



Australian Government

Department of Infrastructure and Regional Development

# National Public Private Partnership Guidelines

## Volume 7: Commercial Principles for Economic Infrastructure



February 2011



**Australian Government**

**Department of Infrastructure and Regional Development**

# National Public Private Partnership Guidelines

## Volume 7: Commercial Principles for Economic Infrastructure

February 2011

## 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

© Commonwealth of Australia 2016

ISBN 978-1-925401-25-7

February 2016/INFRA2763

## Ownership of intellectual property rights in this publication

Unless otherwise noted, copyright (and any other intellectual property rights, if any) in this publication is owned by the Commonwealth of Australia (referred to below as the Commonwealth).

## Disclaimer

The material contained in this publication is made available on the understanding that the Commonwealth is not providing professional advice, and that users exercise their own skill and care with respect to its use, and seek independent advice if necessary.

The Commonwealth makes no representations or warranties as to the contents or accuracy of the information contained in this publication. To the extent permitted by law, the Commonwealth disclaims liability to any person or organisation in respect of anything done, or omitted to be done, in reliance upon information contained in this publication.

## Creative Commons licence

With the exception of (a) the Coat of Arms; (b) the Department of Infrastructure and Regional Development's photos and graphics, copyright in this publication is licensed under a Creative Commons Attribution 3.0 Australia Licence.

Creative Commons Attribution 3.0 Australia Licence is a standard form licence agreement that allows you to copy, communicate and adapt this publication provided that you attribute the work to the Commonwealth and abide by the other licence terms.

A summary of the licence terms is available from <http://creativecommons.org/licenses/by/3.0/au/deed.en>.

The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

This publication should be attributed in the following way: © Commonwealth of Australia 2016, National Public Private Partnership Guidelines – Volume 7: Commercial Principles for Economic Infrastructure.

## Use of the Coat of Arms

The Department of the Prime Minister and Cabinet sets the terms under which the Coat of Arms is used. Please refer to the Department's Commonwealth Coat of Arms and Government Branding web page <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/guidelines-and-procedures-other-agencies> and in particular, the *Commonwealth Coat of Arms Information and Guidelines* publication.

## Contact us

This publication is available in PDF format. All other rights are reserved, including in relation to any Departmental logos or trade marks which may exist. For enquiries regarding the licence and any use of this publication, please contact:

Director - Publishing and Communications, Communications Branch

Department of Infrastructure and Regional Development

GPO Box 594, Canberra ACT 2601 Australia

Email: [publishing@infrastructure.gov.au](mailto:publishing@infrastructure.gov.au)

Website: [www.infrastructure.gov.au](http://www.infrastructure.gov.au)

# Table of Contents

<b>Introduction.....</b>	<b>1</b>
<b>Purpose and application.....</b>	<b>1</b>
<b>Social Infrastructure Projects .....</b>	<b>2</b>
<b>1. Contractual issues .....</b>	<b>3</b>
1.1 Introduction .....	3
1.2 Contracting party .....	3
1.3 Authority to make contracts .....	3
1.3.1 Contracts within portfolio.....	3
1.3.2 Legislative authority .....	4
1.3.3 Warranty of authority .....	4
1.4 Delegated powers and functions .....	4
1.4.1 Instruments of delegation.....	4
1.4.2 Rights of private party .....	4
1.5 Enforceability of the contract .....	4
1.6 Government facilitation .....	4
1.6.1 Limitations on government .....	4
1.6.2 Government not in breach.....	5
1.6.3 Acknowledgment.....	5
1.6.4 Right to Compensation.....	5
1.6.5 'Best endeavours' .....	5
1.6.6 Private party and government to co-operate.....	6
1.7 No contractual status .....	6
<b>2. Conditions Precedent to Financial Close .....</b>	<b>7</b>
2.1 Overview .....	7
2.2 Requirements of Conditions Precedent.....	7
2.2.1 Obligations .....	7
2.2.2 Content.....	7
2.2.3 Waiver .....	8
2.3 Conditions Precedent bond .....	8
2.3.1 Requirement.....	8
2.3.2 Demand.....	8
2.4 Termination.....	9
2.5 Government approvals .....	9
<b>3. Contract term.....</b>	<b>10</b>
3.1 Length of contract term.....	10
3.2 Variation to contract term .....	10
3.3 Earlier termination.....	10
<b>4. Environmental issues and Site Conditions .....</b>	<b>11</b>
4.1 Environmental approvals .....	11
4.1.1 Environmental impact assessments .....	11
4.1.2 Commonwealth assessments .....	11
4.1.3 State / Territory assessments .....	12
4.1.4 Other environmental approvals .....	12
4.2 Site suitability.....	12
4.3 Condition of the site .....	12
4.4 Site Conditions.....	12
4.4.1 Private party responsibility .....	12
4.4.2 High Risk and Low Risk Sites .....	13
4.4.3 Due diligence .....	13

4.4.4	Reporting Obligations.....	14
4.4.5	Identified pre-existing contamination and other Site Conditions.....	14
4.4.6	Unidentified pre-existing contamination / latent geotechnical conditions.....	14
4.4.7	Contamination during the Contract Term.....	15
4.4.8	Indemnity for third party liability .....	16
4.4.9	Environmental Notices .....	16
4.4.10	Unexploded ordinances .....	16
<b>5.</b>	<b>Native title and artefacts .....</b>	<b>17</b>
5.1	Native title .....	17
5.1.1	Risk allocation .....	17
5.1.2	Due diligence .....	18
5.2	Artefacts.....	18
5.2.1	Damage minimisation.....	18
5.2.2	Continuation .....	18
5.2.3	Compensation .....	18
5.2.4	Property in artefacts .....	19
<b>6.</b>	<b>Planning and other approvals .....</b>	<b>20</b>
6.1	Commonwealth approvals .....	20
6.2	State and Territory planning approvals .....	20
6.3	Other site approvals .....	20
6.4	Compliance.....	20
<b>7.</b>	<b>Site access.....</b>	<b>21</b>
7.1	Availability.....	21
7.2	Third party occupants .....	21
7.2.1	Impact on private party.....	21
7.2.2	Access regime.....	21
7.3	Government access and protection of other parties.....	22
7.3.1	Government access .....	22
7.3.2	Protection of other parties .....	22
7.4	Utilities .....	22
<b>8.</b>	<b>Tenure .....</b>	<b>23</b>
8.1	Ownership.....	23
8.2	Construction licence .....	23
8.2.1	Grant of licence .....	23
8.2.2	Terms of licence.....	23
8.3	Lease during operating term.....	24
8.3.1	Grant of lease.....	24
8.3.2	Deemed lease .....	24
8.3.3	Effect of early termination of the project agreement .....	24
8.4	Other licences or sub-leases .....	24
8.4.1	Licence during operating term.....	24
8.4.2	Private party licence or sub-leases .....	24
<b>9.</b>	<b>Design .....</b>	<b>25</b>
9.1	Design obligations .....	25
9.2	Warranties .....	25
9.2.1	Fitness for purpose .....	25
9.2.2	Other warranties.....	25
9.3	Design development.....	26
9.3.1	Design development process.....	26
9.3.2	Preconditions to construction .....	26
9.3.3	Concept design .....	26
9.3.4	Effect of government participation .....	26
9.3.5	Design and Construction program .....	27
9.3.6	Design and construction progress reports .....	27
9.4	Independent verifier .....	27

<b>10.</b>	<b>Construction and Completion .....</b>	<b>28</b>
10.1	Construction obligations .....	28
10.2	Construction updates, reports and review .....	28
	10.2.1 Provision of construction progress reports.....	28
	10.2.2 Effect of government involvement.....	29
10.3	Project committee and meetings .....	29
	10.3.1 Composition of the Project committee .....	29
	10.3.2 Role of the project committee .....	29
	10.3.3 Authority of the project committee .....	29
	10.3.4 Other meetings.....	29
10.4	Inspections.....	29
	10.4.1 Government's right to inspect and test.....	29
10.5	Completion.....	30
	10.5.1 Facility Completion.....	30
	10.5.2 Progressive works completion and handover .....	31
	10.5.3 Commencement of payment .....	31
	10.5.4 Failure to achieve Completion .....	31
	10.5.5 Certification of Completion .....	31
	10.5.6 Minor defects in facility .....	31
	10.5.7 Close-Out .....	32
10.6	Defects.....	32
	10.6.1 Defects liability .....	32
<b>11.</b>	<b>Protection against late or insufficient performance of the project activities .....</b>	<b>33</b>
11.1	Liquidated damages .....	33
	11.1.1 Value for money .....	33
	11.1.2 Genuine pre-estimate.....	33
	11.1.3 Sole and exclusive remedy .....	33
	11.1.4 Security for liquidated damages.....	34
11.2	Performance bonds .....	34
	11.2.1 Performance bond during the construction period and defects liability period	34
	11.2.2 Performance bond during the operating term .....	35
11.3	Parent guarantees .....	35
<b>12.</b>	<b>Operation and maintenance.....</b>	<b>37</b>
12.1	Operation, Maintenance and Repair.....	37
	12.1.1 General Obligations .....	37
	12.1.2 Operation and Maintenance Manuals .....	38
	12.1.3 Changes to the facility .....	38
	12.1.4 Advertising signage .....	38
	12.1.5 Notice of damage and accidents.....	38
	12.1.6 Maintenance Budget and Account .....	38
	12.1.7 Operation and Maintenance Non-conformances .....	38
	12.1.8 Operation and Maintenance Sub-contractors .....	39
12.2	Customer service.....	39
	12.2.1 General Obligations .....	39
	12.2.2 Customer Products/Services.....	39
	12.2.3 Customer Contracts .....	39
	12.2.4 Customer Service Roll Out Program.....	39
	12.2.5 Customer disputes/complaints .....	40
	12.2.6 Customer Service Audit .....	40
<b>13.</b>	<b>Performance management regime .....</b>	<b>41</b>
13.1	Key Performance Indicator regime .....	41
13.2	KPI Assessment System .....	42
13.3	Auditing.....	42
<b>14.</b>	<b>Payment provisions .....</b>	<b>43</b>
14.1	Revenue .....	43

14.2	Government contributions .....	43
14.2.1	Contributions from government.....	43
14.2.2	Timing and Security .....	43
14.2.3	Structure.....	44
14.2.4	Early Completion.....	44
14.2.5	Set off .....	44
14.3	Revenue Upside .....	44
14.3.1	Additional Rent.....	44
14.3.2	Compensable Enhancements.....	44
14.4	Variations to Base Case Financial Model.....	45
14.4.1	When will the Base Financial Case Model be varied? .....	45
14.4.2	Principles for variations to Base Case Financial Model.....	45
14.4.3	Procedure for variations to Base Case Financial Model .....	45
14.5	Taxes .....	46
14.5.1	General tax liability.....	46
14.5.2	Rates .....	46
14.5.3	Goods and services tax.....	46
<b>15.</b>	<b>Relief for Possible Key Risk Events.....</b>	<b>47</b>
15.1	Possible Key Risk Events .....	47
15.2	Threshold requirements.....	48
15.2.1	Acts of private party .....	48
15.2.2	Notification.....	48
15.3	Negotiations and objectives.....	48
15.4	Methods of redress .....	49
15.5	Contribution is last resort.....	49
15.6	No over compensation.....	49
<b>16.</b>	<b>Compensation Events .....</b>	<b>50</b>
16.1	Compensation Events .....	50
16.2	Threshold for Compensation .....	51
16.2.1	Acts of private party .....	51
16.2.2	Notification.....	51
16.2.3	Recovery of costs and losses .....	51
16.2.4	Mitigation .....	51
<b>17.</b>	<b>Compensation payable.....</b>	<b>52</b>
17.1	Calculation of Compensation.....	52
17.1.1	Entitlement .....	52
17.1.2	Overriding principles and requirements .....	52
17.1.3	Payment of Entitlement .....	53
17.2	Delay costs .....	53
<b>18.</b>	<b>Modifications .....</b>	<b>54</b>
18.1	Definition of Modification .....	54
18.2	Omissions .....	54
18.3	Government-initiated Modification .....	54
18.3.1	Right to request.....	54
18.3.2	Private party's proposal.....	55
18.3.3	Cost of Modification works .....	55
18.3.4	Effect on project activities .....	56
18.3.5	Modifications adversely impacting on revenue earning capacity .....	56
18.4	Private party initiated Modifications works .....	56
18.4.1	Private party's right to request Modification .....	56
18.4.2	Government's response .....	56
18.4.3	Private party's right to proceed .....	56
18.4.4	Government to share in any efficiency or saving .....	56
18.4.5	Modifications required due to a Change in Law or advancement in technology .....	57
18.5	Pre-agreed Modifications.....	57

18.6	Modification costs and savings .....	57
<b>19.</b>	<b>Compliance with Law.....</b>	<b>59</b>
19.1	Private party to comply with Laws .....	59
19.2	Scope of Change in Law .....	59
19.2.1	Definition .....	59
19.2.2	Exclusions .....	59
19.2.3	Compensation for Changes in Law .....	60
19.3	Project Specific Change in Law.....	60
19.3.1	Project specific changes compensable .....	60
19.3.2	Meaning of Project Specific Change in Law .....	60
19.3.3	Exceptions.....	60
<b>20.</b>	<b>Force Majeure.....</b>	<b>61</b>
20.1	Force Majeure Events .....	61
20.2	Suspension and Alternative Arrangements .....	62
20.2.1	Notification.....	62
20.2.2	Suspension of obligations .....	62
20.2.3	Alternative arrangements .....	63
20.2.4	Mitigation .....	63
20.2.5	Cessation of Force Majeure Event.....	63
20.2.6	No financial relief.....	63
20.2.7	No compensation to government .....	63
20.3	Termination for Force Majeure Event.....	63
20.3.1	Termination other than for Uninsurable Force Majeure Event .....	63
20.3.2	Termination for Uninsurable Force Majeure Event .....	64
<b>21.</b>	<b>Reinstatement and repair .....</b>	<b>65</b>
21.1	Obligation to repair or reinstate .....	65
21.1.1	Repair or Reinstatement .....	65
21.1.2	Insurance proceeds.....	65
21.1.3	Damage to third party property .....	65
21.2	Uninsurable Force Majeure Events .....	66
<b>22.</b>	<b>Insurance .....</b>	<b>67</b>
22.1	Insurance generally .....	67
22.1.1	Required insurance .....	67
22.1.2	Proof of insurance .....	67
22.1.3	Reputable insurer.....	67
22.1.4	Amendments .....	68
22.1.5	Government may effect insurance policies .....	68
22.1.6	Terms of insurance .....	68
22.1.7	Government as insured under private party insurance .....	68
22.1.8	Settlement of claims.....	69
22.2	General insurance obligations .....	69
22.3	Notices of potential claims.....	69
22.4	Uninsurability .....	70
22.4.1	Meaning of uninsurable risk .....	70
22.4.2	Treatment of uninsurable risk.....	70
<b>23.</b>	<b>Default .....</b>	<b>71</b>
23.1	Events of Default .....	71
23.2	Cure periods and remedies for Events of Default of the private party .....	72
23.2.1	Cure periods.....	72
23.2.2	Remedies for failure to cure an Event of Default capable of cure .....	72
23.2.3	Event of Default not capable of cure .....	73
23.3	General remedies .....	73
<b>24.</b>	<b>Termination.....</b>	<b>74</b>
24.1	Termination by government.....	74



	24.1.1	Private party default .....	74
	24.1.2	Native title.....	74
	24.1.3	Force Majeure Event.....	74
	24.1.4	Voluntary Termination .....	75
24.2		Termination by private party .....	75
24.3		Consequences.....	76
<b>25.</b>		<b>Termination Payments .....</b>	<b>77</b>
25.1		No Termination Payment.....	77
25.2		Termination Payment .....	77
	25.2.1	Payment amount .....	77
	25.2.2	Deductions .....	78
	25.2.3	Method of Payment .....	79
25.3		Mitigation .....	79
25.4		Transfer of senior debt obligations .....	79
<b>26.</b>		<b>Step-in .....</b>	<b>80</b>
26.1		Circumstances of step-in .....	80
	26.1.1	Circumstances .....	80
	26.1.2	Extent of rights in a step-in situation .....	80
	26.1.3	Assistance by private party .....	81
	26.1.4	Government obligations .....	81
	26.1.5	Private party's rights and obligations suspended.....	81
	26.1.6	Power of attorney .....	81
26.2		Costs of step-in.....	81
26.3		No liability or limitation on government's rights .....	81
	26.3.1	No liability .....	81
	26.3.2	No limitation on existing rights .....	81
26.4		Stepping-out .....	82
<b>27.</b>		<b>Sub-contractors .....</b>	<b>83</b>
27.1		Sub-contracts generally .....	83
	27.1.1	Timing of appointment of major sub-contracts.....	83
	27.1.2	Construction and operations sub-contracts to be in agreed form .....	83
	27.1.3	Effect of sub-contracts .....	83
27.2		Additional material sub-contract requirements .....	83
	27.2.1	Material sub-contracts .....	83
	27.2.2	Provision of material sub-contracts .....	84
	27.2.3	Terms and conditions of material sub-contracts .....	84
	27.2.4	Collateral warranty .....	84
27.3		Amendments to material sub-contracts .....	85
27.4		Side deed.....	85
27.5		Sub-contractor requirements .....	85
27.6		Private party's obligations in respect of sub-contracts .....	86
27.7		Sub-contractors appointed by financiers .....	86
27.8		No Relief to private party by sub-contracting obligations .....	86
<b>28.</b>		<b>Change of ownership/Control.....</b>	<b>87</b>
28.1		Warranty as to ownership/Control .....	87
28.2		Change of ownership/Control of private party .....	87
	28.2.1	Prior consent .....	87
	28.2.2	Exception to consent requirement .....	88
	28.2.3	Publicly listed holding companies .....	88
28.3		Equity lock in.....	88
<b>29.</b>		<b>End of term arrangements .....</b>	<b>89</b>
29.1		Return conditions at contract expiry .....	89
	29.1.1	Inspection at contract expiry .....	89
	29.1.2	Performance bond or escrow account .....	89
	29.1.3	Obligation to carry out works.....	89

	29.1.4	Government may carry out the work .....	90
	29.1.5	Escrow account .....	90
29.2		Other private party rights and obligations .....	90
	29.2.1	Surrender and return of the facility .....	90
	29.2.2	Novation .....	90
	29.2.3	Power of attorney .....	90
	29.2.4	Continuing obligations .....	91
	29.2.5	Inspection at end of Contract Term .....	91
29.3		Improvements .....	91
<b>30.</b>		<b>Dispute resolution .....</b>	<b>92</b>
30.1		Dispute resolution panel .....	92
30.2		Independent determination .....	92
30.3		Independent expert .....	92
	30.3.1	Appointment .....	92
	30.3.2	Capacity and procedure .....	93
	30.3.3	Time for decision .....	93
	30.3.4	Decision final and binding .....	93
	30.3.5	Costs .....	93
30.4		Arbitration .....	93
	30.4.1	Appointment .....	93
	30.4.2	Capacity and procedure .....	93
	30.4.3	Time for decision .....	93
	30.4.4	Costs .....	93
30.5		Fast track process .....	93
30.6		Legal rights .....	94
30.7		Obligation to continue to perform .....	94
<b>31.</b>		<b>Re-financing Gain .....</b>	<b>95</b>
31.1		Government consent .....	95
31.2		What is a Re-financing? .....	95
	31.2.1	Re-financing definition .....	95
	31.2.2	Exemptions .....	95
31.3		Notice and Re-financing details .....	96
31.4		Sharing a Re-financing Gain .....	97
31.5		Calculating the Re-financing Gain .....	97
	31.5.1	What is a Re-financing Gain? .....	97
	31.5.2	The discount rate .....	97
	31.5.3	Distributions .....	97
	31.5.4	Professional costs .....	97
31.6		Payment of the Re-financing Gain .....	98
31.7		Government audit rights .....	98
31.8		Funder's direct agreement .....	98
31.9		Termination Payments .....	98
31.10		Government right to request Re-financing .....	98
<b>32.</b>		<b>Indemnities, warranties and contractual claims .....</b>	<b>99</b>
32.1		Private party indemnity .....	99
	32.1.1	Indemnity .....	99
	32.1.2	Limitation of liability .....	100
	32.1.3	Release .....	100
32.2		Representations and warranties .....	100
	32.2.1	Representations by the private party .....	100
	32.2.2	Private party's acknowledgment, waiver and indemnity .....	101
	32.2.3	Reliance on representations .....	102
	32.2.4	Repetition of representations and warranties .....	102
32.3		Non-exclusivity of remedies .....	102
<b>33.</b>		<b>Restrictions on private party .....</b>	<b>103</b>
33.1		Restrictions on business .....	103

33.2	Restrictions on amending certain documents .....	103
33.3	Restrictions on assignment .....	103
33.3.1	No assignment without consent .....	103
33.4	Restrictions on sale or lease .....	103
<b>34.</b>	<b>Records .....</b>	<b>104</b>
34.1	Maintenance of audited records .....	104
34.2	Availability of audited records .....	104
34.3	Accounting records .....	104
34.3.1	Financial model .....	104
34.3.2	Financial records .....	104
34.4	Provision of other details .....	105
34.4.1	Consortium details .....	105
34.4.2	Other information and records .....	105
34.5	Warranty .....	105
34.6	Financial audit .....	105
34.6.1	Audit requirements .....	105
34.6.2	General audit right .....	105
34.6.3	False information .....	106
34.7	Maintenance of non-financial records .....	106
34.8	Period for retaining records .....	106
34.9	Confidentiality .....	106
<b>35.</b>	<b>Confidentiality and disclosure .....</b>	<b>107</b>
35.1	Government disclosure .....	107
35.2	Private party disclosure .....	107
35.2.1	No disclosure without consent .....	107
35.2.2	Requirements for disclosure .....	107
35.3	Legislative disclosure obligations .....	107
35.3.1	Legal requirement of disclosure .....	107
35.3.2	Obligation .....	108
35.4	Confidentiality .....	108
35.4.1	Agreement .....	108
35.4.2	Requirement for consent .....	108
<b>36.</b>	<b>Intellectual property .....</b>	<b>109</b>
36.1	Warranties .....	109
36.2	Grant of licences .....	109
36.3	Obligation .....	110
36.4	Moral rights .....	110
36.5	Survival of rights .....	110
36.6	Indemnity .....	110
36.7	IP rights passed from government .....	110
36.8	Rights to IP on expiry of term .....	111
36.8.1	Government rights .....	111
36.8.2	Indemnity .....	111
36.8.3	Provision of data .....	111
<b>37.</b>	<b>Probity .....</b>	<b>112</b>
37.1	General .....	112
37.2	Meaning of 'Probity Event' .....	112
37.3	Notification of a Probity Event .....	112
37.4	Consequences following notice of a Probity Event .....	112
37.5	Costs of cure .....	113
37.6	Sub-contractors and material sub-contracts .....	113
37.7	Probity investigations .....	113
37.7.1	Government requirement for probity investigations .....	113
37.7.2	Consents .....	113
37.7.3	Costs of probity investigation .....	113
37.8	No appointment without government consent .....	113

# Introduction

These National PPP Guidelines: National Commercial Principles for Economic Infrastructure ("**NCPs for Economic Infrastructure**") detail the Commonwealth and State/Territory governments' current preferred commercial principles for economic infrastructure public private partnerships ("**PPPs**"). These principles apply to **economic** infrastructure projects where the private party bears market (demand) risk and revenues are often derived directly from the end user or other third parties (rather than government). Often the facility reverts to government, at no cost, at the end of the concession term. Examples of economic infrastructure projects include tollroads, ports and car parking facilities.

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 economic infrastructure PPPs across jurisdictions.

These principles 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 some areas these principles acknowledge that approaches for dealing with a particular risk or contractual issues, may differ across jurisdictions while still remaining within the overall risk framework of the principles.

Each jurisdiction will issue supplementary guidance material for their agencies, identifying the positions that will apply to economic 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 economic 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. Key Risk Events vs MAE Events). 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 NCPs for Economic Infrastructure on a project specific basis.

## **Social Infrastructure Projects**

Social infrastructure projects are projects where the government pays the private party a service fee for the availability of a facility. This differs from economic infrastructure projects where the private party's revenues are often derived from third parties and the private party therefore bears demand risk. Examples of social infrastructure projects include schools, prisons and hospitals.

Refer to the National PPP Guidelines: Volume 2 - National Commercial Principles for Social Infrastructure ("**NCPs for Social Infrastructure**") for equivalent national commercial principles applicable to social infrastructure projects.

Government also recognises that individual projects may have characteristics of both economic and social infrastructure projects. Such projects will need to be considered on a project specific basis with reference to these NCPs for Economic Infrastructure and the NCPs for Social Infrastructure, as appropriate for the characteristics and risks of the individual project.

# 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 having regard to the agreed risk allocation between government and the private party for the project.

## 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* (Cth).

## 1.3 Authority to make contracts

### 1.3.1 Contracts within portfolio

Ministers have independent executive authority to make a contract on behalf of the Commonwealth or a State/Territory in connection with any matter that comes within their portfolio and departmental responsibility. In many cases department heads have this authority as well.

However, where the power to contract relied upon in a particular case is conferred by statute, the legislative provisions must be observed in order to properly exercise the power.

### 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.<sup>1</sup>

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 may agree to 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 exercise of its powers, functions or responsibilities in respect of the project agreement will take place through instruments of authorisation separate from the project agreement. The project agreement will acknowledge that government is entitled to revoke or change any such authorisation 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 legislation exists or is enacted to support the project agreement or to otherwise condition the exercise of the executive power to contract, there must be compliance with the requirements of that legislation. If the project agreement does not observe these requirements then it may be void.
- (b) All jurisdictions have enacted legislation removing common law immunity of the Crown.<sup>2</sup> 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.

## 1.6 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

---

<sup>1</sup> 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 s5A of the Act, with the approval of the Treasurer.

<sup>2</sup> For example the *Crown Proceedings Act 1958* (Vic), the *Crown Proceedings Act 1988* (NSW) and the *Crown Law Proceedings Act 1980* (Qld).

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

- (a) 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.
- (b) The private party will also be required to acknowledge that nothing in the Project Contracts restricts or requires the exercise of any right or power of government to develop, manage or change any network relevant or related to the project. For example, with respect to a tollroad project, government is entitled to exercise or not exercise any right or power they would otherwise have had to construct or upgrade new tollroads or other roads, construct or upgrade new or existing public transport routes or services or otherwise implement government transport policies.

## 1.6.4 Right to Compensation

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 (but, not so as to effectively result in the fetter of government's statutory power or discretion described in section 1.6.1).

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

## 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;

---

<sup>3</sup> See Chapters 15 (Relief for Possible Key Risk Events) and 16 (Compensation Events).



- (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.

### **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 NCPs for Economic 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, these NCPs for Economic Infrastructure and the guidance materials that underpin them, do not have any contractual status and will not actually form part of the project agreement (whether by implication or otherwise) unless the parties expressly acknowledge in the project agreement that they do.

## 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 any government contribution is fixed.

### 2.2 Requirements of Conditions Precedent

#### 2.2.1 Obligations

The private party must ensure that each of the Conditions Precedent that it is responsible for satisfying is met by the target date for satisfaction of the Conditions Precedent.<sup>4</sup> Depending on the project, government may require the private party to satisfy the Conditions Precedent at its cost.

#### 2.2.2 Content

The following Conditions Precedent, as a minimum, will usually 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 all Project Contracts and major sub-contracts in a form and substance satisfactory to government and satisfaction of all Conditions Precedent to such documents;
- (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;

---

<sup>4</sup> 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 60 business days from contractual close.

- (c) evidence that all duty payable in connection with entry into the Project Documents has been paid;
- (d) 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);
- (e) effecting of required insurance policies and providing certified copies of those executed policies;
- (f) provision of any required corporate or consortium details; and
- (g) provision of a printed and electronic copy of the certified Base Case Financial Model together with an audit report acceptable to government.

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

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 contract 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 relevant Condition Precedent (unless government causes the Condition Precedent not to be fulfilled).<sup>5</sup>

## 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, the government party may, where appropriate, agree to obtain approvals under the relevant State, Territory or Commonwealth legislation no later than Financial Close.

---

<sup>5</sup> See section 2.4.

## 3. Contract term

### Principle

The term of the contract will depend on the best value for money solution for government. It will be subject to earlier termination or extension in certain circumstances.

### 3.1 Length of contract term

The expiry date of the project agreement will be the last day of the Contract Term which will generally be defined as a fixed period (e.g. 45 years) commencing from the date of the execution of the project agreement or Financial Close.

The Contract Term will be fixed by reference to factors such as:

- (a) the minimum term considered necessary to deliver a reasonable return on the asset;
- (b) the need not to unduly limit government's flexibility in the longer term; and
- (c) the likely length of the design and construction phase.

### 3.2 Variation to contract term

The Contract Term may be extended by a period negotiated by the parties that provides redress for a Possible Key Risk Event<sup>6</sup> or as otherwise agreed by the parties.

Government may elect to reduce the Contract Term (up to a maximum pre-agreed percentage of the remaining Contract Term) instead of requiring payment by the private party of any additional rent in accordance with section 14.3.1 in Chapter 14 (Payment provisions).

### 3.3 Earlier termination

The Contract Term may end earlier than the date specified in the project agreement as a result of various events, including uninsurable force majeure and termination.<sup>7</sup>

---

<sup>6</sup> See section 15 (Relief for Possible Key Risk Events).

<sup>7</sup> See section 24 (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 assessments<sup>8</sup>

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* (Cth),<sup>9</sup> government may refer the project to the relevant Minister 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.

<sup>8</sup> 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.

<sup>9</sup> For example, listed threatened species and communities, listed migratory species, Ramsar wetlands of international importance, world heritage places, national heritage places, nuclear actions, the Great Barrier Reef Marine Park and the environment on Commonwealth land.

### 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.<sup>10</sup>

## 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 undertaking the operations and maintenance activities 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 by the private party, to the extent that such remediation is required.

## 4.4 Site Conditions

### 4.4.1 Private party responsibility

- (a) **'Site Conditions'** includes all circumstances and conditions on, in, under, above, around and affecting, the land, whether latent or otherwise and includes contamination and geotechnical conditions in, on, under or around the site.<sup>11</sup>
- (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. The private party must satisfy itself as to the adequacy and suitability of the site for carrying out the project.<sup>12</sup>

---

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

<sup>11</sup> For certain projects the 'site' may comprise a number of sites. For example, a tollroad project may consist of a number of sites with varying Site Conditions along, and possibly separate to, the alignment.

<sup>12</sup> See section 4.4.3 in respect of due diligence requirements.

- (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) **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.
- (c) **High Risk Sites** may be identified by reference to any of the following characteristics:
  - (i) 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
  - (ii) sites where extensive contamination or latent geotechnical conditions are likely (such as known sites with unexploded ordinances) and a full investigative survey is commercially impractical.

#### 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 attempt to ensure that the report is appropriately detailed and informative in documenting the nature and levels of site risk and may, where



possible, arrange for the private party to have rights directly against the site assessment report provider in respect of those reports;<sup>13</sup>

- (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 and 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; and
- (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 provided by government 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, geotechnical and other Site 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 may 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;

---

<sup>13</sup> 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).

- (c) to be eligible to receive any Relief or Compensation for unidentified pre-existing contamination or latent geotechnical conditions on a High Risk Site, the private party must have 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 agrees to share unidentified pre-existing contamination or latent geotechnical conditions risk on a High Risk Site, it may do so by agreeing at contractual close a protocol for sharing this risk. For example, by:
  - (i) reference to an agreed schedule of rates for specified eventualities<sup>14</sup> (with the private party bearing the risk of costing the unit price);<sup>15</sup> 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 High Risk Site on a percentage basis, it will consider circumstances such as the following when determining an appropriate percentage share:
  - (i) the comprehensiveness of site assessment undertaken by qualified environmental consultants commissioned by government prior to contractual close; 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; and
- (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<sup>16</sup> the private party must:

---

<sup>14</sup> 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).

<sup>15</sup> 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.

- (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;
- (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,<sup>17</sup> the site, except to the extent that government has agreed to share remediation costs (on the basis discussed in section 4.4.6). This indemnity is subject to the limitation of liability in section 32.1.2 of Chapter 32 (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.
- (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.<sup>18</sup>

#### 4.4.10 Unexploded ordinances

The private party will not generally be expected to bear (but may be required to sensibly share) the risk of the removal, defusal and disposal of identified or unidentified unexploded ordinances from military operations or war.

---

<sup>16</sup> See section 5.3(a).

<sup>17</sup> For example, contamination disturbed by the project activities that affects adjacent land or waterways.

<sup>18</sup> See section 16.1(e).

## 5. Native title and artefacts

### Principle

Government will generally assume responsibility for dealing with native title applications and claims. The private party will be responsible for identifying and dealing with all artefacts in accordance with relevant legislation. The private party will generally only be able to claim Relief or Compensation where it is directed to cease the project activities as a consequence of a native title application or claim or discovery of an artefact.<sup>19</sup>

### 5.1 Native title

#### 5.1.1 Risk allocation

- (a) Government will generally 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). However, in some jurisdictions, government may require private party cooperation and involvement.
- (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 communicate with indigenous representatives for the purpose of meeting notification and consultation requirements under the *Native Title Act 1993* (Cth) and relevant State and Territory Aboriginal Land Rights legislation.<sup>20</sup>
- (c) If there is a native title application or claim, the private party must continue to perform its obligations under the project agreement, except to the extent prevented by the native title application (due to a government direction, legal requirement or court or tribunal order to suspend execution of the project activities) and provide all reasonable assistance in connection with dealing with such an application or claim (subject to any Relief and Compensation referred to in paragraph (d) where government assumes this risk).
- (d) The private party will not have any claim against government for Loss or damage suffered as a result of any native title application or claim. However, where government assumes this risk, the private party may be entitled to Relief or

<sup>19</sup> Examples of artefacts include places, fossils, bones, coins, articles of antiquity, buildings, structures, natural features or other remains or objects of scientific, geological, historical, aesthetic, social, spiritual, cultural or archaeological interest, items of cultural heritage significance and Aboriginal Cultural Heritage.

<sup>20</sup> It should be noted that where land title rights exist under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), 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 party. On this basis, the Northern Territory government could expect the private party to accept this risk. A further issue is Aboriginal sacred sites, in respect of which the Northern Territory government has historically expected the private party 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 party and the private party is better placed to manage such issues as part of the project/site development.

Compensation<sup>21</sup> where delays arise or additional costs are reasonably incurred (by the private party), as a direct result of any government direction, legal requirement, court or tribunal order to suspend or cease all or any part of the project activities because of a native title application or claim.<sup>22</sup>

- (e) If as a consequence of such government direction, legal requirement, court or tribunal order the private party is prevented from carrying out the project for a period exceeding 6 months the government may terminate the project agreement and pay the private party Compensation in accordance with the principles set out in Chapter 25 (Termination Payments).

### 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<sup>23</sup> and, at its own cost and expense, prevent the artefact from being removed, disturbed, damaged or destroyed as required by the relevant legislation 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 project activities) (subject to any Compensation referred to in section 5.2.3 where government assumes this risk).

### 5.2.3 Compensation

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, where government assumes this risk the private party may be entitled to Compensation,<sup>24</sup> where delays arise or additional costs are reasonably incurred (by the private party), as a direct result of any government direction, legal requirement, court or tribunal order to suspend or cease all

---

<sup>21</sup> See Chapters 15 (Relief for Possible Key Risk Events) and 16 (Compensation Events)

<sup>22</sup> In some jurisdictions government may require the private party to bear this risk for a specified period of time before being entitled to any relief or Compensation. In other jurisdictions the private party will only be entitled to Compensation for delay costs where they are delayed from achieving Completion by the date anticipated for Completion.

<sup>23</sup> The private party must also notify the relevant third party where the private party has assumed this risk.

<sup>24</sup> See chapter 16 (Compensation Events)

or any part of the project activities because of the discovery of an artefact (provided the suspension or cessation order does not result from a private party breach of its obligations in dealing with discovered artefacts).<sup>25</sup>

## **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.

---

<sup>25</sup> In some jurisdictions government may require the private party to bear this risk for a specified period of time before being entitled to any Compensation. In other jurisdictions the private party will only be entitled to Compensation for delay costs where they are delayed from achieving Completion by the date anticipated for Completion.

## 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 may consider assuming the risk that use of the land will be 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* (Cth) obtained by government for the project,<sup>26</sup> 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), where the use of the land for the project is not already permitted by the relevant scheme, government may consider assuming the risk of the scheme being amended so the proposed land use will be permitted.<sup>27</sup>

### 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.

---

<sup>26</sup> See section 16 (Compensation Events)

<sup>27</sup> Government may, where appropriate, on a project specific basis, endeavour to obtain such land use by Financial Close.

## 7. Site access

### Principle

Government will generally deliver the site for the purposes of the project. 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, 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

- (a) While Government will generally be responsible for delivery of the site for the purposes of the project as described in section 8.1, the private party is responsible for gaining access to the site and is not entitled to any claim against government in connection with access or failure to gain or delay in gaining access to the site.
- (b) The private party also bears the risk and cost of acquiring any land additional to the land agreed at Financial Close.

### 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 project activities.

#### 7.2.2 Access regime

- (a) Consistent with the allocation of design, construction, commissioning, operations and maintenance 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 project activities 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) 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.



## **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 the Contract Term at all reasonable times to the extent necessary to enable government to exercise any of its rights (including for government gaining access to maintain and repair adjoining assets) 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 including unreasonable noise, dust, vibration and disturbance; and
- (d) unless required for purposes of public health or safety, not interfere 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 (except to the extent permitted by the project agreement).

## **7.4 Utilities**

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. However, in some jurisdictions, government may consider taking back or managing limited interface risk.

The private party must minimise disruption to, costs incurred and revenue foregone by any utility owners or third parties with an interest in the land.

## 8. Tenure

### Principle

Government will generally own the project site and grant the private party licences for the construction period and a lease for the operating term. The term of the lease will end on the expiry of the Contract Term.<sup>28</sup>

### 8.1 Ownership

- (a) Subject to 8.1(b), government will generally be responsible for delivery of the site for the purposes of the project and will bear the costs and risks of delivery of the land that is agreed at Financial Close to be required for the Project.<sup>29</sup>
- (b) The private party bears the costs and risks of acquiring any land additional to the land agreed at Financial Close.
- (c) Accordingly, for most projects, land will be in government ownership. This facilitates the transfer of Control of the facility to government at the end of the Contract Term and underpins government's Step-in Rights under the project agreement.<sup>30</sup>

### 8.2 Construction licence

#### 8.2.1 Grant of licence

Government will grant to the private party a non-exclusive licence or licences to use, and permit any construction sub-contractor or operating sub-contractor to use, the site during the construction period on the following terms and subject to government's rights of access<sup>31</sup>.

#### 8.2.2 Terms of licence

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 any operating activities required to be carried out prior to Completion. The licence will generally terminate upon the grant of the lease for the operating term or upon earlier termination of the project agreement.

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 other licence.

---

<sup>28</sup> 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.

<sup>29</sup> Commonwealth agencies must abide by the Australian Government Property Ownership Framework.

<sup>30</sup> See section 26 (Step-in).

<sup>31</sup> See paragraph 8.3.1.

## **8.3 Lease during operating term**

### **8.3.1 Grant of lease**

- (a) Where the private party can demonstrate it is more appropriate given the project structure and it represents better value for money for government to grant a lease during the operating term, as opposed to a licence, then government may choose to grant a lease from the completion of the works to the private party. Unless otherwise specified the lease will be limited to use of the land solely for the purpose of undertaking the project activities in accordance with the project agreement.
- (b) Any lease will be subject to reservations enabling government to access and use the facility to exercise its rights under the project agreement and for any other lawful purpose.

### **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 Date of Completion, 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 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**

### **8.4.1 Licence during operating term**

Government will grant a licence during the operating term for land required by the private party to carry out the project activities and which is not the subject of a lease described in section 8.3.1.

### **8.4.2 Private party licence 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.

## 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 and so that it will comply with the government's requirements as reflected in the project agreement.

### 9.1 Design obligations

- (a) The private party must design the facility so that it will comply with the Project Contracts and so that it is at all relevant times fit for its 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 or any other sub-contractor. Depending on the contract value, the private party must notify the government of, and give it access to, any such sub-contract.<sup>32</sup>

### 9.2 Warranties

#### 9.2.1 Fitness for purpose

- (a) In accordance with section 9.1, the private party will provide a warranty that the facility, as designed and constructed, will be, and will remain at all relevant times, 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 Project Contracts (including the Output Specification).
- (c) Jurisdictions adopting this approach recognise the need (given the requirement for a fitness for purpose warranty) for the Output Specification to adequately describe government's required outputs and disclose relevant operating protocols.

#### 9.2.2 Other warranties

The private party will also warrant that:

- (a) it has checked and considered the Output Specification;
- (b) except for costs resulting from any risks expressly accepted by the government, it has allowed for all risks and costs associated with complying with its obligations to the government under the Project Contracts;
- (c) the design of the project works (including all design documentation) will be fit for the intended purposes and will be completed according to, and satisfy the requirements of, the Project Contracts; and
- (d) construction of the project works according to the design will satisfy the requirements of the Project Contracts.

---

<sup>32</sup> See Chapter 27 (Sub-contractors).

## 9.3 Design development

### 9.3.1 Design development process

The private party must develop the design in accordance with the Project Contracts and an agreed process. It must prepare detailed design documentation for each discrete component or package of project works. The design documentation must be submitted to both the government and an independent verifier for review.<sup>33</sup>

### 9.3.2 Preconditions to construction

The private party may not commence construction of any discrete works package unless the design documentation relating to that package has reached a pre-agreed stage of development and:

- (a) it has submitted that design documentation package to the government and independent verifier;
- (b) it has certified that design documentation package complies with all requirements of the Project Contracts and enclosed further certifications from the designer as to the design documentation's compliance;
- (c) the government has had an opportunity to review and comment on that design documentation package; and
- (d) the independent verifier has verified that that design documentation package complies with the Project Contracts and that any comments by the government have been addressed by the independent verifier.<sup>34</sup>

### 9.3.3 Concept design

The private party assumes all risks arising out of the concept design including that it will not be fit for its intended purposes and that the project works will cost more than anticipated.

Both the government and private party acknowledge that the design development process may result in changes to the concept design. The private party may not make any such changes without following a contractually prescribed process to do so. This process (subject to the determination of the independent verifier) may give the private party the flexibility to change the concept design where the change still meets the government's minimum requirements and does not negatively impact the functional performance of the facility.

### 9.3.4 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 verifier 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 documentation and project agreement.

---

<sup>33</sup> See section 9.4 in respect of the independent verifier.

<sup>34</sup> In some jurisdictions the private party may be permitted to proceed with construction, at its own cost and risk, notwithstanding the opinion of the independent verifier.

### **9.3.5 Design and Construction program**

The private party must regularly update a detailed design and construction program and provide government with a copy.

### **9.3.6 Design and construction progress reports**

During the design and construction phase, the private party must provide government with written reports outlining the progress of the works.

## **9.4 Independent verifier**

Government and the private party will jointly appoint an independent verifier<sup>35</sup> to perform specified review and certification functions in relation to the design and construction of the facility set out in this Chapter 9 and Chapter 10 (Construction and Completion). The independent verifier's function may also include assistance in relation to technical disputes. The costs of the independent verifier will be shared equally by government and the private party).

The independent verifier's decisions will be binding on the parties except in the case of manifest error although in many cases it will be appropriate for the parties to reserve the right to refer the decision to the dispute resolution process as set out in Chapter 30 (Dispute resolution), within a specified period.

---

<sup>35</sup> In some jurisdictions the independent verifier might be referred to by another name such as the independent reviewer or the independent certifier.

# 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 must also ensure the project works are constructed:

- (a) according to the Project Contracts, design documentation and any valid Modifications; and
- (b) with good workmanship and materials, free from defects/imperfections and to the standard specified in the Output Specifications or, where this is absent, the best equivalent industry standard.

The private party is not relieved of any of its construction obligations and liabilities under the project agreement by the private party sub-contracting the performance of any works.<sup>36</sup>

## 10.2 Construction updates, reports and review

### 10.2.1 Provision of construction progress reports

- (a) 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 contractual close.
- (b) Government may require the private party to also provide to the government and the independent verifier regular periodic compliance certificates (in a prescribed form) confirming that it is satisfied that the works are being constructed according to the approved design documentation. At each such interval, the private party must also include a compliance certificate (in a prescribed form) from the project designer to the same effect.
- (c) The independent verifier will conduct regular reviews of the private party's construction work.<sup>37</sup> The Project Contracts may set out a detailed process for the independent verifier to notify the private party and the government if it considers that the works are not being constructed in a compliant fashion. On receipt of such a notice, the private party may be obliged to take remedial steps to address the non-compliance to the satisfaction of the independent verifier.

---

<sup>36</sup> See Chapter 27 (Sub-contractors)

<sup>37</sup> The level of checking and review performed by the independent verifier may differ from project to project and jurisdiction to jurisdiction.

## **10.2.2 Effect of government involvement**

The provision of progress reports or updated construction programs do 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**

A project committee must be established. Although it may vary from project to project, typically this committee will comprise representatives from the private party and the government.

### **10.3.2 Role of the project committee**

The project committee will meet regularly to discuss any matters relating to the project, including, for example, issues of public concern, design and construction issues and community and media relations issues. It will also assist with any matters referred to it and review progress reports provided to it by the private party under the Project Contracts.

### **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 government representatives on the committee 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 delay or damage 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 generally be borne by government unless the inspection or test reveals any defect or was required under the Project Contracts or by Good Industry Practice.



## 10.5 Completion

### 10.5.1 Facility Completion

- (a) For Completion to be achieved, the works (including everything necessary to open the facility for safe, efficient and continuous use) must be completed except for minor defects (as described in section 10.5.6). The private party must do everything required to be done by the Project Contracts (including the Output Specification) as a condition precedent to Completion, including:
  - (i) all commissioning tests must have been carried out in accordance with the Output Specifications and the commissioning plan;<sup>38</sup>
  - (ii) all consents, approvals, authorisations and certificates required for the facility to be occupied and used for its intended purposes must have been obtained and complied with;
  - (iii) all rubbish, construction machinery, equipment and materials must have been removed from the site and all required remediation work undertaken;
  - (iv) the private party must have provided government with all material documents and information required to be provided under the Project Contracts;
  - (v) the private party must have provided copies of relevant insurance policies required by the project agreement; and
  - (vi) all other tests and requirements required to satisfy the independent verifier that operations (in accordance with Output Specifications) can commence, must have been satisfied.
- (b) Where the private party considers that it has achieved Completion, it must notify the government and independent verifier of its opinion, request that the latter issue the prescribed certificate of Completion and provide both parties with a list of the residual works to be completed to achieve "Close-Out".<sup>39</sup> The independent verifier must issue a 'Certificate of Completion' identifying the Date of Completion and advise of any minor defects remaining outstanding (refer to section 10.6). If the independent verifier does not consider that Completion has been achieved, he/she must promptly notify the private party and government listing the outstanding works if possible.
- (c) The government may trigger this completion process itself if the private party has, in the government's view, reached Completion.
- (d) In certain projects (e.g. tollroads) Completion may occur in 2 or more stages. The civil works may achieve completion first followed later by, for example, tolling system completion. In such a scenario, the government may require the private party to open the road for public use upon civil works completion. However, the private party will only be entitled to levy tolls on users upon completion of the whole of the works (including the tolling system).

---

<sup>38</sup> 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.

<sup>39</sup> See section 10.5.7 for the meaning of "Close-Out".

- (e) The Certificate of Completion will not of itself be evidence that any works have been carried out in accordance with the project agreement.

### 10.5.2 Progressive works completion and handover

- (a) The Project Contracts may provide for the private party to progressively complete and handover sections of the works to government or a third party owner that will not be operated and maintained by the private party ("**Returned Works**"). A detailed process for this to occur may be set out in the Project Contracts to ensure that the appropriate notification to government, the third party owner and the independent verifier have occurred first.
- (b) The private party will expressly acknowledge and agree that any such progressive completion and handover will not:
  - (i) constitute the government's approval of the private party's obligations under the Project Contracts;
  - (ii) be taken as evidence that the work complies with the Project Contracts;
  - (iii) prejudice any of the government's rights; or
  - (iv) restrict the independent verifier from making any of its key determinations or forming its opinion on key issues (e.g. in relation to Completion).

### 10.5.3 Commencement of payment

The private party's entitlement to impose fees and charges on users of the facility is triggered from the date identified in a Certificate of Completion (in the case of a staged completion process, where the construction of the facility is complete and the facility is operational (for example, in the case of a tollroad, both the road and the tolling system are complete)).

### 10.5.4 Failure to achieve Completion

Failure by the private party to achieve Completion by the Date for Completion will not of itself result in an Event of Default<sup>40</sup> however government may terminate the Project Contracts if the private party fails to achieve Completion by any specified sunset date.

The private party must take all reasonable steps to preclude the cause, and minimise the consequence of any delay and keep government informed including by providing a detailed corrective action plan if it becomes aware that it is not likely to achieve Completion by the Date for Completion.

### 10.5.5 Certification of Completion

The independent verifier will also be engaged to certify Completion.

### 10.5.6 Minor defects in facility

Completion is not achieved (and no fees, charges or tolls may be levied) until all identified defects have been rectified. The only exceptions are minor omissions or defects which in the independent verifier's opinion:

---

<sup>40</sup> See however, sections 23.1(a) and 23.1(b) in Chapter 23 (Default).

- (a) individually or in aggregate, do not prevent the facility from being used for its intended purposes;
- (b) do not have to be rectified in order for Completion to be achieved; and
- (c) can be corrected without prejudicing the safe, efficient and continuous use of the facility.

### 10.5.7 Close-Out

After Completion has been achieved, the private party is obliged to expeditiously and diligently progress the balance of the works required to achieve Close-Out. This will occur when the private party has completed:

- (a) the balance of the works outstanding as at Completion, including correcting all defects specified in the Certificate of Completion; and
- (b) the private party has done everything required to be done by the Project Contracts (including the Output Specification) as a condition precedent to Close-Out.<sup>41</sup>

A process similar to that which applies to Completion in section 10.5.1(b) will then apply for determining whether Close-Out has occurred.

## 10.6 Defects

### 10.6.1 Defects liability

The private party bears the risk of correcting defects that may emerge in relation to the facility over the Contract Term.

The private party will also bear the risk of correcting any defects in the Returned Works during a defects liability period prescribed by government in the project agreement.

---

<sup>41</sup> See Chapter 11 (Protection against late or insufficient performance of the project activities) for security that government may seek for completion of the balance of the works and activities to achieve Close-Out.

# 11. Protection against late or insufficient performance of the project activities

## Principle

Government will consider, on a value for money basis, requiring protections from the private party such as liquidated damages, performance bonds and parent company guarantees to compensate government for costs and Losses incurred as a result of late or insufficient completion of the facility or performance of the operating activities

## 11.1 Liquidated damages

### 11.1.1 Value for money

The circumstances where government may seek payment of liquidated damages for any period of delay in achieving Completion<sup>42</sup> will be determined on a value for money basis. Consideration will be given to a number of factors including the potential for higher costs of the bid (which may ultimately be passed through to users), remedies otherwise available to government under the project agreement to recover costs arising from a private party delay (e.g. indemnities) and erosion of the operating term.

Where there is a fixed Contract Term, erosion of the operating term as a result of late achievement of Completion and therefore reduction in the revenue able to be generated by the private party may be sufficient incentive to ensure timely Completion. In such a circumstance government may consider that it is not value for money to also recover liquidated damages.<sup>43</sup>

### 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 completion of the facility. 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. opening of the road when it is safe to do so even if the tolling system is not complete in the case of a tollroad project).

### 11.1.3 Sole and exclusive remedy

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

<sup>42</sup> As distinct from the liquidated damages payable by the construction sub-contractor to the private party for any period of delay.

<sup>43</sup> On this basis these NCPs for Economic Infrastructure do not consider relief in the form of extension of time for Completion however this may be appropriate in circumstances where government considers it appropriate to seek liquidated damages. Refer to NCPs for Social Infrastructure for discussion on the impact of relief events on the Completion Date and how this relates to the enforceability of liquidated damages.

### 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.

## 11.2 Performance bonds

### 11.2.1 Performance bond during the construction period and defects liability period

- (a) It is typical for government to require the private party to provide a performance bond for the construction term for a value equivalent to anywhere from 5 to 10% of the design and construction contract price to mitigate the government's risk in relation to late or insufficient completion of the facility. For value for money reasons, government may elect not to seek a direct performance bond of that value from the private party for the construction term (subject to section 11.3(c) below). Instead it may require the private party to:
  - (i) procure a performance bond (issued in the private party's favour) from the construction sub-contractor, guaranteeing the construction sub-contractor's construction obligations.<sup>44</sup> This would generally, in any event, be a requirement of the private party's financiers who will have security over the bonds; and
  - (ii) provide a direct performance bond of a smaller value equivalent to the estimated cost to government to rectify defects in relation to Returned Works or the facility that were not required to be rectified prior to certification of Completion.<sup>45</sup>
- (b) Government may also elect not to mandate the requirement for performance bonds but instead may 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, government must be satisfied that its interests are adequately addressed and protected by any such bond. 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) its entitlement to call upon the bond (including requirements in relation to any bond procured from the construction sub-contractor that government be notified when a call is made on the bond).<sup>4647</sup>

---

<sup>44</sup> 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.

<sup>45</sup> See section 10.5.2 in Chapter 10 (Construction and Completion).

<sup>46</sup> See section 10.5.2 in Chapter 10 (Construction and Completion).

<sup>47</sup> In some jurisdictions there may be restrictions on security being provided by a sub-contractor. In such cases, government's minimum bonding requirements will include enforceability of the security. For example, the *Subcontractors' Charges Act 1974* (Qld).

- (d) Any performance bond must be unconditional and irrevocable and provided (or backed) by a financial institution regulated by the Australian Prudential Regulation Authority and with a minimum specified credit rating.
- (e) The required form of the bond will be set out in the project agreement and must not be amended without government's approval.<sup>48</sup>

### 11.2.2 Performance bond during the operating term

- (a) In considering the appropriate type and structure of any operating term bond, government may take into account a range of factors, including:
  - (i) the value for money implications of requiring a bond;
  - (ii) the level of overall security provided by the private party to support its operational obligations;
  - (iii) the commercial incentive of the private party to meet its obligations; and
  - (iv) other project specific requirements.
- (b) Following consideration of the factors described above, government may seek one or more of the following:
  - (i) an up-front operating term bond directly from the private party;
  - (ii) an ability to increase the amount of the up-front operating bond as a result of repeated or severe breach;
  - (iii) where no bond is required at project commencement, the right to require that such bond be provided at any time during the operating term where a repeated or severe breach occurs; and
  - (iv) a requirement that the private party 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 bond).

## 11.3 Parent guarantees

- (a) Government may seek performance guarantees from the parent companies of the private party or of the material sub-contractors where this represents value for money.
- (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. 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.
- (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

---

<sup>48</sup> 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.

bonds directly from the private party in addition to those provided by the sub-contractor.

## 12. Operation and maintenance

### Principle

Following construction of the facility, the private party must safely, efficiently and continuously operate, maintain and repair the infrastructure. The private party may obtain revenue by offering various products and services to the public (e.g. charging users a toll/charge for the use of the facility.) The private party therefore carries the demand risk on the project. Government, in turn, requires the private party to operate and maintain the facility to prescribed standards and specifications. It must also deliver its products and services to its customers within prescribed parameters.

### 12.1 Operation, Maintenance and Repair

#### 12.1.1 General Obligations

- (a) The private party must operate, maintain and repair the facility safely, efficiently and continuously and to both generic and specifically prescribed standards, including:
  - (i) keeping the facility fit for purpose at all times;
  - (ii) preserving the specified design life of each element of the facility;
  - (iii) ensuring the facility meets the specified condition standards when it is handed back to government at the end of the Contract Term;
  - (iv) ensuring the facility is operated, maintained and repaired according to Good Industry Practice and that defects are corrected in a timely manner;
  - (v) ensuring that the performance of each part of the facility meets the Output Specification;
  - (vi) ensuring the facility satisfies the environmental approval requirements;
  - (vii) ensuring that priority is given to the safety of users of the facility or any other persons affected by the operation and maintenance activities; and
  - (viii) minimising the impact of the performance of the operation and maintenance activities on users of the facility.
- (b) The Output Specification will specify the minimum requirements the private party must meet in operating and maintaining the facility. The private party must comply with these obligations at its cost.
- (c) The private party's operation and maintenance obligations extend to upgrading the facility to incorporate advancements in technology and to continuously improve operation and maintenance practices.
- (d) The private party must operate the facility in a manner that enables the public to use the facility as part of a broader integrated infrastructure network (for example, in the case of a tollroad, the facility should be interoperable with other Australian tollroads (in relation to tolling) and more generally, the local road network).
- (e) The private party must take all reasonable precautions to avoid obstruction and damage to any property and services arising out of the performance of the operation and maintenance activities.



### 12.1.2 Operation and Maintenance Manuals

- (a) The private party will have to develop and keep up to date detailed operations and maintenance manuals which may be reviewed by government. The private party must comply with the manuals and warrant that:
  - (i) they will be fit for their intended purpose;
  - (ii) they are prepared, developed and updated to current Good Industry Practice; and
  - (iii) the private party's compliance with them will enable it to fulfil its operations and maintenance obligations to government (including its obligations under the Project Contracts).
- (b) The private party will agree that compliance by it with the operation and maintenance manuals will not in any way lessen or affect:
  - (i) its liabilities or responsibilities under the Project Contracts or at law or;
  - (ii) government's rights against the private party under the Project Contracts or at law.

### 12.1.3 Changes to the facility

The private party will not make, or permit to be made, any structural or other changes to the facility which are not permitted by the Output Specification, without the written approval of government.

### 12.1.4 Advertising signage

The private party must seek government's approval to erect, install or display any advertising or promotional signage at or near the facility. The private party may erect, install or display any signage permitted by the Output Specification without government's approval.

### 12.1.5 Notice of damage and accidents

During the Contract Term, the private party must give government a detailed written report of:

- (a) any material damage to the facility;
- (b) the action which the private party proposes to take to rectify the damage and the estimated time required for that rectification; and
- (c) any incidents or accidents causing injury or material damage to the facility.

### 12.1.6 Maintenance Budget and Account

The private party must prepare an annual forecast maintenance budget which is to be reconciled with a pre-agreed 5-yearly maintenance program. It will also be required to open a maintenance and repair account which is to be adequately funded and only used for periodic capital works, asset refurbishment and asset replacement. Government may also require that the private party establish and maintain an improvement fund and make sufficient regular payments into that fund to cover the cost of future technological advances.

### 12.1.7 Operation and Maintenance Non-conformances

Failure to comply with the operations and maintenance obligations could result in government exercising its right to seek financial security for performance from the private party (e.g. a

performance bond)<sup>49</sup> and ultimately terminating the project agreement due to an Event of Default.<sup>50</sup>

### 12.1.8 Operation and Maintenance Sub-contractors

The private party may sub-contract performance of some of the key operation and maintenance functions (in particular circumstances there may be critical operation and maintenance functions which government specifically prohibits the private party from sub-contracting, for example, material customer services interface functions).<sup>51</sup>

## 12.2 Customer service

### 12.2.1 General Obligations

The private party must provide customer services that, at a minimum:

- (a) meet the requirements set out in the Output Specification; and
- (b) are to a standard consistent with that performed by other private operators of equivalent infrastructure.

### 12.2.2 Customer Products/Services

The private party must make appropriate products/services available to users having regard to:

- (a) Good Industry Practice;
- (b) advancement in technology; and
- (c) ensuring no unreasonable restriction is placed on the persons to whom the products/services are offered,

and must not suspend, delete or discontinue the products/services without government's prior consent.

### 12.2.3 Customer Contracts

The private party is required to offer customer contracts in respect of each proposed product. Government may prescribe various parameters which the customer contracts must comply with. For example, with respect to a tollroad project these parameters may focus on ensuring that adequate consumer safeguards are included. In other projects, the manner and timeframe for negotiation of the user agreements may be prescribed as well as the key terms that must be covered by the contract. The private party may be required to obtain the prior approval of government to proposed new products and all amendments/modifications to customer contracts.

### 12.2.4 Customer Service Roll Out Program

- (a) The private party may be required to develop and comply with a detailed customer service roll out program which must be submitted to government prior to commencement of operations.

---

<sup>49</sup> See section 11.2.2 in Chapter 11 (Protection against late or insufficient performance of the project activities).

<sup>50</sup> See section 23.1 in Chapter 23 (Default) and section 24.1.1 in Chapter 24 (Termination).

<sup>51</sup> See Chapter 27 (Sub-contractors) for sub-contract requirements.

- (b) The program may include details of all marketing, public relations, accounting and billing and other activities that must be completed prior to the private party imposing fees and charges on the public in relation to the facility. Any deviation from this customer roll out plan may only occur with the prior approval of government and on reasonable grounds.

### **12.2.5 Customer disputes/complaints**

Government may prescribe a particular mechanism for resolving disputes between the private party and customers.

Where the services are provided to the general public, the private party must establish a customer complaints resolution system which is:

- (a) readily accessible and user-friendly;
- (b) fair and efficient;
- (c) achieves Good Industry Practice;
- (d) transparent; and
- (e) provides for an independent process where a satisfactory outcome cannot otherwise be reached with a customer (e.g. use of an ombudsman).

### **12.2.6 Customer Service Audit**

- (a) An independently appointed auditor may be appointed by both government and the private party to conduct annual audits of the latter's compliance with its customer service and customer complaints management obligations.
- (b) The costs for this auditor will be shared equally between government and the private party.

## 13. Performance management regime

### Principle

The private party's performance during the operation and maintenance phase will be measured against a comprehensive Key Performance Indicator (KPI) regime. The private party makes monetary payments for KPI failures and the government may pass the amounts derived from those failures back to users of the facility.

### 13.1 Key Performance Indicator regime

- (a) A comprehensive KPI regime will apply to the private party with a view to measuring performance under the contract and ensuring the government's minimum requirements are met. The detailed KPIs are articulated in specifically measurable metrics so they are capable of being reported against by the private party and independently audited. For example, in the case of tollroads, they may cover:
  - (i) customer service and satisfaction (e.g. customer responsiveness, complaint resolution, billing accuracy);
  - (ii) communication and community obligations (e.g. quality of marketing material, community liaison activities);
  - (iii) environmental (e.g. air quality in tunnels, water discharge);
  - (iv) quality assurance;
  - (v) operations and maintenance requirements;
  - (vi) incident management (i.e. response times); and
  - (vii) aesthetics.
- (b) The private party must use its best endeavours to achieve a level of performance in respect of each KPI to a particular KPI benchmark (usually expressed as a percentage). For example, in respect of a "customer service and satisfaction" KPI,  $x\%$  of customer calls should be answered within  $y$  seconds.
- (c) Each KPI will be assessed within a defined period (e.g. monthly, quarterly, annually) and failure to meet the KPI benchmark will result in the private party incurring demerit points. At the end of each financial year, the private party must notify government of the aggregate demerit points it has accumulated and the applicable KPI credit owed to government for that period (calculated by multiplying the number of demerit points by a unit dollar value e.g. \$1000).
- (d) Government may pass the monetary value of the KPI credit back to users of the facility or use it for any related purpose.
- (e) The existence of the KPI regime does not detract from government's entitlement to exercise any and all other rights it may have against the private party for non-compliance.<sup>52</sup> Significantly, the private party gives a number of acknowledgments designed to ensure the enforceability of the KPI regime, including that the KPI

<sup>52</sup> See section 23.1(i).

credits are a genuine pre-estimate of loss that the government will suffer if it fails to comply with a KPI and that the KPI regime is not penal in nature.

## 13.2 KPI Assessment System

As a condition precedent to Completion, the private party must set up a transparent KPI assessment system which will record and report on its own performance against the KPIs. Specifically, whether the KPIs have been met, if not, what steps it is taking to rectify that failure and any other information that government reasonably requires (including source information for the relevant data). The private party must provide a KPI quarterly report which it must certify and maintain all its records relating to that KPI data for 7 years.

## 13.3 Auditing

- (a) The private party must provide to government upon request an audit report prepared by an independent auditor who has audited the KPI data and quarterly KPI reports at the end of a particular financial year. The government may also request an audit of the KPI data, quarterly KPI report or KPI assessment system at any time up to a year after the end of the Contract Term. In this latter case, government may appoint the independent auditor on its own terms and will bear the associated costs.
- (b) If either form of audit reveals inaccuracies in the KPI data or KPI quarterly report, the private party must:
  - (i) rectify the inaccuracy and reissue the corrected data or report;
  - (ii) advise government of any change to the KPI assessment system; and
  - (iii) pay government any necessary adjustment to the KPI credit.<sup>53</sup>

---

<sup>53</sup> In the case of any audit in the year after the end of the Contract Term government may call on the security referred to in section 29.1.2.

# 14. Payment provisions

## Principle

The private party may be entitled to receive revenue following Completion of the facility.

Depending on the project specific economics, government may make a contribution towards the cost of the project. This contribution could be made through a number of mechanisms including a direct payment (i.e. upfront, during or at the end of the construction period).

## 14.1 Revenue

The regime under which the private party can charge third parties for the use of the facility must be designed having taken into account value for money for users of the facility.

The private party's ability to charge third parties (e.g. levy tolls, user charges and other fees) may be prescribed and constrained by the project agreement. For example, in relation to a tollroad, the project agreement will set out:

- (a) that tolls can only be charged by the private party once there is a fully operational facility, which provides a strong commercial incentive to complete construction by the Date for Completion or earlier;
- (b) the base tolls for different categories of vehicles (e.g. cars, motorcycles, light commercial vehicles and heavy commercial vehicles);
- (c) whether there are different tolls specified for different tollable sections;
- (d) whether there are to be time based tolls;
- (e) the level of GST applicable;
- (f) the method for escalation of the tolls, user charges and fees (e.g. the escalation for tolls may be based on quarterly or annual increases in CPI)

In other projects the user charges may be set according to market rates or according to determinations made by regulatory authorities.

The private party and its associated entities may be restricted in deriving revenue from only those prescribed sources. All alternate sources of revenue/returns must first be approved by the government.

## 14.2 Government contributions

### 14.2.1 Contributions from government

Depending on the project specific economics, government may make a contribution towards the cost of the project. This may be by way of payment or by a contribution of works.

### 14.2.2 Timing and Security

Any payment or contribution should be structured to protect the government against construction risk.

Payments made following Completion provide the lowest risk to government. However, government may consider making payments during the construction term where such

payments are appropriately secured to protect the government against its increased exposure to construction risk.

Government will not generally consider that a payment at Financial Close provides sufficient protection against construction risk.

### 14.2.3 Structure

Payments during the construction term may be structured as milestone payments based on the value of works completed or a payment for specifically identified elements of works verified as completed by an independent verifier.

### 14.2.4 Early Completion

If Completion occurs prior to the Date for Completion, government may require the private party to pay a daily amount by which the contribution required by government decreases. This is to reflect the lower finance costs of the private party associated with repaying its borrowings earlier and the additional costs to government to fund the contribution from an earlier date.

### 14.2.5 Set off

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 may not include the project debt proportion of any Termination Payment.

The private party must make all payments under the Project Contracts without set off, counter-claim, deduction or withholding.

## 14.3 Revenue Upside

### 14.3.1 Additional Rent

As a general principle, government will seek to share in excess profits. The private party may be required to pay to government additional rent payments under the lease government grants to the private party during the operations term. Any additional rent derived may be determined as a proportion of the amount of revenue from end users or other third parties that exceeds that projected in the Base Case Financial Model. The proportion payable will be specified in the project agreement.

Additional rent payments are treated as operating expenses for the private party and take priority to debt service.

Government may elect to reduce the Contract Term (up to a maximum pre-agreed percentage of the remaining Contract Term) instead of requiring payment by the private party of the additional rent.<sup>54</sup>

### 14.3.2 Compensable Enhancements

Additional rent payments may also include a predetermined percentage of any increased revenue generated from enhancements resulting from government actions or policy (a "**compensable enhancement**").

In the case of tollroad projects, such enhancements may include improvements to the transport network which increases the use of the tollroad. For example, this may include the

---

<sup>54</sup> See also section 3.2 (Variation to )

connection of a new road to the tollroad or the construction of a new road, the extension, alteration or upgrade of existing roads, the construction of new public transport routes or services and extension, alteration and upgrade of existing public transport routes. Government is able to share in the additional revenue even if the traffic forecasts in the Base Case Financial Model are not being met.

Conversely, any change to the network which causes a reduction in revenue is a **"negative compensable enhancement"**. Such a reduction in revenue may be set off against any increase in revenue that the private party would otherwise have had to share with government.

If the network change has been assumed in the project agreement and the private party's Base Case Financial Model and that network change is completed on or after the anticipated date for Completion for that network change specified in the project agreement, then it will not be included in any calculation of a compensable enhancement or negative compensable enhancement. If however, the network change is completed prior to the estimated time then its effects can be included in the calculation of a compensable enhancement or negative compensable enhancement.

## 14.4 Variations to Base Case Financial Model

### 14.4.1 When will the Base Financial Case Model be varied?

In some jurisdictions, the Base Case Financial Model (as at Financial Close) may only be varied on the occurrence of one or more of the following specified events and in accordance with the principles and procedures set out below:

- (a) Modifications (as discussed in Chapter 18 (Modifications));
- (b) Key Risk Events (as discussed in Chapter 15 (Relief for Possible Key Risk Events));
- (c) Re-financing (as discussed in Chapter 31 (Re-financing Gain));
- (d) compensable and negative compensable enhancements; and
- (e) other events specified under the project agreement.

### 14.4.2 Principles for variations to Base Case Financial Model

The Base Case Financial Model will be varied taking into account the changes to the private party's incremental costs and/or benefits directly resulting from the variation event (in light of certain specified parameters such as minimum debt coverage ratios and the Base Case Equity Return).

### 14.4.3 Procedure for variations to Base Case Financial Model

- (a) Promptly after the private party or government 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; or



- (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;
  - (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.

## 14.5 Taxes

### 14.5.1 General tax liability

The private party is responsible and indemnifies government for all taxes payable pursuant to the project agreement and any transactions evidenced or contemplated by them.

### 14.5.2 Rates

Where rates and taxes are assessed in respect of the site leased by state entities or councils, government will consider on a project specific 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.

### 14.5.3 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. Relief for Possible Key Risk Events

## Principle

Possible Key Risk Events are particular events which are outside the control of the private party and which may have a material adverse effect on the ability of the private party to repay the debt financiers amounts due under the financing agreements or to pay the equity investors their projected return.

Where there is such a material adverse effect the parties must negotiate in good faith to agree on a method of redress.

## 15.1 Possible Key Risk Events

- (a) The private party will be entitled to Relief for certain events that have themselves a material adverse effect on the ability of the private party to either:
  - (i) pay the debt financiers the amounts due in accordance with the financing agreements (without regard to any acceleration); or
  - (ii) pay the equity investors their projected Equity Return.
- (b) Possible Key Risk Events may occur in either the construction period or the operating term however, the majority of Possible Key Risk Events are typically events occurring during the operating term given the greater potential to cause a material adverse effect described in paragraph (a) above. The specific Possible Key Risk Events will be determined on a project specific basis but may include:
  - (i) the occurrence of a Project Specific Change in Law (discussed in section 19.3 in Chapter 19 (Compliance with Law);
  - (ii) as a result of a native title application or claim the private party is directed, ordered or required to cease to perform the operating activities (or to change the way it does so) (other than by way of a Final Court Decision which may be a Termination Event<sup>55</sup>);
  - (iii) as a result of a challenge to a planning approval obtained by government<sup>56</sup> the private party is ordered by a court to cease carrying out the operating activities (or to change the way it does so) (other than by way of a Final Court Decision which may be a Termination Event<sup>57</sup>) and provided the challenge was not the result of a breach of the planning approval or project agreement;<sup>58</sup>
  - (iv) the occurrence of an Uninsurable Force Majeure Event that affects the project works or facility;
  - (v) in the case of a tollroad project, in some jurisdictions, the offence of failing or refusing to pay tolls or charges is not enforced by government

<sup>55</sup> See section 24.2(a)(i) of Chapter 24 (Termination).

<sup>56</sup> See section 6.2(a) of Chapter 6 (Planning and other approvals)

<sup>57</sup> See section 24.2(a)(i) of Chapter 24 (Termination).

<sup>58</sup> Some jurisdictions develop a planning scheme process via project specific legislation and in some jurisdictions the private party bears the risk of obtaining such planning approval. In those jurisdictions this issue will not be a Possible Key Risk Event.

consistent with government's approach on an equivalent enforcement regime at contractual close;

- (vi) in some jurisdictions, an identical directly competing facility is opened during the Contract Term; and
- (vii) in the case of a tollroad project, in some jurisdictions a principal traffic connection is closed other than for specified events such as emergency, material threat to health or safety of the public, upgrade and maintenance or a special event.

- (c) A negative compensable enhancement notified by the private party (as discussed in Chapter 14 (Payment provisions)) cannot be a Possible Key Risk Event.

## 15.2 Threshold requirements

### 15.2.1 Acts of private party

Government will not provide Relief where the Possible Key Risk Event is caused by or is otherwise within the control of the private party or any sub-contractor or related party.

### 15.2.2 Notification

- (a) The private party must notify government within a specified time from when the occurrence of a Possible Key Risk Event has started to have a material adverse effect and provide full details of the effect of the Possible Key Risk Event.
- (b) If the private party does not notify government of the occurrence of the Possible Key Risk Event within the specified time, the private party will be barred from making any claim for Relief in respect of that Possible Key Risk Event.
- (c) The parties must negotiate in good faith to agree on the occurrence of the Possible Key Risk Event and whether or not it will have a material adverse effect.

## 15.3 Negotiations and objectives

Following agreement as to the occurrence of a material adverse effect from a Possible Key Risk Event the parties must negotiate in good faith to agree on a method of redress that achieves the objective of enabling the private party to:

- (a) repay the debt financiers the interest and principal payments owing under the financing agreements when such amounts are due (without having regard to acceleration of the obligation to repay); and
- (b) pay the equity investors an appropriate return, for example, the lower of the return they would have received if the Possible Key Risk Event had not occurred or the Base Case Equity Return.

If the private party was not able to pay or repay the debt financiers the amounts owing under the financing agreements or to pay the equity investors the Base Case Equity Return prior to the occurrence of the Possible Key Risk Event, then the objectives of the negotiations will be for the private party to have an equivalent ability to do so as it had prior to the occurrence of the Possible Key Risk Event.

## 15.4 Methods of redress

The parties must take a flexible approach to negotiations and must consider the following methods:

- (a) varying the Project Contracts;
- (b) varying the contract term;
- (c) varying the financial or other contributions of the parties;
- (d) requesting the debt financiers restructure the financing arrangements; and
- (e) varying the revenue calculation schedule (including for example, toll, fees and charges).

## 15.5 Contribution is last resort

The method of redress involving a variation to the financial contribution of government will be considered as a measure of last resort and will only apply to the extent the other methods of redress cannot reasonably be used.

## 15.6 No over compensation

Government will not be obliged to make available or be bound by any method of redress to the extent:

- (a) that such method achieves an outcome in excess of that which is necessary to achieve the objectives;
- (b) the applicable Possible Key Risk Event is caused or contributed to by a breach of the Project Contracts by the private party; or
- (c) any other reasonable payment, compensation or other redress has been made by the government in connection with the Possible Key Risk Event.

# 16. Compensation Events

## Principle

Compensation Events are events which are outside of the control of the private party and in respect of which government provides Compensation for additional costs incurred by the private party.<sup>59</sup> Compensation Events may adversely affect the ability of the private party to perform its obligations under the project agreement or cause the private party to incur additional costs.

## 16.1 Compensation Events

Compensation Events may occur in either the construction period or the operating period. The specific Compensation Events will differ for jurisdictional or project specific reasons, but may generally fall within the following categories of events:

- (a) a modification, withdrawal, revocation or replacement of the government obtained planning approval referred to in section 6.2(a), other than due to an application for a further planning approval by, or any other action or inaction of, the private party or its sub-contractors, or as a result of a breach of that planning approval or as a result of a private party initiated Modification;
- (b) as a result of a challenge to the government obtained planning approval referred to in section 6.2(a) the private party is ordered by a court to cease carrying out the design and construction activities (or to change the way it does so), provided the challenge was not the result of a breach of the planning approval or project agreement by the private party;
- (c) a government or court direction to suspend or cease all or any part of the works because of a native title application or claim where government assumes this risk<sup>60</sup> (provided the cessation order does not result from a private party breach of its obligations in relation to native title);
- (d) a government direction in relation to artefacts (provided the direction does not result from a private party breach of its obligations in relation to artefacts); and
- (e) 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; and
  - (ii) a breach by the private party of its obligations under the project agreement (which includes an obligation to undertake the work in accordance with Good Industry Practice).

Jurisdictions may adopt some, all or none of the Compensation Events listed above, or parts thereof, and may include additional Compensation Events.

<sup>59</sup> 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.

<sup>60</sup> See section 5.1 in Chapter 5 (Native title and artefacts).

## 16.2 Threshold for Compensation

### 16.2.1 Acts of private party

Government will not Compensate the private party to the extent that the Compensation Event is caused by, contributed to or is otherwise within the control of the private party, any sub-contractor or related party.

### 16.2.2 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.

### 16.2.3 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) adversely affects the ability of the private party to perform any of its obligations under the project agreement; and
- (b) causes the private party to incur additional costs (including delay costs to the extent that the private party is or will be prevented from achieving Completion by the Date for Completion),

then the private party will be entitled to claim Compensation in accordance with Chapter 17 (Compensation payable).

### 16.2.4 Mitigation

The private party must:

- (a) take all proper and reasonable steps to minimise the costs and expenses incurred and 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. 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 following overriding principles.

## 17.1 Calculation of Compensation

Where the private party is entitled to Compensation for a Compensation Event, 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.<sup>61</sup> Government has the right to appoint an independent party to audit any information prepared by the private party in this regard.

### 17.1.1 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 17.1.2 below, the private party will generally be entitled to the following categories of costs and expenses:

- (a) the sum of the following incremental amounts properly and reasonably incurred by it:
  - (i) design and construction trade costs;
  - (ii) debt financing costs for the period of the delay;
  - (iii) external third party advisory costs; and
  - (iv) administrative and overhead costs of the private party;
- less:
- (b) any insurance proceeds or damages or other compensation or amounts received or receivable by the private party as a direct result of the Compensation Event;
- (c) 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
- (d) 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.

### 17.1.2 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.

<sup>61</sup> Any government determination of such costs will be subject to the private party's right to refer such determination to dispute resolution in accordance with Chapter 30 (Dispute resolution).

- (b) the private party will not be entitled to Compensation for any indirect or consequential loss.
- (c) The private party will prepare and submit a notice of claim 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) 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.
- (f) 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.
- (g) Reasonable costs and expenses do not include amounts payable by the construction sub-contractor to the private party (or vice versa) or a related body corporate of the construction sub-contractor or the private party to the extent that the private party, construction sub-contractor or the related body corporate is not engaged on an arm's length basis or on commercial terms.
- (h) Reasonable costs and expenses must be calculated without double counting.

### 17.1.3 Payment of Entitlement

- (a) Government has the option of paying Compensation for a Compensation Event by:
  - (i) a lump sum payment;
  - (ii) milestone payments, matching delivery of the relevant works; or
  - (iii) subject to the private party's agreement, extending the operating term.
- (b) If government requires the private party to fund an amount up-front and that amount is above a specified threshold,<sup>62</sup> 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,<sup>63</sup> government may instead choose to pay those costs by way of a lump sum payment.

## 17.2 Delay costs

Reasonable costs and expenses can include delay costs that arise directly to the extent that the Compensation Event prevents or will prevent the private party from achieving Completion by the Date for Completion.

---

<sup>62</sup> To be agreed on a project specific basis but is intended to be set at a fairly low level in light of the value of the project.

<sup>63</sup> 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.



# 18. Modifications

## Principle

Government may initiate Modifications to the works, facility and the project activities at any time during the Contract Term. The cost of government-initiated Modifications will be borne by government after taking into account any cost savings from the Modification.

The private party may initiate Modifications to the works, facility or the project activities 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.

## 18.1 Definition of Modification

"**Modifications**" will be defined on a project specific basis but will generally mean any change to the works, the facility or the project activities including any increase, decrease, omission, deletion, demolition or removal to or from them, but will not include:

- (a) the development and refinement of the design documentation in accordance with the project agreement; or
- (b) any other changes to the works, facility or the project activities required to ensure the facility is fit for its intended purposes,

## 18.2 Omissions

Government retains the right to omit works or project activities by way of Modification and in certain instances to have those works or project activities carried out by a third party.

## 18.3 Government-initiated Modification

### 18.3.1 Right to request

- (a) Government may at any time, during the construction and operation phases, request a Modification to the works, facility or project activities 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 18.3.2 below).
- (b) In some jurisdictions, government may not request a Modification that adversely affects the use, patronage or capacity of the facility or the private party's ability to earn revenue, except as set out in section 18.3.5.
- (c) If government requests a Modification after Completion, it may require the private party to conduct a tender process for all or part of the works required to effect the Modification.<sup>64</sup> The private party must have regard to the outcome of the tender

<sup>64</sup> The private party will call for tenders consistent with the principles of the government's procurement policies at the date government requests the proposal with necessary changes to reflect the private party is not an authority.

process (including the tender costs) in the private party's proposal (see section 18.3.2 below).

- (d) 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.
- (e) If the private party fails to notify government in accordance with paragraph (d), it will have no entitlement to claim for any Compensation in respect of that Modification.

### 18.3.2 Private party's proposal

- (a) Within a defined 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 works, facility or project activities, necessary capital expenditure, any impact on recurrent costs (on a fully transparent basis) and, where applicable, how the private party will fund the costs.
- (b) Government may, at its discretion, request further information, accept or reject the private party's proposal, withdraw or reduce the scope of its Modification request.
- (c) Where government rejects the private party's proposal and government still wishes to proceed with the Modification, the government may require:
  - (i) the parties to consult in good faith to agree a resolution to the disputed matters during the construction period; or
  - (ii) the private party to conduct a competitive tender<sup>65</sup> during the operating period.
- (d) If the parties fail to reach agreement within a specified period of the consultation or notification of the outcome of the tender process is provided to government, then government may refer the matter for resolution in accordance with the dispute resolution procedure in Chapter 30 (Dispute resolution).
- (e) Where a proposal for carrying out the Modification is accepted by government, agreed by the parties or government wishes to proceed with a Modification pending agreement or determination of disputed matters in accordance with Chapter 30 (Dispute resolution), the private party must implement the Modification on the basis determined by government. Any necessary adjustments will be made following resolution of any matters in dispute.
- (f) If government has not exercised its right to require the private party to implement a Modification pending agreement or determination of disputed matters, then following resolution of the dispute, government may either require the private party to implement the Modification or withdraw the Modification or government may elect to implement the Modification itself at its cost..

### 18.3.3 Cost of Modification works

Government will compensate the private party for the cost of carrying out government-initiated Modification works except for those set out in section 18.3.5, in accordance with section 18.6 below.

<sup>65</sup> If a tender has not already be undertaken in accordance with section 18.3.1(b).

### **18.3.4 Effect on project activities**

The private party must continue to perform the project activities except to the extent that it is prevented from doing so as a consequence of the implementation of the Modification.

### **18.3.5 Modifications adversely impacting on revenue earning capacity**

Government may request a Modification resulting from public policy decisions which may impact upon the use or patronage of the facility on the private party's ability to earn revenue. For example, in the case of tollroad projects, this may involve amendments to the existing tolling structure or the implementation of physical solutions such as introduction of high occupancy tolling lanes or capacity enhancements, such as widening.

Within a period set out in the project agreement, the private party must give government its proposal for carrying out the requested Modification. The proposal should address the matters set out in section 18.3.2(a) as well as the effect on revenue.

The government request should not result in the private party being in a better or worse position than prior to the policy change. In broad terms, the principles to effect a neutral position for the private party will be based on those outlined in Chapter 15 (Relief for possible Key Risk Events).

## **18.4 Private party initiated Modifications works**

### **18.4.1 Private party's right to request Modification**

- (a) The private party may at any time, during the construction and operations phases, request Modifications to the works, facility or project activities provided they are consistent with the project agreement and the Output Specifications and do not have an adverse effect on the facility or the performance of the project activities. The Modifications could include commercial enhancements which meet service needs such as capacity enhancements on a tollroad project.
- (b) The private party must demonstrate that it has the appropriate financial and technical resources to undertake the proposed Modification.

### **18.4.2 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. Where government imposes conditions or amendments, the private party may either accept them or withdraw its proposal.

### **18.4.3 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 any conditions of government's approval and otherwise in accordance with all the design, construction, commissioning, operation and maintenance provisions of the project agreement as if it were part of the original works or project activities.

### **18.4.4 Government to share in any efficiency or saving**

Government will share in any 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.

### 18.4.5 Modifications required due to a Change in Law or advancement in technology

To the extent a Modification is required by the private party to comply with a Change in Law<sup>66</sup> or to upgrade the facility to incorporate advancements in technology or operations and maintenance practices as required by the project agreement, government must either:

- (a) not reject the private party initiated Modification;
- (b) direct the private party to carry out a government-initiated Modification; or
- (c) take such other action the government considers necessary (other than to carry out the Modification itself).

If the Change in Law is a Project specific Change in Law then Chapter 15 (Relief for Possible Key Risk Events) will apply.

## 18.5 Pre-agreed Modifications

In some cases, government may prior to contract execution, agree with the private party certain Modifications, the occurrence and scope of which can be predicted with some certainty prior to contract execution.

## 18.6 Modification costs and savings

The Compensation payable for government-initiated Modifications will be determined in a manner consistent with the principles in sections 17.1.2 and 17.1.3 of Chapter 17 (Compensation payable)<sup>67</sup> and of the following additional principles and requirements:

- (a) 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.
- (b) If the Modification will result in an increase in costs, government will pay the agreed Modification costs progressively after the relevant work is undertaken or as agreed depending upon whether the Modification is being funded by government or the private party.
- (c) If the Modification will result in a decrease in costs, the private party may set off the Modification saving against a Modification cost payable by government or where there is no set-off, progressively over the period when the cost would otherwise have been incurred if the Modification had not been implemented, or as otherwise agreed by the parties.

---

<sup>66</sup> Including a change to the planning approval contemplated in section 16.1(a) of Chapter 16 (Compensation Events).

<sup>67</sup> Paragraphs (d), (e), (f), (g) and (h) of section 17.1.2.

- (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).
- (e) Modification costs means, to the extent a Modification increases the costs of the project activities, the:
  - (i) direct costs and associated on-site overheads reasonably arising from the Modification; and
  - (ii) a reasonable amount on account of the off-site overheads and profit margin (calculated at a specified rate in accordance with section 18.6(a)) of the major sub-contractors; and
  - (iii) where the Modification is funded wholly or partly from raising new equity, a reasonable market rate of return on that new equity; and
  - (iv) if the proposed Modification will delay Completion beyond the Date for Completion, an amount that will provide the equity investors a return equal to their Base Case Equity Return on their committed amount for the period of the delay beyond the Date for Completion,

after deducting all decreases in the costs of the project activities.

- (f) Modification savings are the:
  - (i) cost savings arising from the Modification; and
  - (ii) a reasonable amount on account of the off-site overheads and profit margin (calculated at a specified rate in accordance with section 18.6(a)).

# 19. Compliance with Law

## Principle

The private party must comply with all Laws, including any Change in Law. Government will only provide Relief or Compensation for Changes in Law which specifically and only affect the project or the project and other similar privately owned and operated projects. Generally, changes in tax arrangements are to be borne by the private party.

## 19.1 Private party to comply with Laws

The private party must:

- (a) comply with all applicable Laws, including any Change in Law, in carrying out the project activities and the works;
- (b) ensure that the facility, and the operation of the facility, complies with all applicable Laws, including any Change in Law.

## 19.2 Scope of Change in Law

### 19.2.1 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 principles of law established by decisions of courts, legislation, subordinate legislation, rules and regulations, binding requirements and approvals and policies or guidelines with which the private party is legally required to comply.

### 19.2.2 Exclusions

Change in Law does not include:

- (a) Changes in the way the Law is interpreted (except as provided in section 19.2.1(c));
- (b) changes to the following legislation:
  - (i) *Income Tax Assessment Act 1936* (Cth) and *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
  - (ii) *Income Tax Assessment Act 1997* (Cth);<sup>68</sup>
- (c) Changes in Law which, as at the date of the project agreement:

<sup>68</sup> In Victoria, "Change in Law" excludes any change in relation to Part IVAA – Proportionate Liability of the *Wrongs Act 1958* (Vic) or its application.

- (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.<sup>69</sup>
- (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).
- (e) Change in Law resulting from a breach of any planning approval or Project Contracts by the private party or a private party initiated Modifications.

### 19.2.3 Compensation for Changes in Law

The private party will only be entitled to Relief or Compensation for a Change in Law that is a Project Specific Change in Law.

## 19.3 Project Specific Change in Law

### 19.3.1 Project specific changes compensable

Relief will be granted for Project Specific Changes in Law in both the construction period and the operating period in accordance with Chapter 15 (Relief for Possible Key Risk Events).

### 19.3.2 Meaning of Project Specific Change in Law

A "**Project Specific Change in Law**" is a Change in Law by the relevant jurisdiction, which specifically and only :

- (a) affects the project; or
- (b) has a direct affect on the project together with other similar privately owned and operated facilities.

### 19.3.3 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 entities; or
- (b) if it is a change in taxes (including GST).<sup>70</sup>

---

<sup>69</sup> In some jurisdictions this exception will only apply if the Change in Law is in substantially the same form as the change envisaged before the date of the project agreement.

<sup>70</sup> In some jurisdictions, there may be an exception for Project Specific Changes in Law that result from any direct or indirect action of the private party in accordance with the project agreement including any private party initiated Modification.

## 20. Force Majeure

### Principle

Force Majeure Events are a limited category of events of exceptional severity which are outside the control of either party and which prevent or delay the private party from performing an obligation under the project agreement.

If a Force Majeure Event occurs, the private party's obligations will be suspended to the extent and only for the duration such obligations are affected by the Force Majeure Event and otherwise in accordance with the principles set out in this Chapter. The private party will not be entitled to financial relief and government will not be entitled to compensation in respect of a Force Majeure Event.

### 20.1 Force Majeure Events

- (a) Force Majeure Events are 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)); and

- (iv) fire, flood or explosion caused by events referred to in paragraphs 20.1(a)(i) or 20.1(a)(ii) above.
- (b) In the case of paragraph 20.1(a) 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.<sup>71</sup> Additional events to those listed should only be adopted where this is warranted by the unique features of the project.

## 20.2 Suspension and Alternative Arrangements

### 20.2.1 Notification

- (a) The private party must notify government within a specified time of the occurrence and effect of the Force Majeure Event and provide full details of the Force Majeure Event.
- (b) The private party must continue to update government at specified intervals for the duration of the Force Majeure Event.

### 20.2.2 Suspension of obligations

Subject to 20.2.1, to the extent that:

- (a) a Force Majeure Event prevents the private party from performing all or a material part of its obligations under the project agreement;
- (b) the impact of the Force Majeure Event could not reasonably have been prevented, mitigated or recovered by the private party acting in accordance with Good Industry Practice;
- (c) the private party is using its best endeavours to perform its obligations under the project agreement; and
- (d) the private party (including agents, employees or sub-contractors) did not cause (either directly or indirectly) the Force Majeure Event,

---

<sup>71</sup>

The definition of Force Majeure Events should only include events which 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.

the private party's obligations under the project agreement which are affected by the Force Majeure Event will be suspended but only to the extent and for so long as those obligations are affected by the Force Majeure Event.<sup>72</sup>

No default notice may be given by government to the private party in respect of a breach of any obligations which are suspended during the period of suspension.

### 20.2.3 Alternative arrangements

During the period for which the private party has been granted relief, government may make alternative arrangements for the performance of obligations suspended by a Force Majeure Event.

### 20.2.4 Mitigation

During the period of the suspension, the private party must use all reasonable endeavours to prevent or mitigate the effects of the Force Majeure Event and must take all reasonable steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event. This may include for example incurring reasonable expenditure, rescheduling resources and implementing appropriate temporary measures.

### 20.2.5 Cessation of Force Majeure Event

The private party must immediately notify government once it ceases to be prevented or delayed from performing its obligations as a result of the Force Majeure Event and must recommence performance of its suspended obligations as soon as it becomes able to do so.

### 20.2.6 No financial relief

Government will not be obliged to provide any financial relief to the private party during the period of suspension (e.g. to meet the private party's fixed operating costs) or extend the Contract Term to take account of the period of suspension.<sup>73</sup>

### 20.2.7 No compensation to government

The private party will not be liable to compensate government for any costs or losses government incurs during the period of suspension.<sup>74</sup>

## 20.3 Termination for Force Majeure Event

### 20.3.1 Termination other than for Uninsurable Force Majeure Event

- (a) As soon as practicable following the Force Majeure Event (other than an Uninsurable 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 (including reinstatement of the works or facility where appropriate).

---

<sup>72</sup> In the case of a toll road project, the obligation to keep all traffic lanes open will only be suspended to the extent that the Force Majeure Event prevents the safe passage of vehicles.

<sup>73</sup> However, see sections 15.1(b)(iv) and 20.3.2 in relation to Uninsurable Force Majeure Events.

<sup>74</sup> Sections 20.2.6 and 20.2.7 are consistent with the principle that for risks (such as Force Majeure Risk) which neither party is better placed to control or manage, the loss should lie where it falls.

- 
- (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 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 more than a specified period,
- then government may terminate the project agreement.
- (c) Upon termination of the project agreement, government will pay the private party a Termination Payment in accordance with the principles set out in Chapter 25 (Termination Payments).

### 20.3.2 Termination for Uninsurable Force Majeure Event

At any time after the occurrence of a Force Majeure Event that is an Uninsurable Force Majeure Event,<sup>75</sup> government may in its absolute discretion terminate the project agreement by notice and government will be liable to pay the private party a Termination Payment in accordance with the principles set out in Chapter 25 (Termination Payments).

---

<sup>75</sup> Uninsurability is discussed at section 22.4 of Chapter 22 (Insurance).

# 21. Reinstatement and repair

## Principle

Subject to the loss or damage occurring as a result of an Uninsurable Force Majeure Event, the private party is responsible, at its cost, for repairing and reinstating any loss or damage to the site, works or the facility.

## 21.1 Obligation to repair or reinstate

### 21.1.1 Repair or Reinstatement

If any part of the site, the facility or the works is damaged or destroyed or cannot be used or occupied, the private party must, at its cost:

- (a) 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;
- (b) manage all repair and replacement activities so as to minimise the impact on the facility and works;
- (c) promptly provide government with written notice of any such loss or damage and any required replacement, reinstatement or repair; 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).

### 21.1.2 Insurance proceeds

- (a) Subject to paragraph (c), any insurance proceeds received in respect of such damage must be paid into a separate account and must be applied towards the cost of reinstatement or repair.
- (b) The account must be in the name of the private party with a financial institution approved by government.
- (c) In some circumstances, government may consider the possibility of allowing some or all of the insurance proceeds to be applied towards the repayment of the project debt where the insurance proceeds received exceed an agreed amount, the insurance proceeds are insufficient and it is not economically viable to repair the damage and the private party will not be able to repay the project debt on the terms agreed with the financiers.

### 21.1.3 Damage to third party property

- (a) Where any loss or damage to property of third parties occurs as a result of:
  - (i) any failure by the private party to comply with its obligations under the project agreement, the private party must repair such loss or damage at its cost; and
  - (ii) the project activities, the private party must repair such loss or damage or pay reasonable compensation to the affected person.

- (b) If the private party fails to carry out any repair work or pay reasonable compensation in accordance with paragraph (a), government may do so and the amount of the repairs or compensation will be a debt due and payable from the private party to government.

## 21.2 Uninsurable Force Majeure Events

If the loss or damage occurs as a result of an Uninsurable Force Majeure Event, the private party's obligation to carry out repair and reinstatement is suspended until the parties have agreed an outcome in accordance with Key Risk Event regime,<sup>76</sup> the matter is resolved in accordance with the dispute resolution procedure in section 30 or the matter is resolved by a decision of a court which is final and binding on the parties, or the project agreement is terminated as described in section 20.3 (Termination for Uninsurable Force Majeure Event).

---

<sup>76</sup> Discussed in Chapter 15 (Relief for Possible Key Risk Events).

## 22. Insurance

### Principle

The private party must obtain and maintain such insurances as required by law and insurances of a kind on no less favourable terms than the minimum insurance requirements specified in the project agreement.

### 22.1 Insurance generally

#### 22.1.1 Required insurance

The private party must, at its own cost, effect and maintain such insurances throughout the construction and operating periods required by law and insurances of a kind on no less favourable terms than the minimum insurance requirements specified in the project agreement. The private party must also ensure that its sub-contractors effect and maintain appropriate insurances.

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, motor vehicle insurance and professional indemnity insurance.

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.

The project agreement will specify the periods that the private party must maintain the insurances. The project agreement will require periodic reviews of insurances in the operating periods.

#### 22.1.2 Proof of insurance

- (a) By Financial Close, the private party must have provided government with evidence from its insurers that the construction period 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.

#### 22.1.3 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.

### 22.1.4 Amendments

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.

In determining whether and on what basis to provide its consent, government will consider the proposed changes in light of market conditions at the time, the impact of the changes on the project risk profile and value for money considerations generally.

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.

### 22.1.5 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 to government.

### 22.1.6 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) a stipulation that failure by any insured to observe and fulfil the terms of the policy or to comply with the duty of disclosure will not prejudice the insurance of any other insured;
  - (iii) a waiver of subrogation of all rights against any of the insured parties;
  - (iv) notice of a claim by any insured will be accepted by the insurer as notice by all insured.
- (d) a provision requiring the approval of the government in writing to any exclusion, endorsement or alteration.<sup>77</sup>

### 22.1.7 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

---

<sup>77</sup> Requirements which refer to multiple insured parties are not applicable where there is only one insured party.

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.<sup>78</sup>

### 22.1.8 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 21.1 of Chapter 21 (Reinstatement and repair).

## 22.2 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 government;
- (e) immediately notifies government of any fact or circumstance or change in circumstances which may prejudice any insurance;
- (f) gives full, true and particular information to the insurer of all matters and things 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 moneys 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.

## 22.3 Notices of potential claims

The private party must:

- (a) notify government of any occurrence that may give rise to a claim under an insurance policy;
- (b) keep government informed of subsequent developments concerning the claim;
- (c) subject to paragraph (d), diligently pursue any claim which it has under any insurance policy; and

---

<sup>78</sup> It is only stipulation on the policy that enables this. No form of words in the project agreement will create such a right for government.



- (d) not compromise, settle or prosecute a claim under any insurance policy without the prior written consent of government, which must not be unreasonably withheld or delayed.

## 22.4 Uninsurability

### 22.4.1 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 *Terrorism Insurance Act* 2003 (Cth); 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).

### 22.4.2 Treatment of uninsurable risk

- (a) If either party considers that a risk which is required to be insured under the Project Contracts is 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) If the uninsurable risk materialises and it is a Force Majeure Event and the project agreement is terminated, government will pay the private party a Termination Payment in accordance with the principles set out in Chapter 25 (Termination Payments).
- (d) 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.
- (e) 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.

## 23. Default

### Principle

The project agreement will specify Events of Default in respect of the private party and provide the opportunity to the private party to cure the default. If an Event of Default of the private party is unremedied after a specified period, government may terminate the project agreement.

### 23.1 Events of Default

Events of Default of the private party may include:<sup>79</sup>

- (a) the private party fails to commence, or to expeditiously and diligently progress, the works;
- (b) the private party permanently abandons, or displays an intention to permanently abandon, the project;
- (c) the private party fails in a material respect to operate, maintain, repair or insure the facility;
- (d) the private party defaults in a material respect in relation to the environmental and community consultation obligations imposed on it under the project agreement;
- (e) the private party defaults in a material respect in the performance of its obligations under the Project Contracts including delivering the project in accordance with the Output Specification or verified design documentation;
- (f) any of the private party, the private party's material sub-contractors or their guarantors become insolvent;<sup>80</sup>
- (g) during the Contract Term a representation or warranty given by the private party to government proves to be untrue or misleading;
- (h) the private party's right to obtain finance or draw down funds under the finance agreements is cancelled;
- (i) the private party persistently breaches a similar obligation more than a specified number of times within a specified period (for example, consistent failure to meet KPIs within a specified period of time); and
- (j) the private party fails to respond to a show cause notice in relation to a potential Event of Default (where the project agreement provides for a show cause process).

<sup>79</sup> These Events of Default are not intended to be exhaustive, and will vary depending on the nature of the project.

<sup>80</sup> The project agreement will contain a broad definition of the concept of "insolvency". The project agreement may also allow the replacement of material sub-contractors and/or guarantors within an agreed timeframe by an entity which is reputable and able to perform the obligations imposed on the relevant sub-contractor or guarantor in the Project Contracts, or that is otherwise acceptable to government.

## 23.2 Cure periods and remedies for Events of Default of the private party

### 23.2.1 Cure periods

- (a) Government may give a default notice to the private party specifying that an Event of Default has occurred.
- (b) If government gives a notice and 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) and the parties must consult in good faith to develop and settle the program. 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) Following agreement of the program (approved cure plan), the private party must cure the Event of Default within the agreed cure period and otherwise in accordance with the approved cure plan.
- (d) In certain circumstances set out in the project agreement, the private party can request an extension of time to cure the default. In some jurisdictions, government will agree to extend the cure period but only once and on certain conditions being met by the private party.
- (e) Government may, acting reasonably, extend the cure period provided the private party:
  - (i) has provided government with sufficient reasons for the extension (and has provided any further information reasonably requested by government);
  - (ii) can satisfy government (acting reasonably) that it will cure the default within the extended period; and
  - (iii) 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.
- (f) If there is a dispute in relation to the cure plan, or a request for extension of time, the private party may refer the dispute for determination in accordance with Chapter 30 (Dispute resolution).

### 23.2.2 Remedies for failure to cure an Event of Default capable of cure

If an Event of Default is capable of cure and the private party fails to:

- (a) provide a draft cure plan to government;
- (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,

government may exercise its rights:

- (d) under Chapter 24 (Termination);

- (e) under Chapter 26 (Step-in); or;
- (f) under its securities.

### 23.2.3 Event of Default not capable of cure

- (a) Where an Event of Default is not capable of cure, government may, depending on the nature of the Event of Default:
  - (i) require the private party, within a specified period, to 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; or
  - (ii) exercise its rights in accordance with Chapter 24 (Termination) without any cure period.
- (b) 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 exercise its rights in accordance with Chapter 24 (Termination).
- (c) 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 in accordance with section 24.1.1(b) of Chapter 24 (Termination).

## 23.3 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.

## 24. Termination

### Principle

Government may terminate the project agreement if the private party fails to remedy an Event of Default, on the occurrence of certain native title applications or claims or on the occurrence of a Force Majeure Event.

The private party can terminate the project agreement in certain circumstances, subject to the government's right to suspend the termination rights of the private party.

### 24.1 Termination by government

#### 24.1.1 Private party default

- (a) If the private party does not:
- (i) remedy an Event of Default of the private party, which is capable of cure, within the cure period;
  - (ii) diligently pursue a cure of the Event of Default; or
  - (iii) comply with an approved prevention plan (in accordance with section 23.2.3(a),
- government may give a specified period of notice to the private party of government's intention to terminate the project agreement. The private party may remedy the Event of Default or comply with its obligations within the notice period.
- (b) If the notice period expires, and the Event of Default is not remedied or the private party has otherwise failed to comply with its obligations in respect of the Event of Default, government may terminate the project agreement by notice to the private party.<sup>81</sup> The right of termination is subject to the financier's rights under the financing agreements.

#### 24.1.2 Native title

If the private party is prevented from carrying out the project activities for a specified period as a result of a government direction, legal requirement or court or tribunal order in relation to a native title application or claim, government may terminate the project agreement by notice and will be liable to pay the private party the Termination Payment in accordance with section 25.2 of Chapter 25 (Termination Payments).

#### 24.1.3 Force Majeure Event

After the occurrence of an Uninsurable Force Majeure Event, or in the circumstances set out in section 20.3.1 of Chapter 20 (Force Majeure), government may terminate the project agreement by notice in accordance with section 20.3 of Chapter 20 (Force Majeure) and will be liable to pay the private party a Termination Payment in accordance with section 25.2 of Chapter 25 (Termination Payments).

<sup>81</sup> Government is not entitled to terminate if the Event of Default of the private party arose as a sole and direct cause of a breach by government of its obligations under the Project Contracts.

### 24.1.4 Voluntary Termination

In addition to the circumstances described above, 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 to the private party ("**Voluntary Termination**") and will be liable to pay the private party a Termination Payment in accordance with section 25.2 of Chapter 25 (Termination Payments).

## 24.2 Termination by private party

The following events may be Termination Events which allow the private party to exercise the rights set out in this section:

- (a) any of the following events occurs which makes it impossible for the private party to undertake all, or substantially all, of the project for a continuous period set out in the project agreement (e.g. 2 months):
  - (i) a court makes a decision which is final and binding on the parties, or the relevant State or Territory government enacts legislation;<sup>82</sup>
  - (ii) there is a resumption of all or a material part of the project site;<sup>83</sup> or
  - (iii) government fails to provide to the private party access rights to the project site;
- (b) government fails to make a contribution towards the cost of the project of the kind described in section 14.2 (Government contributions) which is required under the Project Contracts; or
- (c) the relevant approvals, which government is responsible to obtain, for operation of the facility are not in place or are subject to conditions which make it impossible for the private party to undertake all, or substantially all, of the project.<sup>84</sup>

If a Termination Event occurs, the private party may give government a specified period of notice of its intention to terminate the project agreement. Government may then give the private party notice within a specified period to suspend the private party's right to terminate.

The suspension period will expire when the Termination Event has been remedied (in which case the project agreement will continue in force) or at such other times prescribed in the project agreement. If the suspension period expires other than as a result of remediation of the Termination Event, the private party may terminate the project agreement by notice in writing to government. The private party must, to the extent that it is lawful and practical to do so, continue to perform its obligations under the Project Contracts during the suspension period.

During the suspension period, government may be:

- (d) required to pay compensation to the private party; and

---

<sup>82</sup> Other than a decision issued, or legislation enacted, as a result of a breach or some wrongful act or omission, by the private party.

<sup>83</sup> For the avoidance of doubt, this paragraph does not apply to small resumptions of property (either individually or in aggregate) which do not impede on the private party's ability to undertake the project in accordance with (a).

<sup>84</sup> Except where the approvals are not in place, or the conditions are a result of, a breach or some wrongful act or omission, by the private party.

- (e) restricted in issuing a notice of an Event of Default in relation to the private party.

If government does not give a suspension notice and the Termination Event has not been remedied within a specified period, the private party may terminate the project agreement by notice to government.

## 24.3 Consequences

- (a) Upon termination by government for an Event of Default:
  - (i) government will be entitled to recover damages from the private party;  
and
  - (ii) the private party will not be entitled to any compensation.
- (b) Upon termination by the private party or termination by government for native title, a Force Majeure Event or Voluntary Termination, government may be required to pay a Termination Payment to the private party in accordance with the principles set out in section 25 (Termination Payments).
- (c) 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.

## 25. Termination Payments

### Principle

On early termination of the project agreement, other than due to private party default, government must pay 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, a different regime may be appropriate.

### 25.1 No Termination Payment

On termination of the project agreement resulting from a private party default, no Termination Payment is payable by government.

### 25.2 Termination Payment

#### 25.2.1 Payment amount

On termination of the project agreement for any reason other than private party default (e.g. native title claim<sup>85</sup>, a Force Majeure Event (including an Uninsurable Force Majeure Event)<sup>86</sup>, a Termination Event<sup>87</sup> or Voluntary Termination<sup>88</sup>), government must, subject to section 25.2.3, pay to the private party:

- (a) an amount equal to:
  - (i) the lower of senior debt owing to financiers at the Termination Date and the amount forecast in the Base Case Financial Model to be owing to financiers as at the Termination Date; and
  - (ii) any break costs payable by the private party to the financiers or benefits receivable by the private party under the finance documents as a direct result of early termination, including hedging arrangements (not included in paragraph (i) above),
 less the deductions listed in section 25.2.2 below; and
- (b) an amount equal to:
  - (i) an amount which gives an Equity Return - being on both any share capital subscribed at Financial Close and any shareholder subordinated

<sup>85</sup> See section 5.1.1(e) in Chapter 5 (Native title and artefacts) and section 24.1.2 in Chapter 24 (Termination).

<sup>86</sup> See section 24.1.3 (Force Majeure Event) in Chapter 24 (Termination).

<sup>87</sup> See section 24.2 (Termination by private party) in Chapter 24 (Termination).

<sup>88</sup> See section 24.1.4 (Voluntary Termination) in Chapter 24 (Termination).



debt - (taking into account distributions already paid to shareholders)  
equal to:

- (A) the nominal after tax internal rate of return to the Termination Date equal to the Base Case Equity Return (if the Termination Date occurs between the date of the project agreement and the date which is a pre-agreed period from the anniversary of the date from which the private sector is entitled to receive revenue) (e.g. 3 or 5 years); or
- (B) a reasonable forecast of distributions likely to be made to equity investors based on the historical performance and current projected revenue (if the Termination Date occurs after the relevant anniversary of the date from which the private sector is entitled to receive revenue); or
- (ii) in certain jurisdictions, with respect to a Force Majeure Event (other than an Uninsurable Force Majeure Event) only, half the equity as shown in the balance sheet of the private party at the time of termination at par.

The amount in paragraph (b) must take into account:

- (iii) amounts received or paid by the shareholders up to the Termination Date;
- (iv) amounts the private party must pay as a consequence of the termination (including demobilisation costs and third party costs but not including amounts between parties not engaged on arm's length commercial terms).

The Termination Payment is based on the assumption that the debt finance component of the project is bank debt.

To the extent that the project is fully or partly financed by a bond issue, appropriate amendments to the senior debt element of any payment will need to be made. 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.

In regard to paragraph (a)(i) above, mezzanine and other subordinated debt will be afforded the same protection as senior debt for purposes of the Termination Payment, 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 (a)(ii) above, break costs referred to in this document will be subject to the private party's obligation to mitigate any such break costs. The break costs are also intended to capture any break costs incurred as a result of early termination of hedging arrangements.

## 25.2.2 Deductions

The following deductions will be made from the amount set out in paragraph 25.2.1:

- (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 of the Termination Payment; and
- (d) all sums due and payable to the private party from the financiers as a result of any prepayment of senior debt<sup>89</sup> 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<sup>90</sup>.

### 25.2.3 Method of Payment

Government will be entitled to pay the Termination Payment in a specified number of instalments, taking into account debt commitments and the cost to financiers of using such an approach.

## 25.3 Mitigation

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

## 25.4 Transfer of senior debt obligations

In certain circumstances government may reserve the right to, in lieu of paying out senior debt, have the obligations to repay senior debt transferred to it. This may arise 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 25.2.2.

---

<sup>89</sup> Senior debt will include amounts payable as a result of early termination of hedging arrangements.

<sup>90</sup> 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. 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 occurs.

## 26.1 Circumstances of step-in

### 26.1.1 Circumstances

Government may assume all or some of the 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 operation of the facility;
  - (iii) 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; or
- (b) in some jurisdictions, there has been an Event of Default.

Under the Project Contracts, the financier will recognise and acknowledge the Step-in Rights of government and the priority of government to payment of any Loss incurred by government arising from the exercise by it of the Step-in Rights.

### 26.1.2 Extent of rights in a step-in situation

- (a) On the occurrence of any of the events identified in section 26.1.1, government may elect to:
  - (i) temporarily assume total or partial possession, management and control of the facility and its operation; and
  - (ii) take such other steps as are necessary or desirable to continue the operation of the facility and to minimise the risk to the environment, the public or users of the facility or of material damage to public or private property.

- (b) As an alternative to exercising its Step-in Rights, in some circumstances government may require the private party to:
  - (i) immediately perform any obligation in respect of which the private party is in breach;
  - (ii) suspend construction or operation to ensure the event is dealt with and normal operation of the facility resumes as soon as is reasonably practicable.
- (c) The rights referred to in paragraph (b) will be set out in the project agreement. They are additional to the Step-In Rights but should be treated analogously to the Step-In Rights.

### **26.1.3 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 26.1.2.

### **26.1.4 Government obligations**

Government is not obliged to remedy or cure any breach or termination event to overcome or mitigate any risk or risk consequences in respect of which it exercises Step-in Rights.

### **26.1.5 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.

### **26.1.6 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.

## **26.2 Costs of step-in**

Any Loss suffered or incurred by government arising out of or in connection with the exercise by government of its Step-in Rights is a debt due and payable from the private party to government.

## **26.3 No liability or limitation on government's rights**

### **26.3.1 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.

### **26.3.2 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 (but subject to the debt financier's Step-in Rights).

## 26.4 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, as soon as the Event of Default 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.

## 27. 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 also 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 its operations obligations.

### 27.1 Sub-contracts generally

#### 27.1.1 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.

#### 27.1.2 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 the project) must be in a form agreed by government.<sup>91</sup>
- (b) Provided there is compliance with all other requirements set out in this Chapter 27 (Sub-contractors), government's prior written approval to every sub-contract will not be required.

#### 27.1.3 Effect of sub-contracts

The rights and liabilities of government and the private party under the Project Contracts are not affected by the sub-contracts and government will not be bound or have any liability under the sub-contracts. The sub-contractors have no rights to deal directly with government, unless such rights are expressly provided in the Project Contracts, government consents to such dealing or such rights arise under statute.

### 27.2 Additional material sub-contract requirements

#### 27.2.1 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 the supply of the tolling system in a tollroad project).

<sup>91</sup> 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 27.2.3.

- (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.

### 27.2.2 Provision of material sub-contracts

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

### 27.2.3 Terms and conditions of material sub-contracts

- (a) Each material sub-contract must include:<sup>92</sup>
  - (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) provisions recognising and permitting government to exercise its Step-in Rights and any of its rights arising as a result of a default or other event giving rise to the government's Step-in Rights; and
  - (iii) a provision requiring sub-contractors to comply with all relevant laws.
- (b) In addition, the main construction and operating contracts must include<sup>93</sup>:
  - (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;<sup>94</sup> and
  - (iii) provisions which give full effect to the provisions of the project agreement relating to intellectual property and moral rights.

### 27.2.4 Collateral warranty

- (a) No material sub-contractor is to be engaged in connection with the works or 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

---

<sup>92</sup> 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.

<sup>93</sup> Where a Commonwealth agency is involved, the main construction and operating contracts must include a warranty that the contractor has not had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim.

<sup>94</sup> Bonding and guarantee requirements must at a minimum reflect government requirements under the project agreement in respect of the relevant sub-contract.

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, government 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.

## 27.3 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.<sup>95</sup>
- (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.

## 27.4 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.

## 27.5 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 Documents and with any specific jurisdictional, legal and policy requirements.
- (b) Material sub-contractors must not be replaced without government's prior written consent. It is intended that this requirement generally only captures 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 28 (Change of ownership/Control).

---

<sup>95</sup> The private party must provide to government sufficient information to allow government to consider any impact on government, particularly in relation to any proposed related party sub-contractors.



## **27.6 Private party's obligations in respect of sub-contracts**

- (a) The private party's obligations in respect of sub-contracts are:
  - (i) to comply with its obligations and enforce the terms of any sub-contract as necessary to comply with the private party's obligations under the Project Contracts;
  - (ii) not to, without government's prior written consent, compromise or waive any claim it may have against a material sub-contractor; and
  - (iii) to advise government of any claims made by a material sub-contractor (in respect of outstanding payments or otherwise).
- (b) The private party will not be relieved of its primary obligation to the government for the project activities as a result of any sub-contract.

## **27.7 Sub-contractors appointed by financiers**

The sub-contractor requirements set out in this Chapter 27 (Sub-contractors) also apply to any substitute sub-contractor appointed by financiers under their funder's direct agreement.

## **27.8 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 services or government's approval of any sub-contractor. The private party will, in each instance, be responsible for the sub-contractors' performance.

## 28. 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 group's structure (in each case, from the situation as at contract signing).

### 28.1 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.

### 28.2 Change of ownership/Control of private party

#### 28.2.1 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 groups without government's prior consent. In other jurisdictions, the private party must not permit any Change in Control of any member of the private party group, without government's prior consent.
- (b) Government will not unreasonably withhold consent to the change in ownership/Change in Control. In some jurisdictions, 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:
    - (A) is not solvent and reputable;
    - (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 Contracts, and if applicable, of the material sub-contractor to perform its obligations under the material sub-contract.
- (c) 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 an Event of Default. In other jurisdictions while failure to obtain such prior consent will not automatically trigger an Event of Default, a failure to cure an unauthorised Change in Control of a material sub-contractor within a specified period will do so.

### 28.2.2 Exception to consent requirement

Government's prior consent may not be required for 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.

### 28.2.3 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 an Event of Default.
- (d) Government may, but is under no obligation to, provide pre-approval to a Change in Control if the private party so requests and provides sufficient information to government.

## 28.3 Equity lock in

Government may require certain members of the private party group to hold their equity interests in the project for a defined period (e.g. the date 2 years after Completion).

## 29. End of term arrangements

### Principle

Where there are arrangements for transfer of the facility to government, the private party must (at its own cost) ensure that the facility meets government's return conditions at contract expiry. The facility and site will vest in government at the end of the Contract Term.

## 29.1 Return conditions at contract expiry

### 29.1.1 Inspection at contract expiry

- (a) The private party and government must carry out joint inspections of the facility before the end of the Contract Term. The inspections must take place at regular intervals and at specific times as set out in the project agreement.
- (b) Following the inspection, the parties must use their reasonable endeavours to agree on:
  - (i) the works (if any) required from the date of the review until contract expiry to bring the condition of the facility 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 facility complies with the 'handover conditions';
  - (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.

In regard to paragraph (b) above, either party may refer the matter for dispute resolution if the parties do not agree on all matters referred to in that item.

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

### 29.1.2 Performance bond or escrow account

- (a) Government may require a performance bond or appropriate security for the cost of the works.
- (b) Alternatively, government may require the private party to progressively deposit into an escrow account all revenues it receives (net of certain deductions) after the first inspection referred to in section 29.1.1, up to an amount which equals or exceeds the estimated total cost of the works.

### 29.1.3 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.
- (b) The private party must ensure that, on contract expiry (having carried out any final works), the facility complies with the return conditions.

### 29.1.4 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.

### 29.1.5 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 government's property.

## 29.2 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.

### 29.2.1 Surrender and return of the facility

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;
- (b) the facility 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; and
- (c) the private party must do all acts and things for the smooth transition of responsibility to enable government or its nominee to operate, maintain and repair the facility at the agreed performance level.

### 29.2.2 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 facility.

### 29.2.3 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 29.2. 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.

### 29.2.4 Continuing obligations

Expiry or early termination of the project agreement is without prejudice to any accrued rights and obligations as at the expiry date or Termination Date (including any rights and obligations accrued as a result of a default).

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.

### 29.2.5 Inspection at end of Contract Term

Within an agreed period after the end of the Contract Term, government must give to the private party a notice specifying:

- (a) details of the matters or things that government considers the private party needs to do ensure that the facility and site comply with the return conditions; and
- (b) the amount which government considers necessary to be expended to comply with the return conditions.

The private party has a period of time to respond to the notice by government. If the private party does not dispute the notice, then the amount set out in the notice is a debt due to government, which may be satisfied by government drawing on the escrow account or making a demand under the performance bond.

If the private party disputes the notice, the parties must use their reasonable endeavours to agree on the amount in the notice. Once the amount is agreed, the amount is a debt due to government, which may be satisfied by government drawing on the escrow account or making a demand under the performance bond. If the amount cannot be agreed, it is referred for dispute resolution in accordance with Chapter 30 (Dispute resolution).

If any funds remain in the escrow account after government has exercised its rights under this section, the balance must be paid to the private party.

## 29.3 Improvements

Any improvement (e.g. the facility or other structure on the Site) which has not already vested in government will be transferred to government at the end of the Contract Term.

## 30. 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.

There are a range of non-litigious dispute resolution methods, including negotiation, determination by an independent expert and arbitration. A possible application of these examples is discussed in this section. In some jurisdictions, the project agreement may include other processes for the resolution of disputes.

### 30.1 Dispute resolution panel

Either party may refer a dispute to a dispute resolution panel (**Panel**), by notice to the other party. Within a specified period of receiving notice of the dispute, the Panel must meet and use its reasonable endeavours to resolve the dispute by negotiation.

The Panel will consist of one or more senior government representatives and one or more senior private party representatives with sufficient seniority and authority to resolve the dispute, subject to any requirements for formal approvals as discussed in the next paragraph. The Panel may also comprise one or more independent members. It is expected that at least one representative of the private party will be the CEO or a delegate with authority to bind the private party.

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.

### 30.2 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. The project agreement may specify what matters will be referable to the independent expert in the first instance.

### 30.3 Independent expert

#### 30.3.1 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 Secretary-General of the Australian Centre for International Commercial Arbitration. 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.

### 30.3.2 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.

### 30.3.3 Time for decision

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

### 30.3.4 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 in some circumstances where the value of the determination is greater than a specified monetary threshold, and in either case the matter will be submitted for arbitration or an alternative dispute resolution process, as specified in the project agreement.

### 30.3.5 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.

## 30.4 Arbitration

### 30.4.1 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 Secretary-General of the Australian Centre for International Commercial Arbitration.

### 30.4.2 Capacity and procedure

The arbitrator will conduct the arbitration in accordance with the Arbitration Rules of the Australian Centre for International Commercial Arbitration and subject to state specific legislation on Commercial Arbitration (e.g. the *Commercial Arbitration Act 1984* (New South Wales)).

### 30.4.3 Time for decision

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

### 30.4.4 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.

## 30.5 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.



- (c) A party will have the right to institute proceedings to seek urgent injunctive, interlocutory or declaratory relief.

## **30.6 Legal rights**

To the extent permitted by law, a party will not be entitled to have recourse to the courts on disputes subject to dispute resolution under the project agreement, other than proceedings to seek urgent injunctive, interlocutory or declaratory relief. The parties rights of appeal in respect of the decision of the arbitrator shall be in accordance with the legislation dealing with arbitration in the applicable jurisdiction.

## **30.7 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).

# 31. Re-financing Gain

## Principle

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

Depending upon the nature of the project and the market conditions any Re-financing Gain is to be shared between government and the private party generally 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.

## 31.1 Government consent

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

## 31.2 What is a Re-financing?

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

### 31.2.2 Exemptions

Re-financing will not include any Re-financing which was specifically contemplated at Financial Close and reflected in the Base Case Financial Model at Financial Close. Such Re-financings will be exempted only up to the amounts included in the Base Case Financial Model as at Financial Close. 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.

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:

- (a) disposals of investments or commitments of debt or equity in an arm's length transaction at market value;

- (b) the syndication or subscription of any debt under the current financing agreements that is contemplated at Financial Close;
- (c) 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
- (d) 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.

### 31.3 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 an amended financial model, the basis for the assumptions used in the amended financial model, a certificate from the auditors of the model, any material changes to the private party's obligations to its financiers and the anticipated Re-financing Gain.
- (b) Government's consent to any Re-financing must not be unreasonably withheld or delayed. The project agreement will expressly set out circumstances in which the government must not unreasonably withhold or delay consent. These include if the government is reasonably satisfied that:
  - (i) the incoming financiers will have no greater security than the existing financiers;
  - (ii) the incoming financier has the required rating;
  - (iii) the Re-financing is in accordance with market practice at the relevant time, on commercial terms and an arm's length basis<sup>96</sup>;
  - (iv) all necessary information is provided to government to assess the proposed Re-financing;
  - (v) the Re-financing would not result in any of government's rights, obligations or liabilities under the Project Contracts being worse than if the financing was unchanged;
  - (vi) the indebtedness will be used solely for the project;
  - (vii) the private party has complied with the requirements in this Chapter 31 (Re-financing Gain) generally;
  - (viii) the terms and conditions of the proposed Re-financing (taken as a whole) are not materially more onerous or disadvantageous to the private party than the existing financing arrangements;
  - (ix) the private party will be able to adequately service and repay the financial indebtedness assumed under the Re-financing or that such financial indebtedness will not adversely impact the private party's ability or capacity to perform its obligations under the Project Contracts;

---

<sup>96</sup> For example, if a proposed Refinancing involves a related party, government may require evidence of 3 arm's lengths offers that together have an average cost that is no less than the cost of the proposed Refinancing involving the related party.

- (x) the calculation of any Re-financing Gain and the basis of which government is to be paid its share of the Re-financing Gain has been agreed; and
- (xi) the Re-financing would not adversely affect government's interests including not adversely affecting government's contractual liabilities.

## 31.4 Sharing a Re-financing Gain

- (a) Subject to paragraph (b), 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 Base Case Financial Model at Financial Close.
- (b) Government may consider seeking a higher share of the Re-financing Gain depending upon the nature of the project and the market conditions.

## 31.5 Calculating the Re-financing Gain

### 31.5.1 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 financial model referred to in paragraph 31.3 (Notice and Re-financing details) (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).<sup>97</sup>

### 31.5.2 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.

### 31.5.3 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.

### 31.5.4 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.

---

<sup>97</sup> See paragraph 15.5 in section 15 (Payment provisions).

## 31.6 Payment of the Re-financing Gain

Government is entitled to receive its share of the Re-financing Gain no later than any equity investor receives its share of the Re-financing Gain.

## 31.7 Government audit rights

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

## 31.8 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.

## 31.9 Termination Payments

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

## 31.10 Government right to request Re-financing

Government may request the private party to provide terms for a potential Re-financing if government considers that the terms available in the market for comparable finance to be more favourable than those reflected in the financing agreements.<sup>98</sup>

If requested by government, the private party will be required to use reasonable endeavours to obtain the most favourable available terms for any potential Re-financing. The private party must give government full details of the potential Re-financing, including the details set out in section 31.3.

Government may accept or reject the private party's proposed Re-financing in its absolute discretion.

If government accepts the proposed Re-financing:

- (a) the private party must do all things necessary to give effect to the Re-financing as soon as practicable, including procuring the entry by any new financiers into a funder's direct agreement; and
- (b) government will be entitled to share in any Re-financing gain in accordance with sections 31.4 to 31.7.

If government rejects the proposed Re-financing, it will reimburse the reasonable and proper professional costs directly incurred by the private party in connection with the potential Re-financing.

---

<sup>98</sup> Whether or not such circumstances would arise on a project will depend upon the nature of the project and the market conditions

## 32. 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.

### 32.1 Private party indemnity

#### 32.1.1 Indemnity

- (a) Subject to section 32.1.2, the private party will indemnify<sup>99</sup> 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 Disclosed Information (including any site assessment report prepared by government-appointed independent consultants);<sup>100</sup>
  - (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) breach or failure to comply with the terms of any Project Contract by the private party or any of its associates; and
  - (v) 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;
  - (ii) loss of or damage to property; and
  - (iii) third party suits, claims, actions demands, proceedings, penalty, costs, charges, expenses etc.

<sup>99</sup> The project agreement will normally provide for appropriate procedures for dealing with claims.

<sup>100</sup> See section 4.4.2 of Chapter 4 (Environmental issues and Site Conditions).

- (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,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.<sup>101</sup>
- (e) While there may be a nexus between such caps and the level of required insurances, these should not be expressly or directly linked.

### 32.1.2 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 wrongful acts or omissions of government or its associates; or
- (b) a breach by government or its associates of any Project Contract.

### 32.1.3 Release

The private party will release government from any claim or liability arising out of or in respect of or in connection with the matters referred to in section 32.1.1.

## 32.2 Representations and warranties

### 32.2.1 Representations by the private party

In addition to the representations and warranties identified elsewhere in these NCPs for Economic Infrastructure, the private party will provide a series of representations and warranties for the benefit of government, including that:<sup>102</sup>

- (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;
- (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;

---

<sup>101</sup> Commonwealth agencies should ensure that Commonwealth policies such as granting of indemnities, guarantees, warranties and letters of comfort are followed.

<sup>102</sup> See section 1.3.3 of Chapter 1 (Contractual issues) regarding government warranties.

- (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; and
  - (ii) the rights of government under a Project Contract;
- (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;
- (l) government has been provided with all material documents relating to financing; and
- (m) it is not aware of any material facts or circumstances that have not been disclosed to government and which might, if disclosed, materially adversely affect the decision to enter into the project agreement.

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

### 32.2.2 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) it has done everything and will be deemed to have done everything in assessing the risks under the project agreement and accepting and dealing with those risks;
  - (ii) Disclosed Information and intellectual property rights will remain the property of government and/or its associates;
  - (iii) Disclosed Information did not constitute an invitation, recommendation or offer by government and/or its associates;
  - (iv) Disclosed Information was provided to assist in preparing and lodging a proposal for the project;
  - (v) Disclosed Information did not purport to contain all information required by the private party;
  - (vi) government and/or its associates have not verified and are not obliged to verify the accuracy or completeness of the Disclosed Information;



- (vii) government and/or its associates has not made any representation or warranty as to the accuracy or completeness of the Disclosed Information; and
- (viii) the private party has not relied on the Disclosed Information but on its own investigations in entering into the transaction.

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.

### 32.2.3 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.

### 32.2.4 Repetition of representations and warranties

Government will require that certain representations, warranties and acknowledgments are repeated by the private party on each day of the Contract Term 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.<sup>103</sup>

## 32.3 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.

---

<sup>103</sup> Generally, the representations and warranties that are repeated are those described in this Chapter 32 (Indemnities, warranties and contractual claims).

## 33. 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;
- (c) assignment or disposal of its interests in the project agreement or other agreements to which government is a party; or
- (d) disposal of any interest in the project land or facility.

### 33.1 Restrictions on business

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

### 33.2 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 31 (Re-financing Gain) and 27 (Sub-contractors), respectively.

### 33.3 Restrictions on assignment

#### 33.3.1 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 Project Contracts, without obtaining government's prior consent (to be provided at its discretion).
- (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.<sup>104</sup>

### 33.4 Restrictions on sale or lease

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

<sup>104</sup> This is discussed at section 27.5 of Chapter 27 (Sub-contractors).

## 34. 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.

### 34.1 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 project (including construction, operation and financing costs) and details of funds held to cover such costs. The private party must maintain accounts and records in such a way as to enable government to comply with all applicable legislation relating to government records.
- (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.

### 34.2 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 34.6.

### 34.3 Accounting records

#### 34.3.1 Financial model

The private party must (at least annually [and as reasonably necessary](#)) update and provide government with a copy of its financial model showing the past performance and current projections for the remainder of the Contract Term.

#### 34.3.2 Financial records

The private party must provide a quarterly statement of financial performance, cash flow statement, statement of financial position and statement on changes to owner's equity:

- (a) 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.
- (b) 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, Compensation Events, qualifying Changes in Law, benchmarking and market testing.<sup>105</sup>

## 34.4 Provision of other details

### 34.4.1 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% 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.

### 34.4.2 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, including cost to complete construction of the project.
- (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).

## 34.5 Warranty

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

## 34.6 Financial audit

### 34.6.1 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.

### 34.6.2 General audit right

Without limiting any other right of government to conduct inspections and audits as set out in these NCPs for Economic Infrastructure,<sup>106</sup> at any time during the Contract Term, government

---

<sup>105</sup> Consistent with section 34.1, sufficient information as to the nature of related party transactions and the associated costs.

<sup>106</sup> For example, government's rights under section 10.4.1 of Chapter 10 (Construction and Completion), 13 (Performance management regime) and Chapter 31 (Re-financing Gain).

may (at its cost, except if the test is required by the project agreement or reveals a defect) 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.

### 34.6.3 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.
- (b) Where a financial audit discloses any fraud, collusive, misleading or deceptive reporting, this will constitute an Event of Default.<sup>107</sup>

## 34.7 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 issues.

## 34.8 Period for retaining records

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

## 34.9 Confidentiality

All records, statements and documentation referred to above are subject to the confidentiality and disclosure provisions in Chapter 35 (Confidentiality and disclosure).

---

<sup>107</sup> See section 23.1(e) of Chapter 23 (Default).

## 35. Confidentiality and disclosure

### Principle

Government will be entitled to publish the project agreement and other Project Contracts. Disclosure by the private party is generally prohibited without prior consent of government.

### 35.1 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);

If government intends to disclose any document or information described as 'confidential' in the project agreement it will give the private party notice of that intention (where circumstances permit) and the opportunity to provide reasons why such documents or information should not be disclosed.

### 35.2 Private party disclosure

#### 35.2.1 No disclosure without consent

The private party must not make disclosure in relation to the project or the involvement of government in the project without the prior consent of government and if such disclosure is required by law, such consent will not be unreasonably withheld.

The project agreement may allow disclosure by the private party without consent where such disclosure is required by law or by a stock exchange and the private party is unable to obtain government's consent within the required time frame.

#### 35.2.2 Requirements for disclosure

The private party:

- (a) must use its reasonable endeavours to agree with government the wording and timing of all disclosures before any disclosure is made;
- (b) must give government a draft of any proposed disclosure and must obtain government's approval of the disclosure before distributing such disclosure; and
- (c) as soon as practicable, must give to government a copy of any such disclosure agreed to or approved by government.

### 35.3 Legislative disclosure obligations

#### 35.3.1 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.

### **35.3.2 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.

## **35.4 Confidentiality**

### **35.4.1 Agreement**

The project agreement may identify any matters which are subject to confidentiality obligations.

### **35.4.2 Requirement for consent**

Subject to sections 35.1 to 35.3 matters 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 set out in the project agreement:

## 36. 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 operate and maintain the facility in the event that it takes over the project, whether during or after expiry of the end of the Contract Term.

### 36.1 Warranties

- (a) The private party must warrant that, in performing its activities 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, (other than Permitted Security Interests) over any IP it contributes to the project;
  - (iii) subject to section 36.3, 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.<sup>108</sup>

### 36.2 Grant of licences

Subject to section 36.3, 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, maintenance and handover of a part or the whole of the facility (including all technologies comprised in the facility<sup>109</sup>),

<sup>108</sup> See section 36.6.

<sup>109</sup> For example, information communication technologies or in the case of a tollroad, the tolling system.



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<sup>110</sup> or for any other project involving the site.

### 36.3 Obligation

Where, after having used its reasonable endeavours, the private party is unable to procure the grant to government of any of the licences required to be granted by third parties and the material which is the subject of the relevant IP rights is generally commercially available on reasonable commercial terms then government may exclude such third party IP from the requirement to provide a licence under section 36.2 on such conditions as it sees fit.<sup>111</sup>

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 36.8.1. Government and the private party will also negotiate in good faith where, after having used its reasonable endeavours, the private party is unable to grant to government any of the licences the private party is required to grant.

### 36.4 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.

### 36.5 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.

### 36.6 Indemnity

Subject to the exclusion of any matters warranted by government under section 36.7, 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.

### 36.7 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 Contract Term. In such a case, government may consider requiring from the private party appropriate IP and moral rights warranty and indemnity provisions.

---

<sup>110</sup> Government may require that the licence to use IP developed for the project be assigned to government and able to be used in other projects.

<sup>111</sup> For example, reimbursement to government of any premium paid above reasonable commercial terms.

## **36.8 Rights to IP on expiry of term**

### **36.8.1 Government rights**

The project agreement will provide that:

- (a) if the private party has not been able to grant the licence under section 36.2 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 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 36.5.

### **36.8.2 Indemnity**

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

### **36.8.3 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.

## 37. 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.

### 37.1 General

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

### 37.2 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<sup>112</sup> 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 government projects.

### 37.3 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.

### 37.4 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<sup>113</sup>.

---

<sup>112</sup> This will generally be defined to include 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.

<sup>113</sup> 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:<sup>114</sup>

- (i) where the corporation triggering the Probity Event has Control over the private party or relevant associate, that the corporation ceases to have Control; and
- (ii) procuring that a person triggering the Probity Event ceases 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.

## 37.5 Costs of cure

The private party will bear all costs associated with the above action required by government as set out in section 37.4.

## 37.6 Sub-contractors and material sub-contracts

Material sub-contracts must include provisions recognising government's rights in respect of Probity Events.

## 37.7 Probity investigations

### 37.7.1 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.

### 37.7.2 Consents

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

### 37.7.3 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.

## 37.8 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.

---

<sup>114</sup> This is not intended to be an exhaustive list of the action government may require. For example, in some circumstances where a probity event gives rise to circumstances that are extremely adverse to government a Probity Event may give rise to a right to terminate the project agreement.

# Appendix 1: Glossary

**Base Case Financial Model** refers to the base case financial model agreed between the parties as at the date of Financial Close, as amended from time to time in accordance with section 14.4 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 Equity Return** means the nominal after tax internal rate of return per annum as stated in the Base Case Financial Model at Financial Close.

**Change in Control** means a change:

- (a) in the board of directors or decision making control influence;
- (b) in the parties who are able to cast (or control the casting of) 20 percent or more of the votes at a general meeting; or
- (c) in the shareholding which affects 20 percent or more of shares.<sup>115</sup>

**Change in Law** has the meaning given to it in section 19.1 in Chapter 19 (Compliance with Law).

**Compensation** means the payment of compensation calculated in accordance with Chapters 16 (Compensation Events) and 17 (Compensation payable).

**Compensation Events** means those events which entitle the private party to Compensation in accordance with Chapter 16 (Compensation Events).

**Completion** occurs when the private party has constructed a facility to government's requirements and the facility is deemed suitable for occupation and use.

**Conditions Precedent** has the meaning given to that term in Chapter 2 (Conditions Precedent to Financial Close). **Contract Term** means the period commencing on the date of execution of the project agreement and ending on the expiry date of the project agreement.

**Control** means, for the purposes of Chapter 28 (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 Completion** means the contractual target date for Completion.

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

**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:

- (a) from any relevant authority;
- (b) whether written or otherwise; and

---

<sup>115</sup> Some jurisdictions may prefer to incorporate the Corporations Act definition of "Control".

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.

**Equity Return** means the nominal after tax internal rate of return per annum which an initial equity investor is projected to receive as specified in the project agreement. In some jurisdictions, it will depend upon when the calculation is to be made. If the projection is made within a specified period (for example the first 5 years), it will be based upon the distributions in the Base Case Financial Model. If the projection is made after the specified period, it will be based upon a reasonable forecast of distributions to initial equity investors based on historical performance and current projected growth.

**Event of Default** means an event described in section 23.1 of Chapter 23 (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 Event** has the meaning given to that term in section 20.1 in Chapter 20 (Force Majeure).

**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.

**High Risk Site** has the meaning given to it in section 4.4.2(c) of Chapter 4 (Environmental issues and Site Conditions).

**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 nature of the project.

**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 it in section 32.1.1 of Chapter 32 (Indemnities, warranties and contractual claims).

**Low Risk Site** has meaning given to it in section 4.4.2(b) of Chapter 4 (Environmental issues and Site Conditions).

**Modification** means a change to the project made in accordance with Chapter 18 (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. It will usually include technical specifications, architectural specifications, engineering specifications, design specifications and master plan principles. This set of documents may be defined by various names, including, "Technical Specifications", "Project Specifications", "Design Brief" and other variations.

**Panel**, for the purposes of Chapter 30 (Dispute resolution), has the meaning given to that term in section 30.1 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.

**Possible Key Risk Events** means those events which entitle the private party to Relief. See further Chapter 15 (Relief for Possible Key Risk Events).

**Probity Event** has the meaning given to that term in section 37.2 of Chapter 37 (Probity).

**Project Brief** means government's request for tender issued to the market in respect of the project. This will usually include:

- (a) general project information and instructions to bidders on the tender process;
- (b) a commercial framework summary;
- (c) government's evaluation criteria and the tender schedules to be completed by bidders;
- (d) the Output Specifications;
- (e) draft Project Contracts (including the project agreement); and
- (f) any other relevant information (such as site assessment reports to be provided to bidders (if any)).

**Project Contracts** means those Project Documents entered into between government and the private party in respect of the project, which usually include the project agreement, direct deeds with the private party's major sub-contractors and financiers, the independent verifier agreement (where such a verifier is engaged by the private party and government) and tenure documents (such as leases or licences).

**Project Documents** means all of the contracts entered into between government and the private party and the private party and its major sub-contractors and financiers in respect of the project.

**Project Specific Change in Law** has the meaning given to that term in section 19.3 of Chapter 19 (Compliance with Law).

**Re-financing** has the meaning given to that term in section 31.2 of Chapter 31 (Re-financing Gain).

**Re-financing Gain** has the meaning given to that term in section 31.5.1 of Chapter 31 (Re-financing Gain).

**Relief** means the method of redress negotiated by the parties in accordance with Chapter 15 (Relief for Possible Key Risk Events).

**Returned Works** has the meaning given to that term in section 10.5.2 in Chapter 10 (Construction and Completion).

**Site Conditions** includes all circumstances and conditions on, in, around and affecting, the land, whether latent or otherwise. See further Chapter 4.

**Step-in Rights** has the meaning given to that term in section 26.1.2 of Chapter 26 (Step-in).

**Termination Date** means the date on which the project agreement is terminated.

**Termination Event** has the meaning given to that term in section 24.2 of Chapter 24 (Termination).

**Termination Payment** means any payment made by government under Chapter 25, following termination of the project agreement.

**Uninsurable Force Majeure Event** has the meaning given to that term in section 20.3.2 in Chapter 20 (Force Majeure).

**Voluntary Termination** has the meaning given to that term in section 24.1.4 in Chapter 24 (Termination).