the State has issued a Modification Request under clause 40.1; or
 - (ii) Project Co has issued a Modification Proposal under clause 40.3;the State may at any time instruct Project Co to implement a Modification by issuing a Change Response entitled "Modification Order" in accordance with the Change Compensation Principles.
- (b) **(Implementation):** If the State issues a Change Response entitled "Modification Order" under clause 40.7(a), Project Co must implement the Modification on the terms set out in that Modification Order.

40.8 Modifications proposed by Project Co

- (a) **(Project Co may propose a Modification):** Project Co may request the State to direct a Modification by submitting a Change Notice entitled "Modification Proposal" to the State in accordance with the Change Compensation Principles (**Modification Proposal**).
- (b) **(State may approve or reject):** Upon receipt of a Modification Proposal, the Change Compensation Principles will apply save that the State will be under no obligation to issue a Modification Order requiring Project Co to proceed with the Modification proposed by Project Co under clause 40.8(a).
- (c) **(Project Co to bear risks of costs):** Unless otherwise agreed in writing by the State, Project Co will:
 - (i) bear all risks and costs associated with a Modification proposed by Project Co; and
 - (ii) not be entitled to make any Claim against the State arising out of, or in any way in connection with, a Modification proposed by Project Co,including where the State issues a Modification Order requiring Project Co to implement the Modification in accordance with the Modification Proposal.
- (d) **(Sharing of Savings):** If the State issues a Modification Order in respect of a Modification proposed by Project Co under clause 40.8(a) and the Modification will give rise to a Saving, the State and Project Co will share any Saving between the parties as determined in accordance with the Change Compensation Principles.

40.9 Directions

- (a) **(State direction):** If Project Co considers that a direction by the State constitutes or involves a Modification and the State has not given that direction expressly by way of a Modification Order, and Project Co intends to make a Claim that the direction is a Modification, Project Co must:
 - (i) within 10 Business Days after receiving the direction and before commencing any work the subject matter of the direction, give written notice to the State that it considers the direction constitutes or involves a Modification; and

- (ii) within 10 Business Days (or such other period as agreed with the State acting reasonably, taking into account the size and complexity of the alleged Modification and the information to be included in the Change Notice) after giving the notice under clause 40.9(a)(i) and before commencing any work the subject matter of the direction, give the State a Change Notice in respect of the alleged Modification.
- (b) **(Confirmation):** Within 20 Business Days of the State receiving a Change Notice under clause 40.9(a) the State must issue a Change Response:
 - (i) confirming that the direction is in fact a Modification, in which case the State will issue a Modification Request in respect of the relevant direction in accordance with this clause 40 and the Change Compensation Principles;
 - (ii) withdrawing the direction, in which case Project Co must not comply with the direction; or
 - (iii) informing Project Co that, in the State's view, the direction does not constitute or involve a Modification in which case Project Co must, subject to clause 5.2(a), comply with the direction but may refer the matter to dispute resolution in accordance with clause 50.
- (c) **(Conditions for Project Co claim):** Project Co is not entitled to make any Claim in respect of a direction that gives rise to a Modification of the type described in clause 40.9(a) unless it has given a notice under clause 40.9(a).

40.10 Change in Mandatory Requirements

- (a) **(Change in Mandatory Requirements):** Project Co must provide to the State a notice within 5 Business Days after becoming aware of any Change in Mandatory Requirements.
- (b) **(Project Co action):** If a Change in Mandatory Requirements occurs, Project Co must provide to the State:
 - (i) within 5 Business Days after becoming aware of such Change in Mandatory Requirements, where necessary, an estimate of third party costs of the type described in clause 40.2 to be incurred for preparing a Change Notice in response to a Change in Mandatory Requirements; and
 - (ii) within 20 Business Days after becoming aware of that Change in Mandatory Requirements, or at such later time as agreed by the State (acting reasonably), a Change Notice in respect of the relevant Change in Mandatory Requirements in accordance with the Change Compensation Principles.
- (c) **(State action):** The State must issue a Modification Order in accordance with the Change Compensation Principles in response to a Change Notice provided under clause 40.10(b)(ii) unless the relevant Change in Mandatory Requirements is a Change in Policy described in paragraph (a) or (b) of that definition, in which case the State must:
 - (i) direct Project Co as to whether or not it requires Project Co to comply with the relevant Change in Mandatory Requirements, provided that the State must direct Project Co to comply with the relevant Change in Mandatory Requirements if a failure to comply with that Change in Mandatory Requirements would result in Project Co being in breach of Legislation or any Approval;
 - (ii) if the State directs that it requires Project Co to comply with the relevant Change in Mandatory Requirement under clause 40.10(c)(i), issue a

Change Response entitled "Modification Order" in accordance with the Change Compensation Principles; and

- (iii) if the State directs Project Co not to comply with the relevant Change in Mandatory Requirements under clause 40.10(c)(i), reimburse Project Co the reasonable third party costs of the type described in clause 40.2 incurred by Project Co in preparing the Change Notice, capped at the amount of any estimate provided by Project Co for the Change Notice under clause 40.2 (or such higher amount as the State may approve).
- (d) **(Conditions for Project Co claim):** Project Co is not entitled to make any Claim in respect of a Change in Mandatory Requirements unless it has given a notice in accordance with clause 40.10(a) and 40.10(b)(ii).

40.11 Extension of time

- (a) **(Claim for extension of time):** Where Project Co considers that it has been delayed in achieving Completion or has otherwise been prevented in performing the Delivery Phase Activities as a consequence of a Modification or a Change in Mandatory Requirements then Project Co must include in its Change Notice provided under this clause 40 its claim for an extension of time or other relief (or both) and clause 38 will apply in respect of the relevant relief or extension of time claim (or both) (unless the State and Project Co can agree on an extension of time or other form of relief (or both) in accordance with clause 40.11(b)).
- (b) **(State may agree):** The State and Project Co may agree:
 - (i) that Project Co is entitled to an extension of time or other form of relief (or both); and
 - (ii) the period of any such extension of time or other form of relief (or both), within 10 Business Days after the State receives Project Co's Change Notice, in which case the agreed extension of time or other form of relief (or both) will apply and be included in the Change Response.
- (c) **(Failure to agree on extension of time):** Where Project Co has claimed an extension of time in accordance with clause 40.11(a) and the State and Project Co cannot agree that Project Co is entitled to an extension of time or the period for the extension of time, the State may issue separate Change Responses for:
 - (i) the non-time related aspects of the relevant Modification or a Change in Mandatory Requirements (as applicable); and
 - (ii) the extension of time (if any) which will be determined in accordance with clause 38.5.
- (d) **(Dispute):** Project Co may refer any Dispute in relation to a State determination under clause 40.11(c) for dispute resolution in accordance with clause 50.

40.12 Minor Modifications

- (a) **(Purposes):** The parties agree that the purposes of this clause 40.12 are to:
 - (i) better facilitate and more efficiently give effect to Minor Modifications; and
 - (ii) ease the administrative burden on Project Co and the State in the implementation of Minor Modifications,

and Project Co must seek to give effect to the purpose stated in clause 40.12(a) in complying with its obligations under this clause 40.12.

- (b) **(Minor Modification Proposal):** Without limiting the State's rights under clause 40.7, Project Co or the State may propose a Modification which is a Minor Modification by issuing a notice entitled "Minor Modification Proposal".
- (c) **(Accumulation):** Project Co or the State may agree to accumulate Minor Modifications on a monthly basis (or such other period as is agreed by the parties) by recording the proposed Minor Modifications by agreement on a register and either the State or Project Co submitting a Minor Modification Proposal for all Minor Modifications on that register, at the end of each month, and prior to their implementation.
- (d) **(Notice):** Within 7 Business Days after receipt of a Minor Modification Proposal from Project Co or the State (as the case may be) the receiving party must provide the other party with a notice which:
- (i) accepts the Minor Modification Proposal; or
 - (ii) sets out reasonable amendments to the Minor Modification Proposal.
- (e) **(Terms):** The State and Project Co will implement the Minor Modification on the terms:
- (i) of the Minor Modification Proposal where a Minor Modification Proposal is accepted under clause 40.12(d)(i); or
 - (ii) agreed between the State and Project Co, as recorded in an amended Minor Modification Proposal where either party seeks to amend a Minor Modification Proposal under clause 40.12(d)(ii).
- (f) **(Failure to agree):** If the State and Project Co fail to agree in accordance with clause 40.12(e)(ii), in respect of the Minor Modification Proposal, the State may:
- (i) issue a Modification Order under clause 40.7; or
 - (ii) issue a Modification Request under clause 40.1,
- in order to implement the Minor Modification.
- (g) **(Rights as if Minor Modification is Modification):** Nothing in this clause 40.12 will prevent either party from exercising their rights under clause 40 as if the Minor Modification was in fact a Modification.
- (h) **(State direction):** If the State considers that the Minor Modification process is not meeting the purposes set out in clause 40.12(a), the State may, at its discretion, direct Project Co to no longer use the Minor Modification process set out in this clause 40.12, in which case, all Minor Modifications will be managed in accordance with the process set out in clause 40 (other than this clause 40.12) and this clause 40.12 will be deemed not to operate.
- (i) **(Change Compensation Principles to apply):** Any amounts claimed or payable for a Minor Modification must be calculated in accordance with the Change Compensation Principles, unless the parties agree otherwise.
- (j) **(Directions):** If Project Co considers that any direction given by the State, other than a direction given in a Minor Modification Proposal, constitutes or involves a Minor Modification, Project Co must provide written notice to this effect to the State within 2 Business Days of receipt of the direction.
- (k) **(Agreement in respect of directions):** If the State agrees that the direction constitutes or involves a Minor Modification then the State must to the extent that the direction does so, serve a Minor Modification Proposal and the process for performance of the Minor Modification will proceed in accordance with this clause 40.12.

- (l) **(Non-Agreement in respect of directions):** If the State does not agree that the direction constitutes a Minor Modification, clause 40.9 will apply.

40.13 Implementation

If the State issues a Modification Order in accordance with this clause 40 Project Co must implement the Modification in accordance with the terms of the Modification Order.

41. Refinancing

41.1 Project Co to provide details of Refinancing

- (a) **(Provision of details):** Project Co must promptly provide the State with full details of any proposed Refinancing, including:
 - (i) a copy of the last agreed Financial Model, adjusted for the proposed Refinancing:
 - A. showing all of the material changes to any Project Co Entity's obligations to the Financiers (or their assigns or successors) in a format that allows the calculation of the anticipated Refinancing Gain or Refinancing Loss in accordance with clause 41.5; and
 - B. with projections for the cash flow of any Project Co Entities from the proposed date of the Refinancing to the end of the Term, including projected Distributions after taking the Refinancing into account;
 - (ii) the basis for assumptions used in the adjusted Financial Model referred to in clause 41.1(a)(i);
 - (iii) a certificate on terms and in a form acceptable to the State from the auditors of the adjusted Financial Model referred to in clause 41.1(a)(i), as to its operation and effect;
 - (iv) all information, including terms and conditions, provided by any Project Co Entity to its existing and prospective financiers, or by any Project Co Entity's existing and prospective financiers to any Project Co Entity, in relation to the proposed Refinancing; and
 - (v) whether any Project Co Entity considers that the consent of the State under clause 41.2 is required for the proposed Refinancing.
- (b) **(Further information):** The State may, within 10 Business Days after receiving details of the proposed Refinancing referred to in clause 41.1(a)(i) (or any revised proposed Refinancing submitted under clause 41.3(c)), request any further information which the State reasonably requires from Project Co regarding the proposed Refinancing. If such further information is available to any Project Co Entity, Project Co must (to the extent that the further information is available to it or Finance Co) provide the additional information as soon as reasonably practicable but no later than 5 Business Days after the State's request.

41.2 State consent to Refinancing

- (a) **(Restrictions):** Project Co must not (and must ensure that Finance Co does not) enter into any Refinancing which:
 - (i) gives rise to a Refinancing Gain;

- (ii) gives rise to an increase in the amount of outstanding Debt at or beyond the proposed date of the Refinancing above that forecast at that time in the last agreed Financial Model;
- (iii) gives rise to an increase in the amount of outstanding Debt beyond that forecast for any future period in the last agreed Financial Model;
- (iv) reduces the tenor of the relevant Refinancing tranche by a period greater than 18 Months from that forecast in the Financial Close Financial Model;
- (v) is likely to give rise to an increase or adverse change in the liabilities or the profile of the risks or liabilities of the State (whether actual or contingent) under the Project Documents; or
- (vi) incorporates an Exotic Swap,

without the prior consent of the State, which must be provided in accordance with this clause 41.2.

(b) **(State consent):** The State may only withhold its consent to a Refinancing under clause 41.2(a) if:

- (i) the State reasonably believes that the Refinancing will bring about an increase or adverse change in the potential liabilities or the profile of the risks or potential liabilities of any Project Co Entity under any Project Document (other than as consented to by the State and reflected in the Financial Model) without adequate compensation to the State;
- (ii) the Refinancing is prior to the Date of Commercial Acceptance; or
- (iii) the Refinancing incorporates an Exotic Swap.

(c) **(Deemed consent):** The State will not withhold its consent to a Refinancing under clause 41.2(a) (and if the State has not reverted within 21 Business Days of a consent request by Project Co, the State is deemed to have consented) if:

- (i) the sole purpose of the Refinancing is to prevent a maturity date under the Finance Documents being reached;
- (ii) the circumstances in clause 41.2(b) have not or will not arise; and
- (iii) Project Co has:
 - A. complied with its obligations under clause 41.1; and
 - B. delivered to the State the information required under clause 41.1(b) no less than 40 Business Days but no more than 90 Business Days before the relevant maturity date under the Finance Documents.

(d) **(Consent without prejudice):** The granting of consent under clause 41.2(a) by the State will be without prejudice to the State's rights under this Deed, including its right to any State Refinancing Share.

41.3 Review process

(a) **(Refinancing Review Period):** If under clause 41.2(a) the State is required to provide its consent to a Refinancing, the State must provide or withhold its consent within the period commencing on the date Project Co provides all of the details of the proposed Refinancing referred to in clause 41.1(a) and ending 20 Business Days after that date (**Refinancing Review Period**).

- (b) **(State may comment):** During the Refinancing Review Period, prior to providing or withholding consent, the State may provide comments (and sufficient detail to substantiate those comments) to Project Co in respect of the proposed Refinancing if the State has reasonably formed the view that any of the events in clause 41.2(b) will occur as a result of the proposed Refinancing.
- (c) **(Revised proposed Refinancing):** Following receipt of comments from the State under clause 41.3(b), Project Co may vary the proposed Refinancing in order to ensure that none of the events in clause 41.2(b) will occur as a result of the proposed Refinancing and resubmit the revised proposed Refinancing to the State for review during the Refinancing Review Period.
- (d) **(Further information):** Upon receipt of the revised proposed Refinancing the State may request further information that is reasonably required from any Project Co Entity regarding the revised proposed Refinancing in accordance with clause 41.1(b).
- (e) **(Extension):** If Project Co resubmits the proposed Refinancing to the State in accordance with clause 41.3(c), the Refinancing Review Period will be extended for a further period of 20 Business Days (or such shorter period as requested by Project Co and agreed to by the State) from the date of such resubmission.
- (f) **(Dispute resolution):** Any dispute as to whether the State's consent is required for a proposed Refinancing or if the State is entitled to withhold its consent to a proposed Refinancing may be referred by either party for resolution in accordance with clause 50.

41.4 Refinancing documents

- (a) **(Delivery):** Project Co must deliver a certified true copy of each amended and amending Finance Document to the State within 10 Business Days after execution.
- (b) **(Execution):** Project Co must not (and must ensure that Finance Co does not) execute any Refinancing until:
 - (i) any new Financiers or an appointed representative on behalf of the new Financiers has (as applicable) have executed a deed with the State substantially in the form of the Financiers Tripartite Deed or become bound by the Financiers Tripartite Deed; and
 - (ii) any retiring Financier, or an appointed representative on behalf of the retiring Financiers, who is party to the Financiers Tripartite Deed, has executed any documents reasonably requested by the State to terminate their rights under the Financiers Tripartite Deed.

41.5 Calculation of Refinancing Gain or Refinancing Loss

- (a) **(Impact to be calculated):** For each proposed Refinancing, the impact of the proposed Refinancing on Distributions to Equity Investors in the then current Financial Model must be calculated in order to establish the extent to which gains may arise that may need to be shared with the State in accordance with clause 41.6.
- (b) **(Calculation Formula):** The impact of the proposed Refinancing will be calculated in accordance with the following definitions:

Refinancing Gain means any amount greater than zero when calculated in accordance with the below formula, in which case clause 41.6 will apply.

Refinancing Loss means any amount equal to or less than zero when calculated in accordance with the below formula, in which case clause 41.6 will not apply.

Formula = A - B

where:

A = the net present value of Distributions projected over the remaining period of the Term if the proposed Refinancing is executed, using the Equity IRR and the then current Financial Model as adjusted to reflect the proposed Refinancing, in a manner consistent with clause 41.8, but without taking into account any adjustment for any sharing with the State of any Refinancing Gain arising from the proposed Refinancing; and

B = the net present value of the Distributions projected over the remaining period of the Term immediately prior to the proposed Refinancing using the Equity IRR and the then current Financial Model prior to any adjustments to reflect the proposed Refinancing.

41.6 Sharing Refinancing Gains

- (a) **(State entitlement):** The State will be entitled to [REDACTED] of the benefit of any Refinancing Gain that arises from a Refinancing (**State Refinancing Share**).
- (b) **(Payment):** The State may, taking into account the nature and timing of the Refinancing Gain, elect to receive the State Refinancing Share as:
 - (i) a direct payment (to the extent any Project Co Entity receives an amount referable to the Refinancing Gain as a direct payment);
 - (ii) a reduction in the Monthly Service Payments for the period of the Refinancing; or
 - (iii) a combination of the above.
- (c) **(Dispute resolution):** The State and Project Co must act reasonably to agree the manner and timing of payments of the State Refinancing Share and failing agreement, either party may refer the matter to dispute resolution in accordance with clause 50.

41.7 Costs relating to a Refinancing

Project Co must pay to the State the reasonable costs incurred by the State in relation to considering a proposed Refinancing or consenting to a Refinancing.

41.8 Adjustments to Financial Model upon a Refinancing Gain

For the purpose of clause 59, on execution of a Refinancing that results in a Refinancing Gain, the Financial Model will be adjusted as follows:

- (a) **(Amendment):** Debt, fees and margins for the period of the Refinancing will be updated to reflect the amended or amending Finance Documents;
- (b) **(Debt balances):** the actual Debt balance after the Refinancing and the forecast amortisation profile of Debt balances for the remainder of the Term will be updated to reflect the amended or amending Finance Documents;
- (c) **(Financial covenants):** the impact of financial covenants which result in the forced retention of cash amounts within any Project Co Entity will be updated to reflect the amended or amending Finance Documents;
- (d) **(Costs incurred):** legal, swap break and other costs reasonably and properly incurred in connection with the Refinancing will replace those equivalent costs previously forecast for the period of the Refinancing including those costs paid to the State in accordance with clause 41.7;

- (e) **(Monthly Service Payments)**: the Monthly Service Payments for the period of the Refinancing will be adjusted and direct payments to the State will be recorded to reflect the State Refinancing Share in accordance with clause 41.6 as adjusted in accordance with close protocols for the Refinancing to be agreed prior to the financial close of the relevant Refinancing; and
- (f) **(Further adjustments)**: further required adjustments as otherwise reasonably agreed between the State and Project Co.

42. Emergencies and Step-In by the State

42.1 State may instruct

If an Emergency occurs which cannot be dealt with by the normal performance of the Project Activities, the State, in addition to its rights under clause 42.2, may instruct Project Co to immediately:

- (a) **(Suspend performance)**: suspend performance of all or any part of the Project Activities; or
- (b) **(Additional activities)**: undertake additional or alternative services as and when required by the State,

in each case to ensure that the Emergency is dealt with, and normal performance of the Project Activities resumes, as soon as is reasonably practicable.

42.2 Relief and Payment

- (a) **(Suspension)**: Subject to clause 42.2(b), if the State directs Project Co in accordance with clause 42.1(a), the suspension:
 - (i) during the Delivery Phase will be a Compensable Extension Event; and
 - (ii) during the Operating Phase will be an Intervening Event,unless the Emergency that gives rise to the exercise of the State's rights is a result of a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.
- (b) **(Force Majeure Event)**: If the State directs Project Co in accordance with clause 42.1(a) and the Emergency that gives rise to the exercise of the State's rights is a result of a Force Majeure Event:
 - (i) during the Delivery Phase, clause 38.14 will apply as if the Emergency was an Extension Event caused by a Force Majeure Event; and
 - (ii) during the Operating Phase, clause 39 will apply as if the Emergency was an Intervening Event caused by a Force Majeure Event,unless the Emergency that gives rise to the exercise of the State's rights is a result of a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.
- (c) **(Change Compensation Event)**: If the State directs Project Co in accordance with clause 42.1(b) this will be a Change Compensation Event, unless caused or contributed to by a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed.

42.3 Right of Step-In

If:

- (a) **(Major Default):** a Major Default occurs;
- (b) **(Default Termination Event):** a Default Termination Event occurs;
- (c) **(State Cure Notice):** a State Cure Notice has been issued by the D&C Subcontractor or the Operator in accordance with the D&C Side Deed or Operator Side Deed (as applicable);
- (d) **(Request):** Project Co requests, in writing;
- (e) **(Intervening Event):** an Intervening Event occurs;
- (f) **(Additional services):** an event or circumstance occurs which requires additional or alternate services materially greater than the Services required by the Services Requirements;
- (g) **(Emergency):** an Emergency occurs; or
- (h) **(Entitled by Law):** the State is entitled by Law (including the Corrections Legislation) to act to discharge a statutory power or duty,

(each a **Step-In Event**), the State may elect to do any or all of the following:

- (i) **(Management):** assume total or partial management and control of the whole or any part of the Site, the Relevant Infrastructure or the Project Activities;
- (j) **(Site access):** access those parts of the Site and the Relevant Infrastructure to which Project Co has access or is entitled to occupy; and
- (k) **(Minimise effect):** take such other steps as are necessary in the reasonable opinion of the State for it to carry out the Project Activities and minimise the effect of the relevant Step-In Event,

provided that the State must not exercise its rights under this clause 42.3 on the occurrence of a Major Default for so long as Project Co is complying with its obligations under clauses 48.3 and 48.4 in respect of that Major Default.

42.4 Notice

The State must, if it is reasonably practicable to do so, give prior notice of any exercise of its rights under clause 42.3 and in any event must, as soon as practicable, provide notice to Project Co that it is exercising those rights.

42.5 Consequences of the State exercising its rights

- (a) **(Suspension of State rights):** During the exercise of the State's rights under clause 42.3, Project Co's rights and obligations under this Deed are suspended to the extent necessary to permit the State to exercise its rights.
- (b) **(No limitation):** Except to the extent that Project Co's obligations are suspended under clause 42.5(a), the exercise by the State of its rights under clause 42.3 (or the cessation of such exercise) will not affect any other right of the State under this Deed or any other State Project Document or at Law.

42.6 Payments

- (a) **(Step-in caused by Project Co):** Where the State has exercised its rights under clause 42.3 as a consequence of any Step-In Event:
- (i) contemplated by clauses 42.3(a) to 42.3(d); or
 - (ii) contemplated by clauses 42.3(e) to 42.3(h), which was the result of any Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed,
- then:
- (iii) where the State exercises its rights during the Delivery Phase, any Step-in Liability will be a debt due and payable by Project Co to the State, other than to the extent the Step-in Liability is incurred as a consequence of any breach of the State Project Documents by the State or a negligent act or omission of the State or its Associates;
 - (iv) where the State exercises those rights during the Operating Phase:
 - A. the Monthly Service Payment will be adjusted in accordance with the Performance Regime and the Payment Schedule to the extent the Services are not being provided in accordance with this Deed; and
 - B. any Step-in Liability in excess of the Monthly Service Payment amount (as adjusted in accordance with the Performance Regime and the Payment Schedule under clause 42.6(a)(iv)A), will be a debt due and payable by Project Co to the State, other than to the extent the State's Liability is incurred as a consequence of any breach of the State Project Documents by the State or a negligent act or omission of the State or its Associates.
- (b) **(Step in not caused by Project Co):** Subject to clause 42.6(c), where the State exercises its rights under clause 42.3 as a consequence of any Step-in Event contemplated by clauses 42.3(e) to 42.3(h), and the Step-in Event is not a result of any Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed, the State's exercise of those rights:
- (i) during the Delivery Phase will be a Compensable Extension Event; and
 - (ii) during the Operating Phase, will be an Intervening Event.
- (c) **(Payments during Force Majeure Event):** Where the State has exercised its rights under clause 42.3 as a consequence of any Step-in Event contemplated by clauses 42.3(e) to 42.3(h) and that Step-in Event is the result of a Force Majeure Event which is not a result of any Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed:
- (i) during the Delivery Phase, clause 38.14 will apply as if that Step-In Event was an Extension Event caused by a Force Majeure Event; and
 - (ii) during the Operating Phase, clause 39 will apply as if that Step-In Event was an Intervening Event caused by a Force Majeure Event.

42.7 Project Co to assist the State

Project Co must:

- (a) **(Access to be granted):** grant such access rights as are necessary, and take all action that is required by the State, to assist the State in exercising its rights under clause 42.3;
- (b) **(Sufficient resources):** provide sufficient resources, including personnel, to enable the State to exercise its rights under clause 42.3; and
- (c) **(Not to hinder):** not do anything to hinder, disrupt or prevent the State in exercising its rights under clause 42.3.

42.8 Undertake Project consistent with this Deed

When exercising its rights under clause 42.3, the State must use its reasonable endeavours to carry out the relevant Project Activities in a manner which is consistent with the State Project Documents, but taking into account the State's statutory rights and the circumstances that prompted the State to exercise those rights.

42.9 Limits on State liability during step-in

Project Co acknowledges and agrees that:

- (a) **(No obligation to remedy):** the State is not obliged to:
 - (i) exercise its rights under clause 42.3; or
 - (ii) remedy any breach, or to overcome or mitigate any risk or risk consequences, in connection with which the State exercises its rights under clause 42.3; and
- (b) **(No claim):** Project Co will not be entitled to make any Claim against the State, arising in connection with the exercise by the State of its rights under clause 42.3, except:
 - (i) as expressly provided in this Deed;
 - (ii) if the State has acted fraudulently or in bad faith in exercising its rights under clause 42.3; or
 - (iii) if, in the course of exercising its rights under clause 42.3, the State has acted in breach of its obligations under this Deed.

42.10 Cessation of step-in rights

- (a) **(State may cease):** The State may, at any time, cease to exercise its rights in accordance with this clause upon giving 5 Business Days' notice to Project Co.
- (b) **(State must cease):** The State must cease to exercise its rights in accordance with this clause 42 where the State has exercised its rights as a consequence of any of the Step-In Events under:
 - (i) clauses 42.3(a) or 42.3(b), and the Major Default or Default Termination Event (as the case may be) has been cured or its consequences have been remedied or overcome; or
 - (ii) clause 42.3(c), and the D&C Subcontractor or the Operator (as applicable) notifies the State that the default under the relevant Subcontract has been cured or its consequences have been remedied or overcome;

- (iii) clause 42.3(d), and the relevant event has ceased and its consequences have been remedied or overcome; or
 - (iv) clauses 42.3(e) to 42.3(h), and the relevant event has ceased and its consequences have been remedied or overcome.
- (c) **(Project Co to recommence):** If the State ceases to exercise its rights under clause 42.3 in accordance with this clause 42.10:
- (i) Project Co must immediately recommence carrying out any obligations suspended due to the exercise by the State of those rights; and
 - (ii) the State must give reasonable assistance to Project Co to ensure that this process of transition is effected as smoothly as possible.

43. Relief Events

43.1 Reduction in State liability for Relief Events

The State's Liability and Project Co's entitlements in connection with any Relief Event will be reduced:

- (a) **(Caused by Project Co):** to the extent that the Relief Event is:
 - (i) within the reasonable control of Project Co and its Associates;
 - (ii) caused or contributed to by any breach of another Project Document by Project Co or any of its Associates who is a counterparty to the Project Document; or
 - (iii) caused or contributed to by a Project Co Act or Omission or an act or omission of an Inmate, to the extent arising from a failure by Project Co or its Associates to perform the Services in accordance with this Deed;
- (b) **(Failure to mitigate):** to the extent Project Co, or any of its Associates, fails to:
 - (i) use all reasonable endeavours to mitigate, minimise or avoid the effects, consequences or duration of the Relief Event (including by putting in place temporary measures reasonably required by the State); or
 - (ii) take all reasonable steps which a prudent, competent and experienced contractor in the circumstances of Project Co or the relevant Associate of Project Co would have taken to mitigate, minimise or avoid the effects, consequences or duration of the Relief Event;
- (c) **(Insurance proceeds):** by any insurance proceeds:
 - (i) payable to Project Co, or any of its Associates, in respect of any Insurances; or
 - (ii) which would have been payable to Project Co or any of its Associates in accordance with any Insurances but for a failure by Project Co to comply with this Deed or a failure by Project Co or any of its Associates to comply with any Project Documents, or with the terms of those Insurances; and
- (d) **(Knowledge):** in respect of an extension of time claim pursuant to clause 38 (other than a claim contemplated in clause 38.3(b) or 38.3(c)), to the extent Project Co ought reasonably to have become aware of the occurrence of the Extension Event prior to the date 20 Business Days before submitting its Change Notice pursuant to clause 38.3(a).

43.2 Meetings and other information

If requested by the State (acting reasonably), the parties will, from time to time within five Business Days of a request from the State (in writing), meet to discuss the consequences of a Relief Event, including:

- (a) **(Questions or issues):** any questions or issues the State may wish to raise concerning any information contained within a notice in respect of a Relief Event;
- (b) **(Further steps):** what further steps (if any) Project Co may reasonably take in order to avoid or mitigate the effects of the Relief Event (including any steps Project Co has taken or is proposing to take to make a claim under the Insurance Policies);
- (c) **(Mitigation):** the extent to which Project Co or its Associates can mitigate the effects of a Relief Event, including any insurance which may mitigate the effects of the Relief Event; and
- (d) **(Other matters):** any other matters that the State may wish to raise in connection with the Relief Event.

Part I - Risk, Indemnity and Insurance

44. Loss or Damage

44.1 Risk of loss or damage

Subject to this clause 44, Project Co bears the risk of loss or damage to the Relevant Infrastructure during the Term (including loss or damage caused by Inmates).

44.2 Notification of Loss and Damage

(a) **(Notification):** Project Co must promptly notify the State of any loss or damage to the Relevant Infrastructure including details of the nature and extent of such loss or damage.

(b) **(Repair or rebuild):** Within:

(i) where the Relevant Infrastructure has been wholly destroyed or substantially damaged, 60 Business Days; or

(ii) otherwise, 20 Business Days,

after any loss or damage to the Relevant Infrastructure, the State must notify Project Co whether or not it requires Project Co to repair or rebuild any Relevant Infrastructure for which Project Co retains the risk of loss or damage.

(c) **(Mitigation measures):** Without prejudice to the State's rights under this Deed and Project Co's obligations under this Deed, the State acknowledges that prior to the State notifying Project Co whether to repair or rebuild in accordance with clause 44.2(b), Project Co may undertake reasonable mitigation measures in respect of that loss or damage to the extent reasonably required by its Insurances.

44.3 Repairing and rebuilding

(a) **(Project Co to repair or rebuild):** If the State notifies Project Co that it requires Project Co to repair or rebuild the Relevant Infrastructure in accordance with clause 44.2(b), Project Co must:

(i) subject to allowing reasonable time for inspection by insurers, take immediate steps to clear any debris and begin initial repair work;

(ii) promptly consult with the State, and unless directed by the State to repair or rebuild the Relevant Infrastructure to a different specification:

A. promptly repair or rebuild the Relevant Infrastructure in accordance with the requirements of this Deed; and

B. ensure that the repaired or rebuilt Relevant Infrastructure complies with the requirements of this Deed;

(iii) consult with the State as to the programming of the repair or rebuilding works, and the Site access required to effect the relevant repair, rebuilding or reinstatement;

(iv) ensure:

A. there is minimal disruption to the Relevant Infrastructure, the Site and the Project Activities; and

B. to the greatest extent possible, continue to comply with its obligations under the Project Documents;

- (v) keep the State fully informed of the progress of the repair or rebuilding of the Relevant Infrastructure; and
 - (vi) subject to clause 44.3(c) to 44.3(e), pay for the cost of repairing or rebuilding the Relevant Infrastructure.
- (b) **(State insurance proceeds):** The State will make available to Project Co the proceeds of any Insurance received by the State for the purpose of repairing or rebuilding the Relevant Infrastructure.
- (c) **(Cost impact on Relevant Infrastructure):** If:
- (i) the State directs Project Co that the Relevant Infrastructure is to be repaired or rebuilt to different specifications than the Design Requirements; and
 - (ii) the incremental cost of repairing or rebuilding according to the different specifications exceeds the total cost of repairing or rebuilding the Relevant Infrastructure in accordance with the Design Requirements,
- the State must direct a Modification in accordance with clause 40 in respect of the repair or rebuild works which are different to the Design Requirements.
- (d) **(Cost impact on Project Activities):** If the repairing or rebuilding of the Relevant Infrastructure to different specifications to the Design Requirements will increase or decrease the cost of performing the Services over the remainder of the Term, the State must direct a Modification in accordance with clause 40 but only in respect of such increase or decrease.
- (e) **(Damage caused by State breach):** If the loss or damage to the Relevant Infrastructure was caused by:
- (i) a breach by the State of any State Project Document; or
 - (ii) a fraudulent, negligent, reckless, unlawful or malicious act or omission of the State or any of its Associates when acting in respect of the Project,
- then the cost of repairing or rebuilding the Relevant Infrastructure by Project Co which is over and above the Insurance proceeds received by Project Co in respect of the repairing or rebuilding (or which would have been received by Project Co but for any breach by Project Co or any of its Associates of this Deed or the relevant insurance policy), plus the cost in respect of a deductible or excess under any Insurance, will be a Change Compensation Event.
- (f) **(Corrections Act):** If:
- (i) an Inmate causes any loss of or damage to the Correctional Complex as a result of committing a Correctional Centre Offence (as that term is defined in the Corrections Act); and
 - (ii) the General Manager or Visiting Magistrate orders that the Inmate pay a specified amount as compensation for the loss or damage in accordance with the Corrections Legislation,
- then, to the extent that the Inmate pays such compensation to Project Co or its Associates, Project Co must promptly provide such amounts to the State.

44.4 Uninsurable Risk or Day 1 Uninsurable Risk

If the event which gave rise to the loss of, or damage to, the Relevant Infrastructure is an Agreed Uninsurable Risk, then the parties' rights and obligations will be as set out in clause 47.3.

44.5 Minor damage

If any loss of, or damage to, the Relevant Infrastructure for which the State would, but for this clause 44.5, be liable is of such a minor nature (when considered item by item and in aggregate) that it can be remedied by Project Co:

- (a) **(Additional costs)**: without incurring additional costs;
- (b) **(Site-based resources)** through the use of its site-based resources during normal working hours; and
- (c) **(Project Activities)**: without adversely affecting the ability of Project Co to carry out the Project Activities,

then Project Co must rectify that damage (at its own cost).

44.6 Consequences of State election not to repair or rebuild

If the State notifies Project Co not to repair or rebuild the Relevant Infrastructure, the State must:

- (a) **(Modification)**: where the Relevant Infrastructure has not been wholly destroyed or substantially damaged, omit the relevant part of the Relevant Infrastructure from the Project by directing a Modification in accordance with clause 40; or
- (b) **(Wholly destroyed or substantially damaged)**: if the Relevant Infrastructure has been wholly destroyed or substantially damaged, and the loss or damage was caused by:
 - (i) any act or omission of Project Co or an Inmate, this will be deemed to be a Default Termination Event and the State must issue a notice to terminate this Deed for default in accordance with clause 49.4;
 - (ii) any act or omission of the State, the State must issue a notice to voluntarily terminate this Deed in accordance with clause 49.2; or
 - (iii) any other event, including a Force Majeure Event or an Agreed Uninsurable Risk, this will be deemed to be a Force Majeure Termination Event and the State must issue a notice to terminate this Deed for Force Majeure in accordance with clause 49.3.

44.7 State may repair or reinstate

Without limiting any other provision of this Deed, if Project Co does not repair or rebuild the Relevant Infrastructure where required to do so in accordance with clause 44.3:

- (a) **(Notification)**: the State may notify Project Co that the State intends to repair or remedy any destruction, loss or damage, or replace or reinstate the Relevant Infrastructure (or procure a third party to do so); and
- (b) **(Failure to comply)**: if Project Co is not complying with its obligations under clause 44.3, the State may, without further notice, elect to remedy or repair any destruction, loss or damage, or replace or reinstate the Relevant Infrastructure (or procure a third party to do so) in which case, the costs and expenses incurred in doing that work will be a debt due and payable by Project Co to the State.

44.8 Damage to third party property

- (a) **(Project Co interference)**: Other than in accordance with its obligations under this Deed, Project Co must not interfere with, obstruct, damage or destroy any property on, under, over, in, or in the vicinity of, the Site.

- (b) **(Project Co to rectify and compensate):** If Project Co or any of its Associates interferes with, obstructs, damages or destroys any property (other than the Relevant Infrastructure) on, under, over, in or in the vicinity of, the Site, other than in accordance with its obligations under this Deed, Project Co must:
 - (i) promptly rectify any such loss or damage; and
 - (ii) reasonably compensate the affected person for that interference, obstruction, loss or damage where Project Co has a legal liability to do so.

45. Indemnities and Consequential or Indirect Loss

45.1 Indemnity for Project Co breach

Subject to clauses 38B.2 and 36.3(d), Project Co indemnifies the State, the State's employees and officers and NSW Government (each an **Indemnified Person**) from and against any Claim or Liability suffered or incurred by any Indemnified Person in connection with:

- (a) **(Breach of Deed)** any breach by Project Co of this Deed; or
- (b) **(Breach State Project Document):** any breach by Project Co or any of its Associates of any State Project Document.

45.2 General indemnity

Project Co indemnifies the Indemnified Persons from and against any Claim (including Claims by Inmates) or Liability suffered or incurred by any Indemnified Person in connection with:

- (a) **(Loss or damage):** any loss of, or damage or destruction to, property (other than the cost of repairing or rebuilding the Relevant Infrastructure addressed in clauses 44.3 to 44.7);
- (b) **(Injury or death):** any injury to, illness or death of, any person; or
- (c) **(Third parties):** to the extent not covered under clause 45.2(a) or 45.2(b), any third party actions (including by Inmates) brought against the Indemnified Persons,

to the extent caused or contributed to by Project Co or any of its Associates in connection with the Project or the Project Activities.

45.3 Corrections Act Indemnity

Project Co indemnifies the Indemnified Persons from and against any Claim (including Claims by Inmates) or Liability suffered or incurred by any Indemnified Person in connection with:

- (a) **(Damage):** damage to the Correctional Complex and any associated public property in the possession or under the control of Project Co or its Associates; and
- (b) **(Complaint):** the State attending or responding to any complaint, inquiry, inquest or commission arising out of or in connection with the Correctional Complex or an Inmate (or former Inmate).

45.4 Project Information

Project Co:

- (a) **(Indemnity):** indemnifies the State and any of its Associates against any Claim or Liability suffered or incurred by the State or any of its Associates, and releases and must procure that its Associates or any other person to whom the Project Information is disclosed by Project Co, an Associate of Project Co or any person on

Project Co's or its Associate's behalf, release the State and any of the State's Associates from any Claim, arising in connection with the provision of, or the purported reliance upon, or use of, the Project Information by Project Co, an Associate of Project Co or any other person to whom the Project Information is disclosed by Project Co, an Associate of Project Co or any person on Project Co's or its Associate's behalf to the extent only that a Claim is made against the State or any of its Associates by Project Co, an Associate of Project Co or any other person to whom the Project Information is disclosed by Project Co, an Associate of Project Co or any person on Project Co's or its Associate's behalf; and

- (b) **(Release)**: releases and must procure that its Associates release the State and any of the State's Associates from any Claim in respect of any failure by the State to make available to Project Co any information, data or material relating to the Project.

45.5 Intellectual Property and Moral Rights Indemnity

- (a) **(Intellectual Property Rights, Moral Rights or other rights)**: Project Co indemnifies and releases the State and its Associates and the State's respective sub-licensees (each an **Indemnified IP Party**) against any Claim made against, or Liability suffered or incurred by, any Indemnified IP Party arising out of or in connection with any infringement, violation, alleged infringement or alleged violation by any Indemnified IP Party of any Intellectual Property Rights, Moral Rights or other analogous rights of any person but excluding State Background IP, in connection with:

- (i) delivery of the Project;
- (ii) any Use of Developed IP by the State, its Associates or any person nominated or authorised by the State;
- (iii) any Use of Developed IP by or on behalf of Project Co as referred to in clause 61.3(c);
- (iv) any Use of other Project Co Material, Project Co Background IP or the Relevant Infrastructure as delivered by or on behalf of Project Co to the State or as modified by Project Co; or
- (v) any other Use of other Project Co Material, Project Co Background IP or the Relevant Infrastructure by the State, its Associates or any person nominated or authorised by the State as permitted or contemplated by this Deed.

- (b) **(Project Co obligations to replace, modify or obtain new licence)**: If a Claim referred to in clause 45.5(a) substantially interferes with any Indemnified IP Party's Use of any Developed IP or other Project Co Material, Project Co Background IP or the Relevant Infrastructure, Project Co will (at the State's option, and without limiting any of the State's other rights under any State Project Document or at Law):

- (i) without additional charge to the State, replace the Developed IP or other Project Co Material, Project Co Background IP or the Relevant Infrastructure, with a non-infringing product or service of at least equivalent functionality and performance, and which otherwise meets all relevant requirements for that Project Co Material, Project Co Background IP or the Relevant Infrastructure in accordance with the Project Documents;
- (ii) without additional charge to the State, modify the Developed IP, other Project Co Material, Project Co Background IP or the Relevant Infrastructure to overcome the infringement without materially impeding functionality or performance or rendering it non-compliant with any

relevant requirements for that Material, Project Co Background IP or the Relevant Infrastructure in accordance with the Project Documents; or

(iii) obtain a licence for the relevant Indemnified IP Party to continue to use and enjoy the Developed IP, other Project Co Material, Project Co Background IP or the Relevant Infrastructure (as applicable) and pay any additional fee required for that licence.

(c) **(No limitation):** Neither the State's rights nor Project Co's Liabilities or obligations, whether under this Deed or otherwise according to Law, in connection with Intellectual Property Rights, are limited by the terms of this clause 45.5.

45.6 Privacy indemnity

Project Co 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 Project Co or any Associate of Project Co 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.

45.7 Release

Project Co releases, and must procure that each of its Associates releases, each of the Indemnified Persons from any Claim or Liability for damage, destruction, loss, death, illness or injury to the extent caused by Project Co or any of its Associates in connection with the Project or the Project Activities.

45.8 Limits on Project Co liability to indemnify and release

Project Co's Liability to indemnify and release the Indemnified Persons or the Indemnified IP Parties in accordance with this Deed will be reduced to the extent that any such Claim or Liability is caused or contributed to by:

- (a) **(Breach):** any breach by the State of any State Project Documents;
- (b) **(Fraud):** any fraudulent, negligent, reckless, unlawful or malicious act or omission of the Indemnified Persons or the Indemnified IP Parties (as applicable); or
- (c) **(Relief Event):** a Relief Event, but only to the extent that the reduction in Project Co's Liability to indemnify or release is agreed by the parties or determined in accordance with the Change Compensation Principles (if at all),

other than to the extent that Project Co is entitled to recover under any of the Insurances (or would have been entitled to recover but for this clause 45.8 or any breach by Project Co or any of its Associates of this Deed or the relevant insurance policy).

45.9 Third party claim under indemnity

(a) **(Management of Claims):** Subject to clause 45.9(b) and 45.9(c), if a Claim is made against an Indemnified Person or an Indemnified IP Party, in respect of which Project Co is required to indemnify the relevant Indemnified Person or Indemnified IP Party in accordance with this Deed, the State must:

(i) to the extent that the State's insurers in connection with such a Claim agree, as soon as is reasonably practicable after it becomes aware of the Claim:

- A. notify Project Co of the alleged Claim;
- B. give Project Co the option to defend the Claim; and

- C. provide Project Co (at Project Co's expense) with reasonable assistance in negotiating, defending or otherwise taking action or proceedings in respect of that Claim; and
 - (ii) not settle or compromise the Claim without the prior written consent of Project Co (which cannot be unreasonably withheld or delayed), and Project Co will be deemed to be acting reasonably if Project Co refuses to provide its consent as a result of restrictions or obligations under any Insurance policy to which that Claim relates.
- (b) **(Urgent proceedings):** If interlocutory proceedings are commenced against the State on an urgent basis, the State may initially defend such proceedings, but as soon as practicable after commencement of the proceedings, the State must give Project Co the option to conduct the defence of such proceedings.
- (c) **(Other matters):** Clauses 45.9(a)(i)B and 45.9(a)(i)C do not apply to any Claim which:
 - (i) the State (acting reasonably) considers should be conducted by the State for public policy reasons; or
 - (ii) would prevent the continued development or operation of the Project or continued conduct of the Project Activities,

and the State, to the extent reasonably practicable, must consult in good faith with Project Co with respect to such Claim.
- (d) **(Management of Claims by the State):** If the State is managing a Claim for which Project Co is required to indemnify an Indemnified Person or an Indemnified IP Party, the State must:
 - (i) give Project Co prior notice before agreeing to any compromise or settlement of that Claim; and
 - (ii) use reasonable endeavours to consult in good faith with Project Co prior to agreeing to any such compromise or settlement.
- (e) **(Management of Claims by Project Co):** If Project Co is managing a Claim in accordance with clause 45.9(a)(i)B, Project Co must:
 - (i) give the State prior notice before agreeing to any compromise or settlement of that Claim; and
 - (ii) use reasonable endeavours to consult in good faith with the State prior to agreeing to any such compromise or settlement.

45.10 Continuing obligation

- (a) **(Indemnities):** Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties.
- (b) **(Enforcement):** It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity under this Deed.
- (c) **(Payment):** A party must pay on demand any amount it must pay under an indemnity in this Deed.

45.11 Exclusion of Consequential or Indirect Loss – Project Co

- (a) **(No liability of Project Co):** Subject to clause 45.11(b), but notwithstanding any other provision of the State Project Documents, neither Project Co nor any of its Associates has any Liability to the State or any of its Associates for any

Consequential or Indirect Loss incurred or sustained by the State or any of its Associates:

- (i) as a result of any act or omission of Project Co or any of its Associates; or
 - (ii) due to any breach of a State Project Document by Project Co or any of its Associates.
- (b) **(Exceptions to no Project Co liability):** The exclusion of Liability of Project Co and its Associates under clause 45.11(a) does not apply to Liability:
- (i) for which Project Co or its Associates are insured under any Insurances that have been effected and maintained as required by this Deed or Liability for which Project Co or its Associates would have been insured under such Insurances if:
 - A. this clause 45.11 did not exist; and
 - B. Project Co and its Associates had:
 - 1) effected and maintained the relevant Insurances as required by this Deed;
 - 2) complied with the relevant Insurances;
 - 3) submitted a claim under the relevant Insurances where there was a legitimate entitlement to do so; and
 - 4) taken reasonable steps to pursue the claim;
 - (ii) for which Project Co recovers pursuant to an indemnity under any Project Documents;
 - (iii) arising from any criminal act or fraud on the part of Project Co or any of its Associates;
 - (iv) arising from any wilful misconduct on the part of Project Co or any of its Associates;
 - (v) arising from any loss of or damage to property or injury to, illness or death of any person;
 - (vi) in respect of a deductible or excess under any Insurance;
 - (vii) in respect of any reduction of any Monthly Service Payment as a consequence of the application of the Performance Regime or the Payment Schedule in accordance with this Deed;
 - (viii) expressly imposed on Project Co or any of its Associates under any of the Project Documents to pay the State any of the following amounts:
 - A. any State Refinancing Share of Refinancing Gain under clause 41.6;
 - B. any interest under clause 36.5;
 - C. any amounts payable under clause 36.4, 41.7 or 58.10;
 - D. any amounts expressly stated to be payable as a debt due and payable under the State Project Documents;

- E. any amounts payable by Project Co to an Indemnified IP Party under clause 45.5;
 - F. without limiting clause 45.11(b)(v), any amounts payable by Project Co to the State or an Indemnified Person under clause 45.2(c);
 - G. any amounts payable under and calculated in accordance with the Performance Regime or the Payment Schedule;
 - H. any amounts payable under and calculated in accordance with the Change Compensation Principles; or
 - I. any amounts payable under and calculated in accordance with the Termination Payments Schedule;
- (ix) imposed on Project Co under clause 40.8(d) (Sharing of Savings) to pay or allow to the State any share of Savings;
 - (x) in respect of any statutory fine or civil penalty arising from any breach of Law by Project Co or any of its Associates;
 - (xi) arising from abandonment of the whole or a substantial part of the Delivery Phase Activities or the Services by Project Co or any of its Associates; or
 - (xii) in respect of costs incurred by the State in rectifying Defects for which Project Co is liable under this Deed.

45.12 Exclusion of Consequential or Indirect Loss – State

- (a) **(No liability of State):** Subject to clause 45.12(b), but notwithstanding any other provision of the State Project Documents, neither the State nor any of its Associates has any Liability to Project Co or any of its Associates or any Group Member (whether in contract, tort or otherwise), in respect of Consequential or Indirect Loss incurred or sustained by Project Co, its Associates or any Group Member:
 - (i) as a result of any act or omission of the State or any of its Associates; or
 - (ii) due to any breach of a State Project Document by the State or any of its Associates.
- (b) **(Exceptions to the no State liability):** The exclusion of Liability of the State and its Associates in clause 45.12(a) does not apply to:
 - (i) Liability arising from any criminal act or fraud on the part of the State or its Associates;
 - (ii) Liability arising from any wilful misconduct on the part of the State (in its capacity as a party to this Deed) or its Associates in connection with the Project;
 - (iii) Liability arising from any loss of or damage to property or injury to, illness or death of, any person caused or contributed to by the State or its Associates;
 - (iv) Liability expressly imposed on the State under any of the State Project Documents to pay to Project Co any of the following amounts:
 - A. any Monthly Service Payment;
 - B. any interest under clause 36.5;

- C. any amounts payable under and calculated in accordance with the Change Compensation Principles (including any Financing Delay Costs or Prolongation Costs); or
- D. any amounts payable in accordance with the Termination Payments Schedule; or
- (v) Liability imposed on the State under clause 40.8(d) to pay or allow Project Co any share of Savings;
- (vi) Liability for which the State or its Associates have recovered under any Insurances; or
- (vii) payment of any excess or deductible payable by the State under clause 46.10(b).

46. Insurance

46.1 Delivery Phase Insurances

Project Co must effect and maintain, or cause to be effected and maintained:

- (a) **(Insurance Schedule)**: the Insurances at the times, in the manner and on the terms specified in this clause 46 and the Insurance Schedule; and
- (b) **(Additional insurance)**: any additional insurance required by Law or which a prudent owner and operator would maintain when carrying out activities of a similar nature to the Project Activities.

46.2 General insurance requirements

Project Co must or where relevant, must procure that its Subcontractors:

- (a) **(Reputable Insurers)**: effect all Insurances with Reputable Insurers;
- (b) **(Premiums)**: punctually pay all premiums and other amounts payable in connection with the Insurances, and give the State copies of receipts for payment of premiums if and when requested by the State;
- (c) **(No alteration)**: not alter, extend, discontinue or cancel any Insurance, or allow any Insurance to lapse, where this would result in the relevant Insurance not meeting the requirements of this Deed, without the prior approval of the State;
- (d) **(Not prejudice)**: not do or permit, or omit to do, anything which prejudices any Insurance;
- (e) **(Rectify)**: promptly rectify anything which might, if not rectified, prejudice any Insurance;
- (f) **(Fully disclose)**: fully and promptly disclose all material information to all relevant insurers (and any persons acting on their behalf) relating to the Insurances;
- (g) **(Comply)**: comply at all times with the terms of each Insurance;
- (h) **(State recovery)**: do everything reasonably required by the State or any of its Associates to whom the benefit of any Insurance extends, to enable the State or its Associates (as the case may be) to claim, and to collect or recover, money due under that Insurance; and

- (i) **(Notice of cancellation):** notify the State of any amendment or cancellation of an Insurance, within 30 Business Days of Project Co becoming aware of the amendment or cancellation.

46.3 Terms of Insurances

Project Co must ensure that each of the Insurances:

- (a) **(Terms):** contains terms that, if not specified in the Deed are:
 - (i) acceptable to the State, acting reasonably; and
 - (ii) to the effect that the relevant insurer:
 - A. does not require the State or its Associates to exhaust indemnities given by Project Co, its Associates or any Group Member to the State or its Associates under any State Project Document, before the insurer pays proceeds in respect of any claim under the Insurance;
 - B. will not impute to any Insured any knowledge or intention or a state of mind possessed or allegedly possessed by any other Insured;
 - C. in the case of Insurances under which the State or its Associates are also Insureds, agrees that the interests of the Insured include the entire assets of the Project and waives any rights of subrogation which it may have against any Insured;
 - D. in the case of liability insurances, agrees to treat each Insured as a separate Insured as though a separate contract of insurance had been entered into with each of the Insured, without increasing the deductibles or reducing the overall limit of indemnity;
 - E. agrees that no reduction in limits or coverage affecting the Project or the Relevant Infrastructure will be made during the period of insurance, except under the circumstances and to the extent permitted by the *Insurance Contracts Act 1984* (Cth) and with not less than 20 Business Days prior notice to the State and Project Co; and
 - F. in the case of the Public and Products Liability Insurance during the Operating Phase, the relevant insurer agrees to waive any rights of contribution it may have against the insurers for Project Co, the State and the Operator which but for this waiver would be required to indemnify those parties under other liability insurance policies; and
- (b) **(Objectives of Project):** is appropriate given the nature and objectives of the Project and the responsibilities and entitlements of the various Insureds in connection with this Deed.

46.4 Insurances primary

- (a) **(Enforceability of rights under indemnities):** The State is not obliged to make a claim or institute proceedings against any insurer under the Insurances before enforcing any of its rights or remedies under the indemnities referred to in this Deed or generally.

- (b) **(Project Co's obligations not affected):** Other than as expressly stated in this Deed, Project Co is not relieved from, and remains fully responsible for, its obligations under this Deed, regardless of whether the Insurances respond or fail to respond to any claim and regardless of the reason why any Insurance responds or fails to respond.

46.5 Notification and making of claims

Project Co must, in relation to any Insurances other than workers compensation or motor vehicle Insurances:

- (a) **(Notification):** promptly notify the State of any occurrence that may give rise to a claim in connection with the Project under any Insurance, except where an Insured's right of indemnity under the relevant Insurances would be prejudiced by giving such notice;
- (b) **(Subsequent developments):** keep the State informed of subsequent developments concerning the occurrence under clause 46.5(a);
- (c) **(Pursue claims):** subject to clause 46.5(d), diligently pursue any claim which it has under any Insurance which has arisen in connection with the Project; and
- (d) **(State consent):** not compromise, settle, prosecute or enforce any claim of the type referred to under clause 46.5(a) under any Insurance without the prior consent of the State (which must not be unreasonably withheld).

46.6 Operating Phase Insurances

- (a) **(Project Co to provide):** No less than 60 Business Days prior to the Date for Technical Completion and prior to the date on which any Insurance is due to be effected or renewed during the Operating Phase (as detailed in the Insurance Schedule), Project Co must provide the State with copies of the proposed Operating Phase Insurances for the State to review in accordance with the Review Procedures.
- (b) **(Terms and evidence):** If Project Co is unable to provide copies of the Operating Phase Insurances to the State in accordance with clause 46.6(a), it must:
 - (i) make the terms of such Insurances available to the State's insurance broker to review confidentially on behalf of the State in accordance with the Review Procedures; and
 - (ii) provide the evidence in respect of that Insurance required under clause 46.7(b) to 46.7(d).
- (c) **(Acknowledgement):** The parties acknowledge and agree that:
 - (i) the terms and requirements specified in the Insurance Schedule for the Operating Phase Insurances are a reflection of the insurance market at Financial Close;
 - (ii) if prior to the Date of Commercial Acceptance and throughout the Operating Phase, either party considers (acting reasonably) that the terms relating to an Operating Phase Insurance set out in the Insurance Schedule are no longer a reflection of the terms of the insurance that an operator of facilities similar to the Correctional Complex providing services similar to the Services and exercising Best Industry Practices would procure and maintain, then that party may send a written notice to the other party advising it of the same and the parties must promptly confer in good faith and acting reasonably with a view to reaching agreement on the replacement terms or requirements (as applicable); and

- (iii) if the parties do not reach agreement on any replacement terms or requirements in accordance with clause 46.6(c)(ii) within 5 Business Days after the date on which a written notice was first given under that clause, either party may refer the matter to dispute resolution in accordance with clause 50.

46.7 Evidence of Insurances

Whenever reasonably requested by the State, Project Co must give the State evidence satisfactory to the State that the Insurances have been procured and continue to be maintained in accordance with this Deed, including:

- (a) **(Policies)**: certified copies of each insurance policy, or if Project Co is unable to provide certified copies of an insurance policy, Project Co must make the terms of such Insurances available to the State's insurance broker to review confidentially on behalf of the State in accordance with the Review Procedures;
- (b) **(Certificate)**: signed certificates of currency;
- (c) **(All requirements)**: confirmation that all the requirements of the Insurances specified in the Insurance Schedule are included in the Insurances; and
- (d) **(Deductibles)**: details of deductibles, terms of coverage, erosion and reinstatement of limits that the State reasonably requires,

to enable the State to satisfy itself that all of the insurance requirements of the Project under this Deed are being complied with.

46.8 State may effect Insurances

- (a) **(State may effect insurance)**: The State may procure or effect and maintain the relevant Insurances and pay the relevant premiums in connection with those Insurances:
 - (i) if Project Co fails to provide evidence satisfactory to the State within 20 Business Days of a request under clause 46.7; or
 - (ii) in the event of any default by Project Co or its Associates in obtaining or maintaining Insurances in accordance with this clause 46.
- (b) **(Costs to be recoverable from Project Co)**: Without limiting any other remedies of the State under this Deed or at Law, the costs reasonably incurred by the State in connection with taking action in accordance with clause 46.8(a) will be a debt due and payable by Project Co to the State.

46.9 Proportionate liability

Project Co must ensure that all relevant liability policies of Insurance which are effected on a project specific basis, do not reduce or exclude the insurance cover in connection with liabilities governed by Part 4 of 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 Project Co in connection with it.

46.10 Deductibles

- (a) **(Payment of claims)**: Subject to clause 46.10(b), Project Co must pay or bear all amounts by way of deductibles or excesses which apply to a claim made under any Insurances.
- (b) **(Loss or damage)**: Where the event that is insured under any Insurances is loss or damage referred to in clause 44.3(e) or is caused by a Compensable Extension

Event or a Compensable Intervening Event for which Project Co is entitled to relief in accordance with this Deed, the State will pay the related deductible or excess.

46.11 Application of Insurance proceeds

All proceeds of any Insurance (except business interruption policies) must be applied:

- (a) **(Repair)**: towards replacement or repair of the Relevant Infrastructure or the Site;
- (b) **(Liability)**: to discharge the relevant Liability or Claim, or make good the relevant Liability; or
- (c) **(To the State)**: to the State or to such account as the State may reasonably direct.

46.12 Benchmarking of Insurance Component of Monthly Service Payment

- (a) **(Quotes)**: Three months prior to each Insurance Review Date, Project Co must obtain separate quotes from three Reputable Insurers for annual premium costs of obtaining each Benchmarked Insurance (with the insurance broker's fee component identified separately in each quote).
- (b) **(Selection of quote)**: The State will select one quote for each Benchmarked Insurance (**Quoted Insurance Component**), which shall, for the avoidance of doubt, include each component of the Insurance Component, and that quote will form the basis for benchmarking the Insurance Component relating to that Benchmarked Insurance.
- (c) **(Adjustment)**: On each Insurance Review Date, if the total Quoted Insurance Component for each Benchmarked Insurance (as specified in the quote selected by the State in accordance with clause 46.12(b)) is greater or less than the total Insurance Component (Indexed to the relevant Insurance Review Date) for that Benchmarked Insurance at the then most recent of:
 - (i) the anticipated Operational Commencement Date (being, for the avoidance of doubt, the total Insurance Component shown in the Financial Model immediately prior to the anticipated Operational Commencement Date); or
 - (ii) the last Insurance Review Date on which an adjustment to the relevant Insurance Component occurred under this clause 46.12,

(as applicable), the total Insurance Component relating to that Benchmarked Insurance will be adjusted by the amount by which the total Quoted Insurance Component for that Benchmarked Insurance:
 - (iii) exceeds the total Insurance Component relating to that Benchmarked Insurance; or
 - (iv) is less than the total Insurance Component relating to that Benchmarked Insurance,

as determined in accordance with clause 46.12(c)(i) or 46.12(c)(ii) as applicable, provided that any increase or decrease in the cost of obtaining the Benchmarked Insurance which is directly attributable to Project Co's or its Associates' performance of the Services which has resulted in claims on the relevant Benchmarked Insurance will be disregarded.

- (d) **(Mitigation)**: Project Co must, and must procure that its Subcontractors, use all reasonable endeavours to:
 - (i) mitigate cost increases; and

- (ii) maximise cost savings,
in respect of the Benchmarked Insurances.

47. Uninsurable Risks

47.1 Risks become Uninsurable

- (a) **(Uninsurable Risk):** If Project Co considers that a risk has, or is likely during the Term to, become an Uninsurable Risk:
 - (i) Project Co must notify the State within 5 Business Days of when Project Co becomes aware, or ought to have become aware, that the risk has, or is likely during the Term to, become an Uninsurable Risk;
 - (ii) the parties must meet in good faith within 20 Business Days of Project Co's notification to agree whether the risk is an Uninsurable Risk; and
 - (iii) if the parties are unable to agree within the period referred to in clause 47.1(a)(ii), either party may refer the matter for expert determination in accordance with clause 52.
- (b) **(Parties to meet):** If it is agreed by the parties or determined by an expert in accordance with clause 52, that a risk is an Uninsurable Risk, then the parties must meet to discuss the means by which the Uninsurable Risk should be managed (including considering the possibility of self-insurance by either party).

47.2 No obligation to insure

If the parties agree, or an expert determines in accordance with clause 52, that a risk is or has become an Uninsurable Risk, then:

- (a) **(No requirement to insure):** for so long as the risk remains an Uninsurable Risk, Project Co is not required to procure insurance against that risk; and
- (b) **(Reduction payable to State):** any reduction in insurance premium as a consequence of that risk being Uninsurable will be a debt due and payable to the State.

47.3 Agreed Uninsurable Risks resulting in loss or damage

- (a) **(Loss or damage):** If an Agreed Uninsurable Risk gives rise to loss or damage to the Relevant Infrastructure, the State may exercise its rights under clause 44.2 and the remainder of clause 44 will apply save that:
 - (i) if the State elects to repair or rebuild the Relevant Infrastructure this will be a Change Compensation Event; or
 - (ii) where the State elects not to repair or rebuild, and the whole or a substantial part of the Relevant Infrastructure is damaged or destroyed:
 - A. this will be deemed to be a Force Majeure Termination Event; and
 - B. the State must issue a Force Majeure Termination Notice in accordance with clause 49.3.
- (b) **(Amount payable):** Subject to clause 47.3(c), the maximum amount which the State must pay Project Co if clause 47.3(a)(i) applies, is an amount that is equal to:

- (i) for a Day 1 Uninsurable Risk, an amount that is equal to the insurance proceeds that would have been payable under any of the Insurances had the event been insurable under those Insurances; and
- (ii) for an Uninsurable Risk, an amount equal to the insurance proceeds that would have been payable had the relevant Insurance continued to be available on the previous terms of that Insurance,

less any component of the insurance proceeds that would have been payable which is attributable to the loss of equity return or loss of profit component.

- (c) **(Exclusion):** If clause 47.3(a)(i) applies, and the State directs Project Co in accordance with clause 44.3(c), the amount payable by the State in accordance with clause 44.3(c) is excluded from the maximum amount referred to in clause 47.3(b).

47.4 Review of insurance markets

- (a) **(Project Co to review market):** Project Co must review and test the insurance market vigilantly and no less than once every 3 years to ascertain whether an Agreed Uninsurable Risk has become insurable, and determine whether, and if so what, insurance terms as to premium, deductible and coverage are available in connection with that risk, from Reputable Insurers.
- (b) **(Notification):** If upon such review it is found that an Agreed Uninsurable Risk is no longer uninsurable (the **Newly Insurable Risk**), then Project Co will promptly notify the State and provide the State with details of the new insurance and any other information the State reasonably requests and the additional cost of insuring the Newly Insurable Risk (calculated pursuant to clause 46.12 if applicable).
- (c) **(Election):** At any time after receipt of the information provided to the State under clause 47.4(b), the State may direct Project Co in writing to procure the insurance in connection with the Newly Insurable Risk in accordance with clause 46 and:
 - (i) Project Co will promptly procure the insurance in connection with that risk in accordance with the other provisions of clause 46;
 - (ii) any relevant additional Insurance Component will be:
 - A. determined at the time the State is notified under clause 47.4(b) that an Agreed Uninsurable Risk is no longer uninsurable;
 - B. subject to clause 46.12 (where applicable);
 - C. payable in accordance with Schedule 16; and
 - (iii) such Newly Insurable Risk will no longer be an Agreed Uninsurable Risk.
- (d) **(Non-election):** If the State does not direct Project Co in writing to procure insurance in connection with a Newly Insurable Risk, the Newly Insurable Risk will remain an Agreed Uninsurable Risk and the State will not be liable to Project Co for the costs of any insurance taken out in respect of such Newly Insurable Risk.

Part J - Default, Termination and Disputes

48. Major Default

48.1 Meaning of remedy or cure

- (a) **(Meaning of remedy or cure):** Where the word 'remedy' or 'cure' or any other grammatical form of those words is used in this clause 48, it means to cure or redress the relevant breach or Major Default, or overcome its consequences so that:
- (i) there ceases to be any continuing detrimental effect of that breach or Major Default;
 - (ii) any prior detrimental effect is rectified; and
 - (iii) the State and its Associates are in the position they would have been in had the relevant breach or Major Default not taken place.
- (b) **(Major Default deemed to be capable of remedy or cure):** The parties acknowledge and agree that the events identified in each of the following paragraphs of the definition of Major Default will, for the purposes of this clause 48, be deemed to be capable of cure, notwithstanding that the relevant Major Default may not, as a matter of fact, be capable of cure:
- (i) paragraph (a) (late Technical Completion); and
 - (ii) paragraph (b) (late Commercial Acceptance).

48.2 Notice of Major Default

- (a) **(Project Co's obligations):** Project Co must:
- (i) promptly notify the State upon the occurrence of a Major Default; and
 - (ii) immediately take steps to mitigate, minimise or avoid the effects, consequences or duration of the Major Default.
- (b) **(Major Default Notice):** If:
- (i) Project Co notifies the State of a Major Default under clause 48.2(a); or
 - (ii) the State considers that a Major Default has occurred,
- the State may give Project Co a notice in writing **(Major Default Notice):**
- (iii) stating that a Major Default has occurred;
 - (iv) identifying and providing details of the Major Default; and
 - (v) if the Major Default:
 - A. is capable of remedy stating a date by which Project Co must remedy the Major Default, which must allow for a reasonable period of time to remedy the Major Default in the circumstances, unless the Major Default relates to:
 - 1) an Essential Service, in which case the period of time to remedy the Major Default must be as soon as possible and in any event must not exceed 24 hours; or

- 2) during the Operating Phase, an Insolvency Event occurring in relation to the Operator, in which case the time to remedy must not exceed 1 Month or such longer period approved by the State (in its absolute discretion);
- B. is not capable of remedy, stating any reasonable requirements of the State in connection with that Major Default and a date by which Project Co must comply with those requirements (which must allow for a reasonable period of time to comply with the State's requirements in the circumstances); or
- C. is not capable of remedy and the State has formed the view (acting reasonably) that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, the Major Default, a statement to that effect along with its reasons for forming that view.
- (c) **(Remedy):** The remedy of a Major Default may include (where the State requires) replacing the Operator, if:
- (i) the Operator is responsible for the Major Default; and
 - (ii) the cure period under the Operator Subcontract has expired,
- and Project Co must comply with the requirements of this clause 48 requiring such a replacement, within three months of notice being given by the State and, where the State requires such a replacement, diligently pursuing a replacement Operator and implementing all reasonable measures to perform the Services in accordance with this Deed.
- (d) **(Unreasonable requirements):** If Project Co (acting in good faith) does not agree with a Major Default Notice, or any part of it, it must:
- (i) promptly notify the State, including the reasons why; and
 - (ii) if Project Co does not agree with the period of time stated in the Major Default Notice, specify the period of time which it believes is reasonable.
- (e) **(State to act in good faith):** The State must in good faith consider Project Co's notice under clause 48.2(d) and (acting reasonably):
- (i) make any changes to the Major Default Notice that it considers reasonable as a consequence of Project Co's notice; and
 - (ii) notify Project Co of those changes (if any).
- (f) **(Major Default not capable of remedy or cure):** If after considering Project Co's notice under clause 48.2(d), the State maintains the view (acting reasonably) that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, the Major Default, the State must notify Project Co of this determination and the Major Default will be deemed to be a Default Termination Event.
- (g) **(Project Co not satisfied):** If Project Co is not satisfied with:
- (i) the changes (if any) made by the State under clause 48.2(e); or
 - (ii) the State's determination under clause 48.2(f),

then:

- (iii) Project Co may refer the matter to expert determination in accordance with clause 52; and
- (iv) if clause 48.2(f) applies, the Major Default will not be deemed to be a Default Termination Event unless and until determined by expert determination in accordance with clause 52,

and Project Co must act in accordance with the Major Default Notice while the matter is being determined in accordance with clause 52.

48.3 Project Co to provide remedy program and comply with Major Default Notice

- (a) **(Remedy program):** If the State gives a Major Default Notice to Project Co, then notwithstanding its rights under clause 48.2(d) to 48.2(g), Project Co must within 10 Business Days:
 - (i) where the Major Default is capable of remedy, unless the relevant Major Default is a failure to pay money which must be remedied immediately, give the State a program to remedy the Major Default in accordance with the terms of the Major Default Notice (which may include a plan to replace the Subcontractor causing the Major Default); and
 - (ii) where the Major Default is not capable of remedy, give the State a program to prevent the Major Default from recurring and complying with any reasonable requirements of the State set out in the Major Default Notice (which may include a plan to replace the Subcontractor causing the Major Default),for review by the State in accordance with the Review Procedures.
- (b) **(Content of remedy program):** Any program provided to the State under clause 48.3(a) must include:
 - (i) each task to be undertaken, the date by which each task is to be completed and the additional resources and personnel (if applicable) to be applied:
 - A. in respect of clause 48.3(a)(i), to remedy the Major Default; or
 - B. in respect of 48.3(a)(ii), to prevent the Major Default from recurring; and
 - (ii) any temporary measures that will be undertaken while the Major Default is being cured in order to ameliorate the impact of the Major Default.
- (c) **(Compliance):** Notwithstanding the fact that it may have exercised its rights under clause 48.2(d) to 48.2(g), Project Co must comply with any program provided under clause 48.3(a) in the form approved by the State in accordance with the Review Procedures.
- (d) **(Maximum remedy period):** Subject to the Financiers Tripartite Deed and clause 48.4(a), the maximum period of time (including any extension under clause 48.4(b)) which Project Co may be given to remedy a Major Default will be:
 - (i) where the applicable Major Default occurs during the Delivery Phase, 12 Months in the aggregate from the date of the applicable Major Default Notice; and

- (ii) where the applicable Major Default occurs during the Operating Phase, 6 Months in the aggregate from the date of the applicable Major Default Notice.

48.4 Extension of remedy program

- (a) **(Impact of Relief Event):** If Project Co is prevented from carrying out its obligations in accordance with clause 48.3 as a direct result of a Relief Event for which Project Co is entitled to an extension of time or relief (as applicable) in accordance with this Deed, then the program to remedy or comply (including the time to remedy the Major Default or comply with the State's requirements), the periods identified in clause 48.3(d), and the time set out in the Major Default Notice, must be extended:

- (i) to reflect the period Project Co is prevented from carrying out its obligations in accordance with the remedy program by that Relief Event; or
- (ii) without limiting clause 44, in respect of loss or damage caused by that Relief Event, for the period from the commencement of that loss or damage until the earlier of the date that the necessary repairs or rebuilding have been completed, or ought reasonably to have been completed,

provided that:

- (iii) the period of extension granted under this clause 48.4(a) must not exceed:
 - A. during the Delivery Phase, the period of extension of time granted under clause 38.5 or 38.6; or
 - B. during the Operating Phase, the period of relief granted under the Change Compensation Principles,

(as applicable) for that Relief Event; and

- (iv) Project Co demonstrates to the State's satisfaction (acting reasonably) that Project Co has diligently pursued and, to the extent reasonably possible, continues to diligently pursue the program agreed or determined under clause 48.3.

- (b) **(Extension of Major Default Notice):** Subject to clauses 48.3(d) and 48.4(d), if Project Co:

- (i) is not able to, where the Major Default is capable of remedy, remedy the Major Default or, where the Major Default is not capable of remedy, comply with the reasonable requirements of the State in respect of the Major Default within the timeframe stated in the Major Default Notice; and
- (ii) Project Co has been diligently pursuing the remedy of that Major Default or compliance with any reasonable requirements of the State (as the case may be),

Project Co may request that the State extend the time stated in the Major Default Notice and the State will grant an extension for such period as the State determines is required (acting reasonably) to either enable Project Co to remedy the Major Default or comply with any reasonable requirements of the State.

- (c) **(Request for further information):** The State may request, and Project Co must provide, any further information reasonably required by the State to enable the State to determine an extension under clause 48.4(b).
- (d) **(Limitation):** Project Co is only entitled to one extension in accordance with clause 48.4(b) in connection with the same Major Default.

48.5 Effect of curing

If a Major Default occurs and is cured by any person, any rights in respect of that Major Default which have not been exercised prior to it being cured, may not thereafter be exercised.

49. Termination

49.1 Sole basis

- (a) **(Sole basis):** Clauses 3.4 and this clause 49 set out the sole basis at Law or otherwise upon which the State is entitled to terminate, rescind or accept a repudiation of this Deed.
- (b) **(No limitation):** Subject only to clauses 49.1(a) and 36.3(d):
 - (i) nothing in clauses 3.4 or this clause 49 in any way prejudices or limits any other rights or remedies of the State, whether under this Deed or any other State Project Document or otherwise at Law, and whether against Project Co or otherwise, in relation to any Default Termination Event, Major Default or breach of any State Project Document; and
 - (ii) the termination of this Deed on any basis, and any payment of the relevant Termination Payment, will not in any way prejudice or limit either party's Liability to the other in respect of the events giving rise to the termination.
- (c) **(No right to terminate):** Subject to clause 49.3 but notwithstanding any other provision of this Deed or any rights Project Co has at Law or otherwise but for this clause 49.1(c), Project Co acknowledges that it has no right under this Deed, at Law, or otherwise, to terminate this Deed.

49.2 Voluntary Termination

- (a) **(Voluntary termination notice):** The State may:
 - (i) at any time and in its sole and absolute discretion, terminate this Deed by giving Project Co not less than 60 Business Days' notice; and
 - (ii) thereafter, at its absolute discretion, complete any uncompleted part of the Project either itself or by engaging others to do so.
- (b) **(Date of termination):** Termination of this Deed under clause 49.2(a) will take effect upon the date specified in the notice given under clause 49.2(a).

49.3 Termination for Force Majeure

- (a) **(Force Majeure Termination Event notice):** Subject to clause 49.3(c), if a Force Majeure Termination Event occurs (or is deemed to occur), then either party may terminate this Deed by giving notice to the other party.
- (b) **(Date of termination):** Termination of this Deed for a Force Majeure Termination Event will take effect upon the date specified in the notice given under clause 49.3(a).

- (c) **(Restrictions on termination):** Project Co is not entitled to terminate this Deed under clause 49.3(a) during the period Project Co is able to recover (or, but for any breach by Project Co or any of its Associates of a State Project Document or the relevant Insurances, would have been able to recover) under the advance loss of profits Insurance (applicable to the Works) or the consequential loss cover section of the industrial special risks Insurance or other business interruption Insurance (in respect of the Operating Phase) for the relevant Force Majeure Termination Event.

49.4 Default Termination Event

- (a) **(Rights):** If any Default Termination Event occurs, the State may, without limiting any rights or remedies it has under this Deed or at Law (other than rights of termination), elect to, subject to the Financiers Tripartite Deed:
- (i) terminate this Deed by giving written notice to Project Co; or
 - (ii) exercise its rights under clause 42.3 to cure or attempt to cure the Default Termination Event.
- (b) **(Date of termination):** Termination of this Deed for a Default Termination Event will take effect upon the date specified in the notice given under clause 49.4(a).

49.5 Assistance

Project Co will use its best endeavours to assist the State in the exercise of the State's rights in accordance with this clause 49.

49.6 Payment on termination

- (a) **(Payment):** Subject to clause 49.6(b), if the State has terminated this Deed in accordance with this clause 49, no later than the Termination Payment Date:
- (i) where the Termination Payment is a positive amount, the State must pay to Project Co; and
 - (ii) not used,
- as a debt due and payable, the relevant Termination Payment, being:
- (iii) for Voluntary Termination, the Voluntary Termination Payment;
 - (iv) for a termination for a Force Majeure Termination Event, the Force Majeure Termination Payment; or
 - (v) for termination for a Default Termination Event, the Default Termination Payment,
- in accordance with the Termination Payments Schedule.
- (b) **(Project Co obligations):** The State's obligation to pay a Termination Payment under clause 49.6(a) is subject to Project Co having delivered up the vacated Site and the Relevant Infrastructure to the State in accordance with clause 37.3(a) and this clause 49.6. In addition, if Project Co has not satisfied the other obligations in accordance with clause 37 on or before the Termination Payment Date, the State may withhold a portion of the Termination Payment equivalent to [REDACTED] of the forecast cost of satisfying those obligations (such portion to be determined by the State, acting reasonably) until such time as those obligations are satisfied by Project Co.
- (c) **(State's rights):** If the State is not satisfied that Project Co has satisfied its obligations in clause 49.6(b), Project Co will be Liable to the State for the amount that is reasonably necessary to cover the expected costs of performing those

obligations (including reasonable contingencies) in addition to any Termination Payment payable by Project Co in accordance with this clause 49.6 and the Termination Payments Schedule.

- (d) **(Payment obligations cease):** Upon termination under this clause 49, the State's future obligations under State Project Documents to pay the Monthly Service Payment and any CDPD Amount will cease.

49.7 Novation of liabilities to the State

- (a) **(State's election):** Where this Deed is terminated and, prior to the payment of any Termination Payment in accordance with clause 49.6 and the Termination Payments Schedule, the Project Co Entities have any Debt outstanding, the State may elect to assume (or have its nominee assume) some or all of the Liability for that Debt that would otherwise have been payable by the Project Co Entities, and to the extent the State so elects by notice to Project Co:
- (i) Project Co must ensure that Liability is novated to the State (or its nominee); and
 - (ii) the amount of the Termination Payment which the State would otherwise be obliged to pay will be reduced by:
 - A. the amount of the Liability; and
 - B. the amount of any costs of terminating the Finance Documents which would otherwise have been taken into account in determining the Termination Payment, but which are not incurred by reason of the novation.
- (b) **(Finance Documents):** Project Co must ensure that the Project Co Entities are permitted, in accordance with the terms of the Finance Documents, to procure the novation of its debt obligations in accordance with this clause 49.7.

49.8 Waiver

If this Deed is terminated in accordance with this Deed, then:

- (a) **(Liability):** subject to clause 49.8(b):
- (i) Project Co waives (and must ensure that Finance Co waives) any right it might otherwise have to make any Claim against the State or any of its Associates; and
 - (ii) the State and each of its Associates will have no further Liability to Project Co or any of its Associates,

by reason, or as a result, of the termination or the circumstances relating to the termination, or otherwise arising out of or in connection with the Project Documents, the Site, the Project Activities or the Project more generally other than any Claim previously notified to the State in accordance with this Deed which is not otherwise due and payable under this Deed;

- (b) **(Exclusive entitlement):** Project Co's sole and exclusive entitlement to make a Claim against the State following termination of this Deed will be in connection with its rights to a Termination Payment; and
- (c) **(Wrongful termination):** if the State terminates this Deed for a Default Termination Event and it is subsequently determined that such termination was wrongful (including if the State has terminated this Deed for a deemed Default Termination Event under clause 48.2(f) and it is subsequently determined that the State had no right to terminate this Deed on that basis), then, unless the parties agree otherwise,

such exercise shall be deemed to have been a voluntary termination in accordance with clause 49.2 and Project Co's sole rights in such circumstances will be those set out in this clause 49.6(a)(iii).

49.9 Additional rights and obligations on Termination

The additional rights and obligations of the parties on a termination of this Deed are set out in clause 37.

50. Dispute Resolution procedure

50.1 Procedure

- (a) **(Resolution procedure):** Unless a State Project Document provides otherwise, any dispute between the State and Project Co arising in connection with:
- (i) any State Project Document or the Project Activities (including questions concerning this Deed's existence, meaning, validity or termination); or
 - (ii) any decision of the Independent Certifier or report of the Handover Reviewer which is not stated in this Deed to be final and binding on the parties,
- (each a **Dispute**) must be resolved in accordance with this clause 50 and clauses 51 to 53.
- (b) **(Procedure):** Subject to clause 50.2, the procedure that is to be followed to resolve a Dispute is as follows:
- (i) first, the Dispute must be the subject of negotiation as required by clause 51;
 - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 51(c)(i), within 10 Business Days (or such longer period as the Executive Representatives have agreed in writing) after the expiration of that period:
 - A. the parties may agree that the Dispute will be referred to an expert for determination under clause 52;
 - B. where the Dispute is expressed in this Deed to be a Dispute which may be referred to an expert under clause 52, either party may refer the Dispute to an expert for determination under clause 52; or
 - C. otherwise either party may refer the Dispute to arbitration under clause 53; and
 - (iii) thirdly, if:
 - A. the Dispute has been referred to expert determination in accordance with clause 52 and a determination is not made by the expert within 20 Business Days after the expert's acceptance of appointment (or such longer period as the parties and the expert may agree in the relevant Expert Determination Agreement); or
 - B. the Dispute is referred to expert determination and a notice of dissatisfaction is given under clause 52.4(a),

then the Dispute must be referred to arbitration under clause 53.

- (c) **(Disputes involving Finance Co):** The parties acknowledge and agree that any dispute between the State (on the one hand) and Project Co and/or Finance Co (on the other hand) arising in connection with the Receivables Purchase Deed or the Payment Direction Deed (as applicable), must be resolved in accordance with clauses 50 to 53 as if it were a Dispute between the State and Project Co.

50.2 Selection of resolution process

Where this Deed provides that either party 'may' refer a Dispute to expert determination in accordance with clause 52:

- (a) **(Negotiations):** the parties must first follow the process set out in clause 51 before either party refers the matter for expert determination in accordance with clause 52;
- (b) **(Expert Determination):** the use of the term 'may' means that if the parties have failed to resolve the Dispute in accordance with clause 51 or determined the way in which the Dispute will be resolved and a party elects to further pursue the resolution of the Dispute, it must do so in accordance with clause 52; and
- (c) **(Arbitration):** subject to clause 52.4, if a party has referred a Dispute for expert determination in accordance with clause 52, neither party may refer the Dispute to arbitration (other than in accordance with clause 52.4), or take any steps to enjoin or otherwise restrain the referral of the Dispute to an expert.

51. Senior Negotiations

- (a) **(Notification):** If a Dispute arises then a party may give notice to the other party requesting that the Dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of the State and Project Co (**Executive Representatives**).
- (b) **(Contents of Notice):** A notice under clause 51(a) must:
 - (i) state that it is a notice under this clause 51; and
 - (ii) include or be accompanied by particulars of the matters the subject of the Dispute.
- (c) **(Attempt to resolve Dispute):** If a Dispute is referred for resolution by negotiation under clause 51(a), then:
 - (i) the Executive Representatives must meet and attempt in good faith to resolve the Dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 51(a) is received (or such later date as the parties may agree); and
 - (ii) any agreement reached between the Executive Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

52. Expert determination

52.1 Expert determination

If:

- (a) **(Dispute unresolved by Executive Representatives):** a Dispute which has been referred to the Executive Representatives for negotiation in accordance with clause

51(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 51(c)(i); and

- (b) **(Referral to expert):** within 10 Business Days after the expiration of the period for negotiation referred to in clause 51(c)(i) either:
- (i) the parties agree that the Dispute be referred to an expert for determination in accordance with this clause 52; or
 - (ii) where the Dispute is expressed in this Deed to be a Dispute which may be referred to an expert under clause 52, either party refers the Dispute to an expert for determination under clause 52,

then those parts of the Dispute which remain unresolved will be referred to an expert for determination under this clause 52.

52.2 Selection of expert

- (a) **(Exchange of lists of three preferred experts):** Within 10 Business Days after the date on which a Dispute is referred to an expert for determination under clause 52.1, if the State and Project Co are unable to agree on an expert to determine the Dispute, the State and Project Co must exchange lists of three persons (in order of preference) who, if appointed, would satisfy the requirements of clause 52.2(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists):** Any person that appears on both lists under clause 52.2(a) will be appointed as the expert to determine a Dispute and if more than one person appears on both lists the person given the highest order of priority by the party that gave the notice under clause 51(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on both lists, the party which gave the notice under clause 51(a) must procure the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the parties under clause 52.2(a) within 10 Business Days of the exchange of lists under clause 52.2(a).
- (d) **(Appropriate skills):** It is the intention of the parties that the expert appointed to determine a Dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.
- (e) **(No entitlement to challenge appointment):** Neither party will be entitled to challenge the appointment of an expert under this clause 52.2 on the basis that the expert does not satisfy the requirements of clause 52.2(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Deed will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2010* (NSW).
- (g) **(Agreement):** Within 10 Business Days of the expert being agreed, deemed or nominated, the State and Project Co must enter into an agreement with the expert on substantially the terms of the Expert Determination Agreement or such other reasonable terms as the expert may require.

52.3 Rules of expert determination

The expert determination process will be administered, and the expert will be required to act, in accordance with the terms of the Expert Determination Agreement.

52.4 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the State and Project Co unless:
 - (i) the expert determination includes:
 - A. payment of compensation and the amount claimed, or subsequently determined by the expert, to be payable is equal to or greater than \$1,000,000 (Indexed); or
 - B. an extension of a Date for Completion or rejection of an extension to a Date for Completion and the period of the extension that was claimed in the notice under clause 51(a) is more than 5 Business Days; and
 - (ii) within 10 Business Days of receipt of the determination, a party gives notice to the other party of its dissatisfaction and intention to refer the matter to arbitration in accordance with clause 53.
- (b) **(Amendment to determination):** Upon submission by any party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

52.5 Liability of expert

- (a) **(Liability of expert):** The parties agree:
 - (i) that the expert will have no liability in connection with the expert determination, except in the case of fraud on the part of the expert; and
 - (ii) to indemnify the expert against any Claim or Liability in connection with the determination, (except in the case of fraud on the part of the expert) in which case a Claim may be made against the expert by any party to the Dispute.
- (b) **(Engagement):** The State and Project Co will jointly engage the expert services in connection with the expert determination proceedings and each party will seek a separate Tax Invoice equal to its share of the costs of the expert.

52.6 Costs

The State and Project Co must:

- (a) **(Proceedings):** bear their own costs in connection with the expert determination proceedings; and
- (b) **(Cost apportionment):** pay an equal portion of the costs of the expert.

52.7 Proportional Liability

To the extent permitted by Law, the expert will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this clause

52.7, have applied to any Dispute referred to expert determination in accordance with this clause 52.

53. Arbitration

53.1 Reference to Arbitration

- (a) **(Dispute):** If:
- (i) a Dispute:
 - A. which has been referred to the parties' Executive Representatives for negotiation in accordance with clause 51 remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 51(c)(i); and
 - B. is not a Dispute which the parties have agreed to refer to or must be referred to an expert for determination in accordance with clause 52; or
 - (ii) in the case of a Dispute which is or must be referred to an expert for determination in accordance with clause 52:
 - A. a determination is not made within 30 Business Days after the expert's acceptance of the appointment; or
 - B. a notice of dissatisfaction is given in accordance with clause 52.4,
- then the State or Project Co may notify the other that it requires the Dispute to be referred to arbitration.
- (b) **(Referral):** Upon receipt by the other party of a notice under clause 53.1(a), the Dispute will be referred to arbitration.

53.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 53 will be conducted in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Rules) subject to this clause 53.
- (b) **(Seat):** The seat of the arbitration will be Sydney, New South Wales.
- (c) **(Language):** The language of the arbitration will be English.

53.3 Appointment of arbitrator

The parties will endeavour to agree on the person to be appointed as arbitrator, but if no such agreement is reached within 10 Business Days of the Dispute being referred to arbitration in accordance with clause 53.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

53.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The parties agree that:
- (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
 - (ii) any arbitration conducted in accordance with this clause 53 will not necessarily mimic court proceedings of the seat of the arbitration or the

place where hearings take place (if different), and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator; and

- (iii) in conducting the arbitration, the arbitrator must take into account the matters set out in clauses 53.4(a)(i) and 53.4(a)(ii).
- (b) **(Evidence in writing):** All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) **(Evidence and discovery):** The rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of arbitration.
- (d) **(Oral hearing):** The oral hearing must be conducted as follows:
 - (i) any oral hearing must take place in Sydney, New South Wales and all outstanding issues must be addressed at the oral hearing;
 - (ii) the date and duration of the oral hearing must be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in clause 53.4(a) when determining the duration of the oral hearing;
 - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;
 - (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the parties must be split equally between the parties so that each party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;
 - (v) not less than 28 days prior to the date fixed for oral hearing each party must give notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross examination;
 - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set pursuant to clause 53.4(d)(ii);
 - (vii) a party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross-examination; and
 - (viii) each party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing party may know the nature of and basis for the challenge to the written evidence of a witness.
- (e) **(Experts):** Unless otherwise ordered each party may only rely upon one expert witness in connection with any recognised area of specialisation.

53.5 Civil Liability Act 2002 (NSW)

- (a) **(Part 4):** The powers conferred, and restrictions imposed, on a court by Part 4 of the *Civil Liability Act 2002 (NSW)* are not conferred on an arbitrator appointed in accordance with this clause 53.

- (b) **(Determination):** The arbitrator has no power to make a binding or non-binding determination or any award in respect of a claim by applying or considering the provisions of Part 4 of the *Civil Liability Act 2002* (NSW) (or any equivalent statutory provisions in any other state or territory) which might, in the absence of this provision, have applied to any Dispute referred to the arbitrator.

53.6 Proportional liability

To the extent permitted by Law, the arbitrator will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this clause 53.6, have applied to any Dispute referred to arbitration in accordance with this clause 53.

53.7 Continue to perform

Notwithstanding the existence of a Dispute, each party must continue to perform its obligations in accordance with the State Project Documents.

53.8 Governing law of arbitration agreement

The Law governing this arbitration agreement is the law of New South Wales, Australia.

53.9 Interlocutory relief

This clause 53 does not prevent a party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect that party's rights.

53.10 Jurisdiction of courts

Without limiting clauses 50 to 53, 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.

Part K - Corporate obligations

54. Representations and warranties

54.1 State's representations and warranties

The State represents and warrants for the benefit of Project Co that:

- (a) **(Power to execute)**: it has the power to execute, deliver and carry out its obligations under the State Project Documents and all necessary action has been taken to authorise that execution, delivery and performance;
- (b) **(Validity)**: each State Project Document constitutes a valid and legally binding obligation on it in accordance with its terms; and
- (c) **(Legality)**: the execution, delivery and performance of each State Project Document does not violate any Law to which the State is subject.

54.2 Project Co's representations and warranties

Project Co represents and warrants for the benefit of the State that:

- (a) **(Incorporation)**: each Project Co Entity is duly incorporated in Australia and is existing under Australian Law;
- (b) **(Power to execute)**: each Project Co Entity has the capacity and power to execute, deliver and perform its obligations under the Project Documents to which it is a party and all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
- (c) **(Legality)**: the execution, delivery and performance of each Project Document to which it or Finance Co is a party does not violate any Law, document or agreement to which it or Finance Co is a party or which is binding on it or Finance Co or any of its or Finance Co's assets;
- (d) **(Validity)**: each of the Project Documents to which it or Finance Co is a party constitutes a valid and legally binding obligation on it or Finance Co (as applicable), enforceable in accordance with its terms;
- (e) **(No trust relationship)**: except as stated in this Deed, neither Project Co Entity is the trustee or Responsible Entity of any trust nor does any Project Co Entity hold any property subject to or impressed, by any trust;
- (f) **(No subsidiaries)**: neither Project Co Entity has any subsidiaries;
- (g) **(No tax consolidation)**: neither Project Co Entity is part of any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) or GST grouping arrangement contemplated by the GST Law, except with the consent of the State;
- (h) **(No trading)**: neither Project Co Entity has traded since its incorporation, other than for the purposes of entering into the Project Documents and has no liabilities other than those that have arisen in connection with the Project Documents;
- (i) **(Residency)**: it is a resident in Australia and has not transferred any of its business outside of Australia;
- (j) **(No liability)**: it does not hold any property and has not incurred any liability other than for the purposes of the Project;

- (k) **(Information true and correct):** all information that has been provided to the State in connection with the Project Documents is true, accurate and correct in all material respects and Project Co 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 with Project Co;
- (l) **(No other security interests):** none of its assets are subject to any Security Interest other than a Permitted Security Interest;
- (m) **(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, execution or otherwise);
- (n) **(No default):** it is not in default of its material obligations under any Project Document to which it is expressed to be a party;
- (o) **(No knowledge of other proposals):** prior to the date of this Deed, it had no knowledge of any part of the proposal by any other proponent for the Project and has not directly or indirectly communicated any part of its proposal for the Project to any other proponent; and
- (p) **(No arrangement):** it has not entered into any contract or arrangement or arrived at any understanding with any other proponent in relation to the Project to the effect that it will pay money to or confer any benefit upon any other proponent as a result of entering into this Deed or providing its proposal for the Project.

54.3 Repetition of representation and warranties

Each representation and warranty given by Project Co under this Deed:

- (a) **(Date of Deed):** is made on the date of this Deed; and
- (b) **(Repetition):** other than those set out in clauses 54.2(o) and 54.2(p), will be deemed to be repeated each day during the period from the date of this Deed to the Expiry Date,

with reference to the facts and circumstances then subsisting.

55. Benefits held on trust for its Associates

- (a) **(Benefit of indemnities):** The State holds on trust for:
 - (i) each Indemnified Person and each Indemnified IP Party each indemnity and release given by Project Co under this Deed in favour of the Indemnified Person or Indemnified IP Party (as the case may be); and
 - (ii) each of its Associates and the NSW Government and its Associates, each right in this Deed to the extent that such right is expressly stated to be for the benefit of the State's Associates, NSW Government or NSW Government Associates.
- (b) **(Project Co acknowledgement):** Project Co acknowledges 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 the relevant parties; and
 - (ii) the relevant parties exercising rights in relation to, or otherwise enforcing the indemnities, releases and those rights as if they were a party to this Deed.

56. Project Co general undertakings

- (a) Project Co must:
- (i) **(Dispute proceedings):** (and must ensure that Finance Co) immediately upon becoming aware that any litigation, arbitration, administration, adjudication or mediation proceedings, which may adversely affect the Project or Project Co's or a Key Subcontractor's ability to perform its obligations under the Project Documents, have been commenced or threatened, give the State written notice of such litigation, arbitration, administrative, adjudication or mediation proceedings; and
 - (ii) **(Restrictions):** not (and must ensure that Finance Co does not):
 - A. change or cease its business or start any other business other than that to be carried on by it or Finance Co (as applicable) under the Project Documents;
 - B. cease to be resident in Australia or transfer in whole or in part its undertaking, business or trade outside Australia;
 - C. acquire or hold any property or incur any liability other than for the purposes of the Project;
 - D. enter into contracts with, or assume or permit to subsist any liability in favour of, other Consortium Members, the Equity Investors or any of their respective Associates; or
 - E. engage in any tax consolidation arrangement contemplated by the *Income Tax Assessment Act 1997* (Cth) or GST grouping arrangement contemplated by the GST Law,without the State's prior consent.
- (b) **(State consent):** The State must not unreasonably withhold its consent under clause 56(a)(ii) if the relevant transaction is on arm's length commercial terms.

57. Assignment and amendments

57.1 Assignment, amendments and other dealings by Project Co Entities

- (a) **(Restrictions on Project Co):** Except as expressly permitted by this Deed, the Financiers Tripartite Deed or the State Security, Project Co must not (and must ensure that Finance Co does not):
- (i) enter into any financing agreements (including in respect of present or contingent indebtedness, deferred purchase or leasing arrangements or similar obligations, but excluding indebtedness incurred in the ordinary course of carrying out the Project) other than the Finance Documents;
 - (ii) assign, novate, mortgage, charge, create or allow to exist any security interest over, make or permit any material amendment to or, waive, terminate, surrender, rescind or accept repudiation of any Project Document or enter into any agreement or arrangement which affects the operation or interpretation of any Project Document; or
 - (iii) lease, license, transfer, sell, dispose of, part with possession of, mortgage, charge or otherwise deal with the whole or any part of the Site or the Relevant Infrastructure,

without the State's prior consent (each an **Amendment** for the purposes of this clause 57).

- (b) **(Exceptions):** Clause 57.1(a) does not apply in respect of:
- (i) a Refinancing which is implemented in accordance with clause 41;
 - (ii) an event or circumstance described in paragraphs (d) to (h) of the definition of 'Refinancing';
 - (iii) a Change in Control, which is to be dealt with in accordance with clauses 58.2 to 58.8; or
 - (iv) a Key Subcontract or Significant Subcontract.
- (c) **(Notice of intended Amendment):** If any Project Co Entity requires an Amendment, Project Co must submit to the State a written request seeking its consent. Such a request must set out:
- (i) the proposed Amendment and the reasons for it;
 - (ii) the response or anticipated response of any other party to the Project Documents regarding the proposed Amendment;
 - (iii) the response or anticipated response of any assignee or incoming party of the Project Documents to the proposed Amendment; and
 - (iv) copies of any documents relevant to Project Co's request.
- (d) **(State to advise):** Subject to clause 57.1(f), the State must advise Project Co, within:
- (i) 15 Business Days of receiving its request under clause 57.1(c) if it requires further information from Project Co regarding the proposed Amendment, in which case Project Co must provide the additional information sought by the State within a further period of 10 Business Days after receiving the State's request for further information; and
 - (ii) 10 Business Days of receiving its request under clause 57.1(c) or the additional information requested by the State under clause 57.1(d)(i), whether:
 - A. it consents to the proposed Amendment; or
 - B. the proposed Amendment is unacceptable to it and the reasons why the proposed Amendment is unacceptable.
- (e) **(Failure to respond):** If the State fails to respond for any reason within the relevant period specified under clause 57.1(d)(ii) in relation to a proposed Amendment in respect of a Project Document, which is not a State Project Document, Project Co:
- (i) may send a reminder notice; and
 - (ii) if the State fails to respond to the reminder notice within 10 Business Days, the State will be deemed to have not consented to the requested Amendment.
- (f) **(State consent):** The State will not withhold its consent to a requested Amendment where the requested Amendment will not have a material adverse effect on:
- (i) the ability of any Project Co Entity to perform, and observe its respective obligations under any Project Document to which it is a party; or

- (ii) the rights or Liability 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.

57.2 Amendment of State Project Document

Except as otherwise expressly provided in the State Project Documents, no amendment to any State Project Document is valid or binding on a party unless made in writing and executed by the State and all other parties to the relevant State Project Document.

57.3 Assignment by the State

- (a) **(Project Co consent required):** Subject to clause 57.3(b), the State may not sell, transfer or assign or otherwise dispose of all or any part of its interest in the State Project Documents without the prior consent of Project Co.
- (b) **(No consent required):** The State may sell, transfer, novate, assign or otherwise deal with or dispose of all or any part of its obligations, liabilities, rights or interests under the State Project Documents without the Project Co Entities' consent, if the proposed transferee is:
 - (i) the State of New South Wales (including the Crown in right of the State of New South Wales);
 - (ii) a Minister on behalf of the Crown in right of the State of New South Wales;
 - (iii) any other person acting on behalf of the State of New South Wales (or the Crown in right of the State of New South Wales) where the State of New South Wales (including the Crown in right of the State of New South Wales) remains bound by the obligations and liabilities of, and has the benefit of the rights and interests of, the State under the State Project Documents (other than the PAFA Act Deed Poll of Guarantee); or
 - (iv) an entity described in paragraph (a) of the definition of 'Authority', which is not an entity as referred to in clause 57.3(b)(i), (ii) or (iii) above, and the obligations of which are supported by a guarantee from the State of New South Wales (including the Crown in right of the State of New South Wales) on terms no less favourable in substance than those contained in the PAFA Act Deed Poll of Guarantee,

(State Nominee).
- (c) **(State sale, transfer, assignment or disposal):** If the State elects to sell, transfer or assign or otherwise dispose of all or any part of its interest in the State Project Documents in a manner permitted under clause 57.3(b):
 - (i) Project Co consents (and must procure Finance Co to consent) to that sale, transfer, assignment or disposal;
 - (ii) Project Co must (and must procure Finance Co to) promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to the State and the State Nominee) to give effect to that sale, transfer, assignment or disposal; and
 - (iii) from the date of such sale, transfer, assignment or disposal, all references to 'the State' in this Deed will be deemed to include reference to the State Nominee in place of the State.

57.4 Copies of Finance Documents

Subject to clause 41.4, Project Co must deliver to the State, a certified complete copy of each Finance Document entered into by any Project Co Entity and each amendment to, or waiver, variation or change of any provision of, the Finance Documents, in each case within 5 Business Days after its execution.

57.5 Financiers' securities

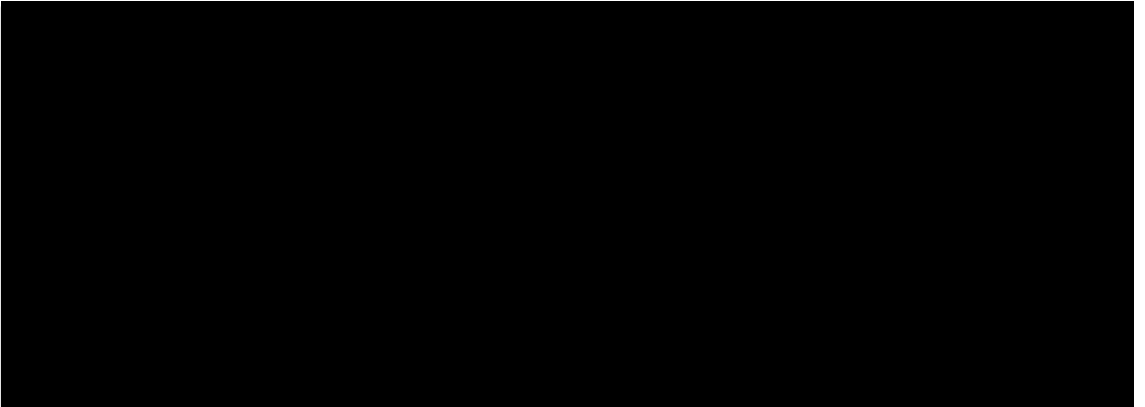
Each Project Co Entity may mortgage or charge its interest under the Project Documents to secure its obligations to any Financier (or the trustee or agent for any Financier) under the Finance Documents, if, and for so long only as, the Financier (or the trustee or agent for the Financier) is a party to the Financiers Tripartite Deed.

58. Change in Control

58.1 Initial status of ownership

Project Co represents and warrants that, as at the date of this Deed and at Financial Close, each Project Co Entity will be indirectly and beneficially owned and Controlled as set out in the Ownership Schedule.

58.2



58.3 Notification of changes in control / management

- (a) **(Notification):** Project Co must give the Commissioner written notice immediately if Project Co becomes aware of a change of control or change of management of a Project Co Entity or the Operator.
- (b) **(Definitions):** For the purpose of this clause 58.3 only:
- (i) a change of control of an entity occurs where:
 - A. an entity that Controls (as that term is defined in the Corporations Act) ceases to Control (as that term is defined in the Corporations Act) that entity; or
 - B. an entity that does not Control (as that term is defined in the Corporations Act) an entity comes to Control that entity (as that term is defined in the Corporations Act); and
 - (ii) change of management means the appointment, resignation or termination of:
 - A. an officer of a Project Co Entity or the Operator; or
 - B. the General Manager.

58.4 Restrictions on Changes in Control

Subject to clause 58.8, Project Co must not and must ensure that each Group Member does not at any time, permit or suffer any Change in Control of a Consortium Member without the State's prior consent which must be requested by notice from Project Co to the State (unless such Change in Control is a Permitted Change in Control).

58.5 Notice to State

Any notice under clause 58.4 seeking the consent of the State to a Change in Control must include:

- (a) **(Nature of proposed change):** the extent and nature of the proposed Change in Control, including the identity and address of each person proposed to acquire Control; and
- (b) **(Necessary information):** all other information necessary for the State to determine:
 - (i) whether to consent to the Change in Control; or
 - (ii) the probity or other investigations (if any) the State wants to undertake in respect of the persons to whom clause 58.5(a) refers.

58.6 State's right to withhold consent

Subject to clauses 58.2 and 58.9, the State may only refuse to consent to a proposed Change in Control that is not a Permitted Change in Control if the State is of the opinion (acting reasonably) that:

- (a) **(Grounds for State refusal):** the proposed Change in Control:
 - (i) is against the public interest;
 - (ii) would adversely affect the ability or capability of the Consortium Member to carry out its obligations in accordance with any Project Document;
 - (iii) would result in a Probity Event;
 - (iv) would, result in a Consortium Member being Controlled by an entity that:
 - A. is not a reputable Entity or person to properly carry out the obligations of the relevant Consortium Member under the relevant Project Documents;
 - B. is an unsuitable Entity or person, having regard to the activities or business of that entity or person, and their compatibility with the obligations of the relevant Consortium Member under the Project Documents; or
 - C. has an interest or duty which conflicts or may conflict in a material way with the interests of the State; or
 - D. does not have a sufficient level of financial, managerial or technical expertise or capacity to deliver the Project;
 - (v) would have a material adverse effect on the Project;
 - (vi) without limiting clause 58.6(a)(iv), would result in a Key Subcontractor no longer:
 - A. having sufficient expertise and ability; or

- B. being of sufficiently high financial and commercial standing, to properly carry out the obligations of the relevant Key Subcontractor under the relevant Project Documents;
- (vii) would increase the Liability of, or risks accepted by the State under the State Project Documents or in any other way in connection with the Project; or
- (viii) would result in a new Controlling Entity that is not Solvent and reputable; or
- (b) **(Trust):** in respect of a change in the manager, trustee or Responsible Entity of any Group Member that is a trust, is such that the proposed manager, trustee or Responsible Entity no longer:
 - (i) has sufficient expertise or ability; or
 - (ii) is of sufficiently high financial and commercial standing, to properly carry out the obligations of the relevant manager, trustee or Responsible Entity under the relevant Project Documents.

58.7 Consent to a Change in Control

The State must advise Project Co, within 15 Business Days (or such longer period as the State reasonably requests given the nature of the proposed Change in Control) of receiving Project Co's request for consent in accordance with clause 58.4 or clause 58.9, whether:

- (a) **(Consent):** it consents to the Change in Control;
- (b) **(Unacceptable):** it does not consent to the Change in Control in which case it must provide reasons for doing so in accordance with clause 58.6; or
- (c) **(Further information):** it requires further information from Project Co regarding the Change in Control, in which case Project Co must provide the additional information sought by the State within a further period of 10 Business Days, after which the State must respond in terms of clause 58.6 or clause 58.7 within 10 Business Days after the State receives that additional information.

58.8 Permitted Changes in Control

Project Co may effect, permit, suffer or allow a Permitted Change in Control at any time without the State's prior consent, provided that Project Co provides notice to the State of the proposed Permitted Change in Control:

- (a) **(Notice):** subject to clause 58.8(b), as soon as reasonably practicable and, in any event, not less than 5 Business Days prior to the Permitted Change in Control; or
- (b) **(Shares):** in relation to a Permitted Change in Control which relates to a transfer of shares or other interests which are listed on a recognised stock exchange, as soon as reasonably practicable.

58.9 On-market acquisitions

If:

- (a) **(Change in Control):** a Change in Control occurs due to the transfer of shares or other interests which are listed on a recognised stock exchange; and
- (b) **(Prior consent not possible):** the consent of the State is required under this Deed but could not have been obtained prior to the Change in Control,

that consent must be sought immediately after the Change in Control, and Project Co must procure that the Controlling Entity ceases to have the Control which resulted in the Change in Control within 60 Business Days after receiving any notice under clause 58.6 that the State withholds its consent to the Change in Control.

58.10 Costs relating to a Change in Control

Project Co must pay the State its costs (including legal and financial advisers' fees) reasonably incurred in relation to considering or consenting to a proposed Change in Control.

59. Financial Model

59.1 Updating the Base Case Financial Model at Financial Close

- (a) **(Base Case Financial Model)**: The parties acknowledge that the Base Case Financial Model is attached as Attachment 1.
- (b) **(Financial Close Adjustment Protocol)**: The parties agree that the Base Case Financial Model has been prepared on an indicative basis prior to the date of this Deed, and must be updated at Financial Close in accordance with the Financial Close Adjustment Protocol.
- (c) **(Financial Close Financial Model)**: The Base Case Financial Model will be:
 - (i) updated by the State in accordance with the Financial Close Adjustment Protocol; and
 - (ii) initialled by the parties,at Financial Close and will then become the Financial Close Financial Model.

59.2 Status of the Financial Model

The parties acknowledge and agree that:

- (a) **(Not actual performance)**: the Financial Model:
 - (i) may not reflect the actual financial performance or the projected performance or budgets of the Project or any Project Co Entity; and
 - (ii) is purely a model to be used in order to determine Forecast Debt and process Model Variation Events and Termination Payments; and
- (b) **(Errors or omissions)**: the State must not be adversely affected by any ambiguities, discrepancies, inconsistencies, conflicts, errors or omissions in the Financial Model.

59.3 Varying the Financial Model

- (a) Subject to clause 59.3(b), the parties must vary the Financial Model in accordance with this clause 59 upon the occurrence of any of the following events (each a **Model Variation Event**):
 - (i) **(CDPD Amount)**: on payment of the CDPD Amount in accordance with clause 35 and the CDPD Adjustment Protocol;
 - (ii) **(Refinancing)**: a Refinancing;
 - (iii) **(Change Compensation Event)**: a Change Compensation Event which results in a permanent adjustment to the Monthly Service Payment in accordance with this Deed (a **CCE Model Variation Event**);

- (iv) **(Prior to Commercial Acceptance)**: the date that is one Month prior to the date that Project Co reasonably expects to achieve Commercial Acceptance (as set out in the latest Delivery Phase Program); and
 - (v) **(Agreed Events)**: any other event which Project Co and the State agree to be a Model Variation Event.
- (b) **(Delivery Phase)**: The Financial Model does not need to be varied for a CCE Model Variation Event that occurs in the Delivery Phase (a **Delivery Phase CCE Model Variation Event**) in accordance with clause 59.3(a)(iii) unless and until:
- (i) the aggregate value of all Delivery Phase CCE Model Variation Events (as set out in the Change Response provided in connection with each relevant Delivery Phase CCE Model Variation Event) that have occurred since the Financial Model was last varied in accordance with clause 59.3(a)(iii), exceeds [REDACTED];
 - (ii) the value of any one Delivery Phase CCE Model Variation Event (as set out in the Change Response provided in connection with the relevant Delivery Phase CCE Model Variation Event) exceeds [REDACTED] or [REDACTED];
 - (iii) the Delivery Phase CCE Model Variation Event relates to an Extension Event, in which case the Model Output Schedule will be updated in accordance with section 3.3(a)(ii) of the Payment Schedule.

59.4 Principles for variations to the Financial Model

When a Model Variation Event occurs, the parties must vary the Financial Model, as necessary, by taking into account only the amounts:

- (a) **(Deed)**: determined in accordance with this Deed;
- (b) **(Agreement)**: agreed between the State and Project Co; or
- (c) **(Dispute resolution)**: determined in accordance with clause 50.

59.5 Procedures for variations to the Financial Model

Any variations to the Financial Model to take account of a Model Variation Event must be made as follows:

- (a) **(Project Co proposal)**: Project Co must propose the variation by notice to the State within 15 Business Days of the Model Variation Event occurring, giving:
 - (i) a varied Financial Model incorporating all adjustments relevant to the Model Variation Event and full details of the assumptions and calculations used;
 - (ii) an instruction manual outlining how to use the varied Financial Model, which is acceptable to the State, acting reasonably;
 - (iii) a proposed financial close protocol (if applicable) outlining the interest rate setting procedures and model solving procedures for adjusting the varied Financial Model to incorporate updated interest rates;
 - (iv) a revised Model Output Schedule; and
 - (v) a certificate from an auditor acceptable to the State confirming that an independent audit of the varied Financial Model has been completed and that:

- A. the calculations in the varied Financial Model have been checked and are in all material respects internally consistent and mathematically correct;
 - B. formulae applied across time periods in the varied Financial Model are consistent;
 - C. the varied Financial Model allows changes to assumptions and input data to correctly flow through to the results and outputs;
 - D. any macros in the varied Financial Model that govern the calculation of the varied Financial Model operate appropriately;
 - E. the assumptions and input data used in the varied Financial Model are consistent with all recent supporting Project Documents;
 - F. the calculations of any relevant ratios and financial covenants in the varied Financial Model have been checked and correctly reflect the definitions contained in the Finance Documents;
 - G. the varied Financial Model correctly incorporates the relevant structural features in the Debt term sheets such as reserve accounts, lock up provisions, default provisions, cash flow waterfall and amortisation;
 - H. the accounting assumptions, calculations and outputs (including financial statements) from the varied Financial Model are in accordance with Australian Accounting Standards Board (AASB) standards; and
 - I. the income taxation assumptions, calculations and outputs from the varied Financial Model are in accordance with Australian taxation laws.
- (b) **(Review):** the review of the varied Financial Model and the proposed financial close protocol (if applicable) must be undertaken in accordance with the Review Procedures;
 - (c) **(Amendment):** once the variations to the Financial Model and the proposed financial close protocol, as applicable, are agreed or are determined in accordance with clause 50, Project Co must promptly amend the varied Financial Model and the proposed financial close protocol (if applicable) accordingly and resubmit this to the State. Project Co must also submit a certificate from an auditor acceptable to the State in accordance with clause 59.5(a)(v) in respect of the updated varied Financial Model if requested to do so by the State;
 - (d) **(Varied Financial Model):** once agreed, the varied Financial Model (as adjusted in accordance with the proposed financial close protocol, if applicable) will be the Financial Model for the purposes of this Deed;
 - (e) **(Audit Certificate):** if the varied Financial Model is adjusted under 59.5(d) in accordance with the proposed financial close protocol, Project Co must submit to the State a certificate from an auditor acceptable to the State confirming that an independent audit of the Financial Model has been completed in accordance with clause 59.5(a)(v); and
 - (f) **(Updated Model Output Schedule):** whenever the Financial Model is updated, the Model Output Schedule must be updated to reflect the updated Financial Model.

59.6 Access to information

Without limiting clause 59.5(a), Project Co must provide the State and any other authorised representatives of the State with:

- (a) **(Electronic copies)**: full access to electronic copies of the varied Financial Model, updated Model Output Schedule and proposed financial close protocol (if applicable);
- (b) **(Log of changes)**: a log of all changes that have been made to the Financial Model and Model Output Schedule;
- (c) **(Calculations)**: all supporting calculations; and
- (d) **(Other information)**: any other information reasonably requested by the State,

for a Model Variation Event, including reasonable access to any financial modeller (including Project Co's and Finance Co's financial modeller) with ability to access that information, and relevant passwords or other access information.

59.7 Custody of Financial Model

The Financial Model must be held from Financial Close for the Term by the State on the basis that it must be released to Project Co for the purposes of:

- (a) varying the Financial Model and Model Output Schedule on the occurrence of Model Variation Events;
- (b) the calculation of Termination Payments; and
- (c) the determination of any Dispute in accordance with clauses 50 to 53.

60. Records and Accounts

60.1 Accounting records

- (a) **(Proper books of account)**: Project Co must keep proper books of account, records and documents, financial and all other accounts and records it has relating to the Project (**Accounts and Records**) at its offices, and must ensure that each other Group Member, the D&C Subcontractor (during the Delivery Phase) and the Operator (during the Operating Phase) does likewise.
- (b) **(Annual audit)**: Project Co must have its accounts audited annually on both an unconsolidated basis and on a consolidated basis (to the extent that Project Co is part of a consolidated entity, within the meaning of the Corporations Act) and must ensure that each other Group Member, the D&C Subcontractor (on a consolidated basis only) and the Parent Guarantor in respect of the D&C Subcontractor (up to the commencement of the CDPD Period and on a consolidated basis only) and the Operator and the Parent Guarantor in respect of the Operator does likewise.
- (c) **(Accounting principles)**: Project Co must ensure that its Accounts and Records are prepared in accordance with the Corporations Act and generally accepted Australian accounting principles and practices consistently applied, and fairly represent its operations and financial condition or consolidated financial position (as the case may be) and must ensure that each other Group Member does likewise.
- (d) **(Availability of accounting records)**: Project Co must ensure that its Accounts and Records are available to the State and any person authorised by the State at any time during Business Hours (subject to receiving 2 Business Days' notice from the State) during the Term for examination, audit, inspection, transcription and copying, and must ensure that each other Group Member does likewise.

- (e) **(Availability of accounting records if Deed is terminated):** Without limiting its obligations in accordance with clause 37, if this Deed is terminated, Project Co must give to the State and its Associates access to all of its Accounts and Records which are necessary for the carrying out of the Project Activities, and must ensure that each other Group Member does likewise for the purpose of inspection, copying or auditing.
- (f) **(Access to group members' accounting records):** The State must give Project Co access to any Accounts and Records given to it by a Group Member for a period of 7 years after the date they are given.

60.2 Cost to complete information

Project Co must give to the State the same information required to be given to any Financier in accordance with the Finance Documents in relation to the costs to complete construction of the Works, at such times as are required in accordance with the Finance Documents, and must ensure that each other Group Member does likewise.

60.3 Financial statements

- (a) **(Audited financial statements):** As soon as practicable (and in any event not later than 120 days) after the close of each Financial Year, Project Co must give to the State certified copies of the consolidated (if applicable) and unconsolidated audited financial statements for the previous Financial Year for Project Co and each Group Member and, if requested by the State, the D&C Subcontractor (during the Delivery Phase) and the Operator (during the Operating Phase).
- (b) **(Cashflow and profit and loss statements):** Not later than 30 days after the end of each Quarter, Project Co must give to the State certified copies of cashflow and profit and loss statements, and, if requested by the State, must ensure that each Group Member does likewise.

60.4 Records

- (a) **(General):** Project Co must keep and maintain Records including information in respect of the Output Specification as required by the State.
- (b) **(Compliance):** To demonstrate compliance with the Output Specification, Records must:
 - (i) incorporate the detail; and
 - (ii) meet the standards,required by the State.
- (c) **(Availability of Records):** Project Co shall make all Records available to the State for inspection, audit, copying or any other purpose.

60.5 Other information

Project Co must give to the State the following information:

- (a) **(Copies):** copies of all documents or information given or received by any Group Member to or from the Australian Securities & Investments Commission or Australian Stock Exchange Limited, promptly after the information is first given or received;
- (b) **(Counterparty changes):** details of any changes to the Counterparty Details within 20 Business Days after the change;

- (c) **(Material changes)**: details of any material change in the financial condition of any Project Co Entity (since its incorporation) or any other Group Member, the Equity Investors, or a Key Subcontractor (since the date of their last audited accounts) which would prejudice the ability of any Project Co Entity to perform its obligations under the Project Documents; and
- (d) **(Other information)**: such other information relating to the Project as the State may reasonably require from time to time, including any information reasonably requested by the State to enable the State to comply with applicable Legislation (including the *State Records Act 1998* (NSW) in relation to Records, the Correctional Complex, the Inmates and other users of the Services (including former Inmates)).

60.6 Project Co Material

Project Co must maintain a document management system for all Project Co Material and Project Information that:

- (a) **(Requirements)**: is in accordance with any requirements set out in the Design Requirements or Services Requirements;
- (b) **(Safe and secure)**: is safe and secure and compatible with the State's document management systems as advised by the State;
- (c) **(Access)**: enables the State and its Associates (including any nominee) to quickly and easily retrieve, review and utilise Project Co Material; and
- (d) **(Distribution)**: tracks the distribution of all Project Co Material.

61. Intellectual Property Rights

61.1 Warranties

Project Co warrants to the State that:

- (a) **(No infringement of rights)**: no Intellectual Property Rights or Moral Rights or other rights of any person will be infringed or breached:
 - (i) in undertaking the Project Activities; or
 - (ii) by:
 - A. the Use of any Developed IP; or
 - B. the Use of any other Project Co Material, Project Co Background IP or the Relevant Infrastructure as permitted or contemplated by this Deed,

by the State, its Associates or any person nominated or authorised by the State; and
- (b) **(Ownership of rights)**: it owns all Intellectual Property Rights in the Project Co Material or, to the extent that it does not, it has the authority to grant the assignments and licences in this clause 61 and none of:
 - (i) the Use of any Developed IP by the State, its Associates or any person nominated or authorised by the State;
 - (ii) the Use of any other Project Co Material, Project Co Background IP or the Relevant Infrastructure by the State, its Associates or any person

nominated or authorised by the State as permitted or contemplated by this Deed; or

- (iii) the possession of any of that Project Co Material,

will give rise to any Liability on the part of the State, its Associates or any person nominated or authorised by the State, including to pay any compensation (including any royalty) to any person, or give rise to a right entitling any person to make a Claim against the State, its Associates or any person nominated or authorised by the State for any attribution or acknowledgment or rectification in relation to the Developed IP, Project Co Background IP or other Project Co Material.

61.2 Background IP

- (a) Project Co acknowledges and agrees that:
 - (i) **(Ownership):** the State, its Associates or their respective head licensors (as the case may be) are and remain the owner of all State Background IP; and
 - (ii) **(Rights):** neither Project Co nor any of its Associates has (under this Deed or otherwise) any title, entitlement to, or rights in relation to, any State Background IP or the Intellectual Property Rights in any State Background IP,

except to the extent provided in this clause 61.

- (b) The State acknowledges and agrees that:
 - (i) **(Ownership):** Project Co, its Associates or their respective head licensors (as the case may be) are and remain the owner of all Project Co Background IP; and
 - (ii) **(Rights):** neither the State nor any of its Associates has (under this Deed or otherwise) any title, entitlement to, or rights in relation to, any Project Co Background IP or the Intellectual Property Rights in any Project Co Background IP,

except to the extent provided in this clause 61.

61.3 Developed IP

- (a) **(Developed IP):** All rights (including Intellectual Property Rights) in the Developed IP vest in the State at the time of creation, and at each and every stage of its development as Developed IP, and Project Co irrevocably assigns to the State all right, title and interest (including Intellectual Property Rights) in all Developed IP with effect from the time of creation, development or production of that Developed IP.
- (b) **(Assigned to State):** Project Co must:
 - (i) ensure, where necessary, that it secures the right to vest the Developed IP in accordance with clause 61.3(a); and
 - (ii) do all such things and sign such documents (and cause its Associates to also do so if and when required),

to ensure that all Developed IP is assigned to the State, including as the State may require from time to time in order to perfect or record the assignments under clause 61.3(a).

- (c) **(Worldwide licence):** The State grants to Project Co a non-exclusive, royalty-free, non-transferable, worldwide licence to Use the Developed IP:
 - (i) for the purposes of carrying out the Project Activities; and
 - (ii) for any other purpose, provided that:
 - A. no Confidential Design Information is disclosed;
 - B. no Personal Information is disclosed; and
 - C. the State has given its prior written consent, which consent must not be unreasonably withheld where the Developed IP does not disclose the identity of the Project or the Correctional Complex or any information that may disclose the identity of Inmates or other users of the Services (including former Inmates),

(subject always to Project Co's obligations of confidence in clause 62 unless otherwise agreed by the State in writing).
- (d) **(Sub-licence):** The licence granted to Project Co under clause 61.3(c) includes the right on the part of Project Co to grant a sub-licence to each of its Associates engaged in the performance of the Project Activities.
- (e) **(Patent):** Project Co may procure the registration or patent of any registrable or patentable Developed IP, but in doing so, must not conflict with or derogate from the vesting of the Developed IP in accordance with clause 61.3(a).

61.4 Project Co licence for Project Co Background IP

Project Co:

- (a) hereby grants to the State and its Associates;
- (b) without limiting Project Co's obligations under clause 61.8, must procure that each of its Associates legally entitled to do so grants to the State and its Associates (with effect from the date the relevant Material comes into existence); and
- (c) must do all things necessary to give effect to the grant to the State and its Associates of,

a world-wide, perpetual, irrevocable, non-exclusive, transferable, royalty-free licence (including the right to sub-licence) to Use the Project Co Background IP for the purposes of any of the following:

- (d) the Project (including, where this Deed is terminated, to complete any Project Activities which have not been carried out, or have not been carried out in accordance with the applicable State Project Documents, as at the date of termination);
- (e) the exercise of the rights of the State or its Associates in accordance with the State Project Documents (including its step-in rights in accordance with clause 42);
- (f) the operation, maintenance, repair and alteration of the Relevant Infrastructure on and from the Expiry Date;
- (g) for any purpose arising out of or in connection with the Site; and
- (h) in connection with other correctional centres in New South Wales.

61.4A Proprietary Software

- (a) Before using any Proprietary Software, Project Co must procure licences for the State and the State's Associates to Use that Proprietary Software in accordance with clause 61.4A(b).
- (b) The licences to Use the Proprietary Software must give the State and the State's Associates the same rights as those specified in clause 61.4, except that clause 61.4(h) does not apply.

61.5 Other third party software

- (a) **(Obligation):** Notwithstanding this clause 61, to the extent that any item of Project Co Material is commercially available off-the-shelf third party software that is not Proprietary Software, the obligation of Project Co is to (at the State's option):
 - (i) license that item of Project Co Material to the State and the State's Associates, if Project Co is legally able to do so, and on the terms of the licence granted to Project Co or its Associates by the third party licensor (and Project Co must use all reasonable endeavours to procure the consent of that licensor to grant that licence to the State and the State's Associates); or
 - (ii) procure (at the State's cost) a licence of that item of Project Co Material from the third party licensor to the State and the State's Associates on terms acceptable to the State (acting reasonably).
- (b) **(Inability to licence):** If, despite using all reasonable endeavours to do so, Project Co is unable to license (or, if applicable, procure a licence of) any Project Co Material owned by a third party to the State and the State's Associates, as required under clause 61.5(a), Project Co must:
 - (i) consult with the State; and
 - (ii) do all things reasonably necessary to obtain for the State's benefit such rights or arrangements as the State requires for any purpose under, or contemplated by, any State Project Document or for the Relevant Infrastructure and its use or the Project more generally.

61.6 Project Co Material and Relevant Infrastructure

Without limiting Project Co's other obligations under this Deed with respect to the delivery of any Project Co Material, Project Co Background IP or the Relevant Infrastructure, Project Co will provide all documentation, information and assistance and materials as the State may from time to time reasonably require in connection with the Use of any of Project Co Material, Project Co Background IP and the Relevant Infrastructure.

61.7 Use of State Background IP

- (a) **(Licence):** The State grants to Project Co and its Associates a non-transferable, non-exclusive, royalty-free licence to Use the State Background IP, but only to the extent necessary to carry out the Project Activities, which licence will terminate automatically on termination or expiry of this Deed.
- (b) **(No sub-licence):** The licence granted by the State under clause 61.7(a) is not sub-licensable to any third party, except where that third party is an Associate of Project Co and is undertaking Project Activities, in which case the sub-licence is only for those Project Activities.
- (c) **(State request):** At the request of the State, Project Co must immediately deliver the original and all copies of State Background IP to the State.

61.8 Moral rights

Project Co must, unless otherwise agreed in writing with the State in relation to a particular case, procure from every person who is an author for the purposes of Part IX of the *Copyright Act 1968* (Cth) of Material forming part of the Project Co Material, a written consent in the form of the Moral Rights Consent which is valid and effective under the *Copyright Act 1968* (Cth) and signed by that person by which that person irrevocably and unconditionally consents to the State, its Associates, any person nominated or authorised by the State (including sub-licensees), Project Co and its Associates (**Beneficiaries**):

- (a) **(Exercise of rights)**: using, disclosing, reproducing, transmitting, exhibiting, communicating, adapting, publishing or otherwise exercising its rights in relation to the Material anywhere in the world in whatever form any of the Beneficiaries thinks fit, including the making of any distortions, additions or alterations to the Material or any adaptation thereof, or to any part of the Material in a manner which, but for the consent, infringes or may infringe that person's Moral Rights in the Material; and
- (b) **(No identification)**: taking any action referred to in clause 61.8(a) without making any identification of the author of the Material.

61.9 Escrow

- (a) **(Escrow Agent)**: Not less than 90 days prior to the anticipated Date of Technical Completion:
 - (i) the State will, by notice in writing to Project Co, nominate the Escrow Agent who will be either:
 - A. Assurex Escrow Pty. Limited (or a Related Body Corporate);
or
 - B. Iron Mountain Incorporated (or a Related Body Corporate);
and
 - (ii) Project Co must provide the State with all information required to complete the Escrow Deed, including any information requested by the State (acting reasonably).
- (b) **(Execution of Escrow Deed)**: Project Co:
 - (i) authorises the State to complete the Escrow Deed by inserting any particulars necessary to complete the Escrow Deed; and
 - (ii) must:
 - A. subject to receipt from the State of the completed Escrow Deed, execute and procure that the D&C Subcontractor, the Operator and the Electronic Security Provider executes the Escrow Deed; and
 - B. return to the State 6 original executed counterparts executed by Project Co, the D&C Subcontractor, the Operator and the Electronic Security Provider as soon as reasonably practicable, and in any event prior to the Operational Commencement Date.
- (c) **(Delivery)**: If Project Co fails to discharge its obligations in clause 61.9(b) by the Operational Commencement Date, Project Co must immediately deliver, or procure immediate delivery by the D&C Subcontractor, the Operator or the Electronic Security Provider of, the Escrow Material to the State, and the licence granted under clause 61.9(f) applies.

- (d) **(Custody):** Subject to clause 61.9(c), the Escrow Material must be held in escrow by the Escrow Agent on the terms of the Escrow Deed.
- (e) **(Costs):** The costs of the Escrow Agent must be borne equally by Project Co and the State in accordance with the Escrow Deed.
- (f) **(Licence):** Upon release to the State of the Escrow Material in accordance with clause 61.9(c) or the Escrow Deed, Project Co grants or must procure that the D&C Subcontractor, the Operator or the Electronic Security Provider grants to the State and the State's Associates (such grant to be effective upon release) a world-wide, perpetual, irrevocable, non-exclusive, transferable, royalty-free licence (including the right to sub-license) to Use the Escrow Material for the purposes of any of the following:
 - (i) the Project (including, where this Deed is terminated, to complete any Project Activities which have not been carried out, or have not been carried out in accordance with the applicable State Project Documents, as at the date of termination);
 - (ii) the exercise of the rights of the State or its Associates in accordance with the State Project Documents (including its step-in rights in accordance with clause 42);
 - (iii) the operation, maintenance, repair and alteration of the Relevant Infrastructure on and from the Expiry Date;
 - (iv) for any purpose arising out of or in connection with the Site; and
 - (v) except in the case of Proprietary Software, in connection with other correctional centres in New South Wales.

62. Confidential Information and disclosure

62.1 Confidential Information and disclosure by the State

- (a) **(Disclosure):** Subject to clause 62.1(b), the State and any Authority may disclose any information in connection with the Project, including Project Information.
- (b) **(Requirements):** The State may only disclose the Commercially Sensitive Information:
 - (i) in accordance with Laws or for the enforcement of any criminal law;
 - (ii) in accordance with clause 62.6;
 - (iii) where disclosure is in the course of the official duties of a minister, the Treasurer, the Premier or the Attorney General;
 - (iv) to satisfy the disclosure requirements of the NSW Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW);
 - (v) to satisfy the requirements of Parliamentary accountability;
 - (vi) 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;
 - (vii) in annual reports of the State or the NSW Government;
 - (viii) in accordance with policies of the State or the NSW Government or any Authority;

- (ix) for any tender process required to be conducted under the Termination Payments Schedule; or
- (x) 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 this Deed.

62.2 Confidential Information and disclosure by Project Co

- (a) **(Confidentiality obligation):** Subject to clauses 62.2(b) and clause 62.4(b), Project Co must (and must procure Finance Co to) 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 Project Co's obligation under clause 62.2(a) and subject to clause 62.2(c), Project Co may disclose Confidential Information:
 - (i) to its Associates to the extent necessary for the purpose of undertaking the Project;
 - (ii) to any prospective financier or equity investor of the Project, subject to the State having been provided necessary information in respect of the proposed parties and having carried out any Probity Investigation that the State considers necessary; or
 - (iii) in accordance with clause 62.4.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, Project Co must ensure that the person to whom the information is disclosed enters into a confidentiality deed with Project Co to keep the Confidential Information, confidential in accordance with this clause 62.
- (d) **(Permitted disclosure):** Project Co may disclose Confidential Information and will not be required to seek the State's consent to a disclosure, announcement or statement under clause 62.2(a) or 62.3(a) 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 Project Co 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. Project Co 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.

62.3 Public announcements by Project Co

Subject to clause 62.2(d), Project Co must:

- (a) **(State's prior consent)**: not (and must ensure that Finance Co does 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) **(Terms and conditions)**: comply (and must ensure that Finance Co complies) 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) **(Copies to be provided)**: as soon as practicable, give (and must ensure that Finance Co gives) to the State a copy of any public disclosure, announcement or statement agreed to or approved by the State in accordance with this clause 62.3 or for which the State's consent or approval was not required in accordance with clause 62.4.

62.4 Information public or known

Notwithstanding anything in this clause 62, either party may disclose information in connection with the Project (including any Confidential Information) if:

- (a) **(Already available)**: 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 62; or
- (b) **(Already in possession)**: the relevant information is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party.

62.5 Disclosure by the State under GIPA Act

- (a) Notwithstanding the other provisions of this clause 62, the parties acknowledge that:
 - (i) **(Documents to be published)**: 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) **(Availability of Project Documents)**: 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) **(Notification)**: the State will notify Project Co 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) **(Consultation)**: following notification by the State in accordance with clause 62.5(b)(i), the State will take reasonable steps to consult with

Project Co before disclosing Commercially Sensitive Information, including under the GIPA Act;

(iii) **(Objection)**: if, following:

- A. notification by the State in accordance with clause 62.5(b)(i); or
- B. consultation between the State and Project Co in accordance with clause 62.5(b)(ii),

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

(iv) **(Disclosure)**: the State may take into account any objection received from Project Co pursuant to clause 62.5(b)(iii) in determining whether the Commercially Sensitive Information identified by Project Co should be disclosed; and

(v) **(State's obligations)**: nothing in this clause 62.5 will limit or otherwise affect the discharge of the State's obligations under the GIPA Act.

62.6 Personal Information

Project Co must:

- (a) **(Collection)**: not (and must ensure that Finance Co does not) collect any Personal Information except in accordance with the Design Requirements and Services Requirements, all Laws and Policies;
- (b) **(Disclosure)**: not (and must ensure that Finance Co does 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) **(Retention)**: keep, and make (and must ensure that Finance Co keeps and makes) available to the State on request, records detailing the recipient of any Personal Information that any Project Co Entity has disclosed, the date of disclosure and the Personal Information that has been disclosed.

62.7 Confidential Design Information

Project Co must:

- (a) **(Access)**: only provide (and must ensure that Finance Co only provides) 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 and, where required by the State, have satisfied any Probity Investigation under clause 63.2; and
 - (ii) require access to that Confidential Design Information to carry out the Delivery Phase Activities or perform the Services;
- (b) **(Limited portion)**: where it is necessary to grant access to Confidential Design Information in accordance with clause 62.7(a), grant (and must ensure that Finance Co grants) access to the most limited portion of the Confidential Design Information possible; and

- (c) **(Records):** keep, and make (and must ensure that Finance Co keeps and makes) 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.

62.8 Privacy

Without limiting any obligations in respect of privacy set out in the Design Requirements or the Services Requirements, Project Co agrees to (and will procure Finance Co to), and will ensure that any Subcontract contains terms which require the 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 (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.

63. Probity Events and Probity Investigations

63.1 Probity Event

- (a) **(Notice):** Project Co must give notice to the State immediately upon becoming aware that a Probity Event has occurred or is likely to occur.
- (b) **(Contents of notice):** The notice under clause 63.1(a), must, at a minimum, describe the Probity Event, when the Probity Event occurred, or is likely to occur, and the circumstances giving rise to the Probity Event.
- (c) **(Meeting):** Promptly, and in any case no later than 5 Business Days after the State:
 - (i) receives a notice under clause 63.1(a); or
 - (ii) becomes aware of a Probity Event,the State and Project Co must meet to agree a course of action to remedy or otherwise address the Probity Event and the timeframe in which that will occur.
- (d) **(Compliance):** Project Co must comply with any agreement made in accordance with clause 63.1(c) in the agreed timeframe.
- (e) **(Failure to agree):** If the State and Project Co fail to agree to a course of action in accordance with clause 63.1(c) (including where Project Co fails to meet with the State in accordance with clause 63.1(c)), Project Co must, at its cost, take any action required by the State to remedy the Probity Event in accordance with any timeframe determined by the State.

63.2 Probity Investigation

- (a) **(Requirement for Probity Investigation):** Project Co agrees that the State may, or may require Project Co at any time to, conduct a Probity Investigation in respect of a Relevant Person, a Consortium Member, a Group Member or any person who is proposed to become a Relevant Person, a Consortium Member or a Group Member.
- (b) **(Promptly):** Where the State requires Project Co to conduct a Probity Investigation in accordance with clause 63.2(a), Project Co must conduct the Probity Investigation promptly.
- (c) **(Consents required for Probity Investigation):** Project Co must procure all consents necessary to enable Project Co or the State to conduct any Probity Investigation.

- (d) **(No appointment without consent):** Project Co must not appoint a person to the position of Relevant Person unless the State has given approval following any Probity Investigation that it elects to conduct or any other investigation the State reasonably requires.

63.3 State costs of Probity Events and Probity Investigation

- (a) **(State Costs):** Subject to clause 63.3(b), Project Co must bear all costs incurred by the State in connection with a Probity Event or Probity Investigation that led to a Probity Event.
- (b) **(Project Co not liable):** Project Co will not be liable for the State's costs of any further Probity Investigation required by the State in respect of a Probity Event in relation to which an initial Probity Investigation has been undertaken.

64. Notices and bar to Claims

64.1 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 specified in the Contract Particulars (as the case may be), or as otherwise notified by that party to each other party from time to time;
- (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 the Contract Particulars;
- (e) **(Taken to be received):** are taken to be received by the addressee at the address set out in the Contract Particulars:
- (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 64.1(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 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.

64.2 Notices of Claims

- (a) **(Liability):** Subject to clause 64.2(b):
- (i) the State and its Associates will not be liable upon any Claim that Project Co is entitled to make against the State or its Associates; and
 - (ii) Project Co is absolutely barred from making any Claim against the State or any of its Associates,

under any State Project Document or otherwise arising in connection with the Project Documents, the Relevant Infrastructure or the Project unless Project Co gives the State the notices required by clause 64.3 and, if applicable, clause 64.4.

- (b) **(Notice requirements):** Where any provision of this Deed contains specific notice requirements (including a requirement to submit or update a Change Notice):
- (i) the State and its Associates will not be liable upon any Claim that Project Co is entitled to make against the State or its Associates; and
 - (ii) Project Co is absolutely barred from making any Claim against the State or any of its Associates,

arising out of, or in connection with, the event or circumstance to which the relevant provisions of this Deed, or any other Project Document, entitling Project Co to make a Claim against the State or its Associates apply, unless Project Co has complied with the specific notice requirements (including any requirement to update a Change Notice) set out in those relevant provisions.

64.3 Prescribed notices

The required notices referred to in clause 64.2(a) are:

- (a) **(Intention to submit claim):** a written notice from Project Co in which Project Co:
- (i) states that it intends to submit a Claim; and
 - (ii) identifies the event on which the Claim will be based,
- which notice must be given to the State within 20 Business Days of the earlier of:
- (iii) the date on which Project Co first became aware; and
 - (iv) the date on which Project Co ought reasonably to have become aware,
- of the event on which the Claim is based; and
- (b) **(Claim):** a formal written notice from Project Co to the State setting out the Claim, including:
- (i) detailed particulars concerning the event on which the Claim is based;

- (ii) the legal basis for the Claim, whether based on a term of the State Project Documents or otherwise, and if based on a term of the State Project Documents, clearly identifying the specific term;
- (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
- (iv) details of the amount claimed and how it has been calculated,

which notice must be given to the State within 10 Business Days of giving the notice under clause 64.3(a).

64.4 Continuing events

If the event upon which the Claim under clause 64.3(b) is based, or the consequences of that event, are continuing, Project Co must continue to give the information required by clause 64.3(b) every 20 Business Days after the notice under clause 64.3(b) was submitted, until after the event or consequences of the event have ceased.

64.5 Notice to Financiers

Project Co acknowledges that the State may provide to the Financiers a copy of any notice from:

- (a) Project Co to the State; or
- (b) the State to Project Co,

in connection with the State Project Documents or the Project.

64.6 Power of attorney

Project Co irrevocably:

- (a) **(Appointment)**: appoints the State, and the State's nominees from time to time, jointly and severally, as its attorneys with full power and authority:
 - (i) with effect from the end of the Operating Phase, to execute any assignment or novation contemplated by clauses 37.1(a)(vii) or clause 49.7;
 - (ii) to exercise the State's rights in accordance with clause 42; and
 - (iii) to undertake Project Co's obligations in accordance with clause 49.7; and
- (b) **(Ratification of action)**: agrees to ratify and confirm whatever action is taken by the attorney appointed by Project Co under clause 64.6(a).

65. PPSA

Project Co acknowledges and agrees that:

- (a) **(State's rights)**: if and to the extent that the State at any time forms a belief on reasonable grounds that the State is, or will become, a secured party with respect to a Security Interest arising under this Deed, the State may at Project Co's expense take all steps that the State considers advisable to:
 - (i) perfect, protect, record, register, amend or remove the registration of, the State's Security Interest in any relevant personal property that is the subject of this Security Interest (**Relevant Personal Property**); and

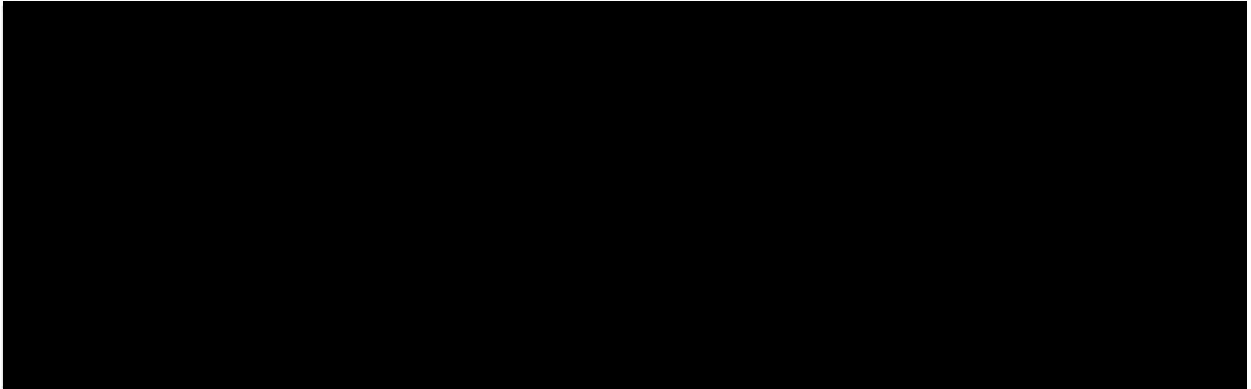
- (ii) better secure the State's position in respect of the Relevant Personal Property under the PPSA;
- (b) **(Project Co's Associates to assist the State)**: it will do, and ensure that each Project Co Associate does, all things reasonably necessary to assist the State to take the steps described in clause 65(a);
- (c) **(waiver of right to receive any verification statement)**: it irrevocably and unconditionally waives, and will ensure that each Project Co Associate irrevocably and unconditionally waives, its right to receive any verification statement in respect of any financing statement or financing change statement relating to any Security Interests of the State in the Relevant Personal Property;
- (d) **(excluded PPSA sections)**: if, and only if, the State is or becomes a secured party in relation to Relevant Personal Property, and to the extent only that Chapter 4 of the PPSA would otherwise apply to an enforcement of a Security Interest in Relevant Personal Property, Project Co and the State agree, and Project Co will ensure that each Project Co Associate agrees, that, pursuant to section 115 of the PPSA, the following provisions of the PPSA do not apply in relation to those Security Interests to the extent, if any, mentioned in section 115, section 117, section 118, section 120, subsection 121(4), section 125, section 129, section 130, subsection 132(3)(d), subsection 132(4), section 142, and section 143;
- (e) **(no disclosure)**: subject to section 275(7) of the PPSA, it will not, and it will ensure that each Project Co Associate does not, disclose the contents of this Deed, the amount or performance obligation secured by the State's Security Interest in Relevant Personal Property and the other information mentioned in section 275(1) of the PPSA pursuant to section 275(4) of the PPSA;
- (f) **(Project Co to notify the State)**: other than in relation to Security Interests arising in the ordinary course of the Project Activities and Security Interests described in section 12(d) of the PPSA of which a Project Co Entity is the grantor (but only where the interest does not secure payment or performance of an obligation) it must immediately notify the State if Project Co or Project Co Associate becomes aware of any person other than the State taking steps to register, or registering, a financing statement in relation to Relevant Personal Property; and
- (g) **(removal of registered security interest)**: it must arrange, and ensure that each Project Co Associate arranges, for the removal or cessation of any registration of any Security Interest that affects the priority of the State's interest in Relevant Personal Property.

For the purposes of this clause 65, 'registration', 'secured party', 'verification statement', 'financing statement', 'personal property' and 'financing change statement' each have the meaning given to those terms in the PPSA.

Executed as a deed.

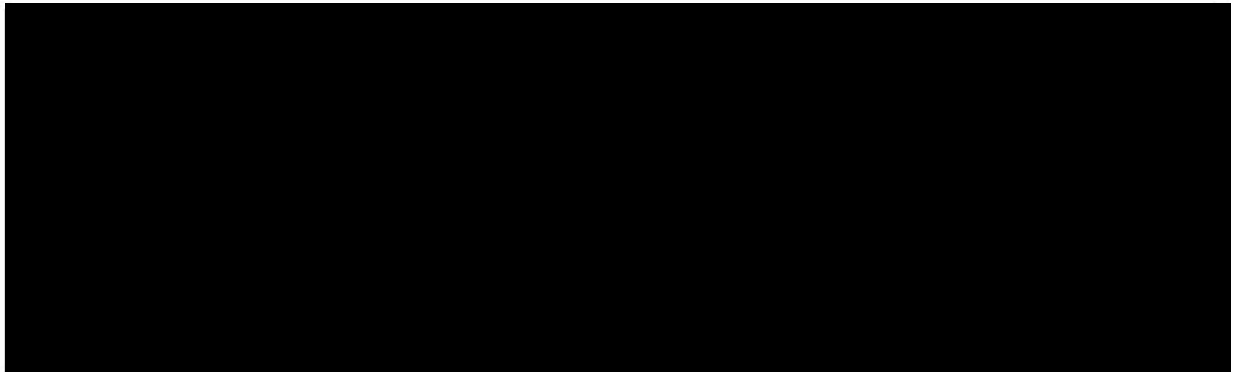
Infrastructure NSW

Signed sealed and delivered by David Riches
as authorised delegate of the Chief Executive
Officer of **Infrastructure NSW** pursuant to section
13(1) of the Infrastructure NSW Act 2011 in the
presence of:



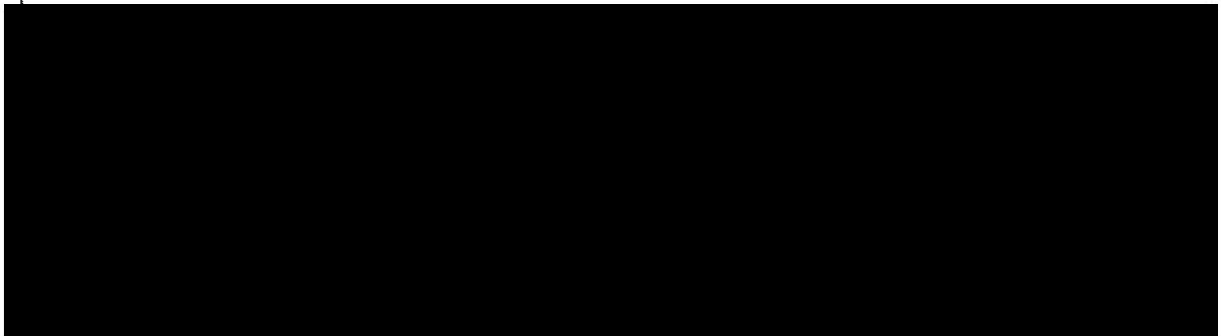
Minister for Corrections

Signed sealed and delivered by David Elliott,
in his capacity as the Minister for Corrections,
on behalf of the Crown in right of the State of New
South Wales in the presence of:



Commissioner of Corrective Services

Signed sealed and delivered by the
Commissioner of Corrective Services in the
presence of:



Project Co

Executed by **NORTHERNPATHWAYS PTY LIMITED AS TRUSTEE FOR THE NORTHERNPATHWAYS PROJECT TRUST** in accordance with Section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors:



