



Australian Government

Department of Infrastructure and Regional Development

National Public Private Partnership Guidelines

Volume 3: Commercial Principles for Social Infrastructure



December 2008



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Components of the Guidelines

National PPP Policy Framework

National PPP Guidelines Overview

National PPP Detailed Guidance Material

Volume 1: Procurement Options Analysis

Volume 2: Practitioners' Guide

Volume 3: Commercial Principles for Social Infrastructure

Volume 4: Public Sector Comparator Guidance

Volume 5: Discount Rate Methodology Guidance

Volume 6: Jurisdictional Requirements

Volume 7: Commercial Principles for Economic Infrastructure

Roadmap for applying the Commercial Principles

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Introduction

These National PPP Guidelines: Commercial Principles for Social Infrastructure ("**CPs for Social Infrastructure**") detail the Commonwealth and State/Territory Governments' current preferred commercial principles for social infrastructure public private partnerships ("**PPPs**").

In general, these principles apply to core services/accommodation type projects where the government payment is based upon availability and the facility reverts to government, at no cost, at the end of the concession term.

This document should be used in conjunction with the processes outlined in other National Public Private Partnerships Guidance material.

Purpose and application

These principles will apply to the Commonwealth and all States/Territories (and their agencies, including, in some jurisdictions, public trading enterprises and Government Owned Corporations where applicable), so as to achieve a consistent and efficient risk allocation framework for the delivery of social infrastructure PPPs across jurisdictions.

These principles will replace existing standard commercial principle guidance material for social infrastructure projects that currently apply at a jurisdictional level. However, they will not apply retrospectively to projects that have closed, or are currently in the market.

While recognising the need for consistency across jurisdictions, governments also appreciate the need for flexibility within this framework to allow for jurisdiction-specific needs that may arise as a result of differing planning regimes, site conditions, legislative requirements, or other risks or policies. Accordingly, in a number of areas (e.g. Relief Events, Compensation Events, Events of Default and Default Termination Events) these principles provide for a 'menu' type methodology where jurisdictions have the flexibility to choose between a number of defined approaches for dealing with a particular risk, or contractual issues, while still remaining within the overall risk framework of the principles.

For those areas which adopt a 'menu' type approach, each jurisdiction will issue supplementary guidance material for their agencies, identifying the positions that will apply to social infrastructure PPPs delivered within their jurisdiction.

As these principles are a high level guide, such supplementary guidance material may also provide further detail on the implementation of these principles within the relevant jurisdiction.

Some of the positions in these principles may differ from positions previously adopted (and with which market participants may be familiar) in social infrastructure PPPs at a jurisdictional level. However, this has been a necessary consequence of achieving a nationally consistent and standard risk allocation framework which will provide greater certainty and assist in reducing the cost and time of contractual negotiations for all parties. In addition, in the interests of consistency, terminology has been 'normalised' across jurisdictions (e.g. Completion vs Commercial Acceptance). Please refer to the attached Glossary.

Given that each project has unique characteristics and risks, use of these principles will not reduce the importance of detailed project by project analysis of individual risks. Accordingly, parties may depart from these CPs for Social Infrastructure on a project-specific basis.

Economic infrastructure projects

Economic infrastructure projects are projects where the private party bears market (demand) risk and revenues are often derived from third parties. This differs from social infrastructure projects where government retains demand risk, traditionally through an availability based payment mechanism. Examples of economic infrastructure projects include toll-roads.

Separate national commercial principles will be released which will apply to economic infrastructure projects.

1. Contractual issues

Principle

Special characteristics and powers of government give rise to particular issues which the project agreement will address in seeking to place the relationship on a commercial footing.

1.1 Introduction

The key issues for the private party when contracting with government are as follows:

- (a) Is the contracting party the Crown or an entity created by legislation?
- (b) Does the person who will sign the project agreement for the government party have the requisite authority to bind the relevant State or Territory or the Commonwealth?
- (c) Is the project agreement enforceable against the Crown?
- (d) What can reasonably be expected of government in the exercise of statutory powers and discretions which impact on the project?

1.2 Contracting party

Depending upon the nature and scale of the project, the contracting party may be:

- (a) the Crown in right of a State;
- (b) the Commonwealth of Australia or a Territory;
- (c) a statutory authority or statutory corporation; or
- (d) a Commonwealth Authority or Company within the meaning of the *Commonwealth Authorities and Companies Act 1997* (Cwlth).

1.3 Authority to make contracts

1.3.1 Contracts within portfolio

Ministers have authority to make a contract on behalf of the Commonwealth or a State/Territory in connection with any matter which comes within their portfolio and departmental responsibility. In many cases department heads have this authority as well. Commonwealth officers can also be conferred with such powers through delegation.

1.3.2 Legislative authority

Generally, statutory authorities and statutory corporations will be vested by their constituent legislation with authority to enter into the project agreement.¹

However, depending on the project, a regulatory framework or other amendments to existing Law may be proposed by a jurisdiction in order to ensure enforceability of the project agreement. In those circumstances, appropriate legislation may be passed.

1.3.3 Warranty of authority

Where there is any reasonable basis for doubt, the government party entering the project agreement will warrant that it has the power to enter into the project agreement and that its obligations under the project agreement are valid and binding obligations which are enforceable against it.

1.4 Delegated powers and functions

1.4.1 Instruments of delegation

In the absence of express statutory delegation, government's delegation of its powers, functions or responsibilities in respect of the project agreement will take place through instruments of delegation separate from the project agreement. The project agreement will acknowledge that government is entitled to revoke or change any such delegation at any time.

1.4.2 Rights of private party

The private party is entitled to know the identity of the current delegate and receive a copy of any current instrument of delegation.

1.5 Enforceability of the contract

- (a) If the Commonwealth enters into the project agreement under its executive power, then it will be bound by its terms because its executive power to contract is unlimited. The same is also the case for the States/Territories (unless the project agreement deals with an area for which the Commonwealth has exclusive responsibility under the Constitution).
- (b) If legislation is enacted to support the project agreement, there must be compliance with the requirements of that legislation. If the project agreement does not observe these requirements then it will be void.
- (c) All jurisdictions have enacted legislation removing common law immunity of the Crown.² In accordance with the terms of this legislation, and subject to paragraph (b) above, the private party will be entitled to commence proceedings against the relevant government to enforce the terms of the project agreement.

¹ In NSW, the *Public Authorities (Financial Arrangements) Act 1987* (NSW) also empowers certain statutory authorities or statutory corporations to enter into joint financing arrangements within the meaning of s 5A of the Act, with the approval of the Treasurer.

² For example the *Crown Proceedings Act 1958* (Vic) and the *Crown Proceedings Act 1988* (NSW).

1.6 Government facilitation

1.6.1 Limitations on government

Government cannot contract out of an existing obligation under legislation or fetter its future exercise of a statutory power or discretion. If the project agreement contained a provision requiring government to do so, the provision would be ineffective. The project agreement will recognise these limitations on any express, or implied, facilitation obligations assumed by government.

1.6.2 Government not in breach

Anything done by government pursuant to its executive or legislative powers and functions, even if directly contrary to the outcomes envisaged by the project agreement, will be deemed not to constitute a breach of the project agreement.

1.6.3 Acknowledgment

The private party will also be required to acknowledge that government, in performing any of its duties and obligations, is not obliged to exercise any power, function or duty within the responsibility of any other government agency, or to influence, override or direct any government agency in the proper exercise of its legal duties and functions. For these purposes, a government agency includes a government, semi-governmental, municipal, statutory or other public entity or authority.

1.6.4 Right to Compensation

However, notwithstanding sections 1.6.1 to 1.6.3, government may assume specific obligations and liabilities under the project agreement with respect to certain acts or omissions of government, including the exercise of its powers, functions and duties which will be enforceable against it. For example, government may be liable to pay Compensation and/or allow the private party certain Relief if its acts or omissions are not in accordance with the project agreement.

Government Relief and Compensation in such circumstances will be limited to that specified in the project agreement.³

1.6.5 'Best endeavours'

Government will not agree to open-ended 'best endeavours' or 'reasonable endeavours' clauses. It will define these obligations by reference to specific matters which are no wider than strictly necessary. These matters will include:

- (a) an acknowledgment that, to the extent that government has any such obligations, it 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) an express statement that, by undertaking to exercise reasonable or best endeavours, government does not agree to:
 - (i) interfere with or influence the exercise by any person of a statutory power or discretion;
 - (ii) exercise a power or discretion, or otherwise act in a manner that it regards as not in the public interest; or
 - (iii) develop policy or legislate by reference only, or predominantly to the interests of the project.

³ See Chapters 16 (Relief Events) and 17 (Compensation Events).

1.6.6 Private party and government to co-operate

- (a) In some jurisdictions any implied good faith obligations will be expressly excluded. In other jurisdictions government may agree to be subject to any implied good faith obligations that arise as a matter of law in commercial contracts. If this is the case, the project agreement will specifically disclaim that there is implied, whether from the concept of 'partnership' or from the PPP guidance materials or otherwise, any other general duties of good faith on the part of government towards the project or the project parties, unless expressly assumed by government under the project agreement.
- (b) The project agreement will specifically disclaim that there is a joint venture, partnership, agency or fiduciary relationship between government and the private party.

1.7 No contractual status

These CPs for Social Infrastructure set out the commercial principles that will inform the drafting of the project agreement. However, the project agreement must be read as a stand-alone document. Accordingly, the parties will acknowledge in the project agreement that neither the CPs, nor the guidance materials that underpin them, actually form part of the project agreement (whether by implication or otherwise).

2. Conditions Precedent to Financial Close

Principle

The project agreement (other than specified limited parts of the project agreement including the Conditions Precedent) does not commence until each of the Conditions Precedent has been satisfied or waived.

2.1 Overview

In the normal course of events, certain conditions will be required to be satisfied prior to the majority of the project agreement becoming effective ("**Conditions Precedent**"). The date of satisfaction of these Conditions Precedent is known as Financial Close.

On Financial Close:

- (a) obligations of each party to the project agreement become binding (other than the limited obligations that become binding on execution of the project agreement); and
- (b) the interest rate setting protocol is implemented and the Base Case Financial Model is reset to reflect the rate set and the service fee is fixed.

2.2 Requirements of Conditions Precedent

2.2.1 Obligations

The private party must, at its cost, ensure that each of the Conditions Precedent it is responsible for satisfying is met by the target date for satisfaction of the Conditions Precedent.⁴

2.2.2 Content

The following Conditions Precedent, as a minimum, will generally be required to be satisfied by the private party (the Conditions Precedent selected to apply will depend on the nature of the project, structure of the consortium and any other specific government requirements):

- (a) delivery of executed copies (excluding execution by government) of relevant Project Contracts and major sub-contracts in a form and substance satisfactory to government;
- (b) delivery of certified copies of all finance documents duly executed, and evidence that all Conditions Precedent to funding have been satisfied (or waived) in accordance with the finance documents;
- (c) evidence of any authorisation (in form and substance acceptable to government) required by the private party, financiers and major sub-contractors to enter into the Project Contracts, major sub-contracts and financing agreements (as applicable);

⁴ The target date for satisfaction of the Conditions Precedent will be determined on a project-specific basis depending on the nature of the Conditions Precedent to be satisfied, but is usually 20 business days from contractual close.

- (d) effecting of required insurance policies and provision of certificates of currency; and
- (e) provision of any required corporate or consortium details.

Jurisdictions may require that a binding private tax ruling in relation to the operation of Division 250 of the *Income Tax Assessment Act 1936* (Cwlth) and the *Income Tax Assessment Act 1997* (Cwlth) be provided as a Condition Precedent. More specifically, jurisdictions may seek greater comfort around the areas of project financing and ownership structures.

Generally, notwithstanding the above Conditions Precedent, in some jurisdictions, government will not execute the project agreement until all major sub-contracts have been executed. This is to ensure that government is not committed to the project before the private party is able to be committed.

2.2.3 Waiver

Only the beneficiary of a Condition Precedent may waive the Condition Precedent.

2.3 Conditions Precedent bond

2.3.1 Requirement

The private party may be required to provide a Conditions Precedent bond to a specified value by the date of execution of the project agreement. Whether or not a Conditions Precedent bond is required, and the value of the bond, will depend on various factors such as:

- (a) whether a process bond was lodged during the bid phase;
- (b) other incentives to reach Financial Close, such as the structure of the term or payment mechanism;
- (c) the risk and consequences of the private party failing to meet the Conditions Precedent;
- (d) the risk and consequences of failure to reach Financial Close;
- (e) the value of the individual project;
- (f) the market environment; and
- (g) timing issues (e.g. whether there is likely to be a significant interval between execution of the project agreement and Financial Close).

2.3.2 Demand

Government may make a demand under the Conditions Precedent bond if any of the relevant Conditions Precedent to be satisfied by the private party are not satisfied or waived by the target date for satisfaction of the Conditions Precedent (unless government causes the Condition Precedent not to be fulfilled).⁵

⁵ See section 2.3.

2.4 Termination

If each of the Conditions Precedent is not satisfied or waived by the target date for satisfaction of the Conditions Precedent, government may terminate each of the Project Contracts. In that event:

- (a) neither party will be entitled to claim against the other in respect of these Project Contracts except those parts expressly said to take effect despite the non-satisfaction or waiver of the Conditions Precedent;
- (b) all future rights and obligations of the parties under the Project Contracts and otherwise in connection with the project are terminated; and
- (c) government may call upon any Conditions Precedent bond.

Government will have the right to extend any target date for the satisfaction of Conditions Precedent.

2.5 Government approvals

In some jurisdictions, government will, where relevant, be required to obtain approvals under the relevant State, Territory or Commonwealth legislation no later than Financial Close.

3. Contract term

Principle

The term of the contract will depend on the best value for money solution for government and will reflect:

- (a) the period to Financial Close;
- (b) the anticipated construction period; and
- (c) the desired operating period.

It will be subject to earlier termination in certain circumstances.

3.1 Length of term

Jurisdictions may either define the contract term:

- (a) as a fixed concession period (e.g. 25 years) commencing from the date of contract signing or Financial Close; or
- (b) as a separate design and construction phase and operating term, with the operating term being a fixed period (e.g. 25 years) commencing from the Date for Completion (thereby fixing the operating term irrespective of when the private party actually achieves Completion).

Depending on which approach is adopted by a jurisdiction, the end of the contract term, subject to any earlier termination, may be either the last day of the concession period or the last day of the operating term.

The contract term will be fixed by reference to factors such as:

- the anticipated duration of government's need for the services;
- the expected economic life of the asset and anticipated timing of major upgrade or refurbishment;
- the expected technological life of the asset;
- the minimum term considered necessary to deliver a reasonable return to the private party on its investment and amortise the capital value of the asset such that the asset can be transferred to government without further payment (or, if the private party is to retain the asset, amortise the capital value of the asset to the extent necessary to enable the private party either to make economic alternative use of the asset or abandon it as redundant);
- the need not to unduly limit government's flexibility in the longer term; and
- where a concession period is used, the likely length of the design and construction phase.

3.2 Extension

Where failure to achieve Completion by the Date for Completion occurs as a result of a Relief Event, the Date for Completion will be extended. In jurisdictions where there is a two-stage Completion process (for example, a Date for Technical Completion to be met prior to a Date for Commercial Acceptance), any such Relief Event may result in an extension to both of those dates.

Whether or not such an event results in an extension of the contract term (and therefore the operating term) will depend on the project specifics and whether there is any special need for the project to terminate at a particular time.

3.3 Liquidated damages

Government recognises that an entitlement to liquidated damages⁶ may result in higher bid costs. Therefore, in most circumstances liquidated damages will not be payable for late delivery. However, there are limited circumstances, as discussed below, where government may seek payment of liquidated damages. This will be determined on a value for money basis and consideration will also be given to other remedies available to government under the project agreement to recover costs arising from a private party default (e.g. indemnities, erosion of the operating term and reduction in the service fee for late delivery).⁷

Accordingly, governments may adopt one of the following approaches to late delivery:

- (a) Where there is a fixed concession period, or the operating term is a fixed period from the Date for Completion, erosion of the operating term as a result of late achievement of Completion and, therefore reduction in the service fee, is the preferred incentive for timely delivery. Government will generally not seek to charge liquidated damages for late delivery in addition to this erosion of the operating period. However, this may be necessary in circumstances where government's potential delay costs are greater than the aggregate of the service fee payments it will not incur as a result of the reduction of the operating period.
- (b) Where the operating period is fixed from the Date for Completion, but the project agreement provides that both the Date for Completion and the contract term are extendable as a result of a Relief Event (i.e. there is in practice no erosion of the contract term), liquidated damages may be payable for the period of delay to defray government's delay costs.

3.4 Earlier termination

The contract term may end earlier than the date specified in the project agreement as a result of various events,⁸ including breach, force majeure and Voluntary Termination by government. This is discussed further in Chapter 25 (Termination).

⁶ As distinct from the liquidated damages payable by the construction sub-contractor to the private party for any period of delay.

⁷ Subject to value for money considerations - see section 11.1.1 of Chapter 11 (Protection against late or insufficient service delivery).

⁸ See Chapter 25 (Termination).

4. Environmental issues and Site Conditions

Principle

Depending on the project, and whether Commonwealth environmental approvals are fundamental to the use of the site, government may obtain such approvals to ensure that environmental considerations do not preclude the use of the site for project purposes. Each jurisdiction may also impose further requirements with respect to environmental assessments to be undertaken and approvals to be obtained. The risk allocation in respect of such assessments and approvals will be determined on a jurisdictional basis.

The private party will be responsible for obtaining and complying with all other environmental approvals (at its cost).

The private party will be responsible for environmental compliance.

The private party accepts overall responsibility for Site Conditions, including the adequacy of the site for delivering the project, regardless of whether the project site is selected by government. An exception may be made, in limited circumstances, for latent geotechnical conditions and unidentified pre-existing contamination on a government selected High Risk Site.

4.1 Environmental approvals

4.1.1 Environmental impact assessments⁹

Depending on their nature and location, projects may trigger either or both Commonwealth and State/Territory requirements for environmental impact assessment. The significance of these processes is that they may be extensive, time-consuming and costly and, more importantly, they are fundamental to the ability of the site to be used for the project.

4.1.2 Commonwealth assessments

- (a) If the nature or location of the site raises the prospect that the project may impact on matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), government will refer the government's master plan for the project to the Minister for the Environment, Heritage and the Arts for determining whether it is a controlled action and, if so, submit the project for assessment under that Act.
- (b) Any further assessment that may be required under that Act as a result of the private party's design solution must be obtained by the private party.

⁹ Environmental impact assessment is a statutory process akin to an approval, but is in a separate category because of the potential length and breadth of the assessment process and resources it may consume.

4.1.3 State/Territory assessments

The process for undertaking of environmental impact and effects assessments and the obtaining of all associated approvals at a State/Territory level, prior to Financial Close, will be driven by the relevant environmental legislation for the particular jurisdiction. However:

- (a) any assessment that may be required after Financial Close, as a result of the private party's design solution, will usually be obtained by the private party; and
- (b) government may agree to cap the private party's exposure to such risk beyond a specified time and cost threshold, but will do so only where delay and/or cost is inordinate and unforeseeable.

4.1.4 Other environmental approvals

The private party bears the risk of obtaining all other environmental approvals required by the bid design.¹⁰

4.2 Site suitability

As part of the bid process, the private party must satisfy itself as to the commercial viability of carrying out the works on, and delivering the proposed Contracted Services from, the site in accordance with the project agreement.

4.3 Condition of the site

- (a) Throughout the contract term, the private party will need to comply with all Environmental Laws and to undertake its obligations in accordance with Good Industry Practice.
- (b) The project agreement will mandate the standard to which the site must be remediated, to the extent that such remediation is required.
- (c) The private party will not bear the risk of the condition of the site at the end of the term, to the extent that it has complied with its obligations under the project agreement.

4.4 Site Conditions

4.4.1 Private party responsibility

- (a) '**Site Conditions**' includes all circumstances and conditions on, in, around and affecting the land, whether latent or otherwise, and includes contamination and geotechnical conditions in, on, under or around the site.
- (b) While government may select the project site, it makes no express or implied warranty or representation with respect to the site, the Site Conditions, or the adequacy of the site for the project.

¹⁰ For example, approvals under the Protection of the Environment Operations Act 1997 (NSW) or the Environment Protection Act 1970 (Vic).

- (c) Subject to the exceptions identified in section 4.4.6, the private party will assume all liability for Site Conditions and will not be entitled to make any claim against government in connection with any Site Conditions. To this effect, the private party will release and indemnify government from any claims or liabilities (including by or to a third party respectively) arising out of, or in connection with any Site Conditions.
- (d) The cost of any necessary rectification or upgrade of the site identified prior to execution of the project agreement will be reflected in the bid price. The risk of costs exceeding what has been priced rests with the private party.

4.4.2 High Risk and Low Risk Sites

- (a) Different risk allocations are appropriate for High Risk Sites and Low Risk Sites, given their differing degrees of risk. These are detailed in sections 4.4.5 and 4.4.6 below.
- (b) **High Risk Sites** may be identified by reference to any of the following characteristics:
 - (i) sites which would ordinarily be referred to as brownfield sites;
 - (ii) previous industrial, heavy commercial or hospital land use likely to give rise to contamination and with existing structures, or other site users, compromising accessibility for due diligence; and
 - (iii) sites where extensive contamination or latent geotechnical conditions are likely and a full investigative survey is commercially impractical.
- (c) **Low Risk Sites** may be identified by reference to any of the following characteristics:
 - (i) sites which would ordinarily be referred to as greenfield sites;
 - (ii) previous land use limited to rural, residential, light commercial or light industrial (e.g. office or warehouse);
 - (iii) minimal structures on the site;
 - (iv) long-standing pre-existing reservation for the project; and
 - (v) accessible for private party due diligence investigation.

4.4.3 Due diligence

Depending on the nature of the site (i.e. whether the site is a High Risk Site or a Low Risk Site) and on value for money considerations (for example, possible cost sharing of the site investigations between government and the bidders):

- (a) Government will usually appoint independent consultants to undertake due diligence on the proposed site and relevant Site Conditions and to prepare a site assessment report.
- (b) Government may provide such reports to the private party. However, this will be conditional on the private party acknowledging that the report has been provided by government for information purposes only and releasing government from any liability arising from the private party's receipt and future use of the report.
- (c) Government will make every attempt to ensure that the report is appropriately detailed and informative in documenting the nature and levels of site risk and will,

where possible, arrange for the private party to have rights directly against the site assessment report provider in respect of those reports.¹¹

- (d) Government will not itself warrant the accuracy or completeness of the report and will disclaim making any representation based on the report.
- (e) The private party will also be given the opportunity to undertake its own due diligence as to site suitability. Government will co-operate with the private party and endeavour to give such access to the site as is reasonable and necessary for the carrying out of any additional assessment.
- (f) Where independent site assessment is possible by the private party, it will be required to acknowledge that it has had an opportunity to conduct its own investigations and assessments and that it has acted in reliance on its own assessment.
- (g) Any rights in a government due diligence report that have been secured for the private party will be exercisable outside the project agreement as against the independent consultant and will not alter the acknowledgments as between government and the private party.

4.4.4 Reporting Obligations

The private party must advise government upon becoming aware of a Site Condition that differs materially from the conditions described in a site report and of measures proposed to be taken by the private party to deal with that Site Condition.

4.4.5 Identified pre-existing contamination and other Site Conditions

The private party will bear the risk of all identified pre-existing contamination or latent geotechnical conditions. The anticipated costs of cleaning up identified contamination on a government selected site (to the extent appropriate to the land use) will effectively be passed through to government through the bid price.

4.4.6 Unidentified pre-existing contamination / latent geotechnical conditions

- (a) Government will generally not share liability for unidentified pre-existing contamination or latent geotechnical conditions where the site has been selected by the private party.
- (b) Government will generally share risk in respect of unidentified pre-existing contamination and latent geotechnical conditions on a High Risk Site if the contamination or condition is located in an area of the site which is inaccessible during the tender period to the private party's consultants and/or to any independent consultants engaged by government, or in respect of which it is otherwise not reasonable, or practical to expect the private party to perform its own full investigative surveys.
- (c) To be eligible to receive any Relief or Compensation for pre-existing unidentified contamination or latent geotechnical conditions, the private party must have

¹¹ This can be done by assigning the warranties provided by the independent consultants in respect of the report (to this end, government will seek to ensure that any consultancy agreement with the independent consultant contains warranties in respect of the report and that government has the right to assign those warranties) or by arranging for the private party to have direct legal rights against the independent consultant (for example, by novation of the consultancy agreement or the creation of a new legal relationship).

promptly notified government of the existence of the contamination or latent geotechnical condition within an agreed period of becoming aware of it (to be determined on a project-specific basis).

- (d) To the extent government shares unidentified pre-existing contamination or latent geotechnical conditions risk, it will do so by:
 - (i) reference to an agreed schedule of rates for specified eventualities¹² (with the private party bearing the risk of costing the unit price);¹³ or
 - (ii) sharing (on a percentage basis to be agreed) the actual costs of remediation for items and eventualities not covered by the schedule, or where a schedule of rates is not used.
- (e) In circumstances where government shares pre-existing contamination or latent geotechnical condition risk on a percentage basis, it will consider the following when determining an appropriate percentage share:
 - (i) the comprehensiveness of site assessment by qualified environmental consultants commissioned by government; and
 - (ii) the ability of the private party to undertake due diligence of the site assessment report commissioned by government and/or ability to undertake its own testing (where feasible).
- (f) This cost-sharing arrangement is preferable to government capping the private party's liability in that it provides an incentive for efficient environmental management of the site and cost-effective clean up at all stages of the project, while significantly limiting the private party's exposure.
- (g) Upon becoming aware of the existence of any unidentified pre-existing contamination, the private party must consult with government on the best way to manage and limit any effects and undertake all reasonable and proper remediation steps necessary to manage and clean up the contamination - and any effects arising from it - in a timely and cost effective way.

4.4.7 Contamination during the contract term

- (a) Any contamination (low level or otherwise) resulting from on-site pollution during the contract term will be the liability of the private party (unless directly caused by government as the contracting entity and where such contamination is not subject to private party management under the project agreement).
- (b) In conjunction with a general obligation to comply with Environmental Laws,¹⁴ the private party must:
 - (i) not use the site or allow it to be used so that any industrial waste or hazardous substance is abandoned;
 - (ii) not allow any industrial waste to be dumped on the site or handled in a manner which is likely to cause an environmental hazard;

¹² The schedule of rates will be bid by the private party and will generally cover variable costs within the private party's control (e.g. labour, craneage and truck movements).

¹³ To the extent it would not be value for money for certain components of that cost (e.g. landfill charges) to be priced up-front in a schedule of rates, a competitive process will be agreed as part of the project agreement for pricing these components at the time relief is requested.

¹⁴ See section 4.3(a).

- (iii) not release or emit anything (including noise) from the land into any part of the environment other than in accordance with a relevant approval; and
- (iv) keep the site in good and safe condition so it does not present a risk to the health and safety of any person or a risk of harming the environment and is suitable for the proposed use.

4.4.8 Indemnity for third party liability

The private party must indemnify government against all third party liability arising in relation to any contamination existing on, over, under or emanating from, the site, except to the extent that government has agreed to share remediation costs (on the basis discussed in section 4.4.6), or the contamination is caused by a co-located core service (to the extent that the private party is not responsible for managing that contamination under the project agreement). This indemnity is subject to the limitation of liability in section 33.1.2 of Chapter 33 (Indemnities, warranties and contractual claims).

4.4.9 Environmental Notices

- (a) The private party must comply with any Environmental Notice issued in relation to the site or any pollution or environmental hazard caused by the private party.
- (b) The private party must not exercise any statutory power to recover its costs of compliance with an Environmental Notice against government or its associates. This restriction does not limit the private party's right to recover its costs under the project agreement to the extent that contamination is a Compensation Event.
- (c) Ultimate liability for clean up costs will be allocated under the project agreement in accordance with the principles set out above. Reimbursement of the private party's costs will be limited to government's share (if any) of the remediation costs and will not include delay or disruption costs, save to the extent this is identified as a Compensation Event.

4.4.10 Unexploded objects

The private party will not be expected to bear the risk of the removal, defusal and disposal of identified, or unidentified, unexploded objects from military operations or war.

5. Native title and artefacts

Principle

Government will assume responsibility for dealing with native title applications and claims. The private party will be responsible for the identification and removal of all artefacts. However, the private party will only be able to claim Relief or Compensation where it is directed to cease the works as a consequence of a native title claim or application or discovery of an artefact.

5.1 Native title

5.1.1 Risk allocation

- (a) Government will be responsible for dealing with any application or claim made under any Law relating to native title and for payment of compensation to native title holders (and in respect of which, it will compensate the private party).
- (b) It is generally both more effective and less costly for government to assume the greater part of native title risk. This is because native title potentially subsists only over Crown Land, and the government is ordinarily better able than the private party to nominate and communicate with indigenous representatives for the purpose of meeting notification and consultation requirements under the Commonwealth *Native Title Act 1993* and relevant State and Territory Aboriginal Land Rights legislation.¹⁵
- (c) If there is a native title application, the private party must continue to perform its obligations under the project agreement, except to the extent prevented by the native title application (such as a government direction, legal requirement or court or tribunal order to suspend execution of the works or Contracted Services) and subject to any Relief and Compensation referred to in paragraph (d), and provide all reasonable assistance in connection with dealing with such an application.
- (d) The private party will not have any claim against government for loss or damage suffered as a result of any native title application. However, the private party will be entitled to Relief and Compensation where delays arise or additional costs are incurred (by the private party) as a result of any government, court or tribunal direction to suspend or cease all or any part of the works or services because of a native title claim or application.

¹⁵ It should be noted that where land title rights exist under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth), the Northern Territory government has no right of compulsory acquisition (unlike Commonwealth authorities) and is therefore in no more an advantageous position than the private sector. On this basis, the Northern Territory government could expect the private sector to accept this risk. A further issue is Aboriginal sacred sites, in respect of which the Northern Territory government has historically expected the private sector to accept land title risk, again on the basis that that the Northern Territory government is in no more advantageous a position than the private sector and the private sector is better placed to manage such issues as part of the project/site development.

5.1.2 Due diligence

- (a) The report of Site Conditions issued with the Project Brief may include information concerning the existence or potential existence of native title and any application on the register of the National Native Title Tribunal (Commonwealth).
- (b) Government will not, however, make any representation or warranty in respect of the existence or otherwise of native title.

5.2 Artefacts

5.2.1 Damage minimisation

If an artefact is discovered at the site, the private party must notify government and, at its own cost and expense, take every reasonable precaution to prevent the artefact from being removed, disturbed, damaged or destroyed until appropriate arrangements (including the obtaining of approvals) have been made for dealing with, or removing, them.

5.2.2 Continuation

The private party must continue to perform its obligations under the project agreement, except to the extent prevented by a requirement to properly manage the discovered item (such as a government direction, legal requirement or court or tribunal order to suspend execution of the works or Contracted Services) and subject to any Relief and Compensation referred to in section 5.2.3.

5.2.3 Relief and Compensation

- (a) Government will not be liable to the private party for any loss or damage which the private party suffers or incurs as a result of the discovery of artefacts at the site. However, the private party will be entitled to Relief and Compensation where delays arise, or additional costs are incurred (by the private party), as a direct result of any government, court or tribunal direction to suspend or cease all or any part of the works or services because of the discovery of an artefact (provided the cessation order does not result from a private party breach of its obligations in dealing with discovered artefacts).
- (b) However, in some circumstances, the private party may be required to carry the delay risk in respect of discovery of artefacts for a specified period before being entitled to Relief or Compensation. This is particularly the case if there is a high likelihood of artefacts being discovered. Whether the private party will be required to carry this risk - and the length of any specified period - will be considered on a project-specific basis depending on government's assessment of the nature of the site, the likelihood of the event occurring and the value-for-money obtainable if the private party prices the risk of such an event occurring.

5.2.4 Property in artefacts

All artefacts discovered on or under the surface of the site will, as between government and the private party, be the absolute property of government.

6. Planning and other approvals

Principle

The allocation of responsibility for obtaining planning approval as between government and the private party and the nature of the approval to be obtained differs between jurisdictions. However, government will be responsible for ensuring that use of the land is permitted under the relevant planning scheme.

The private party is responsible for obtaining and complying with all other site-based approvals (at its own cost).

6.1 Commonwealth approvals

Subject to any approval or other determination under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) obtained for government's master plan,¹⁶ the private party is responsible for obtaining all relevant Commonwealth approvals and bears the risk of delay occasioned by legal challenges to the approvals.

6.2 State and Territory planning approvals

- (a) All jurisdictions have their own planning legislation, as well as other planning policies and instruments. Jurisdictions will accept different obligations and risks based on the particular planning regimes applicable in their jurisdiction and depending on the unique circumstances of each project.
- (b) Notwithstanding paragraph (a), government will ensure that use of the land for the project is permitted under the relevant planning scheme. Where the use is not already in existence, or not permitted by the relevant scheme, government will assume the risk of amending the scheme to ensure that the proposed land use is permitted by applicable planning Laws.

6.3 Other site approvals

- (a) Other site-based approvals such as licences, permits and other consents under various legislation are the responsibility of the private party.
- (b) Similarly, obtaining any necessary industry accreditation is the responsibility of the private party.

6.4 Compliance

The private party must, at its own cost, comply with the requirements of all approvals.

¹⁶ See section 4.1.2 of Chapter 4 (Environmental issues and Site Conditions).

7. Site access

Principle

Where government delivers the site for the project, third party use of the site may continue. The private party is primarily responsible for ensuring that it has the necessary access to the site to enable it to deliver the project, although government may, in some cases, where there is continuing third party use or access that will be otherwise interrupted on an unpredictable basis, negotiate a base case access regime for inclusion in the project agreement.

Government will also retain rights of access sufficient to exercise its rights under the project agreement.

7.1 Availability

Government will, if necessary, exercise its powers (including compulsory acquisition) to deliver the site for the purposes of the project and will bear the costs and risks of the acquisition process.

7.2 Third party occupants

7.2.1 Impact on private party

Although government may deliver the site for the project, there may be other parties that are co-located on, or otherwise have access rights to, the site and whose interests may impinge on the private party's ability to access the site to carry out the works or deliver the Contracted Services.

7.2.2 Access regime

- (a) Consistent with the allocation of design, construction, commissioning and operations risk to the private party, government will generally require the private party to negotiate and implement (and therefore take the risk on) an access regime necessary to enable it to carry out the works and deliver the Contracted Services in accordance with the project agreement.
- (b) However, before going to the market, government will, on a project by project basis, give due consideration to the importance and complexity of the access regime, the identity of the third parties (e.g. whether access is dependent on government related entities) and any timing constraints and other barriers to the private party's ability to negotiate a commercially acceptable access regime with the relevant third parties (particularly during the bidding phase) for inclusion in the Project Brief.
- (c) The base case access regime will be treated analogously to a Site Conditions report,¹⁷ in that government takes no risk of third party compliance with any such regime (notwithstanding that it may have negotiated that regime) and government will not warrant the adequacy or completeness of the regime. The onus will be on the private party to satisfy itself that the proposed access arrangements are adequate for delivery of the project or, if it is not so satisfied, to propose and negotiate (directly with the third parties) additional access rights sufficient for its requirements.

¹⁷ See section 4.4.3 of Chapter 4 (Environmental issues and Site Conditions).

7.3 Government access and protection of other parties

7.3.1 Government access

The private party must provide government with access to the site during construction at all reasonable times to the extent necessary to enable government to exercise any of its rights or perform any of its obligations under the project agreement.

7.3.2 Protection of other parties

With respect to other parties on or adjacent to the site, the private party must:

- (a) provide all things and take all measures necessary to protect and ensure the safety of people and property;
- (b) avoid or minimise unnecessary interference with the passage of people and vehicles and the operations or activities carried out of, on, or from areas adjacent to the site;
- (c) prevent nuisance and unreasonable noise, dust, vibration and disturbance (including preventing such matters that would affect the project facility or areas and activities adjacent to the facility, beyond what is inherent in the carrying out of the works or provision of the Contracted Services); and
- (d) unless required for purposes of public health or safety, not interfere (in so far as compliance with the project agreement permits) with the free movement of traffic into and out of, adjacent to, around, on or about the site or block or impair access to any premises.

7.4 Utilities

7.4.1 Interface

Utilities are a special instance of third party site occupants giving rise to site availability issues. Management of the interface between the implementation of the project and utilities is generally a matter for the private party.¹⁸ However, in some jurisdictions, government may consider taking back limited interface risk.

¹⁸ Government will grant Relief where a utility provider fails to carry out works or provide a utility service. See further section 16.1(e)(iii) of Chapter 16 (Relief Events).

8. Tenure

Principle

Government will generally own the project site and grant the private party licences for construction and operation. However, if the private party can demonstrate it is more appropriate, given the project structure, and represents better value for money, jurisdictions may grant a lease for the operating period (which will be subject to a government right of access through a sub-lease or non-exclusive licence).

The term of any lease, sub-lease or licence will generally align with the term of the project agreement.¹⁹

8.1 Ownership

For most projects, land will be in government ownership. This facilitates the transfer of control of the project assets to government at the end of the contract term and underpins government's Step-in Rights under the project agreement.²⁰

8.2 Construction and Operating licence

8.2.1 Grant of licence

Government will often procure the grant to the private party of a non-exclusive licence or licences to use, and permit any construction sub-contractor or operating sub-contractor to use, the site during the contract term on the following terms. Where possible, government will try to grant an exclusive licence for the areas in which construction activity is occurring during the period of construction.

8.2.2 Terms of licence

- (a) The licence will be for the sole purpose of giving the private party and its sub-contractors sufficient rights of access to enable them to carry out the project works (construction and any associated demolition and earthworks) and provide the Contracted Services.
- (b) Where a lease is granted during the operating term, the licence will terminate upon the grant of the lease or upon earlier termination of the project agreement.
- (c) Where more than one licence is granted, each licence is interdependent so that a breach of one licence is deemed to be a breach of each of the other licences.

8.2.3 Access to licensed area

The private party is responsible for gaining access to and from the licensed area and is not entitled to any claim against government in connection with access or failure to gain, or delay in gaining, access to the licensed area.

¹⁹ This principle relates to the tenure of the core project. To the extent there is a related commercial development (such as hotels, cafes, office space etc), appropriate tenure arrangements will be considered on a project-specific basis and may include leasing arrangements.

²⁰ See Chapter 27 (Step-in).

8.3 Granting of leases in special cases

8.3.1 Nature of tenure

- (a) Where the private party can demonstrate it is more appropriate given the project structure and represents better value for money for government to grant a lease during the operating term (as opposed to a licence), then jurisdictions may choose to grant a lease on the Full Service Commencement Date. The private party will then immediately grant a sub-lease back to government for access to the leased area and use of the plant, equipment, furnishings and fittings.
- (b) Any lease will be subject to reservations enabling government to access and use the facility to deliver the core services and for any other lawful purpose.²¹ Unless otherwise specified, the lease will be limited to use of the land solely for the purpose of delivering the facility in accordance with the project agreement.

8.3.2 Deemed lease

Where a lease is granted, the parties will agree to be bound by the lease or sub-lease from the Full Service Commencement Date, regardless of whether execution of the lease or sub-lease by the government party is formally complete.

8.3.3 Effect of early termination of the project agreement

If either party terminates the project agreement prior to the Full Service Commencement Date, then the private party ceases to have any entitlement to call for the lease or other instrument conferring access for operations and has no further interest in or entitlement (whether legal or equitable) to the land.

8.4 Other licences or sub-leases

The private party may be granted power during the operating term to grant sub-leases and licences over areas leased or sub-leased to it, where the grant of the sub-lease or licence is expressly contemplated in the private party's obligations under the project agreement. The terms of any sub-lease or licence may be subject to government approval, which approval may be deemed to be given in certain circumstances (i.e. where the leases meet certain threshold requirements).

²¹ The rights of government under the lease and sublease should be drafted as broadly as possible to ensure that it may use and act in respect of the facility without the need to obtain the private party's consent.

9. Design

Principle

The private party is responsible at its own cost, for designing the facility so as to be fit for the intended purposes. Government has the right to comment on the detailed design documents and the private party must amend the design documents to the extent that they do not meet the requirements of the project agreement.

9.1 Design obligations

- (a) The private party must design the facility so that the facility (when complete) will be fit for the intended purposes.
- (b) The private party is not relieved of any of its design obligations by sub-contracting any of the design works to a design consultant. Issues associated with sub-contracting are dealt with in Chapter 28 (Sub-contractors).

9.2 Fitness for purpose warranty

- (a) In accordance with section 9.1, the private party will provide a warranty that the facility, as designed and constructed, is (and will be during the contract term) fit for the intended purposes.
- (b) Jurisdictions may, in order to provide further objectivity, seek to limit the fitness for purpose test against the purposes and uses specified in, or reasonably inferred from, the Functional Brief and the project agreement having regard to the Laws, technology, Quality Standards and the then current and intended use of the facility as at the Date of Completion. The private party must ensure that the facility continues to be fit for purpose (in accordance with that test) for the duration of the term.
- (c) The approach in paragraph (b) recognises the need (given the requirement for a fitness for purpose warranty) for the Functional Brief to adequately describe government's required outputs and disclose relevant operating protocols.

9.3 Mandatory design guidelines

The private party must comply with any mandatory design guidelines as set out in the Output Specifications.

9.4 Design development process

9.4.1 Basic design development

The private party must develop the basic design proposed in its bid (and set out in the project agreement) in accordance with an agreed consultative process and submit all final design documentation (and any amendments) to government for comment.

9.4.2 Government comment

- (a) Government (through the Project Director²²) will have the right, within specified periods, to comment on the detailed design documentation (and the accompanying drawings and specifications) submitted by the private party to the extent that they are not consistent with the Design Requirements set out in the project agreement.
- (b) The private party must amend the design documentation to the extent that it is not consistent with the Design Requirements and other requirements of the project agreement, or where government believes that the design documentation would affect the private party's ability to deliver the Contracted Services or government's ability to carry out its core services as intended / required. Where this is the case, government and the private party must confer (at their own cost) to address government's comments and agree necessary amendments.
- (c) Construction on the basis of the design documentation cannot occur until the specified period for comment by government has expired.

9.4.3 Resolution of disputes

If the parties cannot agree on the necessary amendments to the detailed design documentation, or the private party disagrees with government's comments, the matter may be referred to an independent expert for resolution.

9.4.4 Government-initiated Modifications

If the design complies with the Design Requirements and other requirements of the project agreement, but government for its own reasons seeks a variation, this will constitute a government-initiated Modification.²³

9.4.5 Effect of government participation

Government has no obligation to comment or identify errors, omissions or inaccuracies in the design documentation. Neither government's provision of any comments in respect of the private party's design, nor its failure to do so, nor its participation or that of the independent expert in the design development process, relieves the private party of its design obligations (including warranties) or constitutes a representation by government as to the compliance of the design with the Design Requirements.

²² See discussion in section 10.5.4 in Chapter 10 (Construction and Completion) as to whether an independent completion certifier will be appointed to monitor and assess design preparation. In an accommodation project, where the private party is providing functional space from which government will deliver its core services, government needs to be confident of the suitability of the design. Accordingly, the Project Director will monitor the design development on government's behalf. In linear infrastructure projects, where demand risk is transferred to the private party and there is a less significant interface risk, there is more flexibility to allow for the appointment of an independent completion certifier.

²³ See Chapter 19 (Modifications).

10. Construction and Completion

Principle

The private party is responsible, at its own cost, for constructing the facility in accordance with the Output Specifications and other requirements of the project agreement and within the required time period.

10.1 Construction obligations

The obligations set out in section 9.2 of Chapter 9 (Design) as to fitness for purpose also apply to construction of the facility. The private party is not relieved of its obligations and liabilities under the project agreement by the private party sub-contracting the performance of any works.²⁴

10.2 Construction updates and reports

10.2.1 Provision of construction progress reports

During the construction phase, the private party must provide government with written reports outlining the progress of the works by reference to the construction program. The form of the construction program will be agreed with government, based on an indicative program prepared by the private party prior to contract execution.

10.2.2 Effect of government involvement

The provision of progress reports or updated construction programs and their acceptance (or otherwise) by government does not relieve the private party of its construction and Completion obligations.

10.3 Project committee and meetings

10.3.1 Composition of the project committee

During the construction period, a project committee must be established. Although it may vary from project to project, typically this committee will comprise two representatives of the private party, two representatives of government and the Project Director (who will be the chairperson).

10.3.2 Role of the project committee

The project committee will meet regularly to discuss any matters relating to the project, including issues of public concern, design and construction issues and community and media relations issues.

²⁴ Issues associated with subcontracting are dealt with in Chapter 28 (Sub-contractors).

10.3.3 Authority of the project committee

The project committee will not have any legal responsibility to either the private party or government and will not have power to require either party to act or refrain from acting in any way. The committee's decisions will not affect the rights or obligations of either the private party or government under the Project Contracts.

10.3.4 Other meetings

The private party must ensure that the Project Director and his representatives are afforded the opportunity to attend site meetings in respect of the works.

10.4 Inspections

10.4.1 Government's right to inspect and test

- (a) Government (and any person it authorises) has the right to enter, inspect and test any part of the works during the construction phase and to inspect any drawings, documents, test results, samples and specifications used in relation to such works. Except in the case of an emergency (where no prior notice is required), government must give reasonable prior notice. The private party must provide all reasonable assistance required by government.
- (b) When exercising its right to enter, inspect and test, government must not cause any unnecessary disruption to the private party, any sub-contractor or any other authorised user of the site and will comply with the reasonable safety and security requirements of the private party or the relevant construction sub-contractor that are notified to government by the private party.
- (c) The cost of any government inspection and testing will be borne by government unless the inspection or test shows that the design and/or construction is not consistent with the Output Specifications or other requirements set out in the project agreement.

10.5 Completion

10.5.1 Completion

- (a) For Completion to be achieved, a number of criteria will need to be met, including:
 - (i) the works must be completed except for minor defects²⁵ and the facility must be fit for the intended purposes;
 - (ii) all commissioning tests must have been carried out in accordance with the Output Specifications and the commissioning plan;²⁶
 - (iii) all consents, approvals, authorisations and certificates required for the facility to be occupied and used for its intended purposes (including a certificate of occupancy) must have been obtained and complied with;
 - (iv) all rubbish, construction machinery, equipment and materials must have been removed from the site;

²⁵ See discussion in section 10.6.

²⁶ The Completion and commissioning tests and generally the criteria for determining whether Completion has been achieved will be agreed as part of the project agreement.

- (v) the private party must have provided government with all material documents and information (including all as-built documentation and operating manuals);
 - (vi) the private party must have provided copies of relevant insurance policies; and
 - (vii) all other tests and requirements required to satisfy the completion certifier²⁷ that operations (in accordance with Output Specifications) can commence must have been satisfied.²⁸
- (b) Within a specified period after the completion certifier considers that Completion has been reached, the completion certifier must issue a 'Certificate of Completion' and advise of any minor defects remaining outstanding (refer to section 10.6.1). If the completion certifier does not consider that Completion has been achieved, he/she must promptly notify the private party and government.
- (c) Jurisdictions may, depending on the nature of the project, implement a two-stage process for Completion, consisting of Technical Completion and Commercial Acceptance. This approach is recommended where:
- (i) a significant period of time is required technically to test the functionality of the facility once it is completed;
 - (ii) there is significant training of government staff required to be undertaken by the private party before the facility is operational and prior to operations; or
 - (iii) there are a large number of transitional activities that need to be undertaken before the facility is operational.
- (d) Where this two-stage Completion process is used, as the first stage, Technical Completion must be certified as having occurred. Generally this will require meeting the criteria set out in paragraphs (a)(i) to (a)(iv) above. A second and final commissioning period will then commence which will often include training, transition activities and further testing of the functionality of the facility and the meeting of the criteria set out in paragraphs (a)(v) to (a) (vii) above. Commercial Acceptance will be certified on the successful completion of these activities and the satisfaction of any other criteria specified in the project agreement.
- (e) Certification of Completion will not of itself be evidence that any works have been carried out in accordance with the project agreement.

10.5.2 Commencement of payment

Payment of the service fee will commence (assuming full service delivery) from the later of the date the Certificate of Completion is issued and the Date for Completion.²⁹

²⁷ See discussion in section 10.5.4. This role may be carried out by the Project Director or an independent completion certifier engaged by government and the private party.

²⁸ Projects involving phased Completion may require additional tests to be satisfied for Completion to be reached, such as equipment or people having been relocated from an existing site. In addition, the Completion procedure for projects involving government furnished equipment will need to allow for the installation and testing of such equipment. Risk allocation issues in respect of such equipment will be considered on a project by project basis.

²⁹ Government may, in limited circumstances, consider early payment (i.e. where Completion occurs prior to the Date for Completion). See also section 14.4 of Chapter 14 (Payment provisions) with respect to incremental payment of the service fee for phased projects.

10.5.3 Failure to achieve Completion

- (a) An Event of Default (allowing the private party a cure period) will occur if: ³⁰
- (i) the private party fails to reach Completion by the Date for Completion; or
 - (ii) an independent expert engaged by government considers (on or after a specified period after the site is made available to the private party) ³¹ that there is no reasonable prospect that the private party will achieve Completion by the Date for Completion.
- (b) Further, if the facility does not become available by the Sunset Date, or if an independent expert determines (on or after a specified period after the site is made available to the private party) that there is no reasonable prospect that the private party will achieve Completion by the Sunset Date, ³² this will constitute a Default Termination Event.

10.5.4 Completion certifier

- (a) Depending on the project, either the Project Director will perform the function of completion certifier or an independent completion certifier will be engaged to certify Completion. Ultimately, the nature of the project will affect the costs and benefits of utilising an independent completion certifier rather than relying on design and construction monitoring and assessment by the Project Director. Factors to be considered include the following:
- (i) whether engagement of an independent completion certifier could minimise the risk of a party disputing a decision, given the completion certifier's independence and technical expertise;
 - (ii) requirements of the private party's financiers (noting that government will not agree to financiers alone appointing the completion certifier);
 - (iii) the cost and time consequences of involving an additional party in the process;
 - (iv) from government's perspective, minimising the risk of take back of design and construction risk;
 - (v) the nature of the criteria against which Completion is to be certified (i.e. the extent to which they are technical or more government specific); and
 - (vi) government insistence on assessment by the Project Director where there would be significant residual risk to government if the private party fails to adequately design and construct the facility.

³⁰ See section 24.1(c) of Chapter 24 (Default). Where a two-staged Completion process is used, government will usually treat a failure to reach Technical Completion by the Date for Technical Completion as a separate Event of Default. However, it may consider waiving this requirement (thereby limiting the Events of Default to a failure to meet Commercial Acceptance by the Date for Commercial Acceptance) in circumstances where achievement of Commercial Acceptance is conditional on the private party having provided government with a sufficient period (determined by government on a project-specific basis) to transition into and test the functionality of the facility.

³¹ This period will be determined on a project-specific basis having regard to the expected construction period.

³² The independent expert will be prevented from making such determination if the private party is complying with an agreed cure plan arising from such a default.

- (b) Where there is a two-staged Completion process, Technical Completion may be certified by an independent completion certifier and Commercial Acceptance will be certified by the Project Director, given that the majority of criteria for the achievement of Commercial Acceptance is non-technical. In such circumstances, however, the project agreement may still require some input from the independent completion certifier in determining whether Commercial Acceptance has been achieved where any criteria are technical in nature.
- (c) If an independent completion certifier is used, then he/she will be appointed jointly by government and the private party.
- (d) Determinations and decisions by the completion certifier will generally be final and binding on both parties, however, jurisdictions may consider, on a project-specific basis, categories of decisions which are subject to appeal (e.g. questions of law or above a specified cap).

10.6 Defects

10.6.1 Minor defects

- (a) Completion is not achieved (and payment of the service fee does not commence) until all identified defects have been rectified. The only exceptions are minor omissions or defects which:
 - (i) individually, or in aggregate, do not prevent the facility from being used for its intended purposes; and
 - (ii) although they cannot be immediately rectified, can be rectified within an agreed period following commencement of operations without having an adverse effect on the ability of government to provide the core services or of the private party to provide its Contracted Services.
- (b) Any deferred minor defects are to be rectified as directed by government in accordance with a rectification plan (which will include appropriate timeframes for completion of the rectification works, determined on a project-specific basis) to be agreed by the parties and the completion certifier as a condition of Completion. Failure to perform the rectification works in accordance with the agreed rectification plan will have financial consequences (e.g. a reduction in the service fee until the rectification works are completed, or retention of the construction bond beyond the expiry of the defects liability period until the rectification works are complete).

10.6.2 Defects liability

- (a) In some jurisdictions, there is a specified limited defects liability period during which the private party must rectify all defects which exist at Completion³³ or which are discovered during the specified defects liability period. In these jurisdictions, it is intended that the defects liability period will operate in addition to the private party's maintenance obligations under the Services Specifications.
- (b) In other jurisdictions, the private party will have an obligation to rectify all defects which exist at Completion, or which are discovered during the operating term.

³³ Defects other than minor defects referred to in section 10.6.1 will have been rectified as a condition precedent to Completion.

- (c) In each case, where the private party fails to rectify defects, government may either direct rectification by the private party (in which case a further defects liability period will apply to such defect, if paragraph (a) applies) or may itself rectify (or have a third party rectify) such defects at the private party's cost. Such amount shall be a debt due and payable by the private party to government. Government may set off such amount against amounts owing to it or make a demand for such amount under any performance bond provided in respect of the project.
- (d) Nothing in section 10.6.2 will affect the private party's obligations to deliver the Contracted Services to the Services Specifications or government's right to abate payments.

11. Protection against late or insufficient service delivery

Principle

Where non-payment or abatement of the service fee is insufficient to compensate government for costs and losses incurred as a result of late or insufficient delivery of the facility or service delivery, government may require additional protections from the private party such as liquidated damages, performance bonds or parent guarantees.

11.1 Liquidated damages

11.1.1 Value for money

Section 3.3. of Chapter 3 (Contract term) sets out the circumstances in which government may seek the payment of liquidated damages for delay in delivery of the facility.

11.1.2 Genuine pre-estimate

The rate of liquidated damages payable in any project must be a genuine pre-estimate of the costs and losses government is likely to incur from the delay in service delivery. Otherwise the amount may be judged to constitute a penalty and will not be enforceable. Liquidated damages may be reduced where the private party provides adequate temporary arrangements (e.g. temporary accommodation in the case of an accommodation project).

11.1.3 Sole and exclusive remedy

Where payable, liquidated damages will be government's sole and exclusive remedy for delay.³⁴ However, they do not affect or limit government's legal rights in relation to aspects or consequences of an event other than delay costs.

11.1.4 Security for liquidated damages

Government generally requires the private party to provide security for liquidated damages through bonds or guarantees issued either by the private party or its sub-contractors.

³⁴ However, where delayed Completion also reduces the operating term, government will still be entitled to retain the benefit of any reduced service payments in addition to the liquidated damages.

11.2 Performance bonds³⁵

11.2.1 Performance bond during the construction phase and defects liability period

- (a) For value for money reasons, government may elect not to seek a direct performance bond from the private party for the construction phase (subject to section 11.3(c)) following). Instead it may require the private party to procure a performance bond (issued in the private party's favour) from the construction sub-contractor, guaranteeing the construction sub-contractor's construction obligations.³⁶ This would generally, in any event, be a requirement of the private party's financiers who will have security over the bonds.
- (b) Government may not even mandate the requirement for performance bonds from the construction sub-contractor, but will evaluate bidders on the basis of the overall security provided to support the private party's obligations under the project agreement.
- (c) Where government requires the private party to procure a performance bond from the construction sub-contractor, government must be satisfied that its interests are adequately addressed and protected by any such bond.
- (d) As part of the Project Brief, government will identify its minimum bonding requirements including in respect of:
 - (i) the quantum, credit rating and duration of the bond; and
 - (ii) the bases upon which the bond can be drawn (including requirements that government be notified when a call is made on the bond).
- (e) Government's minimum requirements will seek to ensure that the interests of the private party, financiers and government are appropriately aligned.
- (f) The amount of any performance bond, and the length of the period for which any such bond is required, will need to be considered carefully for possible value for money implications. The quantum of the bond will reflect the project features but will generally be a percentage of the design and construction contract price. The amount of the bond may be reduced following Completion (by an amount which appropriately reflects the fact that the project has moved beyond the period with the greatest level of construction risk). However, the bond will remain on foot for a specified period after Completion (at a reduced amount) to secure the private party's performance of its defects rectification obligations.
- (g) Any performance bond must be unconditional and irrevocable and provided (or backed) by a financial institution regulated by the Australian Prudential Regulation Authority.
- (h) The required form of the bond will be set out in the project agreement and must not be amended without government's approval (such approval not to be unreasonably withheld).

³⁵ Government's strong preference is for bank bonds. However, in limited circumstances government may consider accepting insurance bonds subject to the creditworthiness of the insurance company and government being satisfied with the enforceability of its rights under the bond and with the process for recovering funds in the event that it makes a demand.

³⁶ Where government relies on the sub-contractor's performance bond, government may require the financiers' direct agreement to enable government to claim under the bond to rectify any default by the construction sub-contractor, to the extent that the private party or the security trustee (on behalf of the financiers) fails to rectify the default. Government's ability to claim will be subject to the financiers' right to access the bond.

11.2.2 Performance bond during the operating period

- (a) Although government may consider obtaining an operating term bond directly from the private party in certain circumstances, this will as a general rule not be requested by government.
- (b) The comfort government requires that the private party will deliver its Contracted Services will generally be provided by the abatement regime, government's termination and Step-in Rights on default and the fact that any amount of compensation on termination will be reduced by the cost to government of remedying defects and/or appointing a new contractor and collateral warranties. However, where government has concerns as to the creditworthiness of the operational sub-contractors, or their ability to perform their obligations, government may require the private party to procure a performance bond or parent company guarantee in respect of the operating sub-contractor's obligations (on similar terms to the construction sub-contractor performance bonds).
- (c) Alternatively, although government may not require performance bonds or parent company guarantees at project commencement, it may reserve the right to require that such bonds or guarantees be provided at any time during the operating term when a repeated or severe service delivery failure occurs.

11.3 Parent guarantees

- (a) For value for money reasons, government generally does not seek performance guarantees from the parent companies of the private party or of the material sub-contractors. However, this will depend on whether the commitment of a parent company is an important element in the selection of the private party or a material sub-contractor.
- (b) Generally, government prefers that performance bonds (whether bank guarantees or insurance bonds) be given by sub-contractors (in favour of the private party) as they can be called upon on clearly defined terms and their pricing is more transparent.
- (c) Where government is concerned with the creditworthiness of the sub-contractor (and its parent, where a parent guarantee is given) it may require performance bonds directly from the private party in addition to those provided by the sub-contractor.

12. Service requirements and Services Specifications

Principle

Payment is based on private party delivery of the Contracted Services to the standards specified in the Services Specifications. Payment will be abated to the extent the Contracted Services are not delivered to the Services Specifications.

12.1 Provision of Contracted Services

12.1.1 The Contracted Services

The Contracted Services will differ depending on the nature of the project. However, in an accommodation based, core services model they will likely include the accommodation services (including maintenance), together with any or all of utilities management, cleaning and catering, security, car parking, help desk, grounds maintenance and pest control services. In addition, government will attempt to include as many ancillary services as possible to ensure that the overall project provides value for money and is attractive as a bundled project to potential bidders. Accordingly, government will have regard to other services which it may require the private party to carry out, including:

- (a) waste management;
- (b) furniture, fixtures and equipment upgrade, maintenance and repair;
- (c) materials management;
- (d) courier and mail;
- (e) traffic management;
- (f) tenancy management; and
- (g) other appropriate sector-specific services.

12.1.2 Delivering services to specification

- (a) Throughout the operating term, the private party must (at its own cost) provide the Contracted Services:
 - (i) in accordance with the Services Specifications (noting that the Services Specifications may, in part, require compliance with mandatory requirements of government for design and construction);
 - (ii) in a manner consistent with the asset management plan, the Output Specifications (in some jurisdictions only) and the operating and quality assurance manuals that the private party is required to prepare for the project;

- (iii) in accordance with industry best practice, all relevant policies and procedures and applicable Laws, approvals and specified quality and safety standards;³⁷
 - (iv) so that the facility remains at all times during the operating term fit for its intended purposes (as described in Chapter 9 (Design)); and
 - (v) in coordination with the delivery by government of the core services and the contemplated possession and use of the facility by government (and so as not to disrupt government in the provision of the core services).
- (b) The private party must warrant that it will at all times provide the resources, expertise and experience to maintain the facility and provide the Contracted Services in accordance with the above requirements.

12.2 Services Specifications

12.2.1 Content of the Services Specifications

- (a) The content of the Services Specifications will depend on the nature of the project and will be tailored and structured to reflect the particular needs of government. The Services Specifications will be objective, measurable and reasonable, and not immaterial in the context of the Contracted Services as a whole. They will generally be output based, but in some cases, it will be necessary to nominate performance and project inputs, particularly in areas where there is an absolute necessity for a certain specification to be met (e.g. infection control, door locks for prison cells, meal sizes and quality).
- (b) The Services Specifications will refer not only to the existence and accessibility of the asset (such as whether a prison cell or a classroom has been built and is available for use), but will include the delivery of 'soft services' which are integral to the operation of the facility and other Contracted Services. For example, a classroom or a prison cell must have a minimum level of lighting and temperature control and be clean. Adequate levels of catering, security and technology services may be required for the facility to be 'available'.
- (c) The Services Specifications will generally consist of:
 - (i) generic Services Specifications, which set out how the Services Specifications are to be used, generic requirements of government that apply across all Contracted Services and government's requirements for Contracted Services that are not associated with the physical availability and performance of the assets, such as management, reporting and monitoring by the private party during the operating term ("**General Services Specifications**"); and
 - (ii) more specific Services Specifications that apply to the delivery of particular Contracted Services, such as maintenance, security, cleaning, pest control and waste management ("**Specific Services Specifications**").

³⁷ Certain policies applicable to the project will be included in the Project Brief, but the private party will be expected to comply with all policies to which the project is subject.

12.2.2 General Services Specifications

General Services Specifications may be set for the following key performance areas:

- (a) management - that adequate management, reporting, communication and safeguarding systems are in place, that there is appropriate operating committee attendance at committee meetings³⁸ and that there is adequate reporting of performance against KPIs;
- (b) staff and development - that there are no staff shortages and there is adequate staff training and development;
- (c) policy and strategy - that there is compliance with all Laws, Good Industry Practice (as appropriate), prescribed health policies, prescribed work policies, procedures and practices and all other applicable quality standards (including appropriate environment and emergency management systems);
- (d) liaising and resources - that there is adequate liaising between parties and information management and that the private party is providing adequate resources (equipment and consumables); and
- (e) Performance Monitoring System - that the private party responds to and rectifies Service Failures within specified periods.

12.2.3 Specific Services Specifications

- (a) Specific Services Specifications set out the detailed requirements for each particular Contracted Service and the additional requirements that need to be met when delivering such services, including that:
 - (i) accommodation is provided during prescribed periods;
 - (ii) all repair requests are addressed within set times;
 - (iii) fire safety systems and equipment are appropriately maintained;
 - (iv) lifts operate as intended;
 - (v) appropriate equipment testing is undertaken; and
 - (vi) cleaning is undertaken when and to the standard required.
- (b) With respect to maintenance, the Specific Services Specifications will specify a performance standard which will nominate the minimum maintenance and condition standards to be met. The private party will be granted flexibility in choosing a solution to meet these standards.³⁹ Government will not dictate when work is to be carried out, although it will be entitled to refuse approval or require amendment where work may disrupt the provision of government's core services, or does not otherwise meet the requirements of the Services Specifications and project agreement.
- (c) The Contracted Services must be provided taking into account and so as to minimise interference with the delivery of the core services by government.

³⁸ See section 13.4 of Chapter 13 (Performance monitoring and review).

³⁹ Government may require the private party to record its maintenance solution in an asset management plan which must be approved by government and complied with by the private party. See section 12.9.1 below.

12.3 Service Failures

12.3.1 Performance parameters for assessing delivery of Contracted Services to the Services Specifications

In respect of each Contracted Service, performance parameters will be set for determining whether the performance standards specified in the Services Specifications have been achieved. There will be set periods over which each performance parameter will be assessed.

12.3.2 Service Failure

Where a Contracted Service is not provided in accordance with the Services Specifications, a 'Service Failure' will have occurred except where such failure is the result of:

- (a) carrying out planned maintenance or refurbishment (relief from abatement, however, may only be given to the extent the planned maintenance or refurbishment is carried out in accordance with an agreed asset management plan); or
- (b) an approved Modification.

12.3.3 Types of Service Failure

- (a) Service Failures are essentially divided into two categories, Availability Failures and Quality Failures.
- (b) Availability Failures are failures that render one or more functional areas or units of the facility unavailable for use in accordance with its intended function. 'Unavailable' in this context means either that government is unable to use the area because of the failure or can use it but not at the specification required.
- (c) Some jurisdictions also include a further category of Service Failure, called an 'Incident Failure', which occurs when one or more functional areas or units of the facility is affected, but where this does not result in the functional area or unit being unavailable for use in accordance with its intended function.
- (d) Quality Failures are failures that are not referable to a specific area in or unit of the facility. In some jurisdictions, Quality Failures will accumulate failure points. The number of failure points accumulated will depend on the severity of the failure.

12.3.4 Availability Failures and Incident Failures - response and rectification times

- (a) An Availability Failure or Incident Failure will be categorised according to its severity. Its categorisation will determine the response and rectification times given to the private party in respect of that failure. The help desk (which is to be notified of each Service Failure) will determine the initial categorisation of an Availability Failure or Incident Failure. Government may alter the categorisation, and any such re-categorisation will stand pending the resolution of any dispute.
- (b) Where the private party disputes the re-categorisation of an Availability Failure or Incident Failure, it may refer this to the independent expert for resolution. If government's re-categorisation is subsequently determined to be incorrect, the private party will be compensated for any reduction in the service fee.

12.3.5 Reporting Failures

- (a) The service fee will also be abated separately for Reporting Failures. Reporting Failures occur where the private party has incorrectly reported a Service Failure or incorrectly calculated the abatement attributable to a Service Failure.
- (b) A Repeated Failure occurs where the same Service Failure or substantially the same Service Failure occurs on more than a specified number of occasions over a specified period.

12.3.6 Repeated Failures

- (a) A Repeated Failure occurs where the same Service Failure or substantially the same Service Failure occurs on more than a specified number of occasions over a specified period.
- (b) Where Repeated Failures are in respect of Availability Failures, Incident Failures or Quality Failures that occur within specified consecutive periods, this may, in certain jurisdictions, lead to an escalation of abatement.

12.4 Performance monitoring

The private party's delivery of the Contracted Services (in accordance with the Services Specifications) will be monitored and any failures will be reported in accordance with the procedures set out in Chapter 13 (Performance monitoring and review).

12.5 Abatement and default

12.5.1 Abatement

- (a) The service fee will be abated where an Availability Failure, Incident Failure, Quality Failure, Repeated Failure or Reporting Failure occurs.
- (b) In some jurisdictions, the service fee will not be abated if the failure has been caused by a Relief Event, although the service fee may be adjusted for costs not incurred by the private party.
- (c) The amount abated for an Availability Failure or Incident Failure will depend on:
 - (i) what unit and area of accommodation (or other relevant indicator) is affected;
 - (ii) the time taken to rectify the failure following expiry of the rectification period; and
 - (iii) the categorisation of the Availability Failure or Incident Failure.
- (d) The more critical the affected unit and area to the provision of the Contracted Services, the higher the weighting given to that unit/area and the greater the abatement from the service fee for a failure. The more critically classified failure events will have shorter response and rectification times and, therefore, more frequent deductions for failure.
- (e) The level of abatement applied for Quality Failures will depend on the severity of the failure and how long it is sustained (as appropriate) and, in certain jurisdictions, how often it is repeated. The more severe the failure, the greater the abatement. A minimum number of failure points may be accumulated prior to triggering a financial abatement.

12.5.2 Overlap of Service Failures

- (a) If an event simultaneously constitutes an Availability Failure and Incident Failure, the service fee will be abated for an Availability Failure.
- (b) If an event simultaneously constitutes both an:
 - (i) Availability Failure or Incident Failure; and
 - (ii) Quality Failure,the service fee will be abated for both.
- (c) Where the same event causes more than one Availability Failure in the same functional unit, the service fee will be abated only for the Availability Failure that causes the greater abatement.
- (d) Where a Service Failure results in more than one Quality Failure, it will be deemed to be the Quality Failure with the highest number of points.

12.5.3 Temporary measures

- (a) The service fee will not be abated (or will be abated to a lesser extent) to the extent that the private party has adopted appropriate temporary measures, acceptable to government, to ameliorate or mitigate the consequences of an Availability Failure or Incident Failure that has not been permanently rectified within the specified period.
- (b) For an Availability Failure, the level of abatement may also be adjusted to reflect the extent to which government continues to use the facility although it is technically not available.

12.5.4 Default and termination

Refer to section 24.1(b)(i) of Chapter 24 (Default) for a discussion on the level of Service Failures and abatements that will result in a default leading to termination. Service Failures caused by a Relief Event for which the private party has been given Relief will be excluded for the purposes of determining whether an Event of Default or Default Termination Event has occurred.

12.6 Delivery of core services does not relieve the private party of its contractual obligations

The private party is not relieved of its obligations by the use and occupation of the facility by government (as contemplated by the project agreement). The project agreement must recognise the primacy of, and protect, the core services.

12.7 Utility services

- (a) The private party is responsible (at its own cost) for the continuous supply of utility services to the facility in accordance with the specified standards.
- (b) Generally, government will take the risk on the unit price of utilities. The allocation of volume risk will be determined on a project by project basis, taking into account:
 - (i) Lifecycle Costs for the term of the concession;

- (ii) incentives to build using environmental and energy saving materials and systems;
 - (iii) consideration of which party is in the best position to manage utilities consumption risk;
 - (iv) difficulties in estimating long term consumption risk; and
 - (v) most importantly, value for money for government.
- (c) Depending on the nature of the project, jurisdictions may look to either:
- (i) transfer the full volume risk to the private party for some or all utilities, for example where the core service environment is reasonably predictable, such as in a school or prison or where the private party has a degree of reasonable control over the utility end users (because, for example, of the way it designs the facility or approaches the delivery of the Contracted Services); or
 - (ii) share volume risk above a specified threshold (to be bid by the private party). Jurisdictions may also look to share volume savings on the same basis (i.e. below a specified threshold) if the private party uses less utilities than a baseline expected volume.
- (d) Provide incentive for the private party to design an energy efficient facility, jurisdictions may choose not to cap the private party's exposure.

12.8 Abatement as sole remedy

- (a) In some jurisdictions, in addition to government's abatement rights, the private party will indemnify government for government's claims and losses as a result of a breach by the private party of its obligations under section 12.1.2 to the extent that the amount of the loss exceeds the amount of the abatement. Accordingly, in these jurisdictions, a reduction in, or abatement of, the service fee is not an exclusive remedy for a breach.
- (b) In other jurisdictions, government limits its ability to make a damages claim against, or seek indemnity from, the private party for breach and relies on the abatement regime as its exclusive remedy for which the private party is liable in respect of Service Failures, except those which give rise to a claim or liability for:
- (i) third party injury (including death) or property damage;
 - (ii) loss or damage to, or destruction of, the facility or the site;
 - (iii) costs incurred by government in remedying the breach or default or exercising Step-in Rights; or
 - (iv) reasonably foreseeable economic loss suffered by government or government-related parties (including the facility operator) which is caused by the unlawful or negligent act or omission of the private party,⁴⁰

In each case to the extent that the amount of the loss exceeds the amount of the abatement resulting from such act or omission.

⁴⁰ Depending on the nature of the project and any direct relationships which government has with third parties in relation to the facility, government may carve out all reasonably foreseeable economic loss and not only that which is "caused by the unlawful or negligent act or omission of the private party".

12.9 Maintenance and refurbishment

The private party must maintain and refurbish the facility (at its own cost) as necessary to ensure it delivers the Contracted Services to the Services Specifications.

12.9.1 Asset management plan

- (a) Jurisdictions may require the private party (at its own cost) to maintain and refurbish the facility in accordance with an asset management plan in order to meet the Services Specifications (including ensuring that the assets achieve their full working life).
- (b) If an asset management plan is used, it must provide for all preventative maintenance, lifecycle repair and asset management, replacement and refurbishment necessary during the operating phase to ensure delivery of the Contracted Services to the Services Specifications (including, where relevant, handing the asset back to government in the necessary handover condition). The private party should update the asset management plan regularly to take into account all approved Modifications, together with improvements in best practice and technology and any other matters relevant to the maintenance of the project assets.
- (c) Although the private party may be given some flexibility to vary its asset management plan, it will be limited to the extent necessary to ensure the private party can continue to meet its contractual obligations throughout the contract term. For example, the private party may be permitted to defer scheduled refurbishment works for a limited period.

12.9.2 Funding maintenance and refurbishment obligations

The service fee will include amounts to fund the private party's maintenance and refurbishment obligations. This will generally be reflected in a smooth service payment profile, although, depending on the project's funding arrangements, government may consider a lumpy payment profile.

The service fee will generally be abated to the extent the private party's obligations are not satisfied.⁴¹ On some projects, government may consider exempting the lifecycle/maintenance component of the service fee depending on the project's funding proposal (in particular, the associated reserve costs).

12.9.3 Monitoring performance of maintenance and refurbishment obligations

The private party's performance of its maintenance and refurbishment obligations will be monitored in accordance with the Performance Monitoring System (Chapter 13 (Performance monitoring and review)) and be subject to government's audit rights.

⁴¹ In projects where it is expected that a high degree of technological obsolescence will occur or where major refreshes of facilities will be required, it may be value for money for government to carve out refurbishment obligations from the service fee and benchmark them separately.

13. Performance monitoring and review

Principle

The private party will be required to monitor its performance against the Services Specifications, using a comprehensive performance management methodology.

13.1 Monitoring obligations

13.1.1 Performance Monitoring System

The parties will agree upon a comprehensive Performance Monitoring System ("**PMS**") to monitor, on a timely and effective basis, whether the private party is delivering the Contracted Services to the Services Specifications. The methodology for the PMS will be fully set out in the project agreement. The robustness of this system is an important source of comfort to government that the private party is meeting its obligations.⁴²

13.1.2 Who does the monitoring?

The private party must monitor its own performance (including its compliance with the KPIs and obligations under the project agreement) by means of the PMS, subject to government's rights of review and audit. The performance monitoring must commence on the Full Service Commencement Date.

13.1.3 Performance data warranted

The performance data that result from the application of the PMS (including source information, periodic performance reports, documentation and data created for or by the PMS) must be contractually warranted by the private party as being at all times accurate, complete and correct.

13.1.4 Periodic performance report

The private party must prepare a regular periodic performance report which is delivered to government (generally, through the contract administrator). The relevant monitoring periods will depend on the nature of the project. However, it is usual for performance reporting to occur on a monthly basis and within a set number of days from the end of each month.

This report will provide sufficient information to allow the calculation of the service fee by the contract administrator (or where the service fee is calculated by the private party, to allow confirmation of the calculations by the contract administrator) and will include, among other things, the number of Service Failures in the preceding period, details of each Service Failure and how often it was repeated during that period. An authorised officer of the private party will need to warrant (via a statutory declaration) that, to the best of his/her knowledge and belief, the performance and payment report is accurate.

⁴² Note that this comprises only one component of the broader project and contract monitoring that government should carry out or require the private party to carry out.

13.2 Additional performance monitoring rights

13.2.1 Monitoring rights of government⁴³

Government (through the contract administrator) may also monitor and review the private party's performance and the PMS. Except where costs are payable by the private party, as described in section 13.3.3, such monitoring and review by government will be at government's cost. These additional monitoring rights may include the use of:

- (a) customer satisfaction surveys;
- (b) audit processes;
- (c) scheduled and unscheduled reviews and inspections; and
- (d) feedback from facility users (including, where appropriate, of the core services) as to the adequacy and quality of the facility or the Contracted Services being provided by the private party.

13.2.2 Access to information

- (a) The private party must grant and provide ready access to the PMS and any performance data for, or resulting from, the PMS on the provision of reasonable notice by government. Copies of all information, documents and data relevant to the PMS or the provision of the service by the private party must be kept for seven years after their creation or production.
- (b) The private party must provide such assistance and access as government requires in the exercise of its performance monitoring rights.

13.3 Auditing

13.3.1 Requirement for audit

Government can (through the contract administrator) require an audit of the PMS or any performance data for, or resulting from, the PMS at any time up to six months after the end of the term of the project.

13.3.2 Who will conduct the audit?

The audit will be conducted by an independent person appointed by government on terms and conditions determined by government.

13.3.3 Who will pay for the audit?

Government will pay for the cost of the audit. However, if an audit identifies incorrect information provided by the private party that affects the service fee, the private party must pay for the costs of the audit.

⁴³ By way of clarification, the intention of this section 13.2.1 is to provide a mechanism for government to review and monitor the private party's performance under the project agreement, not to introduce additional service requirements.

13.3.4 Inaccurate PMS or performance data

If the auditor's written report shows an inaccuracy, incorrectness or incompleteness in the PMS or any performance data for, or resulting from, the PMS then the private party must:

- (a) correct and re-issue the affected report or data and take steps to remedy the fault in its monitoring, measuring and reporting system; and
- (b) if the error has affected the amount of a service fee, make the appropriate adjustment from the next scheduled service fee, or, if there is no further service fee scheduled, the amount will be a debt due and payable from the private party to government.

13.3.5 Fraudulent or false, misleading or negligent reporting

If any fraud or false, misleading or deceptive reporting is disclosed in the auditor's report, this will constitute an Event of Default potentially leading to termination of the project agreement.⁴⁴

13.4 Operating committee

13.4.1 Composition of the operating committee

During the operating period, an operating committee must be established. Although it may vary from project to project, typically this committee will comprise two representatives of the private party, two representatives of government and the contract administrator (who will be the chairperson).

13.4.2 Role of the operating committee

The operating committee will meet regularly (usually not less than once a month) to discuss any matters relating to the project, including issues of public concern, facilities management and maintenance issues, community and media relations issues and issues arising from the reports provided by the PMS.

13.4.3 Authority of the operating committee

The operating committee will not have any legal responsibility to either the private party or government and will not have power to require either party to act or refrain from acting in any way. Its decisions do not affect the rights or obligations of either the private party or government under the project agreement.

⁴⁴ See Chapters 24 (Default) and 25 (Termination).

14. Payment provisions

Principle

The payment mechanism will provide for calculation of the service fee, including abatements from the service fee to be made for sub-standard performance. The level of abatement will reflect the severity of the performance failure.

14.1 Service fee

14.1.1 Service fee

- (a) The service fee may be made up of sub-elements reflecting particular categories of expenses faced by the private party (both fixed and variable), but collectively these will comprise a single service fee payable for each unit of service.
- (b) In some very limited circumstances, there may be specific components of a project's construction costs that may be highly uncertain, leading to those components being highly priced in bids. In these circumstances, government may hope to obtain a better value for money outcome by including a "provisional" sum for that construction component in the service fee, which represents the expected cost of that component, but is subject to adjustment once the actual cost becomes known during construction.
- (c) If it is proposed that provisional sums will be included in the service fee, care is needed to ensure that:
 - (i) the component of the works to which the provisional sum relates is clearly and comprehensively defined;
 - (ii) the costs incurred in delivering the component of the works to which the provisional sum relates is identifiable as a discreet component of the total construction costs;
 - (iii) the project agreement contains a clear and robust process for determining the actual amount payable by government in respect of the relevant component of the works - for example, a tender process to engage a sub-contractor to perform the works, with both government and the private party having a role in evaluating the tenders; and
 - (iv) government is only liable for those costs reasonably and properly incurred by the private party.

14.1.2 Whole of service fee to be abatable

Subject to section 12.9.2 of Chapter 12 (Service requirements and Services Specifications) in respect of the possible exemption of the life cycle maintenance component, no sub-element of the unitary service fee should be such that it is always received by the private party regardless of its performance, or that it is immune from abatement for particular Service Failures.

14.1.3 Calculating actual service fee

For any given period, the service fee should be calculated in accordance with a formula commencing with the pre-agreed amount payable for the full performance of the Contracted Services (plus or minus any volume adjustments in the period), less amounts for:

- (a) Quality Failure, Availability Failure and Incident Failure abatements;
- (b) Repeated Failure abatements;
- (c) Reporting Failure abatements;⁴⁵ and
- (d) Any volume adjustments.⁴⁶

14.1.4 Maximum amount deductible for service failure

The maximum amount that can be deducted in any given payment period should be no more than the entire service fee for a payment period. If the operation of the payment mechanism results in a negative amount for that payment period, it will be deemed to be zero.

14.2 Payments

14.2.1 Invoicing

- (a) The detailed process for invoicing and payment of the service fee will be determined on a jurisdictional and project by project basis. Typically, service fee payments will be made either monthly or quarterly.
- (b) If government disputes the private party's claim for payment, it may notify the private party of the amount that government considers it should pay and why it differs from the private party's claim. Government will pay any undisputed part of the payment on the date that payment is due.
- (c) If, after government has paid the private party's claim, it disputes the private party's entitlement to the amount of the claim (or part thereof), and to the extent it is determined (by independent expert or otherwise) that an overpayment was made, government will deduct the overpayment from any amounts due in the following payment period.
- (d) Payment of moneys by government to the private party will not, of itself, be evidence that any works or Contracted Services have been carried out in accordance with the project agreement.
- (e) Any late payment of amounts that are properly due and payable (including a previously disputed amount where the dispute is resolved in favour of the private party), will incur interest at a pre-agreed default rate.
- (f) All payments by government will be made in arrears.

⁴⁵ These failure types are defined and discussed further in Chapter 12 (Service requirements and Services Specifications).

⁴⁶ Some jurisdictions restrict this to utility volume adjustments. Other jurisdictions approach it more widely, for example, in the case of catering and the provision of meals, it may be preferable on a value for money consideration, to pay on a fee for service basis.

14.2.2 Set off

- (a) Government may set off amounts payable to the private party under the Project Contracts against any amounts owing by the private party to government or paid by government on the private party's behalf. This does not include amounts owing by the private party that are in dispute, for the duration of the dispute.
- (b) The private party must make all payments under the Project Contracts without set off, counter-claim or deduction.

14.3 Indexation

The payment mechanism will include provisions for indexing the service fee. This will be determined on a project by project basis.

14.4 Service fee for phased service commencement

- (a) Certain projects may require phased service commencement, particularly where the project involves the delivery of multiple facilities at different times (e.g. in the case of schools) or one facility in different stages.
- (b) In these circumstances, commencement of payment will occur either:
 - (i) on Completion of all the facilities; or
 - (ii) on Completion of each facility in the scheme (or each part of the facility) so that government pays for elements of the service as they come on stream.

Although the first option is intended to encourage the private party to complete all of the facilities as soon as possible, government may effectively be receiving a service (in the form of the completed facilities) for which it is not paying, unless it is proposing to transition into and use the facilities at the same time. This will generally come at a cost. Unless the time period between delivery of the first facility and the last facility is relatively short, this approach may not deliver value for money.

The second approach can be adapted to provide greater incentive to the private party, with government withholding a percentage of the payment to be made for services delivered in relation to the completed facilities until all facilities (or all parts of a facility) reach Completion.

14.5 Variations to the Base Case Financial Model

14.5.1 When will the Base Case Financial Model be varied?

The Base Case Financial Model (as at Financial Close) may only be varied on the occurrence of certain specified events and in accordance with the principles and procedures set out below and only to the extent that such variation events result in an adjustment to the service fee over the remaining contract term. The Base Case Financial Model may be varied for the following:

- (a) Modifications (as discussed in Chapter 19 (Modifications));
- (b) Reviewable Services (as discussed in Chapter 15 (Review and market testing of services));
- (c) insurance (as discussed in Chapter 23 (Insurance));
- (d) Compensation Events (including for certain Changes in Law (as discussed in Chapter 20 (Change in Law)));
- (e) Re-financing (as discussed in Chapter 32 (Re-financing));
- (f) government requested acceleration of construction works;
- (g) Force Majeure Events where these are defined as events of exceptional severity outside the private party's control; and
- (h) other events requiring an adjustment to the periodic service fee as specified under the project agreement.

14.5.2 Principles for variations to Base Case Financial Model

The Base Case Financial Model will be varied taking into account only the following:

- (a) the changes to the private party's incremental costs and/or benefits directly resulting from the variation event (in the light of certain specified parameters such as minimum debt coverage ratios and the internal rate of return (as agreed in the Base Case Financial Model)); and
- (b) any changes to the periodic service fee made in accordance with the project agreement.

14.5.3 Procedure for variations to Base Case Financial Model

- (a) Promptly after it becomes aware of a variation event, the private party must submit a modified Base Case Financial Model for endorsement by government, giving full details of the assumptions and calculations used.
- (b) The private party must provide government with full and complete access to any electronic copies of the calculations required to amend the Base Case Financial Model. In addition, the private party must promptly provide any other additional information requested by government in relation to the variation event and any necessary amendments to the Base Case Financial Model.

- (c) Government may:
 - (i) agree with the variation event;
 - (ii) disagree with all or any aspect of the submission by the private party; or
 - (iii) require the modified Base Case Financial Model to be reviewed by an independent expert in accordance with the dispute resolution procedures.
- (d) Once the modified Base Case Financial Model is agreed or is determined by the independent expert:
 - (i) the private party must provide a certificate from an auditor confirming an independent audit of the modified Base Case Financial Model on terms acceptable to government; and
 - (ii) the modified Base Case Financial Model will be endorsed and become the Base Case Financial Model under the project agreement.
- (e) Government's review, rejection or direction in respect of the Base Case Financial Model will not entitle the private party to bring any claim against government.

14.6 Taxes

14.6.1 General tax liability

The private party is responsible and indemnifies government for all taxes payable pursuant to the Project Contracts and any transactions evidenced or contemplated by them. However, the project agreement will generally provide that government will reimburse the private party for any land tax and stamp duty payable to State governments.

14.6.2 Rates

Where rates and taxes are assessed in respect of the site by State entities or councils, government will consider on a project by project basis, and based on a value for money outcome, reimbursing the private party for those costs. This may depend on the extent that the private party's bid solution can influence the quantum of rates charged.

14.6.3 Goods and services tax

If a goods and services tax (GST) is payable on a taxable supply made under the Project Contracts then the party paying for that taxable supply must also pay the GST amount (having accounted for any input tax credit entitlement).

15. Review and market testing of services

Principle

Reviewing and market testing of the cost of specified Reviewable Services are used to keep service costs competitive over the long life of the project and ensure government achieves value for money.

15.1 Reviewable Services

For the majority of projects, only "soft services" (such as catering, cleaning, security and IT services which do not involve a large capital investment) are appropriate for review. This is because lifecycle maintenance costs are inextricably linked to the design and construction costs of the project.

15.2 Purpose of review

The cost of providing the Reviewable Services is to be reviewed at intervals set out in the project agreement (for example, every five years). Depending on the jurisdiction, the approach of the review may involve all or any of:

- (a) a benchmarking exercise against alternate service providers of comparable services;
- (b) submission by the private party of an offer to government for provision of the Reviewable Services over the next interval which is the subject of negotiation with government; and
- (c) market testing by the private party by receipt of tenders.

15.3 Benchmarking

The benchmarking exercise will involve:

- (a) identifying an efficient alternative service provider;
- (b) the determination of an efficient alternative service provider cost, on the basis that an efficient alternative service provider will:
 - (i) have the resources, expertise and financial standing sufficient to reliably provide the Reviewable Services;
 - (ii) achieve a profit level consistent with the market for comparable services; and
 - (iii) optimise the use of its resources in providing the Reviewable Services to achieve the least cost mix of inputs consistent with providing the Reviewable Services to the standard required under the project agreement;
- (c) adjustment of the determined amount to reflect:
 - (i) the terms and conditions associated with the delivery of the services under the project agreement and relevant sub-contract; and
 - (ii) volumes inherent in the Base Case Financial Model (given the focus of the exercise is on prices and not volumes); and
- (d) adjusting the service fee in accordance with section 15.6 below.

15.4 Exclusive Negotiation Process

Instead of a benchmarking exercise, jurisdictions may implement an exclusive negotiation process in accordance with the following principles and procedures:

- (a) At agreed intervals (usually five to seven years, unless there is a highly competitive market, in which case a shorter time frame may offer better value for money), the private party can submit (and must submit if so required by government) an offer for the provision of the Reviewable Services for the next interval. The offer must provide a comparison to market prices and detail all relevant factors and inputs into the proposed price on an open-book basis.
- (b) If an offer is submitted within a specified period prior to expiration of the previous interval, government will negotiate exclusively with the private party and accept or reject the offer within the specified period.
- (c) If the private party is required to submit an offer but fails to do so, or the parties are unable to reach an agreement during the period of exclusive negotiation, either the private party or government may elect to refer the matter for dispute resolution. However, if government elects to utilise the competitive tendering provisions (see below), the parties will not have recourse to the dispute resolution process.
- (d) If the parties are unable to agree on the private party's offer within the specified period, government may refer the Reviewable Services for market testing.

15.5 Market testing

15.5.1 Electing to market test

- (a) The private party may be required to market test the Reviewable Services where:
 - (i) the cost difference between the then existing price and the efficient alternative service provider cost, calculated in accordance with section 15.3(b) above (in the case of benchmarking) or the private party's offer (in the case of review in accordance with section 15.4), is greater than a specified percentage;
 - (ii) government elects to market test;
 - (iii) the outcome of any dispute resolution process recommends market testing; or
 - (iv) in the case of review in accordance with section 15.3 above, government rejects the private party's offer or the private party does not make an offer in the required timeframe, or the parties fail to reach agreement within the exclusive negotiation period.
- (b) The private party must continue to provide the services during the market testing process, and during any negotiation or dispute resolution process, on the same terms as the previous interval.

15.5.2 Market testing procedures

- (a) Market testing will consist of a review of the relevant Reviewable Services through a tender process.
- (b) Government and the private party will meet to agree the procedures for market testing including:
 - (i) evaluation criteria; and
 - (ii) tender documents (including contract documents),but it will be the private party which undertakes (at its cost and risk) the market testing.
- (c) The private party will be able to group services for the market testing exercise.
- (d) The tender process must:
 - (i) where possible include tenders from at least three independent tenderers;
 - (ii) be transparent and inclusive and be conducted so that government has an observational role;
 - (iii) avoid actual or perceived conflicts of interest (e.g. if a company associated with the private party or its shareholders or the principal operating sub-contractor or one of its associates intends to bid, then an independent tender process manager should be appointed);
 - (iv) if government requires, be certified as compliant with these requirements by an independent probity auditor; and
 - (v) include in the call for tender a draft services provider sub-contract from the private party (approved by government) so that the service obligations are the same in all material respects as the current service sub-contract (except for the fee, term or any other provision where previously agreed with government).
- (e) Government must be satisfied that all prospective tenderers are of good character and have appropriate financial standing and technical capacity.

15.5.3 Outcome

- (a) Government may either approve any tender made under the competitive tender process or accept the offer from the private party made in accordance with section 15.4 above.
- (b) The service fee will then be adjusted in accordance with agreed cost sharing arrangements, discussed below, and with such modifications as required to reflect the terms and conditions of the approved tender or accepted offer.

15.6 Cost-sharing arrangements

The service fee will be adjusted upwards or downwards to reflect the change in market prices for the provision of the Reviewable Services arising out of the review. Whether government will fully bear the change in the cost of the Reviewable Services, share the change in cost, or share the change in cost above a percentage difference threshold will be dependent on the specific project, government's appetite for risk and value for money considerations.

Although government understands the need to share such cost increases, it must also ensure that the private party has the incentive to continually control its cost and to mitigate against any cost increases.

16. Relief Events

Principle

Relief Events are specified events which prevent performance by the private party of its obligations at any time. Relief Events will not include events within the private party's control or which, although outside the control of the private party, are best managed by the private party (including where the private party should have put in place appropriate contingency plans).

Provided that certain conditions are met, the occurrence of a Relief Event will entitle the private party to relief from default/termination. However, the private party will bear any additional costs or losses incurred as a consequence of a Relief Event unless that event is also a Compensation Event.

16.1 Relief Events⁴⁷

- (a) Relief Events may occur in either the design and construction phase of the project or the operating phase of the project. Jurisdictions may choose to adopt different Relief Events in the design and construction phase to the operating phase. Where a jurisdiction so chooses, separate procedures for claiming Relief will be set out in the project agreement.
- (b) Relief Events will entitle the private party to relief from default/termination and, in certain jurisdictions, from abatement during the operational phase.
- (c) Relief Events that occur during the design and construction phase will, provided certain conditions are met, entitle the private party to an extension of time to the Date for Completion and relief from any other obligations as is reasonable given the nature of the Relief Event. On some projects and in some jurisdictions, they may also entitle the private party to an extension to the operating term.
- (d) Relief Events that occur during the operating phase will, provided certain conditions are met, entitle the private party to relief from default/termination for failure to provide the Contracted Services in accordance with the Services Specifications and other requirements of the project agreement. In some jurisdictions, they will also entitle relief from abatement.
- (e) The specific Relief Events will differ for jurisdictional or project specific reasons, but will generally fall within the following categories of events:
 - (i) in those jurisdictions where Force Majeure Events are defined as a limited category of events in accordance with section 21.1(b), fire, flood or explosion will constitute a Relief Event to the extent it does not constitute a Force Majeure Event);

⁴⁷ Different jurisdictions may define Relief Events by various names, depending on whether they occur during the design and construction or operational phases, for example during the design and construction phase, "Extension of Time Events", "Extension Events", and during the operational phase "Intervening Events" or "Government Extension Events".

- (ii) in jurisdictions where Force Majeure Events are defined as sustained Relief Events, the following events are defined as Relief Events: storm, tempest, lightning, cyclone, hurricane, ionising radiation, earthquakes, war (declared or undeclared), terrorism, armed conflict, riot and civil commotion, high sea inundations and droughts declared as a state of emergency;
- (iii) an act or omission by government or relevant government-related parties⁴⁸ at the facility/site (but only in their capacity as a contracting party) other than:
 - the performance of the core services or any act or omission authorised or permitted under the Project Contracts; or
 - an act or omission which is a reasonably foreseeable consequence of the performance of the core services⁴⁹ or other authorised/permitted acts or omissions⁵⁰;
- (iv) failure by an authority (including a utility provider) to carry out works or provide services which it is obliged to carry out or provide (noting that some jurisdictions may limit entitlement to Relief to where the relevant authority has not acted in accordance with its statutory powers);
- (v) any blockade or embargo (noting that some jurisdictions may limit this to a site specific blockade or embargo);
- (vi) industrial action, noting that:
 - some jurisdictions limit entitlement to Relief to the extent that it affects the construction or facilities management sectors or significant segment of them in addition to the project; and
 - in other jurisdictions, Relief is only given to the extent that the industrial action directly affects the project and results directly from an act or omission of the contracting government party or any of its employees at the facility/site, excluding industrial action caused or motivated by opposition to PPPs;
- (vii) any event or occurrence (outside the control of either party) which deprives possession of, or access to, the project site other than any event or occurrence arising from third party rights to use or access the site;
- (viii) any event leading to a development approval not being obtained by a specified period after its target date;⁵¹

⁴⁸ What constitutes a government-related party will depend on the nature of the project, although it is intended to capture government employees, consultants and other parties at the site which are appointed by government or whom government effectively controls (for example, as a result of delivering the core services). The focus of that risk will depend on the nature of each of the Contracted services and core services and the level of interface between them.

⁴⁹ This is intended to also capture ancillary services incidental to or otherwise in support of the core services.

⁵⁰ Government's role as contracting party is separate from its role as being responsible for the general administration of government affairs. Accordingly, the Relief Events in paragraph (ii) only capture acts or omissions (including breaches) of government in its capacity as a contracting party, not acts and omissions carried out in its role as general administrator of government affairs. Please also refer to paragraph 1.6.4 of Chapter 1 (Contractual issues).

- (ix) any event causing loss or damage to the facility; and
 - (x) Compensation Events (as defined in Chapter 17 (Compensation Events)).
- (f) Jurisdictions may adopt some or all of the Relief Events listed above, or parts thereof, and may include additional Relief Events. However, additional events should only be adopted where this is warranted by the unique features of the project.

16.2 Threshold requirements

16.2.1 Acts of private party

- (a) Government will not provide Relief when:
- (i) any of the above events are caused (directly or indirectly) by the private party, any of the private party's related parties, agents or employees or any subcontractor (and in each case, whether as a result of their action or inaction including, as a result of a breach by the private party of its obligations under the project documents); or
 - (ii) the occurrence or effects of an event are otherwise within the private party's control. This includes where the private party should have put in place appropriate contingency plans so as to reduce or avoid any effects on its ability to perform its obligations under the project documents.
- (b) Further, the private party will not be granted Relief from those obligations government would ordinarily expect the private party to comply with during a Relief Event (i.e. any obligation to reinstate or to provide certain critical facility management services which government would ordinarily expect to be provided during such events).

16.2.2 Notification

- (a) The private party must notify government within a specified time of the occurrence and effect of the Relief Event and of the private party's intention to claim. The private party must submit a claim to government providing full details of the Relief claimed strictly in accordance with specified procedures.
- (b) If the private party does not notify government of the Relief Event within the specified time, the private party will be barred from making any claim for Relief in respect of that Relief Event.
- (c) The private party must continue to update government at specified intervals for the duration of the Relief Event and must notify government immediately after its obligations cease to be affected by the Relief Event.

⁵¹ If a Relief Event results in a specific number of extensions (in days) to the target date for a development approval, government and the private party will have the right to terminate the project agreement on the basis of a private party default or, in lieu of termination, government will have a right to initiate a Modification removing the affected site from the project.

16.3 Relief Event during design and construction phase

16.3.1 Entitlement

- (a) If the Relief Event occurs during the design and construction phase, the Relief Event must cause a delay to Completion.⁵² In some jurisdictions the delay to Completion must be a delay to the achievement of Completion by the Date for Completion. In other jurisdictions there need only be a delay to an activity on the then actual critical path of the project.⁵³
- (b) Provided the private party has complied with its obligations for claiming Relief for the Relief Event, the Date for Completion will be extended by the number of days by which Completion will be delayed as a result of the Relief Event.
- (c) Government may also grant relief from any other obligations as is reasonable given the nature of the Relief Event.

16.3.2 Determination

- (a) In certain projects, an independent certifier, rather than the Project Director, may be used to determine the private party's entitlements to Relief in respect of a Relief Event during the design and construction phase. This is particularly the case where an independent certifier is appointed to monitor the progress of the works in accordance with section 10.5.4 of Chapter 10 (Construction and Completion), given their relevant expertise and knowledge of the time related aspects of the project.
- (b) If the Project Director determines the entitlement to Relief, then he/she must do so acting reasonably and, if disputed, the matter will be referred to an independent expert for resolution.

16.3.3 Extension of Sunset Date

- (a) Some jurisdictions may extend the Sunset Date for all Relief Events by the same number of days by which the Date for Completion is extended for the relevant Relief Event.

⁵² In those jurisdictions where there is a two staged Completion process, "Completion" in this context means Commercial Acceptance and Technical Completion. Delay to Commercial Acceptance caused by a Relief Event will give rise to an entitlement to extend the Date for Commercial Acceptance. Delay to Technical Completion caused by a Relief Event will give rise to an entitlement to extend the Date for Technical Completion.

⁵³ The critical path for the purposes of allowing extensions of time may, in some jurisdictions, be determined by taking into account the 'as bid' master works program and sub-programs, as updated and adjusted in accordance with the project agreement. The master works program and relevant sub-programs must be updated on a monthly basis (or other appropriate period determined on a project-specific basis) to ensure at all times they accurately and transparently reflect the progress of the works. The Project Director or independent certifier shall be entitled to review and comment on any such updated programs and the private party will respond promptly to any requests for further information regarding the accuracy of the relevant programs. The mechanism for calculating whether relief is available must operate in a transparent manner and government must be able to identify how any original contingency from the 'as bid' version is being used in any updated versions of the master works program and sub-programs.

- (b) In other jurisdictions, the Relief Events for which government will extend the Sunset Date are more limited. In those jurisdictions, where an extension of the Date for Completion occurs as a result of a Relief Event which is caused by an act or omission of government rather than a neutral event (e.g. breach by government of a Project Contract or act or omission of government, other than the performance of the core services or acts / omissions permitted by the Project Contracts), the Sunset Date will be extended by the same period. However, the Date for Completion will not at any time be extended beyond the Sunset Date (as extended) for any Relief Event.
- (c) Where paragraph (b) applies, and where the failure to meet the Sunset Date is caused by:
 - (i) a Force Majeure Event, the private party's obligation to meet the Sunset Date will be suspended in accordance with the regime described in Chapter 21 (Force majeure) and government will not be able to claim an Event of Default or Default Termination Event on the basis of such failure; and
 - (ii) a government-initiated Modification or compensable Change in Law, the private party's obligation to meet the Sunset Date will be suspended in accordance with the regime in Chapters 19 (Modifications) and 20 (Change in Law), respectively.
- (d) Jurisdictions which only extend the Sunset Date for certain Relief Events recognise the importance of ensuring an adequate time period between the Date for Completion and the Sunset Date. Typically, the period will be at least half of the anticipated period for the design and construction phase (e.g. for a three year design and construction phase, the period between the Date for Completion and the Sunset Date will be 18 months). However, this should be determined on a project-specific basis.

16.3.4 Concurrent Delay

In some jurisdictions, if delays result from multiple causes, including a material event which is not a Relief Event, the private party will not be given time relief for the concurrent period of delay unless the event is also a Compensation Event that has been caused by government.

16.3.5 Acceleration

If the progress of the works is delayed by a Relief Event, government will have the option (at its cost) of requiring the private party to accelerate the works instead of extending time to the extent that this is physically possible (refer to Chapter 19 (Modifications)).⁵⁴

⁵⁴ In some jurisdictions, Compensation will be calculated in manner consistent with the principles set out in Chapter 18 (Compensation payable), whereby government will pay for the private party's incremental costs (but with no allowance for a profit margin by the private party). In other jurisdictions, Compensation for acceleration will be calculated on the basis that the acceleration is a Modification (which may include an allowance for profit margin).

16.4 Relief during operating term

16.4.1 Entitlement

- (a) If the Relief Event occurs during the operating term, Relief will only be granted to the extent that the private party can demonstrate to government's reasonable satisfaction that it is prevented from, or delayed, in providing the Contracted Services as a direct result of the Relief Event and is otherwise complying with its contractual obligations.
- (b) To the extent the Relief Event affects the private party's ability to deliver the Contracted Services (and other threshold requirements are met), the private party's obligation to deliver the affected Contracted Services will be suspended and no default notice may be given in respect of such Service Failure.
- (c) Government may grant relief from the private party's other obligations as is reasonable given the nature of the Relief Event. This includes the obligation to provide temporary measures. In some jurisdictions, where the Relief Event prevents the cure of a default within the specified cure period, the cure period will be extended by a reasonable time period given the effect of the Relief Event.

16.4.2 Period of Relief

The private party's obligations affected by the Relief Event will be suspended from the date it gives notice to government of the Relief Event until it ceases to be prevented from performing its obligations.

16.4.3 Abatement

- (a) In some jurisdictions, despite the fact that a Service Failure is caused by a Relief Event, government may continue to abate the service fee under the payment mechanism for that Service Failure.
- (b) In other jurisdictions, the service fee will not be abated for Service Failures caused by a Relief Event,⁵⁵ except for costs not incurred by the private party during the Relief period and to the extent that the Relief Event or any risk that caused the Relief Event was required by the project agreement to be covered by insurance.

16.4.4 Alternative arrangements

In some jurisdictions, during the suspension of the private party's obligations, to the extent that it is able to do so, government may make alternative arrangements for the delivery of the Contracted Services. The allocation of risks associated with the delivery of any alternative arrangements will be determined on a project-specific basis depending on the nature of the additional services and their interface with the existing Contracted Services and the nature of the event leading to the suspension.

⁵⁵ This principle is currently under review in those jurisdictions that adopt this approach (namely Victoria), for events which are controlled or better managed by the private party and for which only time relief (and not money) should be given. Jurisdictions will issue separate guidance material if any change is made to the current principle.

16.5 Mitigation

The private party must take all proper and reasonable steps to minimise the risk of the occurrence, duration and impact of a Relief Event and, during the operating phase, continue to use reasonable endeavours to provide temporary measures during any period of suspension. If, in the reasonable opinion of government, the private party fails to do so then the private party will be entitled only to such extensions of time and relief from its obligations that would have been required had such reasonable steps been taken.

16.6 Force majeure

In jurisdictions where Force Majeure Events are sustained Relief Events, any Relief granted will cease at the time that the Relief Event becomes a Force Majeure Event, unless otherwise agreed by government and the private party in accordance with the force majeure provisions.⁵⁶ In those circumstances, the rights of the private party in respect of such Relief Events will be addressed in accordance with Chapter 21 (Force majeure).

16.7 No effect on government's Step-in Rights

The private party's right to Relief arising from a Relief Event does not affect government's Step-in Rights.

⁵⁶ See section 21.2.1 of Chapter 21 (Force majeure).

17. Compensation Events

Principle

Compensation Events are events which arise during the contract term which are within government's control or best managed by government and in respect of which government provides both Relief and Compensation.⁵⁷

17.1 Compensation Events

Compensation Events may occur in either the design and construction phase of the project or the operating phase of the project. Jurisdictions may choose to adopt different Compensation Events in the design and construction phase and the operating phase. Where a jurisdiction so chooses, separate procedures for claiming Compensation will be set out in the project agreement.

The specific Compensation Events will differ for jurisdictional or project specific reasons, but will generally fall within the following categories of events:

- (a) a breach by government of any Project Contracts (noting that in some jurisdictions this is limited to where the breach substantially frustrates or renders it impossible for the private party to perform its obligations or exercise its rights under the project agreement);
- (b) during the design and construction phase only, any act or omission of government or a relevant government related party⁵⁸ (but only in their capacity as a contracting party),⁵⁹ other than any such act or omission which is authorised, permitted or otherwise in accordance with a project document (noting that, in some jurisdictions, entitlement to Compensation will not be limited to where government is acting in its capacity as a contracting party);
- (c) during the operating phase, loss directly caused by the malicious, unlawful or reckless act of government employees or other government-related parties (but only in their capacity as a contracting party, and only to the extent that the private party is not required to guard against this through its design solution and Contracted Services);⁶⁰

⁵⁷ Projects with complex interface risk may require additional obligations on government. In such cases government may consider providing Compensation for failure to satisfy those obligations. However, the definition must underpin and not undermine the agreed risk allocation for the project.

⁵⁸ What constitutes a government related party will depend on the nature of the project, although it is intended to capture government employees, consultants and other parties at the site which are appointed by government or whom government effectively controls (for example, as a result of delivering core services).

⁵⁹ Government's role as contracting party is separate from its role as being responsible for the general administration of government affairs. Accordingly, these Compensation Events only capture acts or omissions (including breaches) of government in its capacity as a contracting party, not acts and omissions carried out in its role as general administrator of government affairs. Please also refer to section 1.6.4 of Chapter 1 (Contractual issues).

⁶⁰ Although government may in theory have a relatively greater level of control than the private party over actions of government-related parties, the private party is expected to be able to manage damage (by any party), other than deliberate damage, through appropriate facility design and security services. Government expects the private party to deliver a solution which accommodates risks associated with the delivery of core services and the government-related parties delivering or using these core services.

- (d) delay in any works to be carried out by government which are required to allow for the relocation or decanting of equipment, staff or users of the facility (e.g. students, patients etc);
- (e) in certain jurisdictions, the exercise by government of its Step-in Rights (other than as a result of breach by the private party) as set out in Chapter 27 (Step-in);
- (f) any disruption or delay caused by a third party (other than the private party) engaged by government to undertake additional capital works or services on the site⁶¹ (noting that in some jurisdictions this may be a Relief Event which is not a Compensation Event);
- (g) any legal proceedings challenging the validity of a government obtained development approval or the modification, withdrawal, revocation or replacement under environmental and planning legislation of a government obtained development approval, other than due to an application for a further development approval by, or any other action or inaction of, the private party or its sub-contractors, or as a result of a private party Modification proposal;
- (h) an Environmental Notice served on the private party or government other than an Environmental Notice served in respect of:
 - (i) any Site Condition, area or other matter for which the private party is responsible for in accordance with the project agreement; or
 - (ii) a breach by the private party of its obligations under the project agreement (which includes an obligation to undertake the works in accordance with Good Industry Practice);
- (i) compensable Changes in Law;⁶²
- (j) a government, or court, direction to suspend or cease all or any part of the works because of a native title claim or application or as a result of the discovery of an artefact (provided the cessation order does not result from a private party breach of its obligations in dealing with discovered artefacts and subject to sections 5.1.1(d) and 5.2.3 of Chapter 5 (Native title and artefacts));
- (k) industrial action, noting that:
 - (i) some jurisdictions limit entitlement to Compensation to the extent that it is industrial action of government employees at the site; and
 - (ii) in other jurisdictions, Compensation is only given to the extent that it directly affects the project and the private party can demonstrate that the action results directly from an act or omission of the government contracting party, or any of its employees at the facility/site, excluding industrial action caused or motivated by opposition to PPPs;
- (l) government-initiated Modifications⁶³; and
- (m) any loss, delay or damage arising from the discovery, removal, defusal or disposal of identified, or unidentified, unexploded objects from military operations or war.

Jurisdictions may adopt some or all of the Compensation Events listed above, or parts thereof, and may include additional Compensation Events. However, additional events should only be adopted where this is warranted by the unique features of the project.

⁶¹ Relief under this event may be conditional on the private party entering into reasonable and appropriate interface agreements with the relevant government contractors and will not be granted if the third party has acted in compliance with that agreement.

⁶² Compensation for compensable Changes in Law will be dealt with in accordance with the principles set out in Chapter 20 (Change in Law).

⁶³ Compensation for government-initiated Modifications will be dealt with in accordance with the principles set out in Chapter 19 (Modifications).

17.2 Threshold for Compensation

17.2.1 Acts of private party

Compensation will not be given when:

- (a) any of the above events are caused (directly or indirectly) by the private party, any of the private party's related parties, agents or employees or any subcontractor (and in each case, whether as a result of their action or inaction including, as a result of a breach by the private party of its obligations under the project documents); or
- (b) the occurrence or effects of an event are otherwise within the private party's control. This includes where the private party should have put in place appropriate contingency plans so as to reduce or avoid any effects on its ability to perform its obligations under the project documents.

17.2.2 Notification

- (a) The private party must notify government within a specified time of the occurrence and effect of the Compensation Event and of the private party's intention to claim. The private party must submit a claim to government providing full details of the Compensation claimed strictly in accordance with specified procedures.
- (b) If the private party does not notify government of the Compensation Event within the specified time, the private party will be barred from making any claim for Compensation in respect of that Compensation Event.
- (c) The private party must continue to update government at specified intervals for the duration of the Compensation Event and must notify government immediately after its obligations cease to be affected by the Compensation Event.

17.2.3 Recovery of costs and losses

Provided that the private party has complied with its obligations for claiming Compensation, where the occurrence of a Compensation Event:

- (a) means that:
 - (i) during the design and construction phase, the private party is entitled to an extension of time in accordance with Chapter 16 (Relief Events); or
 - (ii) during the operating term, the ability of the private party to perform any of its obligations under the project agreement is adversely affected; and
- (b) causes the private party to incur additional costs or loses revenue,

then the private party will be entitled to claim Compensation in accordance with the Compensation Principles.

17.2.4 Mitigation

The private party must:

- (a) take all proper and reasonable steps to minimise the duration and impact of a Compensation Event and, during the operating phase, continue to use reasonable endeavours to provide temporary measures during any period of suspension; and
- (b) provide evidence that it has used reasonable endeavours (including, where practicable, the use of competitive quotes) to ensure that its sub-contractors minimise increases in costs and maximise any reduction in costs.

17.2.5 Delay Costs

Where the private party seeks Compensation for delay to Completion, the private party will only be entitled to such Compensation for the period during which it is entitled to an extension to the Date for Completion in accordance with section 16.3.1 of Chapter 16 (Relief Events).

18. Compensation payable

Principle

Where the private party is entitled to Compensation for a Compensation Event, the amount to which the private party is entitled will be determined in accordance with the principles set out in this Chapter. The overriding considerations are that government receives value for money and that the Compensation amount be fair and reasonable and be calculated in a manner that is transparent.

18.1 Calculation of Compensation

The private party will be entitled to its reasonable incremental costs and expenses incurred as a direct result of a Compensation Event as reasonably assessed by government.⁶⁴ Government has the right to appoint an independent party to audit any information prepared by the private party in this regard.

18.1.1 Entitlement

Jurisdictions may choose to provide different levels of detail as to what 'reasonable costs and expenses' include. Subject to the overriding principles and requirements set out in section 18.1.2 below, the private party will generally be entitled to the following categories of costs and expenses:

- (a) the sum of the following amounts properly and reasonably incurred by it:
 - (i) incremental design and construction trade costs;
 - (ii) incremental costs in providing the Contracted Services (including incremental Lifecycle Costs);
 - (iii) incremental debt financing costs;
 - (iv) external third party advisory costs; and
 - (v) incremental administrative and overhead costs of the private party; and
 - (b) the lost service fee, or lost commercial opportunities, in so far as the project includes commercial opportunities / development (limited to the revenue projections in the Base Case Financial Model),
- less:
- (c) any insurance proceeds or damages, or other compensation, or amounts received or receivable by the private party as a direct result of the occurrence of any events which gave rise to or contributed to the Compensation Event;
 - (d) any costs avoided (including tax, financing and/or other benefits associated with deferred expenditure) accruing to the private party as a result of the occurrence of a Compensation Event; and
 - (e) any additional revenue (over and above that specified in the Base Case Financial Model) which will be earned as a direct result of the Compensation Event.

⁶⁴ Any government determination of such costs will be subject to the private party's right to refer such determination to dispute resolution by an independent expert.

18.1.2 Overriding principles and requirements

The following overriding principles and requirements will apply when determining the amount of Compensation payable in respect of a Compensation Event.

- (a) Government must receive value for money.
- (b) Subject to paragraph (f), the private party will not be entitled to Compensation for any indirect or consequential loss.⁶⁵
- (c) The private party will prepare and submit a change notice to government, describing and providing details of the Compensation Event (such as the impacts, time and cost consequences, savings, mitigating factors and proposed funding) as a condition precedent to its entitlement to adjustment or payment in respect of the event.
- (d) The private party must provide government with all quotations it receives in relation to the Compensation Event on an open-book basis.
- (e) The private party and its associates are not entitled to any compensation for indirect costs.
- (f) During the bid phase of the project, the private party will be required to bid fixed or maximum margins and other specified on-costs (including preliminaries) that the private party or its major sub-contractors may apply to the cost of Compensation Events during both the design and construction phase and the operating phase. These will be taken into account in evaluation of the bids and, once agreed by government, will be included in the project agreement. The private party and its major sub-contractors will not be entitled to recover any margin or costs above the amounts specified in the project agreement. As a general rule, government does not compensate the private party for profit margins (unless it is demonstrated to be value for money to do otherwise and in respect of government-initiated Modifications above a certain value) and will only compensate reasonable sub-contractor profit margins.
- (g) Government has the right to appoint an independent expert to audit any quote or information provided by the private party (and, if appropriate, provide an alternative cost estimate). Alternatively, government may require the private party to carry out a tender process where the Compensation claimed in respect of a Compensation Event is likely to exceed a certain threshold as specified in the project agreement.
- (h) The private party is required to make a claim under its insurance policy for any damage or liability arising as a result of the Compensation Event occurring.

18.1.3 Payment of Entitlement

- (a) Government has the option of paying Compensation for a Compensation Event by:
 - (i) an adjustment to the service fee (subject to section 18.2);
 - (ii) a lump sum payment;
 - (iii) milestone payments, matching delivery of the relevant works; or
 - (iv) subject to the private party's agreement, extending the operating term.

⁶⁵ This does not limit the private party's entitlement to recover for economic loss under any advanced consequential loss insurance it may have in respect of Force Majeure Events.

- (b) If government requires the private party to fund an amount up-front and that amount is above a specified threshold,⁶⁶ the private party must use its commercial and prudent endeavours to obtain competitive financing for such costs. If the private party is unable to obtain financing acceptable to government,⁶⁷ government may instead choose to pay those costs by way of a lump sum payment.

18.2 Service Fee Adjustment Principles

- (a) Where compensation is by way of adjustment to the Service Fee and debt or equity is required to fund the Compensation Event, then the service fee will be adjusted in accordance with the following principles:
- (i) if the funding is provided by a third party financier, jurisdictions may choose to adjust the service fee to reflect the minimum amount required to amortise the new debt by the expiration of a specified repayment period taking into account interest and indexation; and
 - (ii) if funding is provided by subscription of shares in the private party or new loans by shareholders, jurisdictions may choose for any necessary increase in the service fee to be the minimum amount required to give the new equity a return not greater than:
 - a reference rate at the time the new equity is subscribed plus a specified margin. The margin will be the difference between the reference rate at Financial Close and the Base Case Equity IRR identified in the Base Case Financial Model submitted with the tender; or
 - the prevailing market rate of return for projects of a similar risk profile over the remaining period of the project term (to be determined on a project-specific basis).
- (b) The Base Case Financial Model will be updated in accordance with the above principles and in accordance with section 14.5 of Chapter 14 (Payment provisions) to reflect any necessary changes as a result of the Compensation payable.

18.3 Delay costs

Where the compensation payable to the private party is in the form of delay costs in accordance with section 17.2.5 of Chapter 17 (Compensation Events), in some jurisdictions, the private party may be required to bid a daily rate (which is evaluated and included in the project agreement) for delay costs payable to the private party for delays for which it is entitled to an extension of time. In other jurisdictions, the amount bid may act as a cap rather than a daily rate with the actual amount of the delay costs payable to be determined in accordance with this Chapter 18.

⁶⁶ To be agreed on a project-specific basis but is intended to be set at a fairly low level.

⁶⁷ Jurisdictions may choose to extend this requirement to circumstances where the private party reasonably believes that such financing will have a material adverse effect on it.

19. Modifications

Principle

Government may initiate Modifications to the facility and the Services Specifications at any time during the contract term. The cost of government-initiated Modifications will be borne by government.

The private party may initiate Modifications to the facility at any time during the contract term. Government will have complete discretion as to whether and on what basis it accepts a Modification initiated by the private party. If accepted, the Modification will be funded by the private party. Where Modifications result in net savings due to overall improvements, innovations, time or cost savings, those net savings will be shared with government.

19.1 Definition of Modification

(a) **"Modifications"** will be defined on a project by project basis but will generally include:

- (i) in the design and construction phase, changes to the Design Requirements; and
- (ii) in the operating phase, changes to the facility or the Contracted Services,

but will not include:

- minor changes to the facility where 'minor' may be defined with reference to an agreed monetary threshold and/or defined as being works of a non-structural nature which are requested by government and do not result in a delay to Completion, including any Minor Works as outlined in section 19.8;
- the development and refinement of the design documentation in accordance with the project agreement; or
- any other changes to the works, facility or Contracted Services required to ensure the facility is fit for its intended purposes.

19.2 Omissions

Modifications may be by way of addition or omission. Government retains the right to omit works or Contracted Services by way of Modification and to have those works or services carried out by a third party.

19.3 Government-initiated Modification to the facility⁶⁸

19.3.1 Right to request

- (a) Government may at any time request a Modification to the facility by serving a notice on the private party. Government will provide the private party with sufficient detail of the required Modification to enable the private party to quantify the effects and costs in its proposal (see section 19.3.2 below).
- (b) If the private party considers a government request constitutes a Modification, the private party will be required to notify government of this prior to proceeding with the Modification. A determination will then be made as to whether the request constitutes a government-initiated Modification and whether government wishes to proceed with that request.
- (c) If the private party fails to notify government in accordance with paragraph (b), it will have no entitlement to claim for any Compensation or Relief in respect of that Modification.
- (d) In some jurisdictions, a government-initiated Modification would include the situation where, in the case of delay due to a Relief Event or other specified events, government requires the private party to accelerate the works instead of extending time to the extent possible as it may not be possible to make up all the lost time via acceleration (refer to Chapter 16 (Relief Events)).

19.3.2 Private party's proposal

- (a) Within a defined period after government's request, the private party must advise government, by way of a quote, of the cost of preparation of a proposal for carrying out the requested Modifications. Government will either accept or reject this quote. If government rejects the quote, it may:
 - (i) require the private party to submit a further price;
 - (ii) refer the issue to an independent expert for dispute resolution; or
 - (iii) advise the private party that it will not proceed with the Modification.
- (b) If government accepts the quote for the proposal, then within a specified period after government's request, the private party must give government its proposal for carrying out the requested Modification, including (without limitation) details of any effect on the facility and delivery of the Contracted Services, necessary capital expenditure, any impact on recurrent costs (on a fully transparent basis) and, where necessary, how the private party will fund the costs.
- (c) Government may, at its discretion, accept (with or without conditions) or reject the private party's proposal, or withdraw its Modification request.
- (d) Where the parties fail to agree upon the cost of the Modification works and government still wishes to proceed with the Modification, the cost will be determined either by:
 - (i) the independent expert during the construction phase,⁶⁹ or
 - (ii) competitive tender⁷⁰ during the operating phase.

⁶⁸ Government-initiated Modifications to Contracted Services and to the Services Specifications are dealt with in section 19.4.

⁶⁹ See section 31 (Dispute resolution).

- (e) Where the cost is to be determined by competitive tender, the private party must appoint the tenderer whom the parties agree (or an independent expert determines) offers best value for money.⁷¹ In the event that government agrees to proceed, it will compensate the private party for the cost in accordance with the tender which it is agreed or determined offers best value for money.
- (f) Where government does not proceed with a government-initiated Modification, it will pay a percentage of the reasonable, fully audited third party costs incurred by the private party in preparing its proposal, with some jurisdictions paying up to the total amount of the quote given by the private party under this section 19.3.2.
- (g) Where a proposal for carrying out the Modification is agreed by the parties or government wishes to proceed with a Modification in accordance with the independent expert determination or tender proposal, the private party must implement the Modification.
- (h) Where the expert determination or tender cost is not to government's satisfaction, government may elect not to proceed with the Modification works or to carry out the Modification itself.⁷²

19.3.3 Cost of Modification works

Government will compensate the private party for the cost of carrying out government-initiated Modification works in accordance with section 19.5.

19.3.4 Government's option to carry out the Modification works

Government may carry out Modification works itself. If government carries out (or procures a third party to carry out) the Modification, then government may require the private party, via a government-initiated Modification to:

- (a) extend the Contracted Services to the completed Modification; or
- (b) enter into co-ordination and interface agreements with the third party contractor with respect to all or any of the design, construction, completion, commissioning and handover and facilities management of the modified area.

19.3.5 Effect on Contracted Services

The private party must continue to provide the Contracted Services except to the extent that it is prevented from doing so as a consequence of the implementation of the Modification.

⁷⁰ The private party will call for tenders (for a fixed price for carrying out the works) from a list of three contractors agreed with government or determined by an independent expert.

⁷¹ The value for money assessment will have regard to, amongst other things, the experience, skills, reputation and financial capacity of each tenderer.

⁷² Where government carries out or appoints a third party to undertake the Modification works, it will compensate the private party for costs directly incurred by the private party as a result of such works.

19.4 Private party initiated Modifications works

19.4.1 Private party's right to request Modification

- (a) The private party may at any time request Modifications to the facility works provided they are consistent with the project agreement and the Output Specifications and do not have an adverse effect on the facility or the delivery of the Contracted Services (by the private party) or the core services (by government).
- (b) The private party must demonstrate that it has the appropriate financial and technical resources to undertake the proposed Modification.

19.4.2 Government's response

Government may withhold its approval to a private party proposed Modification or it may accept the proposal subject to conditions and amendments.

19.4.3 Private party's right to proceed

The private party may carry out the Modifications only if its proposal is approved by government. Where it is so approved, the private party must implement the Modification at its own cost, in accordance with its proposal and otherwise in accordance with all the design, construction and commissioning provisions of the project agreement as if it were part of the original works.

19.4.4 No extension of time

No extension of time (to the Date for Completion or any other milestone date) will be given to the private party as a consequence of any private party initiated Modification unless government considers (in its sole discretion) that to do so would deliver value for money.

19.4.5 Government to share in any efficiency or saving

Government will share in any revenue upside and/or total net saving arising from the Modification (whether as a result of a decrease in the private party's capital expenditure or recurrent costs or the sub-contractors' costs and having deducted the private party's costs in implementing the change). Sharing will occur in accordance with a mechanism to be agreed as part of the project agreement. Any service fee reduction (reflecting the saving being shared) will be set in accordance with the Compensation Principles.

19.4.6 Modifications required due to a Change in Law

Government cannot reject a Modification required by the private party to comply with a Change in Law. The costs of such Modifications will be dealt with in accordance with the Change in Law provisions (refer to Chapter 20 (Change in Law)).

19.5 Government-initiated Modifications to service standards

19.5.1 Government's right to request Modification

Government may at any time request a Modification to the Contracted Services or the Services Specifications (including the specified service standards and KPIs) provided it has first consulted with the private party.

19.5.2 Private party's proposal

Within a defined period from government's request, the private party must provide government with its proposal as to how it will implement the Modification, the effects of the proposed Modification on the Contracted Services and the private party's ability to deliver them, the estimated effect of the Modification on the private party's recurrent expenditure and any necessary adjustment to the service fee.

19.5.3 Obligation to implement Modifications

If government agrees with the private party's proposal, the private party must provide the Contracted Services as amended (including amended KPIs). It must do so in a way that avoids or minimises any disruption to the delivery of the Contracted Services to the Services Specifications.

19.5.4 Failure to agree on private party's proposal

If the parties, after making reasonable endeavours, cannot agree upon the private party's proposal, the matter will be referred to an independent expert for resolution. Following resolution by the independent expert, government may either proceed with the private party's proposal, as amended by the independent expert, or elect not to proceed with the private party's proposal.

19.5.5 Adjustment to the service fee

The cost of implementing a government-initiated Modification to the Contracted Services or Services Specifications will be borne by government through an adjustment to the service fee. Any adjustment to the service fee must be made in accordance with the Compensation Principles.

19.5.6 Government sharing of any benefit arising from a Modification

Government will share in any cost savings to the private party arising from a Modification (having deducted from the saving the private party's costs in implementing the change) by way of a reduced service fee in accordance with a mechanism to be agreed as part of the project agreement. Any sharing will reflect the Compensation Principles.

19.6 Compensation payable for government-initiated Modifications

The Compensation payable for government-initiated Modifications will be determined in a manner consistent with the Compensation Principles and the following additional principles and requirements⁷³:

- (a) Government will determine (and advise the private party when notifying it of its Modification request):
 - (i) whether it requires the private party to initially fund the Modification works (with government paying for that cost through an adjusted service fee over the contract term); or
 - (ii) where the Modification involves capital works, whether it will pay the initial costs directly through a one-off capital expenditure payment.
- (b) The private party will not be entitled to apply any margin or other on-costs to the price charged to the private party for Modifications up to a specified threshold. This threshold will be determined on a project-specific basis and will depend on the value of the project, but is intended to capture those Modifications for which the private party does not require additional resources, which do not require significant project management, or which do not materially affect the private party's project risk profile.⁷⁴
- (c) Where government omits work or a Contracted Service by way of Modification, deductions will be made from the service fee for any savings to the private party (including any profit on the amount of such savings).
- (d) Any payment made to the private party by government (as a result of a Modification) will be on a whole-of-life basis (i.e. it will take into account the positive and negative effect of the Modification on the private party's recurrent expenditure, as well as the capital cost of any works).

19.7 Pre-agreed Modifications

In some cases, government may, prior to contract execution, agree with the private party the cost (and associated adjustment to the service fee) of certain Modifications the occurrence and scope of which can be predicted with some certainty prior to contract execution (e.g. demountable / relocatable units for schools).

⁷³ As a matter of structure, the project agreement may include the methodology for determination of Compensation in respect of government-initiated Modifications in a separate regime, but which will nonetheless be based on the Compensation Principles and other requirements set out in this Chapter.

⁷⁴ See section 18.1.2(f) of Chapter 18 (Compensation payable).

19.8 Minor Works

- (a) In addition to and notwithstanding the Modifications regime, some jurisdictions may elect to create a Minor Works regime.⁷⁵
- (b) The minor works regime will be utilised by the private party to complete works, the cost of which fall under specified per event monetary thresholds and which are considered to be a routine element of administering the relevant social infrastructure (whether it be a hospital, school etc) ("**Minor Works**"). Any thresholds will be determined on a project-specific basis.
- (c) A Minor Works regime will only be relevant to works completed during the operating term. Minor works requested by government or the operator of the facility will be deemed to be part of the Contracted Services. No additional margin or other costs will be payable to the private party for the Minor Works.
- (d) If Minor Works are requested, the private party must cost them on an open-book basis.
- (e) Minor Works will not impact on the risk transfer between the private party and government, although it is envisaged that the Minor Works will generally be agreed directly between the facility operator and the facilities management sub-contractor.
- (f) Generally, any overspend of the provisional sum allowed for Minor Works over the operating term will be recovered directly by the facilities management sub-contractor from the facility operator on an annual basis. Any annual underspend will be rolled forward to the next year. Any accumulated underspend will be payable to government.

⁷⁵ In making this decision, government will consider (inter alia) the level of minor modifications expected during the operation phase as well as budgetary constraints of the operator.

20. Change in Law

Principle

Government will compensate for Changes in Law which exclusively affect the project or category of project. Government will also share the cost of general Changes in Law which necessitate capital expenditure or operating cost effects not captured through indexation or reviews of Reviewable Services (although, in some jurisdictions, no Relief or Compensation will be granted for general Changes in Law during the design and construction phase). Generally, changes in tax arrangements are to be borne by the private party.

20.1 Scope of Change in Law

20.1.1 Definition

"**Change in Law**" encompasses the following occurrences after the execution of the project agreement:

- (a) the enactment of new Laws;
- (b) the amendment, repeal or change of any Law; and
- (c) in some jurisdictions, any judgment of a relevant court of Law which changes a binding precedent.

For these purposes, "**Law**" means legislation, subordinate legislation, rules and regulations and policies or guidelines with which the private party is legally required to comply.

20.1.2 Exclusions

Change in Law does not include:

- (a) Changes in the way the Law is interpreted (except as provided in section 20.1.1(c));
- (b) Changes to the following legislation:
 - (i) Income Tax Assessment Act 1936 (Cwlth) and A New Tax System (Goods and Services Tax) Act 1999 (Cwlth); and
 - (ii) Income Tax Assessment Act 1997 (Cwlth);⁷⁶
- (c) Changes in Law which, as at the date of the project agreement:
 - (i) were published or of which public notice had been given (even as a possible change); or
 - (ii) a party experienced and competent in the carrying out of works similar to the contracted works and delivery of services similar to the Contracted Services would have reasonably foreseen or anticipated, and in some jurisdictions this exception will only apply if the Change in Law is in substantially the same form as the change eventuating after the date of the project agreement.
 - (iii)
- (d) Changes in Law effected in response to an illegal act or omission by the private party (other than an act or omission which becomes illegal by virtue of the change).

⁷⁶ In Victoria, "Change in Law" excludes any change in relation to Part IVAA – Proportionate Liability of the *Wrongs Act 1958* (Vic) or its application.

20.2 General Change in Law

20.2.1 Compensation for Changes in Law

In some jurisdictions, Relief and Compensation for general Changes in Law are only given during the operating phase. In other jurisdictions, Relief and Compensation may be given for general Changes in Law during both the design and construction and operating phases of the project.

Compensation will only be granted for capital expenditure and operating costs where not captured through review of services⁷⁷ or indexation.

20.2.2 General Change in Law as a shared risk and agreeing suitable thresholds

- (a) Although Change in Law is not a risk which the private party can control, in practice the private party is usually in the best position to manage the effects of Changes in Law and minimise their impact on the business. For this reason, a sharing approach, using specified thresholds to cap the private party's exposure, is often the most equitable way to ensure that the costs of implementing Changes in Law are minimised. Risk sharing, particularly on a threshold basis, should provide the private party with the incentive to minimise the cost of implementing the change (as opposed to simply invoicing government for whatever it costs), reduce any concern the private party may have that government may take advantage of the situation and also enable the private party and its financiers to quantify the private party's maximum exposure.
- (b) Both government and the private party should seek to ensure that cost and adequate risk transfer are balanced as far as possible to achieve the best value for money on a particular project. The threshold figures agreed and the number of graduated steps will take into account the size of the project and the impact of other factors, such as the likelihood of environmental and health and safety legislation. The competitive bidding process should encourage bidders to accept realistic maximum thresholds and competitively price general Change in Law risk.

20.2.3 Capital expenditure and hard operating cost

- (a) Government will share the relevant capital expenditure and hard operating cost effects arising from a Change in Law (per event) in accordance with a three tiered cost sharing mechanism as follows:
 - (i) the private party will bear 100 per cent of the capital expenditure and hard operating cost effect up to a specified threshold (first threshold);
 - (ii) the private party and government will share the capital expenditure and hard operating cost effect above the first threshold on a percentage share basis (to be agreed on a project-specific basis) until a higher threshold (second threshold) is reached; and
 - (iii) government will bear 100 per cent of the capital expenditure and hard operating cost effect above the second threshold.
- (b) In some jurisdictions, the thresholds for hard operating costs and capital expenditure will differ, in that the thresholds for hard operating costs will be lower.

⁷⁷ Refer to section 20.2.5 below.

20.2.4 Change in Law benefits

- (a) Government and the private party will share any cost benefits or savings (including the avoidance of any previously anticipated capital expenditure) arising from any Changes in Law. The amount shared will be determined on a project-specific basis.
- (b) In some jurisdictions, government will only share hard operating cost savings or benefits arising in a period during which it would otherwise share in cost increases and above a specified threshold.
- (c) To the extent government shares in a cost benefit or saving, the service fee may be reduced accordingly over the balance of the term.

20.2.5 No Relief for soft operating costs

Costs arising from general Changes in Law affecting soft facilities management services (e.g. cleaning, security, grounds maintenance and catering) should generally be for the account of the private party, as these services are reviewable and the private party is protected on pricing the risk through the combined effects of government review, market testing and indexation.

20.3 Project-Specific Change in Law

20.3.1 Project-specific changes compensable

Relief and Compensation will be granted for Project-Specific Changes in Law in both the design and construction phase and the operating phase. Where a Change in Law is a Project Specific Change in Law (as set out in section 20.3.2), government will (subject to a nominal threshold in certain jurisdictions⁷⁸) take full risk on each such event. Government will compensate the private party for any direct cost increases (including operating, capital expenditure consequences and financing costs) above specified thresholds. These thresholds may differ for capital and operating costs. Government will also take the benefit of any decreases in operating costs.

20.3.2 Meaning of Project-Specific Change in Law

A "**Project-Specific Change in Law**" is a Change in Law by the relevant jurisdiction, the terms of which apply expressly to the:

- (a) project and not to similar projects procured by government;
- (b) project facility or site and not to other similarly situated land or facilities;
- (c) private party in relation to the project and not to other persons; or
- (d) companies undertaking projects procured under public private partnerships arrangements and not to other persons.

⁷⁸ These nominal threshold levels will be determined on a project-specific basis but are intended to avoid the administrative burden to government of frequent claims for relatively small amounts of monetary relief. Examples of the type of thresholds government may consider appropriate are \$200,000 (indexed) for capital costs and \$20,000 (indexed) per annum for operating costs.

20.3.3 Exceptions

A Change in Law will not be a Project-Specific Change in Law:

- (a) solely on the basis that its effect on the private party is greater than its effect on other companies; or
- (b) if it is a change in taxes (including GST).

20.4 Compensation and Relief

20.4.1 Entitlement

Where a compensable Change in Law arises, then subject to the principles set out below, government will grant the private party Compensation and Relief consistently with the principles set out in Chapters 16 (Relief Events), 17 (Compensation Events) and 18 (Compensation payable).⁷⁹

20.4.2 Hard operating costs

- (a) Where a Change in Law results in hard operating cost increases for which the private party is entitled to Compensation, some jurisdictions may mandate that no Relief will be given in respect of any such costs arising in the interval before the next specified review date.⁸⁰
- (b) To the extent that government bears hard operating costs in accordance with the above regime, the service fee will be increased accordingly over the balance of the term from the next review date following the relevant Change in Law, with no retrospective adjustment for increased costs incurred during the period prior to that review date.

⁷⁹ As a matter of structure, the project agreement may include the methodology for determination of Compensation in respect of Changes in Law in a separate regime, but which will nonetheless be based on the Compensation Principles and other requirements set out in this Chapter.

⁸⁰ Review dates are determined on a project specific basis, but reviews are conducted usually no more often than annually.

20.4.3 Mixed hard operating costs and capital costs

- (a) Where the private party's claim is only in respect of hard operating cost increases, or a mixture of capital expenditure and hard operating cost increases, government will assess and respond to the private party's claim at the next review date following the submission of the claim. To the extent the private party's claim is accepted by government, government will compensate the private party (by way of a one-off payment) for any approved capital expenditure and hard operating costs incurred by the private party during the period between the relevant Project Specific Change in Law occurring and the relevant review date.
- (b) However, where:
- (i) the capital expenditure is above a specified threshold; and
 - (ii) the private party, having used its reasonable endeavours, is unable to obtain competitive funding for the cost of additional works which is acceptable to government,

government will consider the private party's claim for capital expenditure in isolation from the operational effect at the time the private party submits its claim.

20.5 Continue to provide Services

The private party must continue to provide the Contracted Services except to the extent that they cannot be provided as a necessary and intended consequence of implementing and adopting a Change in Law.

21. Force majeure

Principle

In some jurisdictions, Force Majeure Events are defined as Relief Events which last for longer than a specified period. In other jurisdictions, Force Majeure Events are defined as a limited category of events of exceptional severity which are outside the control of either party and prevent the private party from performing all or a material part of its non-financial obligations under the project agreement.

If a Force Majeure Event occurs, the private party (and government) will receive relief from obligations as is reasonable and in accordance with the principles set out in this Chapter.

21.1 Force Majeure Events

- (a) In some jurisdictions, a "**Force Majeure Event**" is defined as a Relief Event which exists or consequences of which exist, or can be reasonably expected to exist or occur for a continuous period specified in the project agreement, and which causes either party to be unable to comply with all or a material part of its obligations under the project agreement. The specified period may be shortened or lengthened based on value for money considerations, availability of business interruption insurances and the time required to replace or reinstate the project in the case of total (or near total) loss.⁸¹
- (b) In other jurisdictions, "**Force Majeure Events**" is defined as a limited category of events of exceptional severity which are outside the control of either party, namely (subject to any necessary project-specific variations):
 - (i) lightning, cyclones, earthquakes, natural disasters, landslides, tsunamis and mudslides;
 - (ii) civil riots, rebellions, revolutions, terrorism, insurrections and military and usurped power, act of sabotage, act of public enemy and war (declared or undeclared);
 - (iii) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination unless caused by the private party or sub-contractors (excluding the risk of pollution and contamination allocated to the private party in accordance with Chapter 4 (Environmental issues and Site Conditions));
 - (iv) fire, flood or explosion caused by events referred to in paragraphs (b)(i) or (b)(ii) above; and
 - (v) during the operating phase only, one or more utility services required for the operation of the facility not being available for use at the mains connection to the site, due to a major distribution or transmission system failure, except to the extent the non-availability is because of an act or omission of the private party or its sub-contractors including failure to comply with any of its obligations such as having to provide back-up or other security requirements,⁸² or a dispute between the private party and the relevant utility supplier.

⁸¹ The specified period is determined on a project-specific basis, but is not usually less than 180 continual days.

⁸² This is regardless of whether provision of such back-up supply, connection or other security of supply would have prevented the event occurring.

- (c) In the case of paragraph (b) above, jurisdictions have the flexibility of adopting or not adopting some or all of the Force Majeure Events listed or adopting further Force Majeure Events. However, Force Majeure Events should strictly be limited to those events that are catastrophic in nature.⁸³ Additional events to those listed should only be adopted where this is warranted by the unique features of the project.

21.2 Relief and Alternative Arrangements

21.2.1 Relief from obligations

- (a) Subject to paragraph (b), to the extent that:
- (i) a Force Majeure Event prevents the private party from performing all or a material part of its obligations under the project agreement;
 - (ii) the impact of the Force Majeure Event could not reasonably have been mitigated or recovered by the private party acting in accordance with Good Industry Practice, and without incurring material expenditure in excess of the amount it is entitled to recover under any insurance policy in respect of a Force Majeure Event;
 - (iii) the private party is using its best endeavours to perform its obligations under the project agreement; and
 - (iv) the private party (including agents, employees or sub-contractors) did not cause (either directly or indirectly) the Force Majeure Event,
- the private party can apply for and government will grant such relief from the private party's obligations (including time relief and relief from termination) as is reasonable taking into account the likely effect of the Force Majeure Event. An Event of Default or Default Termination Event will be deemed not to have occurred to the extent that the failure or breach is the direct result of a Force Majeure Event.
- (b) Relief will not be given when:
- (i) any of the above events are caused (directly or indirectly) by the private party, any of the private party's related parties, agents or employees or any subcontractor (and in each case, whether as a result of their action or inaction including, as a result of a breach by the private party of its obligations under the project documents); or
 - (ii) the occurrence or effects of an event are otherwise within the private party's control. This includes where the private party should have put in place appropriate contingency plans so as to reduce or avoid any effects on its ability to perform its obligations under the project documents.

⁸³ The definition of Force Majeure Events should only include events which, unlike extension of time events or other events entitling relief from default / termination or abatement, are likely to have a catastrophic effect on either party's (although usually the private party's) ability to fulfil its obligations under the Project Contracts and which neither party can prevent or where neither party is in a better position to manage the consequences of the event occurring. In practice, such events are highly unlikely to occur and this should be reflected in the drafting of Force Majeure Events as the potential consequences to government under section 21.3 are much more serious than the granting of relief for extension of time events or those other events entitling relief from default / termination or abatement.

21.2.2 Abatement

Despite the fact that a Service Failure is caused by a Force Majeure Event, government may continue to abate the service fee under the payment mechanism for that Service Failure on the basis, and to the extent that, Contracted Services are not being performed due to the Force Majeure Event.

21.2.3 Alternative arrangements

During the period for which the private party has been granted Relief, government may, to the extent that it is able to do so, make alternative arrangements for the performance of any Contracted Services affected by a Force Majeure Event.

21.2.4 Mitigation

During the period for which the private party is granted relief, it must still use all reasonable endeavours to prevent or mitigate the effects of the Force Majeure Event and must take all steps in accordance with Good Industry Practice to overcome or minimise the consequence of the Force Majeure Event.

21.2.5 No financial relief unless project agreement terminated

- (a) In some jurisdictions, government will not provide any financial relief to the private party during the period for which it is otherwise entitled to relief from performance (e.g. to meet the private party's fixed operating costs). However, an appropriate compensation amount will be paid if the project agreement is terminated for a Force Majeure Event.⁸⁴
- (b) Other jurisdictions may service the lower of actual senior debt commitments and the senior debt commitments forecast in the Base Case Financial Model as being due and payable during the period of performance relief if the Force Majeure Event is not:
 - (i) required to be insured against by the private party under the project agreement⁸⁵ (as distinct from uninsurable events arising during the term to which the uninsurability regime under the project agreement applies). Government will consider, on a project-specific basis, the Force Majeure Events which are not required to be insured against; and
 - (ii) an insurable risk customarily insured by operators of facilities similar to the facility or providing services similar to the Contracted Services.

21.2.6 No compensation to government

The private party will not be liable to compensate government for any costs or losses government incurs (such as the increased costs of obtaining services from an alternative source) during the period of performance relief.⁸⁶

⁸⁴ See section 21.3.

⁸⁵ Government will consider, on a project-specific basis, the Force Majeure Events which are not required to be insured against, for example, damage caused by earthquake. Once identified, it is only on the occurrence of such Force Majeure Events that government will service forecast senior debt.

⁸⁶ Sections 21.2.5 and 21.2.6 are consistent with the principle that for risks (such as Force Majeure Event risk) which neither party is better placed to control or manage, the loss should lie where it falls.

21.3 Termination

21.3.1 Either party may terminate

- (a) As soon as practicable following the Force Majeure Event, government and the private party must consult with each other and use reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate continued performance of the project agreement.
- (b) If:
 - (i) the private party and government are unable to agree appropriate terms to mitigate the effect of the Force Majeure Event and facilitate the continued performance of the project agreement within a specified period; and
 - (ii) the Force Majeure Event (or the Relief Event giving rise to the Force Majeure Event) is continuing or its consequences remain such that the affected party has been or is unable to comply with all or a material part of its obligations under the project agreement for a period of more than a specified period,
 - (iii) then this will be a "**Force Majeure Termination Event**" and, subject to paragraphs (c) and (e) below, either party may terminate the project agreement.
- (c) The private party's right to terminate may only arise:
 - (i) in the design and construction phase, once the period for which the builder has advanced consequential insurance has expired; and
 - (ii) during the operational period, where the private party is unable to recover under business interruption insurance.
- (d) For projects involving multiple sites or where the Force Majeure Event otherwise affects a separable portion of the site, the project agreement will contemplate the option of partial termination.
- (e) If the private party elects to terminate the project agreement and government wishes to continue the project agreement, then the project agreement may remain on foot but only on the basis that government pays to the private party the service fee, less:
 - (i) the costs not incurred by the private party as a result of non-provision of the Contracted Services; and
 - (ii) the amount of the proceeds the private party receives from any insurances.

21.3.2 Compensation

Upon termination of the project agreement for a Force Majeure Termination Event, government will pay the private party compensation in accordance with the principles set out in Chapter 26 (Termination Payments).

22. Reinstatement and repair

Principle

Subject to the uninsurability provisions in section 23.4 of Chapter 23 (Insurance), the private party is responsible, at its cost, for repairing and reinstating any loss or damage to the site, the works or the facility.

22.1 Obligation to repair or reinstate

22.1.1 Repair or Reinstatement

If any part of the site, the facility or the works is damaged or destroyed or cannot be used or occupied, then unless government directs otherwise,⁸⁷ the private party must at its cost:⁸⁸

- (a) promptly provide government with written notice of any such loss or damage and any required replacement, reinstatement or repair;
- (b) consult with government as to the programming of the works needed to effect the relevant replacement, reinstatement or remedy and, in some jurisdictions, reinstate in accordance with an approved reinstatement plan;
- (c) promptly repair or replace or remedy the loss or damage so that, to the greatest extent possible, the private party continues to comply with its obligations under the project agreement; and
- (d) provide government with a further detailed report of all action being taken or to be taken to effect replacement, reinstatement or remedy of the loss or damage (including an estimate of the time such action will take).

The private party will not be required to repair the damage or reinstate the facility to the extent that a Relief Event prevents the private party from undertaking the reinstatement works.

22.1.2 Direction by government to reinstate to different specifications

Government may require the private party to reinstate or repair the facility on the basis of different specifications. Any such request will be treated as a government-initiated Modification (but only to the extent that the specifications differ from those which would otherwise have been required under the project agreement and to the extent that any insurance proceeds do not cover the full reinstatement cost).⁸⁹

⁸⁷ See section 22.2.

⁸⁸ Where the event causing the destruction or damage is uninsurable, the private party's obligations are subject to section 23.4.2 of Chapter 23 (Insurance).

⁸⁹ See Chapter 19 (Modifications).

22.1.3 Insurance proceeds

- (a) Any insurance proceeds received in respect of such damage⁹⁰ (including any amounts representing insurance proceeds paid by government where the relevant event was uninsurable) must be applied towards the cost of reinstatement or repair.
- (b) All insurance proceeds will be paid into a separate insurance account and may be withdrawn only for reinstatement purposes. In some jurisdictions, the account must be in the joint names of government, the private party and, as appropriate, the private party's financiers.

22.1.4 Limitation of liability

The private party does not bear the risk of reinstatement or repair to the extent that it is the direct result of a fraudulent, unlawful or negligent act or omission of government (or its associates) or a government breach of the project agreement, unless and to the extent that the private party is entitled to, or does, recover under required insurances.

22.2 Direction by government not to reinstate or repair

22.2.1 Direction

Where the facility has been materially damaged or destroyed, government may direct the private party not to reinstate or repair the relevant damage and may then also terminate the project agreement.

It is envisaged that a monetary threshold will be agreed on a project-specific basis, above which the facility will be deemed to be materially damaged or destroyed. In addition, government will consider limiting its ability to exercise this right to a limited period before contract expiry.

22.2.2 Termination

If government elects to terminate the project agreement rather than require the private party to reinstate or repair the facility or the site, and the damage was caused by an event which was:

- (a) a Force Majeure Event, government must pay compensation on the basis of a Force Majeure Termination Event;
- (b) a private party default, government must pay compensation on the basis of a Default Termination Event; or
- (c) not a Force Majeure Termination Event or Default Termination Event, but which was an event which these principles state will be treated as a Voluntary Termination, government must pay compensation on the same basis as for a Voluntary Termination.⁹¹

⁹⁰ This refers to proceeds paid under all risks/physical damage policies, and not to third party liability, employer's liability, business interruption or advance loss of profits insurance.

⁹¹ See Chapter 26 (Termination Payments).

22.2.3 No termination

If government directs the private party not to repair or reinstate the damage but does not terminate the project agreement:

- (a) the private party waives in favour and for the benefit, of government its right to give a notice of claim under its insurance policy;
- (b) the private party must pay government any insurance proceeds it receives (including moneys paid by government as an insurer of last resort in respect of an uninsurable risk),⁹² subject to the rights of the financiers under any funder's direct agreement;
- (c) the private party will be relieved of its obligations to construct the works or provide the Contracted Services to the Services Specifications, to the extent reasonably determined by government in the context of the damage;⁹³ and
- (d) government will issue a government Modification request in relation to the private party's reduced obligations.⁹⁴

⁹² See section 23.4 of Chapter 23 (Insurance).

⁹³ The service fee will be adjusted in accordance with Chapter 18 (Compensation payable).

⁹⁴ See Chapter 19 (Modifications).

23. Insurance

Principle

The private party must obtain and maintain such insurances (and on such terms) as a prudent owner or services provider would obtain and maintain for the type of facility from which the core services and Contracted Services are delivered and/or insurances required by Law and of a kind on no less favourable terms than the minimum insurance requirements specified in the project agreement. Depending on the insurance climate at the time, government may share within agreed thresholds any insurance cost increases for certain categories of operational insurance.

23.1 Insurance generally

23.1.1 Required insurance

- (a) The private party must, at its own cost, effect and maintain such insurances throughout the contract term as a prudent owner or service provider would obtain and maintain for the facility, including those insurances specified in the project agreement (being insurances of a kind and on no less favourable terms than the minimum insurance requirements specified in the project agreement).
- (b) The private party must also ensure that it and its sub-contractors effect and maintain appropriate insurances in accordance with Good Industry Practice and at a prudent level of cover, having regard to the nature and scope of the services each sub-contractor is to provide. Levels of cover should be linked to the rate of inflation, such that the amount of insurance increases over time.
- (c) Insurance requirements will reflect the degree of risk transfer, the ability of the private party to pay premiums (relative to the size of the risk), value for money considerations and the specifics of the particular project in question. Examples of required insurances during both the construction and operating periods include workers compensation insurance, property/material damage insurance, public/products liability insurance and motor vehicle insurance.
- (d) In certain instances, insurances may be effected by means of the private party's existing group insurance policies, with appropriate care taken that these are extended to adequately cover the required project risks on an individual and aggregate basis.

23.1.2 Proof of insurance

- (a) By Financial Close, the private party must have provided government with evidence from its insurers that the construction phase insurances are in effect.
- (b) Throughout the contract term, the private party must provide government with copies of insurance policies, certificates of currency, renewal certificates and any endorsement slips in relation to all required insurances. Where government is not required to be an insured under the policy, and the actual policy copies cannot be provided (due to commercial confidentiality), appropriately worded certificates confirming expressly all of the insurance terms and conditions, as set out in the project agreement, must be provided from the insurer or insurance broker.

23.1.3 Reputable insurer

The insurances are to be effected and maintained at all times with reputable insurers approved by government and on conditions required by government. When determining whether to accept the insurances proposed by the private party and what conditions it may seek to impose, government may have regard to the rating (if any) of the proposed insurer; the contracting entity of the proposed insurer and their relationship to the ultimate underwriter; the proposed insurer's exposure to other projects of a similar nature in the relevant jurisdiction; and such other matters as government considers relevant in the circumstances.

23.1.4 Amendments

- (a) The approved insurances are not to be materially changed (including, without limitation, the scope of cover, limits/sub-limits to liability and deductible levels) without government's prior consent (which is not to be unreasonably withheld).
- (b) In determining whether and on what basis to provide its consent, government will consider the proposed changes in the light of market conditions at the time, the impact of the changes on the project risk profile and value for money considerations generally.
- (c) The private party must indemnify government for its reasonable legal and other costs (if any) associated with determining whether or not to consent to any requested change.

23.1.5 Government may effect insurance policies

If the private party fails to effect or maintain the required insurances, government may effect and maintain the relevant insurance and pay the premiums for that insurance. Any amount paid by government will be a debt due and payable from the private party and may be deducted from amounts owing to the private party under the project agreement.

23.1.6 Terms of insurance

All required insurance policies must, at a minimum, include:

- (a) a breach of condition or warranty / severability / non-vitiation provision acceptable to government;
- (b) a provision requiring at least 30 days notice to be given to government prior to cancellation or amendment; and
- (c) where government is an insured under the policy:
 - (i) a provision requiring the policy to operate as if each was a separate policy of insurance covering each insured party;
 - (ii) failure by any insured to observe and fulfil the terms of the policy or to comply with the duty of disclosure does not prejudice the insurance of any other insured;
 - (iii) a waiver of subrogation against any of the insured parties; and
 - (iv) notice of a claim by any insured will be accepted by the insurer as notice by all insured.

23.1.7 Government as insured under private party insurance

Government shall be an insured party under the policies procured by the private party save in respect of those policies under which typically only the private party or its relevant sub-contractors can be insured, such as professional indemnity insurance. The extent of government's rights and interests in respect of specific insurance policies, such as public and products liability insurance and workers' compensation insurance, will be detailed in the project agreement. The actual terms in which government's interest is set out in the policies are very important, as the words used will define the extent to which cover is extended and thus the circumstances under which government can claim on the insurance.⁹⁵

23.1.8 Settlement of claims

Any insurance proceeds received in respect of repairing or reinstating damage to the site, works or facility must be dealt with in accordance with section 22.1.⁹⁶ Upon settlement of a claim for any other property loss or damage under any required insurance where government did not have an insurable interest, the private party must pass through to government the benefit of the insurance where government has suffered a loss for which government has been indemnified by the private party under the project agreement.

23.2 General insurance obligations

The private party will ensure that it:

- (a) does not do anything or permit (insofar as it is reasonably within its power) anything to occur which prejudices any insurance;
- (b) if necessary, rectifies anything of which it is aware which might prejudice any insurance;
- (c) reinstates any policy if it lapses;
- (d) does not cancel, vary or allow an insurance policy to lapse without the prior written consent of the other party;
- (e) gives full, true and particular information to the insurer of all matters which might otherwise prejudice any policy or the payment of benefits under the insurance;
- (f) gives full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefits under the insurance;
- (g) immediately informs government when it receives or gives a notice under, or in connection with, any insurance policy, including any notice of cancellation of claim; and
- (h) does everything reasonably required by government or any other person in whose name the policy is effected to enable government or that other person to claim, collect or recover monies due under any insurance policy.

This is not intended as an exhaustive list but only highlights the key obligations. Jurisdictions have the flexibility of adopting or not adopting some or all of the obligations listed above.

⁹⁵ It is only stipulation on the policy that enables this. No form of words in the project agreement will create such a right for the government.

⁹⁶ The requirement to repair and reinstate is subject to section 22.2.2 and to the terms of the financiers' tripartite deed.

23.3 Changes in insurance costs

23.3.1 Sharing mechanism

- (a) Government will not share in increases in the cost of design and construction insurances other than in exceptional circumstances, such as where there is a very long construction period and the cost of insurances for the whole period cannot be fixed up front.
- (b) Although operational insurances will not be reviewed or market tested like other 'soft' services,⁹⁷ government will share with the private party cost increases of certain categories of required operational insurances⁹⁸ identified in the project agreement. The cost of such insurances will be reviewed at regular intervals (e.g. annually) on a forward-looking basis to determine whether and by how much the actual costs of insurance for the following year will vary from the projected costs of insurance applicable to the forthcoming operating year. The service fee will be adjusted to reflect the change in cost of those insurances.
- (c) The "cost" of insurance refers to the premium only. It does not, for example, include increases in broker's fees and commissions, or the cost of any modifications required by an insurer.
- (d) Any increase in the cost of insurance which government shares must be due to circumstances generally prevailing in the Australian and overseas insurance market for the relevant class of insurance. Government will not be liable for insurance cost increases caused by the private party, its sub-contractors or any member of the consortium (including the claims history of each such party). Government will not share in cost increases solely due to general inflation.
- (e) Government will not share in the increased cost of insurances which cover risks the private party is required to bear (such as loss of profit, professional indemnity and non-vitiation insurances).
- (f) The private party must obtain and submit to government at least three separate quotations from reputable insurance brokers with respect to the annual premium costs of obtaining the shared operating insurances for the first year of the operating phase, and must notify government of the private party's preferred quotation and insurer. Government and the private party will then agree the insurer to be selected, including the terms and conditions of the proposed insurance. If the government and the private party fail to reach agreement on the preferred approach to, and cost of, obtaining the shared operating insurances, the matter may be referred to an independent expert for determination.
- (g) At least three months prior to each anniversary of the operations commencement date, the private party must repeat the above procedures in respect of shared operating insurances to be taken out for the ensuing year. If government and the private party fail to reach agreement on the most suitable insurer, premiums and other terms and conditions of the shared operating insurances, the matter may be referred to an independent expert for determination.

⁹⁷ Accordingly, the cost of required insurances is (subject to inflation) fixed for the term of the project at Financial Close. It is not 're-set' as a result of any review.

⁹⁸ Government will not share the cost of insurances which cover risks the private party is required to bear (such as loss of profit, professional indemnity and non-vitiation insurances).

- (h) Government may share any change in eligible insurance costs on a threshold basis. The precise arrangement will be determined on a project-specific basis, so that the private party's incentive to prudently manage insurance costs is preserved. In particular, government will consider what percentage of the overall operating costs is represented by insurance costs and the risk and magnitude of likely insurance cost changes (in the light of the market conditions at the time). Government may wish to invite variant bids based on the size of thresholds and frequency of review periods.
- (i) In circumstances where this sharing approach is used for increases in insurance costs, the private party will, in all circumstances, be liable for the original fixed cost of the insurance.

23.3.2 Portfolio Cost Savings

A 'Portfolio Cost Saving' is any insurance saving attributable to either the private party placing any of the required insurance within a policy or policies covering risks in other projects or matter outside the scope of the project in question, or to a change in how that insurance is placed as compared with that which had been anticipated at Financial Close.

Any Portfolio Cost Saving is to be shared with government, under the costs sharing mechanism set out above.

23.3.3 Mitigation

The private party must use reasonable endeavours to minimise any increase and maximise any reduction in the increased insurance cost, whilst maintaining the minimum level of insurance agreed between the parties.

23.3.4 Effect of an appropriate insurance index

The cost sharing arrangements set out in this section will be reviewed by government when an independently compiled index of Australian market movements in the annual premium cost of obtaining certain categories of required operational insurance is developed.

23.4 Uninsurability

23.4.1 Meaning of uninsurable risk

An 'uninsurable risk' occurs where:

- (a) insurance is not available in the recognised international insurance market with reputable insurers of good standing (including the minimum credit rating specified in the project agreement) in respect of that risk at the time that the insurance is sought to be obtained and coverage is not available under the Commonwealth *Terrorism Insurance Act 2003*; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the international insurance market with reputable insurers of good standing by prudent, competent and experienced providers in Australia of services similar to the services at the time at which the insurance was sought to be obtained. The effect of this provision should not be to give protection against changes in terms of insurance or levels of deductibles. Rather, it is intended to offer protection if the cost of insurance is such that the market is not generally insuring against that risk (on any terms).

23.4.2 Treatment of uninsurable risk

- (a) If either party considers that a risk which is covered by the required insurances⁹⁹ is or will be uninsurable, then that party must immediately notify the other in writing, giving particulars.
- (b) If the parties agree, or it is determined through the dispute resolution procedure, that the relevant risk is uninsurable, and the fact that the risk is uninsurable is not attributable to the actions of the private party or a sub-contractor, the private party is not required to procure insurance against that risk for so long as that risk is and remains uninsurable.
- (c) Government will then deduct from the service fee an amount equal to the premium that was payable immediately prior to the insurance becoming uninsurable. Government may also consider any other changes to the private party's rights and obligations arising from the unavailability of the relevant required insurance.
- (d) If the uninsurable risk materialises, government will:
 - (i) pay to the private party an amount equivalent to the insurance proceeds that would have been payable if the relevant insurance was available;
 - (ii) in some jurisdictions, if the facility is wholly or substantially damaged or destroyed, terminate the project agreement, in which case:
 - (A) in some jurisdictions, compensation will be payable on a Voluntary Termination basis¹⁰⁰; and
 - (B) in other jurisdictions, compensation will be payable on a Force Majeure Termination Event basis; or
 - (iii) implement a government-initiated Modification to remove the affected part of the site from the project provided that following the implementation of the Modification, the private party will be no worse off had the Uninsurable Event not occurred.
- (e) Where a risk is uninsurable, the private party must approach the insurance market on a regular basis to establish whether that risk remains uninsurable and advise government accordingly. If the insurance becomes available again, the private party must effect that insurance.
- (f) Government may treat risks which are uninsurable prior to contractual close differently, as it is a matter of negotiation with the private party and will depend on the particular circumstances of the project.

⁹⁹ Uninsurability protection does not extend to insurances which cover risks which the private party is required to bear (such as loss of profit, professional indemnity and non-vitiation insurances). However, for value for money reasons, the uninsurability provisions will extend to cover business interruption insurance.

¹⁰⁰ See Chapter 26 (Termination Payments).

24. Default

Principle

The project agreement will categorise certain defaults under the project agreement and other conduct by the private party or its subcontractors to be:

- (a) an 'Event of Default'; or
- (b) a 'Default Termination Event'.

The type of event will determine the remedies available to government and the opportunity given to the private party to cure the default before government can exercise its remedies.

24.1 Events of Default

- (a) An Event of Default gives rise to various government remedies. However, it does not of itself give rise to an automatic right of termination.
- (b) An Event of Default may occur if:¹⁰¹
 - (i) there is a serious Service Failure;¹⁰²
 - (ii) during the contract term a representation or warranty given by the private party to government proves to be untrue (although in some jurisdictions this may be subject to a material adverse effect regime);
 - (iii) during the contract term there is fraud,¹⁰³ collusive, misleading or deceptive conduct on the part of the private party or its sub-contractors in the performance of the project or any part of it (including in respect of reporting in the form of financial and payment statements and invoices or other books and records or in respect of the master works program and sub-programs). Some jurisdictions also include fraud or breaching the Law in regard to awarding the contract;
 - (iv) there is any other breach by the private party of its obligations (that is not dealt with as a Default Termination Event or a breach of a KPI) in the project agreement or other specified contracts with government (although, in some jurisdictions, this will only be an Event of Default if the breach has not been remedied within a reasonable period, which is traditionally, 20 business days); or
 - (v) there is any breach of any other Project Contract (although, in some jurisdictions, this will only be an Event of Default if it has a material adverse effect on government or users of the facility or the private party's ability to perform its obligations).

¹⁰¹ These Events of Default are not intended to be exhaustive and will vary depending on the nature of the project. Breaches caused by a Relief Event or Force Majeure Event do not constitute an Event of Default to the extent that Relief is given from the relevant obligations.

¹⁰² A serious Service Failure is evidenced by the service fee being abated by a specified percentage, or performance points accruing beyond a specified level, within a specified period.

¹⁰³ In some jurisdictions, the State will seek to retain all its common law rights in relation to any fraudulent activity.

- (c) In addition to the above, some jurisdictions may also specifically list other events as Events of Default, for example:
- (i) failure to achieve either Completion (or, where a two-phased Completion process is used, Technical Completion or Commercial Acceptance) by the due dates;
 - (ii) the independent expert determines (following a reasonable period after Financial Close) that there is no reasonable prospect the private party will achieve Completion (or Technical Completion or Commercial Acceptance) by the due dates;
 - (iii) the works not being commenced within such period after Financial Close where this is likely to have a material adverse effect on the ability of the private party to achieve Completion¹⁰⁴, Technical Completion or Commercial Acceptance by the due dates. (Some jurisdictions may categorise similar events as Default Termination Events.);
 - (iv) a breach of the sub-contractor provisions, (see section 28.5 of Chapter 28 (Sub-contractors)), noting that some jurisdictions may define this as a Default Termination Event;
 - (v) a failure by the private party to obtain consent to a Change in Control of a relevant company other than the private party or, in some jurisdictions, a failure of the private party to cure an unauthorised Change in Control of a material sub-contractor within a reasonable time;
 - (vi) a breach by the private party of its assignment obligations;
 - (vii) failure of the private party to comply with its obligations in respect of a Probity Event¹⁰⁵;
 - (viii) the private party failing to take out and maintain required insurances (subject to the uninsurability provisions set out in section 23.4 of Chapter 23 (Insurance));
 - (ix) failure by the private party to comply with its obligations to reinstate damage or destruction; or
 - (x) the private party's right to obtain finance or draw down funds under the finance agreements being terminated, withdrawn or otherwise materially restricted.
- (d) Jurisdictions have the flexibility of adopting or not adopting some or all of the Events of Default listed above or adopting additional Events of Default not listed above. However, additional events should only be adopted where this is warranted by the unique features of the specific project.¹⁰⁶

¹⁰⁴ If commencement is subject to the provision of access, the time period may commence from the provision of access by government.

¹⁰⁵ Although, depending on the severity, in some circumstances this may be a Default Termination Event.

¹⁰⁶ The severity of the default on the particular project will need to be taken into account when determining whether such additional defaults should be categorised as Events of Default (and therefore be subject to a cure regime) or whether they should be categorised as Default Termination Events.

24.2 Cure periods and remedies for Events of Default

24.2.1 Cure periods

- (a) Government may give a default notice to the private party specifying that an Event of Default has occurred.
- (b) Where the Event of Default is capable of cure, the private party must, within a specified period, provide a draft cure plan proposing a program of rectification (including the proposed cure period) in form and substance acceptable to government (acting reasonably). If the draft cure plan proposed is not acceptable to government then the private party must (subject to its right to refer the matter to dispute resolution) amend the draft cure plan in accordance with government's reasonable requirements (this will be deemed to be the 'approved cure plan').
- (c) The private party must cure the Event of Default within the agreed cure period and otherwise in accordance with the approved cure plan.¹⁰⁷ In some jurisdictions, government will agree to extend the cure period, but only once and on certain conditions being met by the private party.¹⁰⁸
- (d) The cure period applicable to a Service Failure which is an Event of Default will be in addition to the original response and rectification times for that Service Failure.

24.2.2 Remedies for failure to cure an Event of Default capable of cure

If the private party fails to:

- (a) provide a draft cure plan;
- (b) comply with the approved cure plan or otherwise diligently pursue a cure of the Event of Default in accordance with the approved cure plan; or
- (c) cure the Event of Default within the agreed period,

then this is a 'Project Default' and government may accordingly:

- (i) exercise its rights under Chapter 25 (Termination);
- (ii) exercise its rights under Chapter 27 (Step-in) except in certain jurisdictions where government will not exercise such rights where the private party is complying with an approved cure plan and diligently pursuing a remedy; or

¹⁰⁷ Although the financiers will have separate step-in rights under the funder's direct agreement, they will not have separate cure periods before an Event of Default can be called. Appropriate cure periods will be agreed as part of the cure plan. In addition, the cure periods may be extended in accordance with paragraph 27.3.

¹⁰⁸ Government may, acting reasonably, extend the cure period provided the private party:

- (a) has provided government with sufficient reasons for the extension (and has provided any further information reasonably requested by government);
- (b) can satisfy government (acting reasonably) that it will cure the default within the extended period; and
- (c) can satisfy government that it has complied and is continuing to comply with the approved cure plan (as may be amended with government's agreement) and is diligently pursuing cure of the Event of Default.

- (iii) in some jurisdictions:
 - require the private party, at its own cost, to replace any sub-contractor performing the obligations to which the Event of Default relates; or
 - exercise any of its security rights.

24.2.3 Event of Default not capable of cure

- (a) Where an Event of Default is not capable of cure, the private party must, within a specified period, provide a draft prevention plan which sets out how the private party will overcome the consequences of, and compensate government for, the Event of Default, in form and substance acceptable to government. The private party must comply with the approved prevention plan. Failure by the private party to comply with its obligations under this paragraph will allow the government to treat this Event of Default as a Project Default and exercise its rights in accordance with Chapter 25 (Termination).
- (b) In some jurisdictions, if the prevention plan is not accepted by government, government may require the private party to comply with other requirements it considers (acting reasonably) will overcome the consequences of, or compensate government for, the relevant Event of Default. If government does not exercise the right or, having exercised it, the private party fails to comply with those requirements, this will give rise to an immediate government termination right.

24.2.4 Other remedies for Event of Default

- (a) If an Event of Default occurs, in some jurisdictions, government may (but will be under no obligation to) perform (or procure performance by a third party) of the obligations of the subject of the Event of Default, and the amount of any costs or expenses incurred in such performance will be a debt due and payable from the private party to government.
- (b) In other jurisdictions, the government may formally exercise its Step-in Rights except where the private party is complying with an approved cure plan and diligently pursuing a remedy (refer to Chapter 27 (Step-in)).

24.3 General remedies

The exercise by government of any of its remedies set out in this Chapter does not prevent government from:

- (a) exercising any other power under the project agreement; or
- (b) suing the private party, or exercising any other legal or equitable rights or remedies, in relation to a default or any other action or conduct of the private party.

25. Termination

Principle

Government may terminate the project agreement on the occurrence of a Default Termination Event or a Force Majeure Termination Event or may Voluntarily Terminate the project agreement, each subject to payment of a Termination Payment.

In some jurisdictions, the private party can terminate the project agreement for Government Default.

25.1 Default Termination Event

25.1.1 Termination without cure

Subject to the financiers' rights under the funder's direct agreement, if a Default Termination Event occurs, government has the right to terminate the project agreement without any cure period being given to the private party.

25.1.2 What constitutes a Default Termination Event?

- (a) The specific events that will be categorised as Default Termination Events will be determined on a project by project basis but will typically include:
- (i) the works not being commenced within a specified period after Financial Close (alternatively, jurisdictions may consider categorising this event as an Event of Default);
 - (ii) the private party wholly or substantially abandoning the works, the facility or the provision of the services, or displaying an intention to do so;
 - (iii) a Project Default;
 - (iv) a Persistent Breach;
 - (v) the occurrence of an Insolvency Event¹⁰⁹ in relation to the private party;
 - (vi) the occurrence of an Insolvency Event in respect of any member of the private party group,¹¹⁰ or material sub-contractor or any guarantor, and that member of the private party group or guarantor is not replaced within a specified period¹¹¹ of the Insolvency Event by a party which is reputable, solvent and has the resources and experience to perform its obligations under the relevant sub-contracts or guarantee (as applicable);

¹⁰⁹ Cure periods will not be allowed for, other than in respect of an application for winding up.

¹¹⁰ See section 29.1 of Chapter 29 (Change of ownership/control) for what constitutes the private party group.

¹¹¹ This is traditionally 60 business days.

- (vii) where the private party assigns, transfers or otherwise disposes of any of its rights under the project agreement without the consent of government (other than in the permitted circumstances set out in section 34.3.1 of Chapter 34 (Restrictions on private party)) or, depending on the nature of the project, where a specified major sub-contractor disposes of their interest in the relevant sub-contract;
 - (viii) a breach of the change of ownership/control provisions¹¹² of the project agreement (but in some jurisdictions this is limited to breach in respect of private party Change in Control only);
 - (ix) Completion not having occurred by the Sunset Date, or government or an independent expert reasonably forming the view that the private party will not achieve Completion by the Sunset Date;
 - (x) an Illegality Event has occurred;
 - (xi) a specified cap or a specified percentage of the cap being reached in respect of any performance bonds or parent company guarantees provided to government as required under the project agreement, or any such bond or guarantee ceasing to be valid without, in each case, rectification or replacement within a specified period;
 - (xii) government directing the private party not to reinstate or repair damage where the relevant damage was caused by a private party default;
 - (xiii) where performance points accumulated over a fixed period (i.e. due to a series of Service Failures) exceed a specified level; and
 - (xiv) the private party suffering abatements over a specified number of consecutive months, which in value equate to an amount which is at or above a specified percentage of the total services fee.
- (b) Jurisdictions have the flexibility of adopting or not adopting some or all of the Default Termination Events listed above. On certain projects government may also include additional Default Termination Events but only where this is warranted by the unique features of the relevant Project.¹¹³

25.2 Termination for force majeure and uninsurability

25.2.1 Force Majeure Event

Either party may terminate the project agreement:

- (a) for a Force Majeure Event that has endured for a specified period; or
- (b) if the government directs the private party not to reinstate or repair the damage caused by a Force Majeure Event. Refer to section 21.3 of Chapter 21 (Force majeure) for details.

¹¹² See Chapter 29 (Change of ownership/control).

¹¹³ For example, the government may or may not opt to treat failure to insure (subject to section 23.4 of Chapter 23 (Insurance) on uninsurability) as a Termination Event, depending on the particular attributes, requirements and risks of the project.

25.2.2 Uninsurability provisions

Government may terminate the project agreement pursuant to the uninsurability provisions set out in section 23.4 of Chapter 23 (Insurance).

25.3 Voluntary Termination

In addition to Default Termination Events and Force Majeure Termination Events, government may at any time, in its sole discretion and without giving any reasons, terminate the project agreement by giving a specified period of notice ("**Voluntary Termination**"). Where government has directed the private party not to reinstate or repair damage¹¹⁴, and the relevant damage was not caused by a Force Majeure Event or private party default, termination of the project agreement by government will be treated as a Voluntary Termination.

25.4 Termination for Government Default

Certain jurisdictions do not allow for termination by the private party following Government Default. In other jurisdictions, the private party can terminate the project agreement by giving a specified period of notice, and assuming government has not cured that default during the notice period, where:

- (a) there is an expropriation of a material part of the assets and/or any of the shares of the private party group by a relevant authority in each jurisdiction;
- (b) a failure by government to make payment to the private party of an amount (that is not in dispute) that is due and payable under the projects agreement and that is above a specified threshold within 20 business days of service of a formal written demand by the private party; or
- (c) a breach by government which substantially frustrates or renders it impossible for the private party to perform its obligations for a continuous period of two months.

25.5 Procedure

- (a) Following a Default Termination Event, Force Majeure Termination Event or otherwise in accordance with section 25.3, government may elect to terminate the project agreement by giving notice to the private party.
- (b) Termination will take effect within a specified time after the date of the notice, or such earlier time as specified in the notice.

25.6 Consequences

- (a) Upon termination, the private party will be entitled to compensation in accordance with the principles set out in Chapter 26 (Termination Payments).
- (b) The rights and obligations of the parties to the project agreement (or other agreements that may be relevant to include here, such as any lease between the private party and government) will cease except for:
 - (i) any accrued rights and obligations; and
 - (ii) any rights or obligations which are expressed to continue after termination.

¹¹⁴ See section 22.2 of Chapter 22 (Reinstatement and repair).

26. Termination Payments

Principle

On early termination of the project agreement, government generally pays a Termination Payment to the private party. This payment is calculated in accordance with the principles set out in this Chapter.

This Chapter assumes that the private party has not taken residual risk on the project assets, and that those assets are transferred to government upon termination. In other circumstances, different termination payments may be appropriate.

26.1 Default Termination Compensation Amount

On termination of the project agreement resulting from a Default Termination Event, government will pay the private party an amount equal to the fair market value of the Project. If a liquid market exists, Government will determine the fair market value of the project by re-tendering the project in accordance with section 26.1.1. If no liquid market exists, or if government otherwise elects, the Independent Valuer will calculate the Estimated Fair Value of the project as between a willing buyer and willing seller in accordance with section 26.1.2. In each case the deductions described in section 26.1.3 will apply.

In the case of re-tendering (as described in section 26.1.1), from the Termination Date until the date the Default Termination Compensation Amount is paid, government will pay the private party a post-termination service fee calculated as the full service fee less:

- (a) The greater of all cost components related to the provision of the hard and soft services, and the cost to government of alternative provision of the services;
- (b) cost components related to the provision of insurance; and
- (c) rectification costs incurred by government.

This will generally be deducted from the final Default Termination Compensation Amount.

26.1.1 Determination of Compensation by Tendering¹¹⁵

- (a) If there is a liquid market, government will be entitled to sell (i.e., re-tender) the unexpired term of the project agreement on the same terms and will, subject to section (d), pay the proceeds of the sale to the private party. If, despite a liquid market, government receives no bids, or no bids compliant with the terms of the project agreement, the 'proceeds' received from the tender will be deemed to be zero.
- (b) A liquid market will exist if there is a sufficient number of contractors (e.g. in Victoria the minimum number of required market participants will be determined on a project-specific basis, but will be at least two) in the prevailing market (or markets for similar contracts to PPP contracts) to ensure that the price that is likely to be achieved through a tender will be a reliable indicator of fair value.

¹¹⁵ The re-tendering mechanism and associated tests for a liquid market will be developed and refined by government on a project-by project basis.

- (c) Any dispute as to the existence of a liquid market will be referred for resolution to the dispute resolution procedure.
- (d) In jurisdictions which give priority to the step-in rights of senior lenders, government will not be entitled to re-tender the unexpired terms of the project agreement if the senior lenders have exercised their right to step-in under their direct deed with government and have not procured the transfer of the private party's rights and liabilities under the project agreement to a suitable substitute private party (provided they have used all reasonable efforts to do so).¹¹⁶

26.1.2 Determination of Estimated Fair Value

- (a) If there is no liquid market, or if government otherwise elects, government will pay to the private party an amount equal to the Estimated Fair Value of the project as calculated by an independent valuer. Jurisdictions may provide different mechanisms for calculating what the Estimated Fair Value of the project is.
- (b) In some jurisdictions, the Estimated Fair Value of the project will be determined as follows:
- (i) Prior to Completion:
- (A) the lower of:
- the design and construction costs properly incurred by the private party up to and including the Termination Date; and
 - the design and construction costs forecast to be incurred from Financial Close (as set out in the Base Case Financial Model and Works Program) less the capital costs to be incurred by government (including a reasonable estimate of cost overruns) from the Termination Date to ensure Completion is achieved by the Date for Completion,
- less:
- (B) all deductions determined in accordance with section 26.1.3.
- (ii) After the Completion:
- (A) the forecast service fee to be paid from the Termination Date until the expiry of the project agreement (ignoring any abatements and assuming no breach had arisen), discounted at the Base Case Weighted IRR,
- less:

¹¹⁶ The senior lenders must take the risk of the private party's performance (this risk is mitigated by their right to step-in and cure or to transfer the project). Where government elects to terminate the project agreement for poor performance, senior lenders are encouraged to exercise their step-in rights and use their reasonable efforts to transfer the project (which may include accepting offers which do not fully pay out senior debt). If the senior lenders have used their reasonable efforts to transfer the project and have been unable to do so (for reasons other than not achieving full pay-out of senior debt), then government considers that a liquid market is unlikely to exist.

- (B) the total costs to be incurred by government as a direct result of termination, including the cost forecast to be incurred by government in providing the Contracted Services, a reasonable risk assessment of any cost overruns which will occur and any rectification costs required to restore the operating services standards, discounted at the Base Case Weighted IRR.
- (c) In other jurisdictions, determination of the Estimated Fair Value will be as follows:
- (i) in determining the Estimated Fair Value, the independent valuer must determine the net present value of the projected cash flows for the unexpired contract term (ignoring any abatements and assuming no breach had arisen) calculated on a nominal, pre-tax basis, taking into account agreed rates of indexation¹¹⁷ and assuming:
- a reasonable time to achieve Completion;¹¹⁸
 - the subsisting grounds for termination of the project agreement have not arisen (but the costs of remedying any default by the private party giving rise to termination, including any rectification costs, must be taken into account); and
 - any breach of the project agreement arising prior to the successful tender will not entitle government to terminate the project agreement;¹¹⁹
- (ii) the projected cash flows must take into account the amount and timing of any rectification and reinstatement costs required to be incurred to enable the delivery of the Contracted Services to the Services Specifications for the unexpired contract term, as well as all other forecast costs (including everyday operating costs and life cycle maintenance costs), indexed at the agreed or determined rate. These will include any costs forecast to be incurred to achieve Completion and all costs incurred, or to be incurred, by government where:
- it directly completes the works and/or delivers the relevant services; or
 - procures the completion of the works or delivery of the services by a third party;

¹¹⁷ The inflation rate to be used in this calculation will be determined by government. Victoria has traditionally used the forecast general inflation rates from the predictions in the State budget papers. See *Partnerships Victoria* Advisory Note – Determining the General Inflation Rate for Use in *Partnerships Victoria* projects (August 2005). If the parties cannot agree any other rates of indexation which are applicable, the relevant indexation rates must be referred to dispute resolution.

¹¹⁸ Where the project agreement is terminated prior to the private party achieving Completion.

¹¹⁹ In making this determination some amendments to the project agreement's terms and conditions may need to be assumed to allow for the incoming service provider to deliver the project (e.g. all things being equal, any accrued warning notices and frequent and persistent breaches will need to be cancelled or where termination occurs during the construction phase, the date for completion and the sunset date may need to be extended).

(iii) in addition, the costs identified above will be adjusted for a reasonable contingency over the base amount. The resultant projected cash flows are to be the valuer's estimate of the operating cash flow stream which, had a liquid market existed and the project been tendered, a hypothetical bidder would have valued to determine the amount to bid for the project and must be discounted to its net present value at the Termination Date;¹²⁰ and

(iv) the discount rate to be used by the independent valuer to establish the net present value of the projected cash flows will be derived using the following formula:

$$R = ((1 + \text{real base case pre-tax project IRR}^{121} + \text{CB B} - \text{CB A}) * (1 + i)) - 1$$

where:

R = the discount rate;

CB B = the real yield to maturity on a benchmark Commonwealth bond traded in the Australian bond markets with a modified duration closest to that of the weighted average life of any outstanding senior debt as shown in the Base Case Financial Model as at the Termination Date;

CB A = the real yield to maturity on a benchmark Commonwealth bond traded in the Australian bond markets with a modified duration closest to that of the weighted average life of any outstanding senior debt as shown in the Base Case Financial Model as at the date of Financial Close; and

i = the assumed inflation rate¹²² to index the cash flows.

For the purposes of the above formula, government recognises that there may not be a product with an appropriate tenor. If this occurs, an appropriate alternative will be determined at the time in consultation with the private party.

26.1.3 Deductions

The following deductions will be made from the amount determined in accordance with section 26.1.1 or 26.1.2:

- (a) any costs incurred by government in determining the fair market value (including engaging the independent valuer);
- (b) any amounts owing by the private party to government as at the Termination Date (including any amounts government is entitled to set-off under the project agreement);
- (c) credit balances standing to any of the private party's bank accounts and insurance proceeds or other amounts owing to the private party, in each case only to the extent not taken into account in calculating the Estimated Fair Value;

¹²⁰ Using the discount rate determined in section 26.1.2(c)(iv)).

¹²¹ As at project commencement.

¹²² That is, the forecast general inflation rate from the predictions in the State budget papers.

- (d) government's reasonable forecast internal and external re-tendering costs as applicable; and
- (e) to the extent not covered by paragraphs (a) to (d) above, all additional costs reasonably incurred by government as a result of the default.¹²³

If, after deducting the above amounts, the Default Termination Compensation Amount determined in accordance with section 26.1.1 or 26.1.2 is negative, some jurisdictions will require the private party to pay that amount to government while other jurisdictions will deem the Default Termination Compensation Amount to be zero.

26.1.4 Termination for abandonment

In some jurisdictions, if the project agreement is terminated due to abandonment (see section 25.1.2(a)(ii)) the private party will receive no Termination Payment.

26.1.5 Timing of payment

- (a) Government will be entitled to pay to the private party the Default Termination Compensation Amount either by a lump sum payment or instalment payments¹²⁴ (which may be instalments of a specified number of equal amounts if a jurisdiction so chooses) no later than a specified period after the date on which such amount is determined. This is subject to any disputed element of the payment being referred to dispute resolution, in which case payment of the disputed component will be deferred until the matter has been determined.
- (b) Interest may be payable on late payments, depending on the type of financing and the reasons for the delay in payment, and will be determined (including the applicable interest rate) on a project-specific basis.

26.2 Force Majeure Compensation Amount

26.2.1 Payment amount

- (a) On termination of the project agreement for each type of Force Majeure Termination Event, government must, subject to Chapter 21 (Force majeure), pay to the private party:
 - (i) an amount equal to:
 - (A) the lower of senior debt owing to financiers at the Termination Date and the amount forecast in the Base Case Financial Model (as varied from time to time in accordance with section 14.5 of Chapter 14 (Payment provisions)) to be owing to financiers as at the Termination Date¹²⁵; ; and

¹²³ This would generally exclude indirect and consequential losses for which government would otherwise not be liable.

¹²⁴ In jurisdictions which recognise the private party's debt commitments upon termination, such instalments will (where possible) reflect debt commitments. Alternatively, in these jurisdictions government may choose to compensate the financiers for their costs and expenses incurred as a consequence of government exercising such a right.

¹²⁵ In either case, in some jurisdictions, ensuring that any senior debt payments of principal made by government during any period of suspension (arising from a Force Majeure Event) are appropriately taken into account (see section 21.2.5).

- (B) any break costs payable to the financiers or benefits receivable by the private party from or to the financiers under the finance documents as a direct result of early termination, including hedging arrangements (not included in paragraph (A) above). Any break gains must be deducted.

less the deductions listed in section 26.2.2 below ("**Force Majeure Compensation Amount**"); and

- (ii) in certain jurisdictions only, half of equity as shown in the balance sheet of the private party at the time of termination, at par.
- (b) The Force Majeure Compensation Amount is based on the assumption that the debt finance component of the project is bank debt. In a project financed by bonds, government will only pay the par value of the bonds outstanding (together with any accrued and unpaid interest) less any deductions.
 - (c) To the extent that the project is fully or partly financed by a hybrid issue or another form of finance, appropriate amendments to the senior debt element of any payment will need to be made.
 - (d) In regard to paragraph (a)(i)(A) above, mezzanine and "other subordinated debt" will be afforded the same protection as senior debt for the purposes of the Force Majeure Compensation Amount, but only to the extent that such debt has the essential characteristics of senior debt (other than to the extent that it is subordinated to pure senior debt). This will be determined on a project-specific basis depending on the debt structure of the private party. If subordinated debt has the characteristics of equity, some governments will not provide any compensation, whilst others will compensate half of the subordinated debt.
 - (e) In regard to paragraph (a)(i)(B) above, break costs will be subject to the private party's obligation to mitigate any such break costs.
 - (f) Where the Force Majeure Compensation Amount could potentially include amounts to be refinanced by an anticipated contribution from equity at the end of the construction phase, government may seek to cap the Force Majeure Compensation Amount to the level of what would have been the long term senior debt after that anticipated equity contribution.

26.2.2 Deductions

The following deductions will be made from the amount set out in section 26.2.1:

- (a) all credit balances on any bank accounts held by or on behalf of the private party on the Termination Date;
- (b) any amounts owing by the private party to government as at the Termination Date (including any amounts government is entitled to set-off);
- (c) any insurance proceeds paid or payable to the private party (or which would have been payable to the private party if it had complied with its insurance obligations) at any time between the Termination Date and the date the Force Majeure Compensation Amount is paid, other than payments that are to be applied to repairing or rebuilding the facility or to third party liabilities, including insurance proceeds which would have been received before the Termination Date and applied against a component of the Force Majeure Compensation Amount if the private party had complied with the Project Contracts;

- (d) all sums due and payable to the private party from the financiers as a result of any prepayment of senior debt¹²⁶ and any third party amounts paid to the private party at any time during the period between the Termination Date and the date of payment;¹²⁷ and
- (e) in some jurisdictions only, in the case of termination prior to completion of construction, 50 per cent of the equity to be contributed at the end of the construction phase.

26.2.3 Default Termination or Force Majeure Compensation Amount

In some jurisdictions, where the Force Majeure Compensation Amount is less than the Default Termination Compensation Amount which would have been payable had termination (and the relevant loss or damage to the project) occurred as a result of a private party default, rather than a Force Majeure Event, then government will pay the Default Termination Compensation Amount instead of the Force Majeure Compensation Amount.

In other jurisdictions, where those circumstances arise, government may elect to pay the Default Termination Compensation Amount instead of the Force Majeure Compensation Amount where equity is not paid out as a result of a Force Majeure Termination Event.

26.2.4 Method of payment

Government will be entitled to pay the Force Majeure Compensation Amount in a specified number of instalments.¹²⁸

Interest may be payable on late payments of the Force Majeure Compensation Amount, depending on the type of financing and the reasons for the delay in payment, and will be determined (including the applicable interest rate) on a project-specific basis.

26.2.5 Subsisting private party Termination Event

Where a private party Default Termination Event is subsisting at the time that notice of termination is given for a Force Majeure Termination Event, the Termination Payment is to be calculated on the same basis as for termination following a Default Termination Event (in accordance with section 26.1).

26.3 Payment for Government Default or Voluntary Termination by government

26.3.1 Voluntary Termination Payment Amount

On termination of the project agreement resulting from a government Voluntary Termination, government must, subject to section 26.3.3, pay to the private party an amount equal to the aggregate of:

¹²⁶ Senior debt will include amounts payable as a result of early termination of hedging arrangements.

¹²⁷ Upon termination, the private party must assign to government its rights to any claims against third parties which have not been determined or paid by the payment date.

¹²⁸ In jurisdictions which recognise the private party's debt commitments upon termination, such instalments will (where possible) reflect debt commitments. Alternatively, in these jurisdictions government may choose to compensate the financiers for their costs and expenses incurred as a consequence of government exercising such a right.

- (a) where the senior debt amount has been financed by bank debt, the lower of senior debt owing to financiers at the Termination Date and the amount forecast in the Base Case Financial Model (as varied from time to time in accordance with section 14.5 of Chapter 14 (Payment provisions)) to be owing to financiers as at the Termination Date;
- (b) where the senior debt amount has been financed by capital market instruments (bonds), the lower of the present value of the:
- (i) future cash flows under the outstanding bonds; and
 - (ii) the future cash flows under the bonds forecast to be outstanding at the Termination Date in the Base Case Financial Model (adjusted for any Re-financing pursuant to which government is paid a Re-financing Gain),¹²⁹

calculated at the Termination Date and, in some jurisdictions, having regard to the yield at which the underlying capital market instruments are priced in the market at the Termination Date, using standard market conventions for each relevant instrument,¹³⁰ on the basis that the project agreement and the other Project Contracts immediately prior to the Termination Date continue to operate to the expiry date;

- (c) an amount which gives an equity return, being on both any share capital subscribed at Financial Close and any shareholder subordinated debt not taken into account as debt above, (taking into account distributions already paid to shareholders) equal to:
- (i) in some jurisdictions, the real blended equity internal rate of return in the Base Case Financial Model, as varied from time to time in accordance with section 14.5 of Chapter 14 (Payment provisions); or
 - (ii) in other jurisdictions, the greater of:
 - (A) the real blended equity internal rate of return in the Base Case Financial Model, as varied from time to time in accordance with section 14.5 of Chapter 14 (Payment provisions); and
 - (B) the market rate of equity return, having regard to market rates of return, for the project cash flows taking into account the independent valuer's reasonable assessment of forecast cash flows to equity from the date of termination to expiry of the project agreement, in each case:
 - assuming the Contracted Services will be delivered in accordance with the performance standards set out in the project agreements;

¹²⁹ In both paragraphs (i) and (ii), the future cash flows must exclude any 'bond payout amount' or the like payable under the bond terms on default or early repayment of the bonds.

¹³⁰ The determined yields should each comprise a market reference (base) interest rate plus the lower of the issue margin as set out in the Base Case Financial Model and the trading margin derived from the average offer rate as quoted by a panel of leading dealers in the Australian bond market over five trading days preceding the date the government gives notice of the Voluntary Termination. The precise calculation of any bond payout will depend on the terms of the specific funding proposal.

- assuming the service fee provisions will continue to apply as set out in the project agreement;
 - taking into account deductions for forecast costs (including everyday operating costs, finance costs and life cycle maintenance costs) required to enable the delivery of all the contractual services to specifications for the un-expired term; and
 - taking into account the net present value of the projected distributions to equity for the unexpired contract term;
- (d) the break costs and all other reasonable costs incurred by the private party as a direct result of terminating a finance agreement, including hedging arrangements and with any break gains deducted; and
- (e) redundancy payments for employees of the private party and amounts owing to the sub-contractors, which are, in each case, reasonably and properly incurred and arise as a direct result of the termination,

less the deductions in section 26.3.2 below, ("**Voluntary Termination Payment Amount**").

In regard to paragraph (a) above, mezzanine and other subordinated debt will be afforded the same protection as senior debt for purposes of the Voluntary Termination Payment Amount, but only to the extent that such debt has the essential characteristics of senior debt (other than to the extent that it is subordinated to pure senior debt). This will be determined on a project-specific basis depending on the debt structure of the private party. However, government will not compensate subordinated debt which is effectively equity.

In regard to paragraph (d) above, government will not compensate the private party for redundancy amounts and sub-contractor costs arising from arrangements not entered into in connection with the project, or in the ordinary course of business and on commercial arm's length terms. In addition, government will not compensate sub-contractor loss of profit for work not performed or indirect, or consequential, loss.

26.3.2 Deductions

The following items will be deducted from the amount set out in section 26.3.1:

- (a) all credit balances on any bank accounts held by or on behalf of the private party on the Termination Date;
- (b) any amounts owing by the private party to government as at the Termination Date (including any amounts government is entitled to set-off);
- (c) any insurance proceeds paid or payable to the private party (or which would have been payable to the private party if it had complied with its insurance obligations) at any time between the Termination Date and the date the Voluntary Termination Payment Amount is paid, including insurance proceeds which would have been received before the Termination Date and applied against a component of the Voluntary Termination Payment Amount had the private party complied with the project documents, other than payments that are to be applied to repairing or rebuilding the facility or to third party liabilities; and
- (d) all sums due and payable to the private party from the financiers as a result of any prepayment of senior debt (including any amounts payable as a result of early termination of hedging arrangements) and any third party amounts paid to the private party at any time during the period between the Termination Date and the date of payment.¹³¹

¹³¹ Upon termination, the private party must assign to government its rights to any claims against third parties which have not been determined or paid by the payment date.

26.3.3 The greater of outstanding debt and Voluntary Termination Payment Amount

In some jurisdictions, if the Voluntary Termination Payment Amount is less than the senior debt amount identified in section 26.3.1 (together with any break costs), government will pay the private party the relevant senior debt amount.

26.3.4 Interest

Interest may be payable on late payments, depending on the type of financing and the reasons for the delay in payment, and will be determined (including the applicable interest rate) on a project specific basis.

26.4 Mitigation

The private party must use all reasonable endeavours to mitigate losses or costs in respect of which government is making a Termination Payment.

26.5 Transfer of senior debt obligations

In certain circumstances, government may reserve the right (in its absolute discretion) to, in lieu of paying out senior debt, have the obligations to repay senior debt transferred to it. This may arise (without limitation) in circumstances, for example, where the hedges are "out of the money" and government would prefer not to bear the break costs of early termination.

Accordingly, if government so determines, the Termination Payment made by government to the private party will exclude any amounts that would otherwise be payable with respect to the transferred senior debt.

The amount of senior debt transferred to government will be less any deductions government would otherwise be able to make under section 26.3.2.

27. Step-in

Principle

Government may step-in and assume all or some of the service delivery obligations of the private party when:

- (a) there is an emergency, a serious risk to the structure of the facility or the works, the environment, the public or users of the facility, or a serious risk of material damage to public or private property;
- (b) step-in is necessary to discharge a statutory duty; or
- (c) in some jurisdictions, an Event of Default remains unremedied or a Default Termination Event or Force Majeure Termination Event occurs.

27.1 Circumstances of step-in

27.1.1 Circumstances

Government may assume all or some of the service delivery obligations of the private party for a period of time where:

- (a) a situation arises which in the bona fide opinion of government:
 - (i) is likely to be a serious risk to the environment, a risk to the health or safety of the users of the facility or other members of the public, a risk to the structural integrity or safety of any parts of the works or the facility, or a serious risk of material damage to public or private property or other specified emergency;
 - (ii) in some jurisdictions, causes material disruption to the safe and secure performance of the construction works or the provision of the Contracted Services or operation of the facility;
 - (iii) in some jurisdictions, will require the provision of the Contracted Services or alternate services materially greater than that required in the Services Specifications; or
 - (iv) requires government to take immediate action to discharge or exercise a statutory duty or power. Where the service being provided is an essential service, government may be given Step-in Rights to guarantee the continuity of that essential service;
- (b) in some jurisdictions, there has been an Event of Default except where the private party is complying with an approved cure plan and diligently pursuing a remedy; or
- (c) in some jurisdictions there has been a Default Termination Event.¹³²
- (d) While government is entitled to exercise its Step-in Rights during any period of suspension following the occurrence of a Force Majeure Termination Event, if any of paragraphs (a) to (c) apply, it is not intended that any government emergency step-in regime cut across the force majeure regime (for example, operation of termination rights for force majeure).

¹³² Government's step-in rights in sections 27.1.1(b) and (c) will be subject to funders' step-in rights under the funders' direct agreement.

27.1.2 Extent of rights in a Step-in situation

- (a) On the occurrence of any of the events identified in section 27.1.1, government may elect to:
- (i) temporarily assume total or partial possession, management and control of the facility and the provision of the services; and
 - (ii) take such other steps as are necessary or desirable to continue the provision of the services and to minimise the risk to the environment, the public or users of the facility, or of material damage to public or private property,
- ("Step-in Rights").**
- (b) As an alternative to exercising its Step-in Rights, in some circumstances government may require the private party to:
- (i) immediately perform any Contracted Service in respect of which the private party is in breach where the Step-in Rights are exercised due to an Event of Default or Default Termination Event;
 - (ii) do all that it can do to procure additional or alternative Contracted Services; or
 - (iii) suspend performance of the Contracted Services to ensure the event is dealt with and normal operation of the facility resumes as soon as is reasonably practicable.
- (c) Such rights are in addition to the Step-In Rights listed above, but should generally be treated analogously to Step-in Rights under the project agreement.

27.1.3 Assistance by private party

The private party must assist government whenever and however possible to exercise its Step-in Rights as set out in section 27.1.2.

27.1.4 Government obligations

- (a) Government is not obliged to remedy or cure any breach or Termination Event to overcome or mitigate any risk or consequences in respect of which it exercises Step-in Rights.
- (b) When exercising its Step-in Rights, government must use all reasonable endeavours to operate the facility and otherwise deliver the Contracted Services in accordance with the project agreement. What is reasonable under the circumstances will be determined in the light of the reason for government stepping-in.

27.1.5 Private party's rights and obligations suspended

The private party's rights and obligations under the project agreement are suspended to the extent necessary to permit government to exercise its Step-in Rights.

27.1.6 Power of attorney

The private party irrevocably appoints government (and its nominees) as its attorney with full power to exercise its Step-in Rights. The power of attorney will be in the security granted by the private party in favour of government. The security will secure the exercise of the Step-in Rights and associated costs.

27.2 Costs of step-in

While government is stepped-in, it must continue to pay the full service fee reduced by the following amounts:

- (a) where government has stepped in as a result of an Event of Default or Default Termination Event (without double counting):
 - (i) government's reasonable estimate of the costs not incurred by the private party as a result of non-provision of the Contracted Services; and
 - (ii) the costs incurred by government in exercising that Step-in Right, including all reasonable and proper costs incurred by government in delivering the affected services (whether directly or through a replacement sub-contractor).

If the aggregate amount to be deducted under sections 27.2(a)(i) and (ii) is greater than the service fee, the difference will be a debt due and payable from the private party to government; and

- (b) where government has stepped in as a result of any other triggering event, the private party will be entitled to Compensation. However, the government's payment will be reduced by the operating or other costs which will not be incurred by the private party as a result of the exercise of the Step-in Rights.

27.3 No liability or limitation on government's rights

27.3.1 No liability

Government will have no liability to the private party and the private party will not be entitled to make any claim arising out of or in connection with the exercise of Step-in Rights unless government has acted grossly negligently (in relation to emergency step-in only), fraudulently or in bad faith in the exercise of those rights.

27.3.2 No limitation on existing rights

The exercise of Step-in Rights does not limit any other right of government under the project agreement, including rights arising pursuant to an Event of Default and Default Termination Event.

27.4 Stepping-out

- (a) Government may cease to exercise its Step-in Rights at any time. Government will give the private party reasonable notice of its intent to complete or cease the step-in and shall complete, or cease the step-in, in accordance with such notice.
- (b) Some jurisdictions provide that government must cease exercising its Step-in Rights where:
 - (i) government has exercised its Step-in Rights as a result of an Event of Default or Default Termination Event, as soon as the Event of Default or Default Termination Event is remedied or government ceases to pursue a remedy; or
 - (ii) where government has exercised its Step-in Rights as a result of any other triggering event, the relevant material risk is averted, overcome, or mitigated to government's satisfaction, or the statutory duty has been performed.
- (c) Government will not be obliged to cease exercising its Step-in Rights in respect of a particular step-in event if, prior to the date upon which government would otherwise have been required to step-out (in respect of that event), there occurs another step-in event entitling government to step-in.
- (d) Upon government ceasing to exercise any Step-in Rights (and subject to government not having terminated the project agreement):
 - (i) the private party must immediately recommence performance of the suspended obligations; and
 - (ii) government will, at the cost and expense of the private party, give reasonable assistance to ensure a smooth transition.

28. Sub-contractors

Principle

All sub-contracts and material sub-sub-contracts must be in an agreed form. The main construction and operations sub-contracts may not be amended without government consent. Amendments to other material sub-contracts (including, sub-sub-contracts) which may impact on government's rights, or lessen the ability of the private party to perform its obligations, may not be made without government consent.

The private party is not relieved of any of its obligations and liabilities under the project agreement by sub-contracting the performance of the works or Contracted Services.

28.1 Sub-contracts generally

28.1.1 Timing of appointment of major sub-contracts

Government will, as a standard position, require the private party to appoint the main construction and operational services sub-contractors at contractual close. However, in exceptional circumstances, this may be a Condition Precedent to Financial Close.

28.1.2 Construction and operations sub-contracts to be in agreed form

- (a) The construction and operations sub-contracts entered into by the private party (in respect of all or any part of the works or Contracted Services) must be in a form agreed by government.¹³³
- (b) Provided there is compliance with all other requirements set out in this Chapter 28 (Sub-contractors), government's prior written approval to every sub-contract will not be required.

28.1.3 Effects of unapproved amendments

Government will not be bound by, and none of its rights (under the project agreement or otherwise) will be affected by any amendment to termination, assignment or replacement of any sub-contract entered into by the private party, which has not been approved by government.¹³⁴

¹³³ Details of the type of provisions required in material sub-contracts (which includes the main construction and operations sub-contracts) are more fully set out in section 28.2.3.

¹³⁴ See section 28.3 in respect of amendments to material sub-contracts.

28.2 Additional material sub-contract requirements

28.2.1 Material sub-contracts

- (a) The project agreement will specify what type of sub-contracts (including sub-sub-contracts) are to be regarded as 'material'. They will usually include sub-contracts above a specified threshold value, but may also include sub-contracts of a specified duration and sub-contracts for the provision of particularly important or sensitive Contracted Services (such as security services in a prisons project).
- (b) The threshold value will depend on the nature and value of the project and whether the sub-contract is for construction or operation. However, it is effectively intended to represent a material part of the works or operational services (as appropriate).
- (c) Material sub-contracts will be deemed to include the main construction and operations sub-contracts.

28.2.2 Provision of material sub-contracts

The private party must promptly provide to government a copy of each material sub-contract entered into.

28.2.3 Terms and conditions of material sub-contracts

- (a) Each material sub-contract must include:¹³⁵
 - (i) a covenant requiring entry into a side deed (if requested by government) and for the assignment, at government's option, of the benefit of the material sub-contract to government if the project agreement is terminated;
 - (ii) an undertaking from the sub-contractor to provide such consents and information as may be required under the project agreement in respect of its employees (employee-related requirements, including personnel screening processes for sensitive projects such as education, health and corrective service projects will be more fully detailed in the project agreement on a project-specific basis); and
 - (iii) provisions recognising and permitting government to exercise its Step-in Rights and any of its rights arising as a result of an Event of Default or Default Termination Event and various other rights expressly identified in the project agreement as affecting the sub-contract.
- (b) In addition, the main construction and operating contracts must include:
 - (i) an undertaking from the sub-contractor to rectify any defects;
 - (ii) an undertaking from the sub-contractor to provide such bonds, guarantees, warranties and manuals as are required by the private party;¹³⁶ and
 - (iii) provisions which give full effect to the provisions of the project agreement relating to intellectual property and moral rights.

¹³⁵ These reflect government's minimum requirements and are not intended to be an exhaustive list of material sub-contract requirements. Additional requirements or amendments to the requirements may apply on a project by project basis.

¹³⁶ Bonding and guarantee requirements must at a minimum reflect government requirements under the project agreement in respect of the relevant sub-contract.

28.2.4 Collateral warranty

- (a) No material sub-contractor is to be engaged in connection with the works or Contracted Services without having delivered to government a collateral warranty in substantially the form set out in the project agreement.
- (b) The collateral warranty constitutes a direct covenant from the sub-contractor in favour of government with respect to its performance of relevant obligations including, without limitation, maintenance and non-vitiation of insurances, provision of information regarding defaults and claims, and the continuing performance by the sub-contractor of its obligations in certain circumstances for the benefit of government.
- (c) This is a necessary element of government's 'security' package, given that it is dealing with a special purpose vehicle which itself does not have the necessary resources and competencies to perform the project.
- (d) In addition, since government consent to all sub-contracts is not required, it needs direct rights against the sub-contractors (such as making claims in respect of defects) which are not dependent on the sub-contract or upon government exercising its Step-in Rights.

28.3 Amendments to material sub-contracts

- (a) The main construction and operation sub-contracts (to be determined on a project by project basis) are not to be amended, terminated, assigned or replaced without government's prior written consent.
- (b) The other material sub-contracts are also not to be amended, terminated, assigned or replaced without government's prior written consent where such amendment may impact on government's rights or the ability of the private party to satisfy its obligations under the project agreement and associated documents.
- (c) Where prior government consent is not required, the private party must give government prompt notice of the termination or material amendment of a material sub-contract.

28.4 Side deed

A side deed (substantially in a form agreed by the parties and set out in the project agreement) must be provided in respect of the construction and operations sub-contracts and may be required from certain other material sub-contractors.

28.5 Sub-contractor requirements

- (a) The private party must ensure that each sub-contractor is reputable and has access to sufficient experience, expertise and ability to perform its obligations in accordance with the Project Contracts.
- (b) Material sub-contractors must not be replaced without government's prior written consent. It is intended that this requirement generally only capture the main construction and operating sub-contractors. However, depending on the importance, this requirement may be extended to other material sub-contracts.
- (c) In respect of a Change in Control in material sub-contractors, refer to Chapter 29 (Change of ownership/control).

28.6 Private party's obligations in respect of sub-contracts

The private party's obligations in respect of sub-contracts must:

- (a) comply with its obligations and enforce the terms of any sub-contract as necessary to comply with the project obligations;
- (b) not, without government's prior written consent, compromise or waive any claim it may have against a material sub-contractor; and
- (c) advise government of any claims made by a material sub-contractor (in respect of outstanding payments or otherwise).

28.7 Sub-contractors appointed by financiers

The sub-contractor requirements set out in this Chapter 28 (Sub-contractors) also apply to any substitute sub-contractor appointed by financiers under their funder's direct agreement or any substitute sub-contractor appointed under the market testing regime.

28.8 No relief to private party by sub-contracting obligations

The private party is not relieved of any of its obligations and liabilities under the project agreement as a result of sub-contracting any of the works or Contracted Services, or government's approval of any sub-contractor. The private party will, in each instance, be responsible for the sub-contractors' performance.

29. Change of ownership/control

Principle

With the exception of transfers to related bodies corporate and of listed shares and interests, the private party must obtain prior government consent to either any Change in Control or change in the legal or beneficial ownership of the private party or any member of the private party's group and to any change in the private party's group structure (in each case, from the situation as at contract signing).

29.1 Warranty as to ownership/control

- (a) The private party will warrant the legal and beneficial ownership of each member of the private party group and the private party group structure as at contract signing.
- (b) The constitution of the private party group will be defined on a project-specific basis. However, it will generally include all relevant related bodies corporate of the private party as at contract signing or as otherwise approved by government during the contract term in accordance with change in ownership provisions.

29.2 Change of ownership/control of private party

29.2.1 Prior consent

- (a) In some jurisdictions, the private party must not permit any change to the legal or beneficial ownership of any shares or units or any other interests in any member of the private party group without government's prior consent.
- (b) In other jurisdictions, the limitation on change in ownership without consent is limited to the Change in Control of any member of the private party group.
- (c) Government will not unreasonably withhold consent to the change in ownership/Change in Control. The project agreement may stipulate circumstances where it will be deemed to be reasonable for government to withhold consent, for example where government is of the reasonable opinion that one or more of the following conditions apply:
 - (i) the private party has not provided it with full details of the proposed change in ownership / Change in Control and any further information requested by government;
 - (ii) the change in ownership / Change in Control is to take effect prior to the second anniversary of Completion (where it relates to the private party only);
 - (iii) the proposed entity:¹³⁷
 - (A) is not solvent and reputable;

¹³⁷ The proposed entity is to be considered and defined on a project-specific basis.

- (B) has an interest which conflicts in a material way with the interests of government and is involved in a business or activity which is incompatible, or inappropriate, in relation to the construction or operation of the facility; and
 - (C) does not have a sufficient level of financial and technical capacity;
- (iv) the proposed change in ownership / Change in Control is against the public interest;
- (v) the proposed change in ownership / Change in Control would increase the level of risk or liabilities to government; or
- (vi) the proposed change in ownership / Change in Control would impact adversely on the ability or capacity of the private party to perform its obligations under the project agreement or any other project documents, and if applicable, of the material sub-contractor to perform its obligations under the material sub-contract.
- (d) Failure to obtain this consent will be a Default Termination Event.
- (e) Change in Control of a material sub-contractor will also require the prior written consent of government. In some jurisdictions, failure to obtain such prior consent will result in a Default Termination Event. In other jurisdictions, while failure to obtain such prior consent will not automatically trigger a Default Termination Event, a failure to cure an unauthorised Change in Control of a material sub-contractor within a specified period will do so.

29.2.2 Exception to consent requirement

Government's prior consent is not required for a Change in Control or a change in the beneficial or legal ownership of any listed equity interests, or any transfer of equity interests, by a party to its related body corporate. However, the private party is still required to notify government of any such changes.

29.2.3 Publicly listed holding companies

- (a) If a Change in Control occurs due to the transfer of listed shares or interests in an entity with ultimate Control of any member of the private party group or where relevant, a material sub-contractor:
 - (i) the private party must promptly notify government of such event (providing full details); and
 - (ii) government must notify the private party within a specified period whether it accepts or rejects the Change in Control.
- (b) If government rejects the Change in Control, the private party must procure that the relevant person cease to retain the Control within a specified time. In the case of a material sub-contractor, the private party must procure an alternative sub-contractor.
- (c) Failure to so procure will give rise to a Default Termination Event.
- (d) Government may, but is under no obligation to do so, provide pre-approval to a Change in Control if the private party so requests and provides sufficient information to government.

30. End of term arrangements

Principle

The private party must (at its own cost) ensure that the project assets meet government's return conditions at contract expiry. The project assets and site will vest in government at the end of the contract term.

Where government is to re-tender the Contracted Services at the end of the contract term, the private party must take all reasonable steps to ensure that the Contracted Services continue with minimum disruption and risk to government employees and public users.

30.1 Return conditions at contract expiry

30.1.1 Inspection at contract expiry

- (a) An independent assessor appointed by government¹³⁸ must:
 - (i) four years prior to the end of the contract term; and
 - (ii) at any other time (if requested by government) within the four year period and, in any case, at least one year prior to the end of the contract term,

inspect the project assets to determine what condition they will be in at contract expiry. The periods for inspection described in paragraphs (i) and (ii) may be changed depending on the relevant life cycle expectations of the assets.
- (b) Depending on the nature of the project, it may be more appropriate for government (rather than an independent assessor) to survey the condition of the facility, in which case the Project Director / contract administrator will carry out such assessment on government's behalf.
- (c) Following the inspection, the independent assessor must notify government and the private party of:
 - (i) the works (if any) the independent assessor considers are required from the date of the review until contract expiry to bring the condition of the project assets to the standard they would have been in had the private party properly performed its obligations under the project agreement and to ensure that, on contract expiry, the project assets comply with the 'handover condition';
 - (ii) a reasonable program for the private party to carry out such works; and
 - (iii) the expected cost of carrying out the works in accordance with the program.
- (d) In regard to paragraph (c) above, the private party may refer the matter for dispute resolution by an independent expert if it disagrees with the assessment by the independent assessor.

¹³⁸ In some jurisdictions, the independent assessor is appointed jointly by the private party and government.

- (e) In regard to paragraph (c)(i) above, the project agreement will specify the condition the project assets must be in at contract expiry, taking into account the design life requirement after contract expiry.

30.1.2 Cost of inspection

The cost of the inspection will be borne equally by government and the private party.

30.1.3 Obligation to co-operate

The private party must co-operate with the independent assessor and provide all assistance necessary for the inspection to be carried out.

30.1.4 Performance bond or abatements from service fee

- (a) Government may require a performance bond or appropriate security for the cost of the works.
- (b) Alternatively, government may deduct from each remaining scheduled service fee due for payment during the period from the inspection until contract expiry, an amount equal to the cost of the final works (as determined by the independent assessor) divided by the number of remaining payments and may deposit such deductions into the escrow account.

30.1.5 Obligation to carry out works

- (a) The private party will carry out the final maintenance and refurbishment works in accordance with the agreed program, all applicable Laws and approvals and all specified quality, design and construction standards and otherwise to the independent assessor's satisfaction.
- (b) The private party must ensure that, on contract expiry (having carried out any final works), the project assets comply with the return conditions. The independent assessor must be satisfied that this has been achieved.

30.1.6 Private party successfully performs the final maintenance and refurbishment works

- (a) If the independent assessor is satisfied that the private party has completed the final works (or any relevant part of them), government will allow the private party to reduce the amount of the performance bond to reflect the cost of the works carried out, provided that where the performance bond is partially released for only a portion of the refurbishment works, the amount of the performance bond retained is not less than the remaining refurbishment works.
- (b) Alternatively, government may also pay the private party the cost of the works by drawing on the escrow account, if applicable. In some jurisdictions, government's obligation to pay for the private party's costs is limited to the amounts held in the escrow account.

30.1.7 Government may carry out the work

If the private party fails to carry out the necessary rectification and/or maintenance work to the appropriate level of professional care and in accordance with Good Industry Practice, and in accordance with the program, government may carry out the work (or procure a third party to carry out the work) and the cost incurred by government will be a debt due and payable by the private party to government.

30.1.8 Refurbishment Bond

Where government adopts the approach of using an escrow account rather than seeking a performance bond under section 30.1.4, and:

- (a) the cost of the final maintenance and refurbishment works is greater than the aggregate amount of any remaining scheduled payments (until expiry); or
- (b) at any time during the period from the inspection to contract expiry, the cost of any remaining works to be completed is greater than the balance standing to the credit of the escrow account at such time,

the private party must provide government with a refurbishment bond with a face value of not less than the amount of the shortfall and which expires one year after contract expiry.

30.1.9 Abatements from Termination Payments

To the extent not already accounted for in any Termination Payment, the value of any maintenance and refurbishment works that have not been carried out by the private party, but for which government has paid during the contract term, will be deducted from any early Termination Payment.¹³⁹

31.1.10 Escrow account

- (a) Should jurisdictions choose to use an escrow account, government will be the sole signatory to the account, which is to be an interest bearing account, with an authorised deposit-taking institution and on call with 24 hours notice.
- (b) Interest earned on money standing to the credit of the escrow account will be deposited in the escrow account.
- (c) The private party will be given full particulars of the escrow account.
- (d) Money in the escrow account is the government's property.

30.2 Other private party rights and obligations

These provisions will depend on the specific project and the extent to which government may already own relevant assets and the extent to which government requires the assets to be transferred to it.

30.2.1 Surrender and return of the project assets

Unless the project agreement explicitly provides otherwise:

- (a) the private party must surrender and return to government all its right, title and interest in the facility and site (licensed or leased to the private party) free from encumbrances and consistent with the return conditions; and
- (b) the project assets and site become the absolute property of government at the end of the contract term. The private party may, if relevant for the particular project, also be required to make available any handover packages that it will be obliged to prepare during the term in accordance with the project agreement.

¹³⁹ See Chapter 26 (Termination Payments).

30.2.2 Novation

If government so requests, the private party must novate to government, or its nominee, any project lease, sub-lease or licence granted by the private party, or any other agreement entered into by the private party in respect of the works or the services.

30.2.3 Re-tendering requirements

- (a) The private party must use reasonable endeavours to assist government where government is to tender the right to deliver the Contracted Services following the end of the contract term. This includes making available any information government, or any successor party, reasonably requires relating to the project (excluding confidential financial information).
- (b) The private party must take all reasonable steps to assist government and any successor so that any continuation of the Contracted Services is achieved with minimum disruption and risk to government employees and public users. However, the private party is not required to undertake activities which will unreasonably interfere with the operation of its business.

30.2.4 Power of attorney

From the end of the contract term, the private party will appoint government (and any persons nominated by government) as its attorney to carry out any end of term rights and obligations as described in section 30.2. The power of attorney will be contained in the security granted by the private party in favour of government. The security will secure the private party's end of term obligations.

30.2.5 Continuing obligations

- (a) Expiry or early termination of the project agreement is without prejudice to any accrued rights and obligations as at the expiry or Termination Date (including any rights and obligations accrued as a result of a default).
- (b) The parties will agree the specific provisions which will survive termination or expiry of the project agreement. However, they usually include provisions relating to the satisfaction of Conditions Precedent, indemnities and warranties, the defects liability period, end of term maintenance and refurbishment obligations (including the escrow account), payment and termination provisions, government's Step-in Rights, general remedies, intellectual property, confidentiality obligations, dispute resolution, public relations and publicity, records and end of term rights and obligations.

30.2.6 End of term payment

- (a) In circumstances where government believes that the private party is unlikely to perform any of its specified ongoing obligations after expiry or early termination of the project agreement, government may either:
 - (i) withhold part of the final scheduled payment (in the event of contract expiry) or the relevant Termination Payment (where there is an early termination); or
 - (ii) require a performance bond to be provided in respect of those obligations.
- (b) Any monies withheld by government will be payable to the private party on the earlier of the outstanding obligations being satisfied and the end of a specified period (to the extent that the private party has met its obligations arising up to the end of that specified period).

- (c) Government may make a demand under the performance bond to the extent that the private party fails to perform its obligations. The performance bond will expire at the end of a specified period. This period will be determined on a project-specific basis depending on the nature of the obligations, but would generally be expected to be a 12 month period.
- (d) The amount of any withheld monies and the value of any bond (which may be a bid item) is intended to reflect the costs and losses which government is likely to incur as a result of the private party's failure to perform its ongoing obligations.
- (e) Whether government seeks to withhold any funds, or requires a performance bond, is a value for money consideration dependent on a number of issues. These include whether government will continue using the facility at the end of the contract term (and, in particular, whether it will be re-tendering the services), the risk and effect on government of the private party not complying with its end-of-term obligations and whether the private party is a special purpose vehicle or a company of substance financing the project on balance sheet.

30.3 Improvements

30.3.1 Improvements to vest in government on expiry

In some jurisdictions, any improvement which has not already vested in government will be transferred to government at the end of the contract term.

30.3.2 Payment for value of the improvements

Generally, the value of the facility will have been paid for through the service fee and the private party can make no claim for payment for the assets upon their transfer to government. However, depending on the nature of the asset, its projected residual value and which party has assumed the end of term asset risk, a pre-determined amount may be payable in some jurisdictions, to the private party by government for the facility.

31. Dispute resolution

Principle

The dispute resolution processes are designed to provide resolution of matters in dispute in a speedy and non-litigious, but fair and independent manner.

31.1 Panel

- (a) A panel will be established under the project agreement as the initial forum for resolution of disputes ("**Panel**").
- (b) Within a specified period of receiving notice of a dispute, the Panel must meet and use its reasonable endeavours to resolve the dispute.
- (c) The Panel will consist of one senior government representative and one senior private party representative with sufficient seniority and authority to resolve the dispute, subject to any requirements for formal approvals as discussed in the next paragraph. It is expected that the representative of the private party will be the CEO or a delegate with authority to bind the private party.
- (d) A decision of the Panel may only be made by unanimous agreement and is binding on both parties, subject to any formal approval required as part of the parties' governance structures, or by statute.

31.2 Independent determination

- (a) Where the Panel is unable to resolve the dispute, the panel will (depending on the nature of the disputed matter) refer the matter for independent determination either by:
 - (i) an independent expert; or
 - (ii) an arbitrator.
- (b) Matters of a technical or financial nature (including disputes over compensation amounts) will generally be referred to an independent expert for resolution. However, arbitration may be the appropriate course in other circumstances.

31.3 Independent expert

31.3.1 Appointment

An independent expert will be appointed by agreement of government and the private party or, failing agreement, by a third party such as the chairperson of the Institute of Arbitrators and Mediators Australia. In some instances, a list of independent experts may be agreed and included in the project agreement, with the independent expert to be appointed from that list by agreement or, failing agreement, at government's selection from the list.

31.3.2 Capacity and procedure

The independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit. However, requirements will be included in the project agreement to ensure that the independent expert process is run quickly and efficiently. These may include limited rights to submit evidence or hold oral hearings.

31.3.3 Time for decision

A timeframe will be set for the independent expert to deliver his, or her, determination.

31.3.4 Decision final and binding

To the extent permitted by law, the decision of the independent expert will be final and binding on the parties unless a party disputes it within a specified period or the value of the determination is greater than a specified monetary threshold (depending on the value of the project).

31.3.5 Costs

- (a) The costs of the independent expert will be borne equally by the parties.
- (b) Each party will bear its own costs relating to the independent expert's determination.

31.4 Arbitration

31.4.1 Appointment

Where a dispute is to be resolved by arbitration, an arbitrator will be appointed by agreement of government and the private party or, failing agreement, by a third party such as the chairperson of the Institute of Arbitrators and Mediators Australia, or the Australian Centre for International Commercial Arbitration.

31.4.2 Capacity and procedure

The arbitrator will conduct the arbitration in accordance with the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitration and subject to state specific legislation on commercial arbitration.

31.4.3 Time for decision

A timeframe may be set for the arbitrator to deliver a determination.

31.4.4 Costs

The decision of the arbitrator will include a decision relating to the costs of the reference and the award, including the fees and expenses of the arbitrator.

31.5 Fast track process

- (a) Provision may be made for a fast-track option for resolution of disputes where the outcome is particularly time-critical.
- (b) The timeframes of the Panel process, expert determination or arbitration will be truncated.

31.6 Legal rights

The decision of the arbitrator will be final and binding on the parties, except that the parties' rights of appeal in accordance with the relevant domestic arbitration legislation will be preserved.

31.7 Obligation to continue to perform

Despite the existence of a dispute, each party must continue to perform its obligations under the project agreement (including obligations to pay monies).

32. Re-financing

Principle

All Re-financings other than those contemplated at Financial Close will require government consent.

Any Re-financing Gain is to be shared between government and the private party on a 50:50 basis provided the projected equity return at the time of the Re-financing (taking into account any Re-financing) is above that reflected in the original Base Case Financial Model.

32.1 Government consent

The private party must not Re-finance the project without government's prior consent and without a direct agreement being entered into with the new financier.

32.2 What is a Re-financing?

32.2.1 Re-financing definition

A "Re-financing" is:

- (a) any amendment to, or replacement of, the current financing agreements (i.e. the project financing documents as at contract signing as amended with government approval) and the exercise of any right, or the request for, any waiver or consent under such documents, however they may occur; and
- (b) any new contractual or financing arrangement which has the effect of in any way restructuring the financing arrangements as at contract signing (including the gearing levels).

Some jurisdictions require that for a Re-financing to occur, (a) and (b) above must give rise to a Re-financing Gain or increase, or change the profile of the liabilities of government under the project agreement, or adversely affect any of government's rights or obligations under a project agreement. These jurisdictions usually have separate provisions for government's consent for general changes to the financing agreements.

32.2.2 Exemptions

- (a) Re-financing will not include any re-financing which was specifically contemplated at Financial Close and reflected in the Base Case Financial Model. Such re-financings will be exempted only up to the amounts included in the Base Case Financial Model as at Financial Close and taken into account in determining the service fee. Government must ensure that adequate due diligence of the Base Case Financial Model is conducted prior to Financial Close to ensure that any Re-financing assumptions are clarified and agreed.
- (b) For jurisdictions where the definition of "Re-financing" does not include the requirement that they give rise to a Re-financing Gain, or change in the profile of government's liabilities, the following exemptions also apply:
 - (i) disposals of investments or commitments of debt or equity in an arm's length transaction at market value;

- (ii) the syndication or subscription of any debt under the current financing agreements that is contemplated at Financial Close;
- (iii) depending on the financing arrangements of the individual project, the change in control or sell down of any bonds in an arm's length transaction at market value; and
- (iv) waivers and consents and similar actions which relate to day to day administrative matters.

All the above exemptions assume that the project is not undertaken on a corporate finance basis.

32.3 Notice and Re-financing details

- (a) The private party must give government adequate notice and full details of the proposed Re-financing. Required details will include amendments to the Base Case Financial Model, the basis for the assumptions used in the amended Base Case Financial Model, a certificate from the auditors of the Base Case Financial Model, any material changes to the private party's obligations to its funders and the anticipated Re-financing Gain.
- (b) In some jurisdictions, government's consent to any Re-financing must not be unreasonably withheld or delayed. The project agreement will expressly set out circumstances in which it is deemed reasonable for government to withhold consent, namely:
 - (i) the Re-financing would adversely affect government's interests including increasing or adversely affecting government's contractual liabilities;
 - (ii) the terms and conditions of the proposed Re-financing (taken as a whole) are materially more onerous or disadvantageous to the private party than the existing funding arrangements and government considers the private party will be unable to adequately service and repay the financial indebtedness assumed under the Re-financing, or that such financial indebtedness will adversely impact the private party's ability or capacity to perform its obligations under the project documents;
 - (iii) the terms and conditions are not in accordance with market practice at the time;
 - (iv) the indebtedness will not be used solely for the project; and
 - (v) there has not been compliance by the private party with the requirements described in this Chapter 32 (Re-financing) generally.

32.4 Sharing a Re-financing Gain

Government will be entitled to a 50 per cent share of any Re-financing Gain where the projected equity return at the time of the Re-financing (taking into account any Re-financing) is above that reflected in the original Base Case Financial Model.

32.5 Calculating the Re-financing Gain

32.5.1 What is a Re-financing Gain?

Re-financing Gain is the difference (greater than zero) between the net present value of:

- (a) the distributions projected at the proposed Re-financing date (taking into account the proposed Re-financing) using the updated Base Case Financial Model referred to in section 32.3 (post-Re-financing distributions); and
- (b) the distributions projected immediately prior to the proposed Re-financing (without taking into account the proposed Re-financing) using the Base Case Financial Model as varied from time to time in accordance with the project agreement (pre-Re-financing distributions).¹⁴⁰

32.5.2 The discount rate

The discount rate used to determine the net present value of the distributions (for both pre- and post-Re-financing) will be the equity rate of return provided for in the Base Case Financial Model.

32.5.3 Distributions

Distributions are any dividends, interest payments or other distributions by the private party to its shareholders, loan stock or related bodies corporate, including amounts available for such distributions - whether such distributions are in respect of share capital or subordinated debt - and receipt of any other benefit by those parties (including the release of any contingent liabilities), but excluding payments made to a related body corporate under a sub-contract (where the related body corporate is a sub-contractor) or otherwise on arm's length terms.

32.5.4 Professional costs

The Re-financing Gain will be calculated after allowing for the recovery by both parties of their reasonable and proper professional costs directly incurred in connection with the Re-financing.

32.6 Payment of the Re-financing Gain

Government may elect to receive its share of the Re-financing Gain in one (or a combination) of the following ways:

- (a) a lump sum payment from the private party; and/or
- (b) a reduction in the service fee in accordance with the Compensation Principles.

In determining the appropriate method for payment, government will consider the form in which the private party receives the Re-financing Gain (i.e. whether a reserve that has been released is paid out).

32.7 Government audit rights

Government may at any time audit any Base Case Financial Model used in connection with the Re-financing (including the underlying assumptions for the data and projections used in the proposed Base Case Financial Model).

¹⁴⁰ See section 14.5 of Chapter 14 (Payment provisions).

32.8 Funder's direct agreement

The private party must not enter into a Re-financing until the new financiers have entered into a funder's direct agreement.

32.9 Termination Payments

Unless otherwise agreed, government is obliged to make Termination Payments only to the extent set out in the Base Case Financial Model.

33. Indemnities, warranties and contractual claims

Principle

The private party indemnifies government for loss or liability due to death or personal injury, property and third party claims arising from the project and, in some jurisdictions, the acts or omissions of the private party and its associates. The private party acknowledges that it has entered into the project on the basis of its own investigations and not on the basis of any government representations and it indemnifies government accordingly.

33.1 Private party indemnity

33.1.1 Indemnity

- (a) Subject to section 33.1.2, the private party will release and indemnify¹⁴¹ government and its associates in respect of any action, claim, demand, cost, charge, liability, loss, damage and expense (including legal expenses) ("**Loss**") incurred by government (including any third party claims or liabilities) which may arise out of (or as a consequence) of:
- (i) the design, construction, operation or maintenance of the facility;
 - (ii) the provision or use of, or purported reliance on, information documents (including any site assessment report prepared by government-appointed independent consultants);¹⁴²
 - (iii) any acts or omissions of the private party, the sub-contractors and their associates in relation to, or in consequence of, the project (including the performance or non-performance by the private party of its obligations under the project agreement and their presence on, or access to, the facility and the site);
 - (iv) any contamination or pollution occurring on or from the site other than that created by a government core service at the site and for which the private party does not have management responsibility;¹⁴³
 - (v) breach or failure to comply with the terms of any Project Contract by the private party or any of its associates; and
 - (vi) negligence or unlawful acts or omissions, or wilful misconduct, by the private party and its associates.
- (b) In some jurisdictions, this indemnity may be limited to Loss incurred due to:
- (i) death or personal injury;

¹⁴¹ The project agreement will normally provide for appropriate procedures for dealing with claims.

¹⁴² See section 4.4.3 of Chapter 4 (Environmental issues and Site Conditions).

¹⁴³ See section 4.4.8 of Chapter 4 (Environmental issues and Site Conditions) in respect of the private party's liability for third party claims and liability arising from contamination or pollution occurring on or emanating from the site.

- (ii) loss of or damage to property; and
 - (iii) third party suits, claims, actions demands, proceedings, penalty, costs, charges, expenses etc.
- (c) Generally government will not cap the private party's liability under the indemnity. However, in some cases, and where it represents value for money, government may cap or otherwise limit the private party's liability under the indemnity in respect of:
 - (i) third party claims (other than death and personal injury claims);
 - (ii) damage to government property; and
 - (iii) government economic losses,
 - (iv) subject to paragraph (d).
- (d) If it is agreed that government will cap the private party's liability, this cap will not extend to any actions, claims or liabilities arising or brought against the private party by a third party.
- (e) While there may be a nexus between such caps and the level of required insurances, these should not be expressly or directly linked.

33.1.2 Limitation of liability

The private party will not be liable under the indemnity to the extent that a claim or liability is a consequence of:

- (a) any fraudulent or negligent acts or omissions of government or its associates; or
- (b) a breach by government or its associates of any Project Contract.

In some jurisdictions, the limitation on liability will be extended to include:

- (i) wilful misconduct or unlawful acts or omissions of government, or its associates, except to the extent that the claim or loss is caused by the private party's failure to provide the Contracted Services; and
- (ii) the private party following the express directions of government with respect to its obligations under the project agreement, where such directions are given in accordance with the project agreement.

33.2 Representations and warranties

33.2.1 Representations by the private party

In addition to the representations and warranties identified elsewhere in these CPs for Social Infrastructure, the private party will provide a series of representations and warranties for the benefit of government, including that:¹⁴⁴

- (a) it has corporate status to enter into the transaction and is solvent;
- (b) it has the power to own its property and enter into the transaction;

¹⁴⁴ See section 1.3.3 of Chapter 1
Contractual issues) regarding government warranties.

- (c) all authorisations to enter into the transaction have been obtained;
- (d) all obligations in the Project Contracts are binding on it;
- (e) its compliance with the Project Contracts will not cause any contravention of Law, or of any authorisation or undertaking, or of its own constitution;
- (f) it is not acting as a trustee of a trust except to the extent agreed by government in writing (if the private party is acting as a trustee this representation and warranty will be removed and appropriate trustee representations, warranties and undertakings will be included in the project agreement);
- (g) no proceedings are current or pending which have, or may have, a material adverse effect on:
 - (i) its ability to perform its obligations;
 - (ii) the rights of government under a Project Contract; or
 - (iii) in some jurisdictions, the performance of, or cost of, performing the core government services;
- (h) all information given to government is true, accurate and not misleading;
- (i) no filings or taxes are needed to make the project agreement binding;
- (j) no default has occurred and is subsisting;
- (k) there are no security interests other than Permitted Security Interests over its property; and
- (l) government has been provided with all material documents relating to financing.

The above list of representations and warranties is not an exhaustive list.

33.2.2 Private party's acknowledgment, waiver and indemnity

- (a) The private party must acknowledge and agree that government and its associates have not made any representation, advised or given any warranty or undertaking (other than as expressly set out in the project agreement) in respect of the Project Contracts, any transactions contemplated by the project or financing documents, or any other matter relevant to the private party's decision to enter into the project or finance documents.
- (b) The private party will also acknowledge and agree the following:
 - (i) Disclosed Information and intellectual property rights will remain the property of government and/or its associates;
 - (ii) Disclosed Information did not constitute an invitation, recommendation or offer by government and/or its associates;
 - (iii) Disclosed Information was provided to assist in preparing and lodging a proposal for the project;
 - (iv) Disclosed Information did not purport to contain all information required by the private party;
 - (v) government and/or its associates have not verified and are not obliged to verify the accuracy or completeness of the Disclosed Information;

- (vi) government and/or its associates has not made any representation or warranty as to the accuracy or completeness of the Disclosed Information; and
 - (vii) the private party has not relied on the Disclosed Information, but on its own investigations in entering into the transaction.
 - (viii) The above list of representations and warranties is not an exhaustive list.
- (c) To the extent permitted by Law, the private party will waive all rights it has to bring any action against government, or its associates, for misrepresentation or misleading or deceptive conduct in providing the Disclosed Information.
- (d) The private party will indemnify government and its associates against all claims or liabilities in breach of these provisions.

33.2.3 Reliance on representations

The private party must acknowledge that government enters into the project agreement in reliance on the representations, warranties, acknowledgments and agreements made by the private party in the Project Contracts and that these survive termination or expiry of the Project Contracts.

33.2.4 Repetition of representations and warranties

Government will require that certain representations, warranties and acknowledgments are repeated by the private party on each anniversary of Financial Close with reference to the facts and circumstances subsisting at that date, subject to any written disclosures made by the private party to government and waived by government at, or before, the time of repetition.¹⁴⁵

33.3 Non-exclusivity of remedies

The rights and remedies provided in the project agreement are in addition to, and do not exclude or limit, any right or remedy of government provided by Law or equity, or by any agreement.

¹⁴⁵ Generally, the representations and warranties that are repeated are those described in this Chapter 33 (Indemnities, warranties and contractual claims).

34. Restrictions on private party

Principle

The private party must obtain prior government consent to any:

- (a) business conduct other than implementation of the project;
- (b) amendment of the project agreement or any other agreements to which government is a party;
- (c) amendment of the financing documents and material sub-contracts;
- (d) assignment or disposal of its interests in the project agreement or other agreements to which government is a party; or
- (e) disposal of any interest in the project land or facility.

34.1 Restrictions on business

The private party must not conduct any business other than the implementation of the project without obtaining government's prior consent.

34.2 Restrictions on amending certain documents

The private party must not terminate, or make or permit any amendment to, any financing or equity document or sub-contract, other than in accordance with the provisions set out in Chapters 32 (Re-financing) and 28 (Sub-contractors), respectively.

34.3 Restrictions on assignment

34.3.1 No assignment without consent

- (a) Other than a Permitted Security Interest, or where a replacement private party has been appointed by a financier in accordance with the requirements of the funder's direct agreement, the private party must not dispose of any of its rights or interests in the project agreement, or other agreements to which government is a party, without obtaining government's prior consent (to be provided at its discretion). Failure to obtain such consent will be a Default Termination Event.¹⁴⁶
- (b) Depending on the nature of the project, this restriction may also extend to the private party procuring that specified major sub-contractors do not dispose of their interest in the relevant sub-contract.

34.4 Restrictions on sale or lease

Other than granting a Permitted Security Interest, or otherwise acting in accordance with provisions in the project agreement, the facility or construction licences, the private party must not dispose of the project land or the facility without the prior consent of government.

¹⁴⁶ See section 25.1.2 of Chapter 25 (Termination).

35. Records

Principle

The private party must maintain and provide government with all financial and other records, statements and documentation necessary to enable government to monitor and assess their financial capacity and the private party's performance of its obligations under the project agreement and to allow for transparency of costs.

35.1 Maintenance of audited records

- (a) The private party must keep proper accounts and all other financial records expected of a prudent and competent person undertaking obligations similar to those of the private party. In particular, the private party must maintain a full record of the costs of delivering the Contracted Services (including construction, operation and financing costs) and details of funds held to cover such costs.
- (b) The private party must have their financial statement audited annually.
- (c) In some jurisdictions, the obligations in paragraphs (a) and (b) extend to the private party's material sub-contractors. In other jurisdictions, whether the government extends such obligations and the extent to which they are extended, will depend on the creditworthiness of the material sub-contractors and their relationship to the private party.

35.2 Availability of audited records

All the above accounts and records must be readily available to government (or any party it nominates) for examination, inspection, transcription and copying. In the case of the private party, the accounts and records must also be available for audit in accordance with section 35.6.

35.3 Accounting records

35.3.1 Annual business plans

The private party must (on an annual basis) provide government with a copy of its business plan, and its service provider's business plan, and budget for the following financial year in relation to the project, which shall be in such detail and provide such information as the contract administrator requests.

35.3.2 Six-monthly records

- (a) The private party must provide, on a half-yearly basis, the following unaudited documents for the financial year to date:
 - (i) statement of financial performance, cash flow statement, statement of financial position and statement on changes to owner's equity;

- (ii) comments on any material variations between actual and budgeted-to-date results; and
 - (iii) details of all the private party's indebtedness and changes to its financing arrangements. Where the project provides for third party revenue, government may also require details of any third party revenue earned by the private party in respect of which government may have a financial interest.
- (b) Government requires audited financial statements of the private party and its material sub-contractors to be submitted to it following the end of the financial year.
- (c) All books of account are to be kept in accordance with Law and the accountancy principles generally accepted in Australia and must show in detail the private party's administrative overhead costs, payments to sub-contractors and capital and revenue expenditure. This information allows government to verify expenditure proposed by the private party arising from government-initiated Modifications, compensable events, qualifying Changes in Law, benchmarking and market testing.

35.4 Provision of other details

35.4.1 Consortium details

- (a) The private party must notify government of any change to the consortium details for any consortium member as provided at Financial Close.
- (b) Required information includes the name of the parties' auditors, directors, company secretary and chief executive, any business name under which they operate, any persons holding a relevant interest in 20 per cent or more of the shareholding in each of the parties, or who are able to control each party. The relevant consortium members will depend on the corporate structure relevant to the particular project.

35.4.2 Other information and records

- (a) The private party must provide government with copies of all documents, reports, plans, materials, certificates, notices and materials which the private party provides to its financiers.
- (b) The private party must also provide government with any other information, records or documents government reasonably requires in relation to the facility and its operation (including copies of any documents issued to the private party's members, lodged with ASIC or relevant stock exchange).

35.5 Warranty

All information given by the private party is to be warranted as being true, correct and complete at the time provided.

35.6 Financial audit

35.6.1 Audit requirements

- (a) At any time up to six months after the end of the contract term, government may (at its cost) require an independent audit of any financial statements (other than audited financial statements) or accounts provided in respect of the private party to verify their accuracy, correctness and completeness.
- (b) The private party must make available for the audit all its financial statements and accounts and, if necessary, an appropriately trained and qualified member of its staff to provide accounting system information relevant for audit.

35.6.2 General audit right

Without limiting any other right of government to conduct inspections and audits as set out in these CPs for Social Infrastructure,¹⁴⁷ at any time during the contract term (but no more than twice a year), government may (at its cost) inspect the facility, or any part of it, and any systems, registers, manuals, records, plans and programs relating to the project to assess whether the private party is complying with its obligations under the project agreement.

35.6.3 False information

- (a) If an audit shows that any of the statements or accounts are not accurate, complete and correct, or that the private party is not complying with its obligations, then the private party must rectify the problem and the cost of the audit will be for the private party's account. With respect to government's audit right in section 35.6.2, government will be allowed to carry out additional inspections to assess the private party's compliance with its requirement to carry out any rectification work.
- (b) If the inaccuracy has affected any payment made to the private party, the next scheduled payment will be reduced, or increased, by an appropriate adjustment amount (as determined by government).
- (c) Where a financial audit discloses any fraud, collusive, misleading or deceptive reporting, this will constitute an Event of Default.¹⁴⁸

35.7 Maintenance of non-financial records

The private party must maintain a full record of all incidents relating to health, safety, security and pollution of the environment occurring during the contract term and of all maintenance procedures carried out during the contract term. Such records must be available to government for inspection and copying.

Depending on the nature of the project, it may be necessary to include additional specific record keeping requirements in the project agreement - e.g. where there are information privacy or health record issues.

¹⁴⁷ For example, government's rights under section 10.4.1 of Chapter 10 (Construction and Completion), Chapter 13 (Performance monitoring and review) and Chapter 32 (Re-financing).

¹⁴⁸ See section 24.1(b)(iii) of Chapter 24 (Default).

35.8 Period for retaining records

All records and statements must be retained for at least five years after the private party's obligations under the contract have ended.

35.9 Confidentiality

All records, statements and documentation referred to above are subject to the confidentiality and disclosure provisions in Chapter 36 (Confidentiality and disclosure).

36. Confidentiality and disclosure

Principle

Government will be entitled to publish the project agreement and other Project Contracts, subject to limited exceptions for commercially sensitive information.

36.1 Government disclosure

Government will be entitled to disclose (on the Internet or otherwise):

- (a) the terms and conditions of the project agreement and any associated transaction document; and
- (b) any documents or information arising out of, or connected to, the agreement or transaction documents (including the performance of those agreements),

except to the extent that any documents or information are classified as 'confidential' in accordance with the government's policy on disclosure of information on government contracts with the private sector, as amended from time to time.

36.2 Confidentiality

36.2.1 Agreement

The project agreement may identify any matters which are subject to a confidentiality obligation on both parties, subject to the government's disclosure policies.¹⁴⁹

36.2.2 Requirement for consent

Any matter which the parties agree should remain confidential must not be disclosed to any person by either party without the prior written consent of the other, except in specific circumstances including:

- (a) any disclosure required by Law, or legally binding statutory approval, or other government-wide policy directive on disclosure of information on government contracts with the private sector;
- (b) information already in the public domain;
- (c) any disclosure required by any applicable stock exchange listing rules;
- (d) any disclosure to solicitors, barristers or other professional advisers under a duty of confidentiality;
- (e) any disclosure to a banker or other financial institution relevant to a party, to the extent required for the purpose of raising funds or maintaining compliance with credit agreements, or in respect of a permitted syndication;

¹⁴⁹ In general, the Australian governments' policies on disclosure of information on government contracts with the private sector will normally identify specific items that may be treated as 'confidential'.

- (f) any disclosure by the private party to a related body corporate of the private party as necessary for the related body corporate to perform its obligations under the project agreement, or other Project Contracts, subject to the related body corporate providing a covenant to maintain confidentiality which is satisfactory to government;
- (g) any disclosure of information to any prospective or actual permitted assigns or investors in, or shareholders of, the private party (and their respective financiers), subject to such purchaser providing a covenant to maintain confidentiality which is satisfactory to government;
- (h) any disclosure required in connection with permitted re-tendering or any benchmarking or market testing;
- (i) any disclosure amongst permitted government parties; and
- (j) any disclosure necessary for the registration or recording of documents where required.

36.3 Legislative disclosure obligations

36.3.1 Legal requirement of disclosure

The private party will acknowledge and agree that disclosure by government may be required to satisfy the disclosure requirements of jurisdiction-specific policies and legislation, including those relating to Freedom of Information, the Auditor General, ombudsmen, or of Parliamentary accountability or, in the case of a Minister, to fulfil his, or her, duties of office.

36.3.2 Obligation

The private party must, at its own cost and expense, use all reasonable endeavours to assist government in meeting government's legislated disclosure obligations.

37. Intellectual property

Principle

The private party is responsible for the costs of intellectual property required by the project (including costs resulting from infringements, subject to any government warranties and indemnities in respect of intellectual property contributed to the project by government). Government must be able to use any intellectual property required to provide the Contracted Services in the event that it takes over any Contracted Service, whether during or after expiry of the end of the contract term.

37.1 Warranties

- (a) The private party must warrant that, in performing its obligations under the project agreement:
 - (i) it will not breach the intellectual property ("**IP**") rights or moral rights of any person;
 - (ii) there are no security interests, and it will not allow any security interests to be created, over any IP it contributes to the project;
 - (iii) subject to section 37.3, it has authority to grant to government the licence or other rights to be granted under the project agreement; and
 - (iv) neither the use nor exercise by government (or any party authorised by government) of such IP rights will infringe any Law, or any IP or moral rights of any person.
- (b) If government contributes IP to the project, the scope of the warranty described in paragraph (a) will be adjusted to exclude matters warranted by government.¹⁵⁰

37.2 Grant of licences

Subject to section 37.3, the private party will grant government (and where necessary ensure the grant by third parties of) non-exclusive, irrevocable, perpetual, transferable and royalty-free licences with the right to sub-licence, use and exercise all IP rights in, or used in, the project including:

- (a) the design of the works and facility;
- (b) the design and construction documentation (including final design documentation);
- (c) methods of working and materials used in the construction, commissioning and completion of the works; and
- (d) operation of a part or the whole of the facility,

as required for government to exercise its rights under the project agreement (including its Step-in Rights) and, where applicable, to allow for the continuation of the project services following termination of the agreement, or expiry of the contract term,¹⁵¹ or for any other project involving the site.

¹⁵⁰ See section 37.6.

¹⁵¹ Government may require that the licence to use IP developed for the project be extended to use in other projects.

37.3 Obligation

Where, after having used its reasonable endeavours, the private party is unable to grant government any of the licences it is required to grant, government and the private party will negotiate in good faith with a view to the private party obtaining such rights, or arrangements for government's or its associates' benefit, as government reasonably requires having regard to government's rights as set out in section 37.8.1.

37.4 Moral rights

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

37.5 Survival of rights

The IP and moral rights granted to government survive:

- (a) any frustration, suspension, termination or expiry of the project agreement; and
- (b) the exercise by government of its Step-in Rights.

37.6 Indemnity

Subject to the exclusion of any matters warranted by government under section 37.7, the private party will indemnify government, and its associates, against claims or liabilities arising from a breach of a representation, warranty or obligation relating to IP.

37.7 IP rights passed from government

If government contributes IP which the private party is either required or entitled to use for the project, government will provide a licence to the private party. The terms of the licence will only entitle the private party to use government's IP for the project and only for the term of the project agreement. In such a case, government may consider appropriate IP and moral rights warranty and indemnity provisions.

37.8 Rights to IP on expiry of term

37.8.1 Government rights

The project agreement will provide that:

- (a) if the private party has not been able to grant the licence under section 37.2 for use of third party IP rights beyond the expiry or earlier termination of the project agreement, the private party will procure a novation of any IP licences from those third parties to government and that the private party will be obliged to ensure that the IP licences it obtains for the benefit of government make provision for this; or
- (b) if the requirements in paragraph (a) prove impossible, the private party must secure government's right to obtain those licences at commercial rates.

These obligations survive expiry or earlier termination of the project agreement in the same manner as in section 37.5.

37.8.2 Indemnity

The private party must indemnify government against any costs incurred because the IP necessary for the continuation of the Contracted Services is not available.

37.8.3 Provision of data

To ensure government's immediate ability to operate the facility, the private party may be required to provide any data (including source code for software) that is necessary for operation to an independent party to be held in escrow for release in appropriate circumstances.

38. Probity

Principle

The private party is responsible for reversing or otherwise addressing the effects of any Probity Event to government's satisfaction. Government may require the private party to carry out probity investigations to ensure those involved with the project are fit and proper to have such involvement.

38.1 General

Jurisdictions may impose certain probity requirements on the private party. Where this is the case, the following principles will apply.

38.2 Meaning of 'Probity Event'

A "**Probity Event**" includes any event or thing which:

- (a) has a material adverse effect on the character, integrity or honesty of an Associate of the private party;
- (b) relates to the private party or an Associate and has a material adverse effect on the public interest, or public confidence, in the project; or
- (c) involves a material failure by the private party or an Associate (where it is a corporation) achieving or maintaining reasonable standards of ethical behaviour, good corporate citizenship, avoidance of conflicts of interest, or other standards of conduct that would otherwise be expected of a party involved in a government project.

38.3 Notification of a Probity Event

The private party must notify government as soon as it becomes aware that a Probity Event has occurred, or is likely to occur.

38.4 Consequences following notice of a Probity Event

- (a) Where, within a specified period, the parties are unable to agree a course of action (including where the private party fails to meet with government to agree a course of action), the private party must take any action required by government to address the adverse effect of or cure the Probity Event.¹⁵²

¹⁵² This is subject to the private party's right to refer a government determination to dispute resolution if it considers that the required action will not address the adverse effects of the Probity Event.

- (b) Actions government may require of the private party include:¹⁵³
- (i) where the corporation triggering the Probity Event has control over the private party, or relevant Associate, that the corporation cease to have control; and
 - (ii) procuring that a person triggering the Probity Event cease to have any involvement, shares, entitlement or significant influence, power or control over any relevant company (being the private party or an Associate of the private party) or the project, and removing such person from any involvement in the project.

38.5 Costs of cure

The private party will bear all costs associated with the above action required by government as set out in section 38.4.

38.6 Subcontractors and material subcontracts

Material subcontracts must include provisions recognising government's rights in respect of Probity Events.

38.7 Probity investigations

38.7.1 Government requirement for probity investigations

Government may require the private party at any time to conduct probity investigations in respect of an Associate of the private party (or any proposed Associate) which may include probity, criminal and security investigations into the character, honesty and integrity of a person, or a corporation, as are necessary to ensure that they are fit and proper for their intended involvement in the project.

38.7.2 Consents

The private party must procure all relevant consents from the party in respect of which government requires probity investigations.

38.7.3 Costs of probity investigation

The private party will bear the costs reasonably incurred by government in carrying out the initial investigation in respect of each relevant party or event. The private party will not be liable for any further probity or security investigations required by government.

38.8 No appointment without government consent

The private party will not appoint an Associate unless such party has been approved by government following a probity investigation and other investigations required by government.

¹⁵³ This is not intended to be an exhaustive list of the action government may require.

Appendix 1: Glossary

Associate, for the purposes of Chapter 38 (Probity) only, generally includes any related body corporate of the private party and any officer, employee, agent, contractor, consultant or adviser of a member of the private party group for the particular project.

Availability Failure means a Service Failure which affects one or more functional areas or units of a facility.

Base Case Financial Model refers to the base case financial model agreed between the parties as at the date of Financial Close, as updated, amended or adjusted from time to time in accordance with section 14.5 of Chapter 14 (Payment provisions). The Base Case Financial Model typically includes all costs, revenues and payments between parties and all parameters and assumptions underlying these calculations.

Base Case Weighted IRR means the average internal rate of return to both equity and debt providers, expressed as a percentage, that is stated in the Base Case Financial Model. (This should be differentiated from the Base Case Equity IRR, which represents the internal rate of return only to equity providers.) In these CPs for Social Infrastructure, the Base Case Weighted IRR is normally applied in relation to the calculation of Termination Payments.

Change in Control means a change:

- (b) in the board of directors or decision making control of influence;
- (c) in the parties who are able to cast (or control the casting of) 20 per cent or more of the votes at a general meeting; or
- (d) in the shareholding which affects 20 per cent or more of shares.

Change in Law has the meaning given to it in section 20.1 of Chapter 20 (General Change in Law).

Commercial Acceptance means, in a two-stage Completion process, the stage of the works where all of the specified tests and completion criteria have been satisfied, to the satisfaction of the completion certifier as described in section 10.5.1 of Chapter 10 (Construction and Completion).

Compensation means the payment of compensation calculated in accordance with Chapters 17 (Compensation Events) and 18 (Compensation payable) and otherwise in accordance with these CPs for Social Infrastructure.

Compensation Events means those events which entitle the private party to Compensation in accordance with Chapter 17 (Compensation Events).

Compensation Principles means the principles set out in Chapter 18 (Compensation payable).

Completion occurs when the private party has constructed a facility to government's requirements and the facility is deemed suitable for occupation and use. Where a two-staged completion process is used (see section 10.5.1(c) of Chapter 10 (Construction and Completion)) the project agreement may distinguish between:

- (e) "Technical Completion" - i.e. completion of technical requirements, but with some minor defects remaining and with certain tests remaining to be carried out to satisfy the completion certifier the operations can commence; and
- (f) "Commercial Acceptance" - upon the occurrence of which operations can commence).

References to "Completion" may include references to "Technical Completion" or "Commercial Acceptance", or both, as appropriate.

Conditions Precedent has the meaning given to that term in Chapter 2 (Conditions Precedent to Financial Close).

Contracted Services means those services described as such in Chapter 12 (Service requirements and Services Specifications).

Control means, for the purposes of Chapter 29 (Change of ownership/control), the ability or capacity to determine the outcome of decisions about the relevant entity's financial and operating policies.

Date for Commercial Acceptance means the contractual target date for Commercial Acceptance (refer to definition of Date for Completion).

Date for Completion means the contractual target date for Completion. Where a two-staged completion process is used (refer to section 10.5.1(c) of Chapter 10 (Construction and Completion)), this term may also be used to refer to one or both of, or may be substituted by one or both of, "Date for Technical Completion" or "Date for Commercial Acceptance", depending on the context.

Date for Technical Completion means the contractual target date for Technical Completion (refer to definition of Date for Completion).

Date of Completion means the actual date Completion is certified to have been achieved.

Default Termination Compensation Amount has the meaning given to that term in section 26.1 or 26.1.1 of Chapter 26 (Termination Payments), depending on the option selected in respect of payments to be made to the private party on termination.

Default Termination Event has the meaning given to that term in Chapter 25 (Termination). "Default Termination Event" may be defined by various names in different project agreements, including "Termination Event".

Design Requirements are the requirements for the design of the facility as set out in the Output Specifications, the design documentation bid by the private party and included in the project agreement as at contractual close, and the other design requirements set out in the project agreement.

Disclosed Information means all information and documentation provided by government to the private party in respect of the project, including the invitation for expression of interest and the Project Brief.

Environmental Law means the common law, statutes, regulations and other subordinate instruments relating to the environment (such as State environment protection policies and industrial waste management policies).

Environmental Notice means any direction, order, demand or other requirement to take any action or refrain from taking any action in respect of the project site or facility or its use:

- (g) from any relevant authority;
- (h) whether written or otherwise; and
- (i) in connection with any Environmental Law.

References to "Environmental Notice" include references to "Clean Up Notice" or such other equivalent notice under other jurisdictions' Environmental Laws.

Estimated Fair Value means, for the purposes of "Option 1" in Chapter 26 (Termination Payments), the amount of consideration at which an asset is traded, the value agreed upon in an arm's length transaction between knowledgeable and willing parties who are under no compulsion to act. Fair value is similar to market value. In these CPs for Social Infrastructure, Estimated Fair Value is calculated by reference to the formulae in section 26.1.2 of Chapter 26 (Termination Payments).

Event of Default means an event described in section 24.1 of Chapter 24 (Default) which, if uncured, will entitle government to terminate the project agreement.

Financial Close means the date on which the last Condition Precedent is satisfied or waived and the obligations of each party to the project agreement becomes binding. See further Chapter 2 (Conditions Precedent to Financial Close).

Force Majeure Events has the meaning given to that term in section 21.1 of Chapter 21 (Force majeure).

Force Majeure Compensation Amount has the meaning given to that term in section 26.2 or 26.2.1 of Chapter 26 (Termination Payments), depending on the option selected in respect of payments to be made to the private party on termination.

Force Majeure Termination Event means a Force Majeure Event which results in government or the private party terminating the project agreement, as set out in section 21.3.1 of Chapter 21 (Force majeure). The term "Force Majeure Termination Events" captures termination resulting from a Force Majeure Event and termination pursuant to the uninsurability provisions in section 23.4 of Chapter 23 (Insurance).

Full Service Commencement Date means the date on which Contracted Services and government's core services may commence to be provided in, and in respect of, the facility (which is usually prescribed as the Date of Completion or the day after that date).

Functional Brief means that part of the Output Specifications that describes the functional and design principles and requirements that must be addressed by the private party in its design of the facility, including the purposes for which government is procuring delivery of the project and the facility, the intended uses of the facility, a description of the accommodation and components required and the functional areas and relationships within the facility.

General Services Specifications has the meaning given to that term in section 12.2.1(c)(i) of Chapter 12 (Service requirements and Services Specifications).

Good Industry Practice means the degree of skill, care, prudence, foresight and practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced person, engaged in the same type of undertaking as that of the private party or its sub-contractors, under the same or similar circumstances as the implementation of the project.

Government Default means a default by government, including in the circumstances described in section 25.4 of Chapter 25 (Termination).

High Risk Site has the meaning given to it in section 4.4.2(b) of Chapter 4 (Environmental issues and Site Conditions).

Illegality Event means the occurrence of any of the following events:

- (j) the private party or a material sub-contractor ceases to hold a consent or breaches applicable Law and such failure or breach is, in the opinion of government, material to the performance of the private party's obligations under the project agreement and is not remedied within 30 days or the earlier of:
 - (i) the date on which government notifies the private party of the breach; or
 - (ii) the date on which the private party becomes aware of the breach;
- (k) any Project Contract being revoked, repudiated or terminated, or ceasing to be legal, valid and binding and enforceable against the private party or any other person (other than government), other than as contemplated by or permitted in accordance with the Project Contracts, or a Project Contract becomes or is claimed to become invalid, void or voidable in any material respect, and the event is not remedied within 30 days of the relevant event occurring or, in the event of a claim, is shown, within 30 days, to the satisfaction of government to be frivolous, vexatious or without proper legal basis; or
- (l) it is or becomes unlawful for the private party or a material sub-contractor to perform any of its obligations under the Project Contract, provided that, where such event occurs as a direct result of a general Change in Law, the event is not remedied within 30 days of the relevant event occurring.

Insolvency Event includes voluntary and involuntary winding up (except for the purposes of a reconstruction, merger or consolidation), administration, insolvency (including inability to pay debts as and when they fall due and failure to comply with a statutory demand), the appointment of a receiver, receiver and manager, controller or provisional liquidator, or entering into arrangements with creditors, or bankruptcy.

IP has the meaning given to that term in section 37.1(a)(i) of Chapter 37 (Intellectual property).

KPIs means "key performance indicators", being the financial or non-financial indicators used to measure progress or success of the private party during the operating term, on critical factors relevant to the project, and which will normally vary depending on the Contracted Services and other attributes of the project. KPIs are often included in the contractual arrangement because they may serve as the basis for certain payments to the private party.

Law has the meaning given to that term in section 20.1.1 of Chapter 20 (Change in Law).

Lifecycle Costs means those costs associated with maintenance, refurbishment and disposal of an asset over the duration of that asset's life, over and above those costs expended on initial capital acquisition and installation.

Loss has the meaning given to that term in section 33.1.1(a) of Chapter 33 (Indemnities, warranties and contractual claims).

Low Risk Site has meaning given to it in section **Error! Reference source not found.** of chapter 4 (Environmental issues and Site Conditions).

Minor Works has the meaning given to that term in section 19.8 of Chapter 19 (Modifications).

Modification means a change to the project made in accordance with Chapter 19 (Modifications).

Output Specifications means government's minimum design and construction requirements. This is usually a set of documents prepared by government and included as part of the Project Brief documentation. It will usually include the Functional Brief, technical specifications, architectural specifications, engineering specifications, design specifications and master plan principles. This set of documents may be defined by various names, including the "Technical Specifications", "Project Specifications", "Design Brief" and other variations.

Panel, for the purposes of Chapter 31 (Dispute resolution), has the meaning given to that term in section 31.1 of that Chapter.

Permitted Security Interest means a security interest to which government has provided its prior consent, or which is created under an agreement with government or a lien which arises solely by operation of Law in the ordinary course of ordinary business.

Persistent Breach means:

- (m) a specified number of defaults (whether of the same or different type and class) (excluding Service Failures) occurring in a specified period (whether or not remedied); or
- (n) where, in the government's opinion, there has been a persistent or repeated failure by the private party to comply with its obligations (noting that, in some jurisdictions, this is limited to where these persistent breaches frustrate the performance or implementation of the project agreement, or which has a material adverse effect on the provision of core services by government),

which continue or recur after a notice of warning in respect of such breaches has been delivered by government (noting that, in certain jurisdictions, subsequent continuance, or recurrence, must occur a specified number of times within a limited period, before a Persistent Breach is deemed to have occurred).

PMS or Performance Monitoring System means a system typically comprising a suite of indicators and procedures agreed upon in the project agreement, primarily for the purpose of determining whether the private party is delivering the Contracted Services to the Services Specifications. See further section 13.1 of Chapter 13 (Performance monitoring and review).

Probity Event has the meaning given to that term in section 38.2 of Chapter 38 (Probity).

Project Brief means government's request for tender issued to the market in respect of the project. This will usually include:

- (o) general project information and instructions to bidders on the tender process;
- (p) a commercial framework summary;
- (q) government's evaluation criteria and the tender schedules to be completed by bidders;
- (r) the Output Specifications;
- (s) draft Project Contracts (including the project agreement and Services Specifications); and
- (t) any other relevant information (such as site assessment reports to be provided to bidders (if any)).

Project Contracts means the contracts entered into by government and the private party (respectively) in respect of the project, which usually include the project agreement, construction sub-contract, facility management sub-contract, direct deeds with the private party's major sub-contractors and financiers, the independent completion certifier agreement (where such a certifier is engaged by the private party and government) and tenure documents (such as leases or licences).

Project Default means:

- (u) failure by the private party to provide a cure plan, cure an Event of Default within the relevant cure period and otherwise comply with the agreed cure plan and, in certain jurisdictions, otherwise diligently pursue the cure of the default; or
- (v) failure to prepare a draft prevention plan which is approved by government, comply with the approved prevention plan, or (in some jurisdictions) comply with government's requirements, as notified, in circumstances where the prevention plan is not accepted by government.

Project Director means government's representative, who in most cases will be authorised to exercise and perform government's day to day rights and obligations under the project agreement and may have additional functions (such as certification of Completion).

Project Specific Change in Law has the meaning given to it section 20.3 of Chapter 20 (Change in Law).

Quality Failure means a Service Failure which is not referable to a specific area or unit of a facility.

Re-financing has the meaning given to that term in section 32.2 of Chapter 32 (Re-financing).

Re-financing Gain has the meaning given to that term in section 32.5.1 of Chapter 32 (Re-financing).

Relief means relief from default / termination granted by government in respect of Relief Events in accordance with the principle set out in Chapter 16 (Relief Events), which 'relief' may translate into:

- (w) during the design and construction phase, the granting of extensions of time; and
- (x) during the operating term, relief from the performance of obligations and, in some jurisdictions, from abatement.

Relief Events means those events which entitle the private party to Relief, in accordance with the principles of Chapter 16 (Relief Events).

Repeated Failure means a failure caused by the same Service Failure, or substantially the same Service Failure, occurring on more than a specific number of occasions over a specified period. The number of times and the length of the period will be determined on a project-by-project basis.

Reporting Failure means a failure by the private party to correctly report a Service Failure or where the private party has incorrectly calculated the abatement attributable to a Service Failure.

Reviewable Services means services of the type described in section 0 of Chapter 15 (Review and market testing of services) which will be subject to review and market testing in accordance with the principles set out in that Chapter.

Service Failure means a failure caused by the failure of the private party to provide the Services in accordance with the Services Specifications, as further defined and described in Chapter 12 (Service requirements and Services Specifications).

Services Specifications means government's requirements for the provision of the Contracted Services, and will include the General Services Specifications, Specific Services Specifications and performance standards (including KPIs). The Services Specifications can encompass both quantity and quality aspects of the Contracted Services.

Site Conditions has the meaning given to that term in Chapter 4 (Environmental issues and Site Conditions).

Specific Services Specifications has the meaning given to that term in section 12.2.1(c)(ii) of Chapter 12 (Service requirements and Services Specifications).

Step-in Rights has the meaning given to that term in section 27.1.2 of Chapter 27 (Step-in).

Sunset Date means a set period after the Date for Completion, after which if Completion of a facility has not occurred (or is unlikely to occur by the Sunset Date), government will have the right to terminate the project agreement. See further Chapter 25 (Termination).

Technical Completion means, in a two-stage Completion process, the stage of the works where all of the specified tests and Completion criteria have been satisfied, to the reasonable satisfaction of the completion certifier as described in section 10.5.1 of Chapter 10 (Construction and Completion), which stage must occur prior to Commercial Acceptance.

Termination Date means the date on which the project agreement is terminated.

Termination Payment means any payment made by government under Chapter 26 (Termination Payments), following termination of the Project Agreement.

Uninsurable Event means an event which occurs and which results in a particular risk becoming uninsurable. See further section 23.4.2 of Chapter 23 (Insurance).

Voluntary Termination has the meaning given to that term in section 25.3 of Chapter 25 (Termination).

Voluntary Termination Payment Amount has the meaning given to that term in section 26.3 or 26.3.1 of Chapter 26 (Termination Payments), depending on the option selected in respect of payments to be made to the private party on termination.

Works Program means the detailed program of works as required by the Services Specifications, including details of the critical path for the design, construction and commissioning and other activities required in order for the private party to deliver the Contracted Services, and details of the time intervals required to complete each of those stages or activities. The degree of detail, the items to be included and the time periods for each stage in the Works Program will vary depending on the project.