

New South Wales

New Schools 2

Public Private Partnership Project

Summary of Contracts



6 July 2006

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I Introduction

This report summarises the main contracts, from a public sector perspective, for the second New South Wales “New Schools” “public private partnership” (PPP) project.*

It has been prepared by the NSW Department of Education and Training in accordance with the public disclosure provisions of the NSW Government’s November 2001 guidelines *Working with Government: Guidelines for Privately Financed Projects*, and has been submitted to the Auditor-General for auditing prior to its tabling in Parliament.

In compliance with the requirements of and restrictions imposed by these *Guidelines*, this report:

- Focuses on those contracts to which the Minister for Education and Training, representing the State of NSW, is a party, or which otherwise have a potentially substantive impact on public sector benefits or risks. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector’s exposure.
- Does not disclose the private sector parties’ structures, profit margins, intellectual property or any other matters which might place them at a disadvantage with their competitors.

This report should not be relied upon for legal advice and is not intended for use as a substitute for the contracts.

It is based on the “New Schools 2” PPP project’s contracts as at 6 July 2006. Subsequent amendments or additions to these contracts, if any, are not reflected in this report.

I.1 The project

The “New Schools 2” PPP project involves:

- Private sector financing, design, construction and commissioning of ten new public schools, in new urban release areas in northwestern, western and southwestern Sydney, on the Central Coast, in the Lower Hunter and in the Illawarra and at Kelso near Bathurst, by specified dates between January 2007 and January 2009, to standards that must meet or exceed current Department of Education and Training school design standards, and

* A similar *Summary of Contracts* for the first “New Schools” PPP project, for nine new schools that were opened in 2004 and 2005, was prepared and submitted to the NSW Audit Office by the Department of Education and Training in May 2003, audited in August 2003 and tabled in the NSW Parliament in March 2004.

- Private sector cleaning, maintenance, repair, security, safety, utility and related services for these schools’ buildings, furniture, fittings, equipment and grounds until 31 December 2035 or any earlier termination of the project’s contracts, when the buildings will be handed over to the public sector

in return for a payment upon the completion of all the schools and performance-based monthly payments by the State of NSW during the operational phase of each of the schools.

These tasks are to be carried out by Axiom Education NSW No 2 Pty Limited, supported by ABN AMRO, Babcock & Brown, Hansen Yuncken, St Hilliers and Spotless.

All educational services and functions at the schools will be provided by the Department of Education and Training.

The new schools will be:

- A new primary school in Ashtonfield, in the lower Hunter, with permanent classrooms for around 300 students and general facilities to cater for a peak enrolment of up to 525 students (to be opened by 8 January 2007)
- A new Halinda School for Specific Purposes in Whalan, for between 85 and 120 students (to be opened by 21 April 2007)
- A new primary school in Hamlyn Terrace, on the Central Coast, with permanent classrooms for around 385 students and general facilities to cater for a peak enrolment of up to 615 students (to be opened by 15 October 2007)
- New primary schools in Ropes Crossing, on the St Marys ADI site in Mt Druitt, and in Tullimbar, west of Albion Park in the Illawarra, both with permanent classrooms for around 300 students and general facilities to cater for up to 525 students, and in Second Ponds Creek in Blacktown, with permanent classrooms for around 385 students and general facilities to cater for up to 615 students (all to be opened by 7 January 2008)
- A new high school on the existing high school site at Kelso, for between 680 and 750 students, with the new facilities to be completed by 28 April 2008 and associated relocation and make-good works to be completed by 29 August 2008, and
- New primary schools in Hoxton Park South, with permanent classrooms for around 385 students and general

facilities to cater for up to 525 students, in Elderslie, with permanent accommodation for around 300 students and general facilities to cater for up to 525 students, and a new high school in Rouse Hill for around 1,000 students (all to be opened by 5 January 2009).

The NSW Treasury has estimated that the net present cost of the new schools to the Government over the next 30 years will be approximately 25% lower than it would have been under conventional public sector delivery, assuming the same timeframes for both methods of delivery (*Table 1*).

1.2 Processes for selecting and contracting with the private sector parties

1.2.1 Shortlisting of proponents

On 2 May 2005 the NSW Department of Education and Training advertised for *Expressions of Interest* in the second “New Schools” project.

Expressions of Interest were received, by the closing date of 27 May 2005, from five consortia:

- AdvancED (Commonwealth Bank, Laing O’Rourke Australia and United Group, with Collard Maxwell Earnshaw Gardener Wetherill and Brisland Construction)
- Axiom Education (at that time, ABN AMRO with St Hilliers, Hansen Yuncken, Spotless Services, Pyramid Pacific and Perumal Pedavoli)
- Community Schools Partnership (Royal Bank of Scotland, Abigroup Contractors and Trane Australia, with Tempo Services and Suters)
- Future Schools (Macquarie Bank and Transfield Services, with Lipman, Donnelly, Buildcorp, Transfield Services Australia and Group GSA), and

- Plenary Schools (Plenary Group, with Deutsche Australia, Richard Crookes, ADCO, Advance Building Technologies, Broadlex Services, Morrison Design and Charles Glanville).

These *Expressions of Interest* were evaluated by an Evaluation Committee comprising Mr Peter Ross (Department of Education and Training), Mr Stephen Brady (NSW Treasury) and Mr Simon Wilson (NSW Treasury Corporation), with assistance from Blake Dawson Waldron (legal issues), Ernst & Young (financial issues), Milliken Berson Madden (technical and services issues) and Mr John Armstrong (procurement issues).

The Evaluation Committee’s activities were overseen by a Project Steering Committee, comprising Mr Michael Cush (the Department of Education and Training’s General Manager, Asset Management), Mr Paul Culshaw (the DET’s Director, Asset Management North), Mr Ken Dixon (the DET’s General Manager, Finance and Administration), Mr Danny Graham (NSW Treasury’s Director, Private Projects and Asset Management), Dr Kerry Schott (NSW Treasury’s Executive Director, Private Projects and Asset Management) and Mr Michael Collins (an independent committee member and a director of Michael Collins & Associates), and by a probity auditor, Mr Warwick Smith of Deloitte Touche Tohmatsu.

The *Expressions of Interest* evaluation criteria, and their relative weightings, were:

- The respondents’ structures, allocations of responsibilities and risks and acceptance of the project’s commercial principles (15% weighting)
- The understanding of the respondents, and their participants and key personnel, of social infrastructure public-private interfaces and other matters likely to affect the project, the respondents’ strategies to provide certainty

Table 1. “Value for money” comparison between public sector and private sector project delivery

Delivery method	“Public sector comparator” (PSC) <i>(hypothetical, risk-adjusted estimate of the cost of the most efficient likely method of public sector delivery)</i>			Private sector delivery <i>(adjusted to ensure discount rate calculated on a consistent basis with the PSC)</i>
	“PSC best case” <i>(95% probability that PSC cost would be higher than this)</i>	“PSC most likely case” <i>(mean of PSC cost estimates)</i>	“PSC worst case” <i>(95% probability that PSC cost would be lower than this)</i>	
Estimated net present value of the financial cost of the project (over 30 years) to the NSW Department of Education and Training	\$226.3 m	\$235.3 m	\$245.3 m	\$177.5 m
Estimated saving achieved through private sector delivery	21.6%	24.6%	27.6%	

of delivery of the project's objectives and the respondents' ability to work in a cooperative and harmonious partnership with the public sector over the long term (20% weighting)

- The understanding of the respondents, and their participants and key personnel, of the project's design and construction requirements, and the respondents' experience, expertise, capacities and strategies for procuring and managing design and construction of the schools so as to provide certainty of delivery of the project's objectives (15% weighting)
- The understanding of the respondents, and their participants and key personnel, of the project's operation and maintenance requirements, and the respondents' experience, expertise, capacities and strategies for procuring and managing the operation and maintenance of the schools' facilities so as to provide certainty of delivery of the project's objectives (20% weighting)
- The understanding of the respondents, and their participants and key personnel, of the project's financial requirements, and the respondents' experience, expertise and strategies for providing certainty of delivering these requirements (20% weighting)
- The financial capacities of the respondents and their participants, security providers, subcontractors and guarantors (10% weighting)
- The respondents' adherence to requirements concerning related corporations and other requirements for the preservation of probity and effective competition (assessed on a "pass or fail" basis), and
- The capabilities and experience of the respondents' key personnel (assessed on a "pass or fail" basis).

Three of the respondents, Axiom Education, Future Schools and Plenary Schools, were shortlisted to submit detailed proposals for the project.

1.2.2 Selection of the preferred proponent

On 14 July 2005 the Department of Education and Training issued a *Request for Detailed Proposals* to the three shortlisted consortia.

On 19 September 2005 the Department of Education and Training issued an *Addendum* to its *Request for Detailed Proposals*, requesting two additional, "variant" proposals for an additional secondary school with either all or only seven of the nine schools originally specified in the *Request for Detailed Proposals*.

All three consortia submitted *Detailed Proposals* and *Variant Proposals* by their respective closing dates, 30 September 2005 and 28 October 2005.

The *Detailed Proposals* of 30 September were accompanied by Deeds of Disclaimer, executed by the consortia participants, warranting that they had not relied on specified documents provided to them by the Department of Education and Training and promising to comply with confidentiality requirements.

The *Detailed Proposals* and *Variant Proposals* were separately and sequentially evaluated by an Evaluation Panel comprising Mr Terry Whyte (Department of Education and Training), Mr Stephen Brady (NSW Treasury) and Mr Simon Wilson (NSW Treasury Corporation), with assistance from Blake Dawson Waldron (legal issues), Ernst & Young (legal and financial issues) and Milliken Berson Madden, the Department of Education and Training, the NSW Department of Commerce and Mr Peter Ross (educational, technical and services issues).

The "most likely" cost estimate for the "public sector comparator" (PSC) of \$235.3 million includes a "raw" capital cost estimate with a present value (@5.5% pa) of \$115 million, a capital risk adjustment of \$14.6 million, a "raw" operational cost of \$97.8 million, an operational risk adjustment of \$7.4 million and a competitive neutrality adjustment of \$0.5 million.

The cost estimate for private sector delivery of \$177.5 million includes a notional upward adjustment of \$0.5 million, reflecting NSW Treasury estimates of the value of risks not accepted by the private sector parties, so as to permit a "like for like" comparison with the cost estimates for the "public sector comparator".

Approximately 50 separate risks were evaluated to determine the various risk adjustments for the project.

The most significant components of the capital risk adjustment related to the risks that:

- There might be errors, omissions or oversights in the original specification of the works or discretionary Project Management changes to this specification during the construction period of the project

- Adverse site-specific conditions might be encountered after the commencement of construction
- There might be errors in project costings as a result of market conditions varying from estimates
- The project might be delayed as a result of planning approval delays or site-specific environmental or heritage requirements, and
- The schematic concept cost plan might not fully cover cost outcomes.

The most significant components of the operational risk adjustment related to the risks that:

- Actual inflation might differ from the initial estimate
- Facilities and equipment might be sub-standard
- Facilities and installed equipment might wear out or fail as a result of sub-standard maintenance
- The operation of facilities might be inhibited by inadequate performance by the services contractors, and
- The forecasts of maintenance costs might be incorrect as a result of changing market conditions, changes in industry practices and/or market perceptions of the risk elements of long-term pricing.

The Evaluation Panel's activities were again overseen by the Project Steering Committee and by the probity auditor, Mr Warwick Smith of Deloitte Touche Tohmatsu.

The criteria against which the *Detailed Proposals* and *Variant Proposals* were evaluated, and their relative weightings, were:

- Four “educational requirements” criteria (recognition of the need to raise education staff and student awareness to ensure the highest possible safety standards while engendering pride and “ownership” in the new facilities; understanding of the fluid nature of educational provision and the need to develop a partnership relationship with the individual schools; commitment to fostering continuous improvement in the delivery of services, gathering data from users and responding to users’ feedback; and understanding of the Department of Education and Training’s corporate objectives and service delivery and asset strategies and the links between these strategies and the school facilities) (10% weighting)
- Three “financial requirements” criteria (the quality and value for money of the proponents’ financial proposals; certainty of delivery; and financial strength and robustness) (30%)
- Two sets of “legal requirements” criteria (compliance with the terms and risk allocations of the Department of Education and Training’s draft project documents; and the certainty of delivery of the proposed commercial arrangements) (15%)
- Three sets of “technical requirements” criteria (the capabilities and experience of nominated contractors and key individuals; the compliance, quality, innovation and understanding of the proponents’ planning, architectural and design proposals; and the compliance of the proponents’ construction works program and management plans) (20%)
- Three sets of “services requirements” criteria (general demonstration of how the proponents would deliver the required services; general service delivery, including the proponents’ operations manuals and procedures for responding to changing requirements and their performance reporting, helpdesk and mobilisation and commissioning proposals, capabilities and experience; and the compliance and quality of the proponents’ proposals for specific services, including maintenance services, energy management and utility supplies, security services, cleaning and waste management services, janitorial and portage services and services to meet any future needs for expansions, including the installation and removal of demountable classrooms) (25%).

On 21 November 2005 the Evaluation Panel advised the Project Steering Committee that the Axiom Education

proposals were superior to those of the other proponents, but there should be negotiations to resolve some material departures in its *Detailed Proposal* and *Variant Proposals* from the State’s preferred allocations of risks.

The Steering Committee approved a negotiation process, in accordance with arrangements set out in the *Request for Detailed Proposals*, under which the initial negotiations would be exclusively with the Axiom Education consortium, in the presence of the independent probity auditor, and would be followed by negotiations with a “reserve” bidder, the Future Schools consortium, if and only if the initial negotiations with Axiom Education failed to satisfactorily resolve the material deficiencies identified by the Evaluation Panel.

The Axiom Education and Future Schools consortia were notified of these processes on 22 November 2005.

The negotiations with Axiom Education concluded on 2 December 2005 with a satisfactory resolution of all of the material deficiencies identified in its proposals, and on 14 December 2005 the Department of Education and Training announced that Axiom Education had been chosen as the preferred proponent.

1.2.3 Execution of the contracts

The project’s main contract, the New Schools 2 Public Private Partnership Project Deed, and most of the other project contracts to which the Minister for Education and Training is a party were executed on 20 December 2005, although they generally did not take effect until 28 February 2006 (see section 2.3).

The other contracts—a Financiers Tripartite Deed, a Securitisation Agreement, a Master Rental Agreement, a Payment Directions Deed, associated Side Letters and a deed amending an Independent Certifier Deed—were executed on 28 February 2006 and took effect from that date.

The Project Deed was also amended on 28 February 2006, to implement Department of Education and Training decisions since 20 December 2005 to add Kelso High School to the project and change the required scope of works and services at the Halinda School for Specific Purposes and Tullimbar Primary School.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the second “New Schools” PPP project and explains the interrelationships of the various agreements between the public and private sector parties.

Sections 3 and 4 then summarise the main features of the agreements affecting public sector rights and liabilities and the sharing of the project’s benefits and risks.

2 Overview of the project's contracts

2.1 The participants in the project

The only public sector party to the “New Schools 2” project contracts is the **Minister for Education and Training**, representing the Crown in the State of New South Wales (“**the State**”) and fulfilling the Minister’s statutory function, under the Education Act 1990 (NSW), of establishing and supervising the operation of government schools in NSW.

The private sector parties which have contracted with the State are:

- **Axiom Education NSW No 2 Pty Limited** (ACN 114 474 565, ABN 71 114 474 565) (“**the Project Company**”), a special purpose vehicle which was established for this project and which may not conduct any other business.

The Project Company is wholly owned by Axiom Education NSW No 2 Holdings Pty Limited (ACN 114 474 350, ABN 35 114 474 350).

75% of the shares in this holding company are held by ABN AMRO Infrastructure Investments No 3 Pty Limited (ACN 102 644 486, ABN 67 102 644 486) in its capacity as the trustee of the ABN AMRO Infrastructure Investments Unit Trust, which was formed on 11 June 2003. Half of the units in this trust are held by ABN AMRO Infrastructure Investments No 1 Pty Limited (ACN 102 644 413, ABN 65 102 644 413), which is wholly owned by ABN AMRO Bank NV (ARBN 079 478 612, ABN 84 079 478 612), a major international bank listed on the Euronext Amsterdam and New York stock exchanges and trading in Australia as ABN AMRO Bank NV (Australian Branch), and the balance of the units in the trust are held by ABN AMRO Infrastructure Investments No 2 Pty Limited (ACN 102 644 459, ABN 61 102 644 459), which, along with the trustee, ABN AMRO Infrastructure Investments No 3, is also wholly owned by ABN AMRO Bank NV.

The other 25% of the shares in Axiom Education NSW No 2 Holdings Pty Limited are held by Babcock & Brown Schools 2 Investments Pty Limited (ACN 116 355 367), which is wholly owned by Babcock & Brown PPP Investments Pty Limited (ACN 112 282 907, ABN 33 112 282 907), which is wholly owned by Babcock & Brown Australia Pty Limited (ACN 002 348 521, ABN

49 002 348 521), which is wholly owned by Babcock & Brown Australia Group Pty Limited (ACN 115 059 188, ABN 26 115 059 188), which is wholly owned by Babcock and Brown International Pty Limited (ACN 108 617 483, ABN 76 108 617 483), which is 30% owned by a range of individual shareholders and 70% owned by Babcock & Brown Limited (ACN 108 614 955, ABN 53 108 614 955), a public company listed on the Australian Stock Exchange.

- **Hansen Yuncken Pty Limited** (ACN 063 384 056, ABN 38 063 384 056) and **St Hilliers Contracting Pty Limited** (ACN 082 594 563, ABN 60 082 594 563) (“**the Construction Contractors**”).

The Construction Contractors are obliged to design, construct and commission the schools for the Project Company, thereby enabling the Project Company to meet its design, construction and commissioning obligations to the State.

Hansen Yuncken Pty Limited is owned by Hansen Investment Co Pty Limited (ACN 062 487 889), G.B.S. Investments Pty Limited (ACN 062 940 840, ABN 92 062 940 845) and Rilomi Pty Limited (ACN 082 769 793, ABN 18 082 769 793).

St Hilliers Contracting Pty Limited is wholly owned by St Hilliers Pty Limited (ACN 003 819 681, ABN 78 003 819 681), which in turn is wholly owned by St Hilliers Holdings Pty Limited (ACN 069 565 331, ABN 71 069 565 331), St Hilliers (SP) Pty Limited (ACN 064 561 495, ABN 54 064 561 495) and Timothy Gavin Casey.

- **St Hilliers Holdings Pty Limited** (ACN 069 565 331, ABN 71 069 565 331) (“**the Construction Contractor Guarantor**”), which has provided a parent company guarantee of St Hillier Contracting’s performance of its design, construction and commissioning obligations to the Project Company and has entered into an associated side contract with the State.
- **CGP Management Pty Limited** (ACN 003 457 949, ABN 56 003 457 949) (“**the Independent Certifier**”), which will carry out specified inspection and certification obligations during the completion of construction and commissioning of the school facilities.

- **Spotless P&F Pty Limited** (ACN 072 293 880, ABN 83 072 293 880) (“**the Facilities Manager**”), which will provide facility management services for the Project Company, thereby enabling the Project Company to meet its services obligations to the State.

Spotless P&F Pty Limited is wholly owned by Spotless Services Australia Limited (ACN 005 309 320, ABN 19 005 309 320), which is ultimately owned by Spotless Group Limited (ACN 004 376 514, ABN 77 004 376 514), a public company listed on the Australian Stock Exchange.

- **Spotless Group Limited** (ACN 004 376 514, ABN 77 004 376 514) (“**the Facilities Manager Guarantor**”), which has provided a parent company guarantee of the Facilities Manager’s performance of its services obligations to the Project Company and has entered into an associated side contract with the State.
- **JEM (NSW Schools II) Pty Limited** (ACN 118 451 326, ABN 94 118 451 326) (“**JEM**”), with which the State has entered into a series of agreements as part of financing and taxation arrangements for the project. JEM is wholly owned by JEM Bonds Limited (ACN 068 273 503, ABN 14 068 273 503).
- **AET Structured Finance Services Pty Limited** (ACN 106 424 088, ABN 12 106 424 088) (“**the Security Trustee**”), as the trustee of a security trust established on 28 February 2006 under a Security Trust Deed for the benefit of the project’s debt financiers, issuers and underwriters. The Security Trustee is wholly owned by Australian Executor Trustees Limited (ACN 007 869 794, ABN 84 007 869 794), which is ultimately owned by Australian Wealth Management Limited (ACN 111 116 511, ABN 53 111 116 511), a public company listed on the Australian Stock Exchange.
- **AET SPV Management Pty Limited** (ACN 088 261 349, ABN 67 088 261 349) (“**the Bond Trustee**”), as the trustee for the holders of bonds to be issued by JEM as part of the project’s private sector debt financing arrangements. The Bond Trustee is wholly owned by the Security Trustee and thence by Australian Executor Trustees Limited and ultimately by Australian Wealth Management Limited.

2.2 Contractual structure

The contractual structure of the project, inasmuch as the contracts affect or potentially affect the State’s rights and obligations, is summarised in *Figure 1*.

The principal contract is the **New Schools 2 Public Private Partnership Project Deed** (“**the Project Deed**”), dated 20 December 2005, between the State and

the Project Company, as amended by three contract variations which took effect on 28 February 2006.

This agreement sets out the terms under which:

- (a) The Project Company must **finance, design, construct and commission the school facilities**.

The Project Company will satisfy these obligations to the State through:

- Equity investments by ABN AMRO and Babcock & Brown and loans by JEM, supported by bonds issued by JEM (with the Bond Trustee acting as trustee for the bondholders, and underwritten by ABN AMRO) and by other debt financing arrangements (in accordance with restrictions imposed by the NSW Government’s *Working with Government: Guidelines for Privately Financed Projects*, the details are generally beyond the scope of this report)
- The performance by the Construction Contractors of their obligations to the Project Company under two “**Construction Contracts**”, a **New Schools 2 Public Private Partnership Project Construction Contract** between Hansen Yuncken Pty Limited and the Project Company dated 20 December 2005 (“**the Hansen Yuncken Construction Contract**”) and a **New Schools 2 Public Private Partnership Project Construction Contract** between St Hilliers Contracting Pty Limited and the Project Company also dated 20 December 2005 (“**the St Hilliers Construction Contract**”), and
- The performance of any other construction contractors appointed by the Project Company.

The Construction Contractors have promised the State, in separate **New Schools 2 Public Private Partnership Project Collateral Warranty Deeds** between the State, the Project Company and each of the Construction Contractors dated 20 December 2005 (the “**Hansen Yuncken Collateral Warranty Deed**” and the “**St Hilliers Collateral Warranty Deed**”, or, together, the “**Construction Contractors Collateral Warranty Deeds**”), that they will fully comply with their obligations to the Project Company under their Construction Contracts and comply with a number of other standards and requirements specified in these deeds.

The performance of St Hilliers Contracting under the St Hilliers Construction Contract has been guaranteed to the Project Company by St Hilliers Contracting’s parent company, the Construction Contractor Guarantor, under a **Parent Company Guarantee**, dated 20 December 2005, between the Project

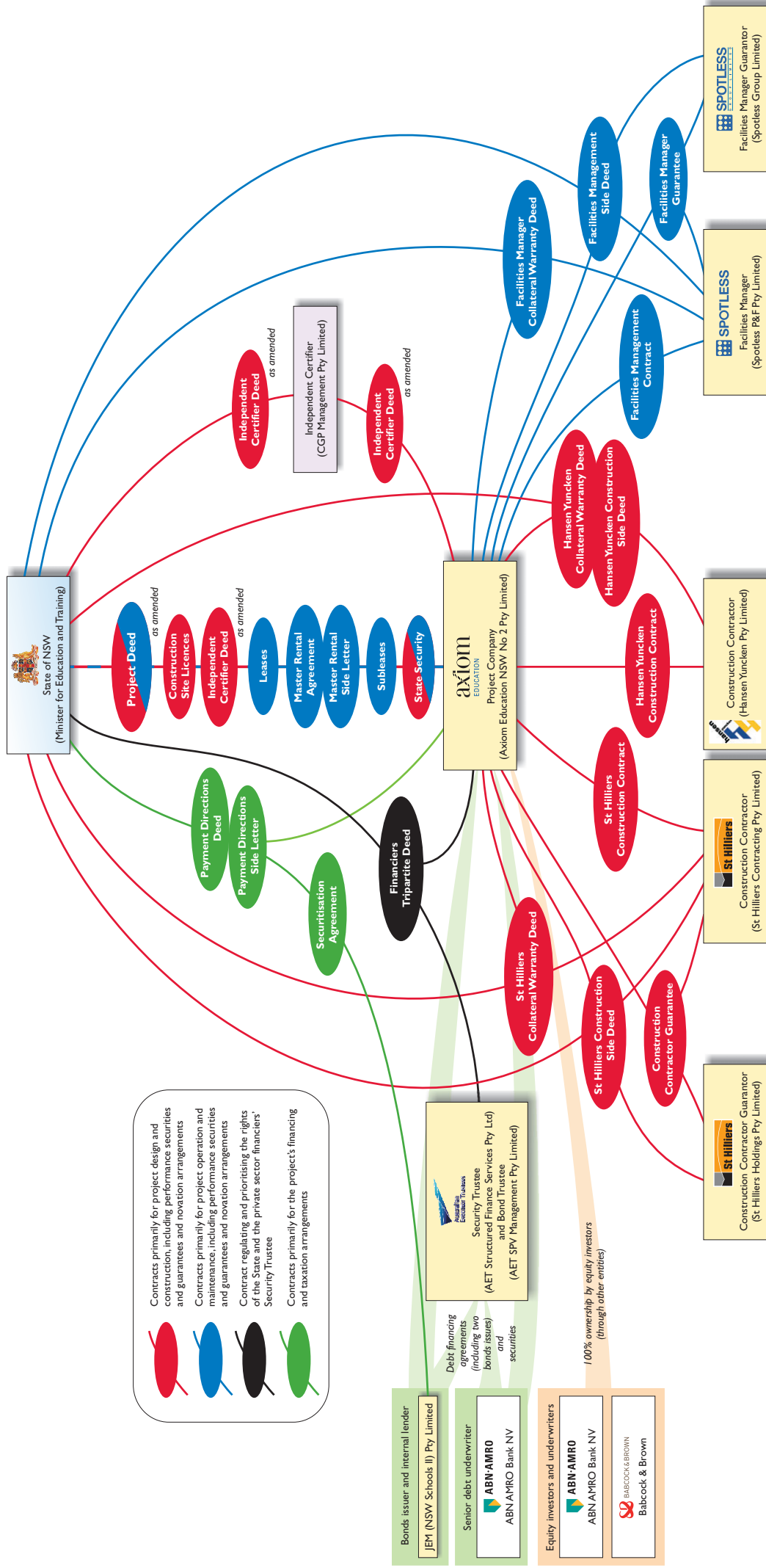


Figure 1. Overview of the structure of the second 'New Schools' 'public private partnership' project contracts from a public sector perspective.

Company, the Construction Contractor Guarantor and St Hilliers Contracting (“**the Construction Contractor Guarantee**”).

The State must grant or procure the granting of a series of ten **Construction Site Licences** giving the Project Company and its Construction Contractors access to each school’s construction site during the construction phase at each school.

The **New Schools 2 Public Private Partnership Project Independent Certifier Deed** between the State, the Project Company and the Independent Certifier (“**the Independent Certifier Deed**”), dated 20 December 2005, sets out the terms of the Independent Certifier’s appointment by the State and the Project Company and specifies its inspection and certification obligations during the completion of construction and commissioning of the school facilities.

This deed was amended on 28 February 2006, by the **New Schools 2 Public Private Partnership Project Independent Certifiers Deed Amendment Deed** between the State, the Project Company and the Independent Certifier (“**the Independent Certifier Deed Amendment Deed**”), to reflect the inclusion of Kelso High School in the project.

- (b) The State must make a “construction payment” to the Project Company upon the completion of all the schools.

Under a **Payment Directions Deed** between the State, the Project Company and JEM, dated 28 February 2006, the Project Company has irrevocably directed the State to make this payment to JEM, or as directed by JEM, instead of the Project Company.

The amount to be paid is specified in the **Payment Directions Deed** and an associated **Payment Directions Side Letter** executed by the State, the Project Company and JEM on 28 February 2006, in accordance with a **Financial Close Protocol** agreed to by the State and the Project Company on 20 December 2005, and will be equal to a “securitisation payment” to be made to the State by JEM on the same day under arrangements outlined in (e) below.

- (c) The Project Company must **provide cleaning, maintenance, repair, security, safety, utility and related services for the schools’ buildings, furniture, fittings, equipment and grounds throughout the “operations phase” of the project**, from the completion and opening of each school until 31 December 2035 or any earlier termination of the project’s contracts.

The Project Company will satisfy these obligations to the State through:

- The performance by the Facilities Manager of its obligations to the Project Company under a **New Schools 2 Public Private Partnership Project Facilities Management Contract** between the Project Company and the Facilities Manager, dated 20 December 2005 (“**the Facilities Management Contract**”), and
- The performance of any other facilities managers appointed by the Project Company.

The Facilities Manager has promised the State, in a **New Schools 2 Public Private Partnership Project Collateral Warranty Deed** between the State, the Project Company and the Facilities Manager dated 20 December 2005 (the “**Facilities Manager Collateral Warranty Deed**”), that it will fully comply with its obligations to the Project Company under the Facilities Management Contract and comply with a number of other standards and requirements specified in the deed.

The performance of the Facilities Manager under the Facilities Management Contract has been guaranteed to the Project Company by the Facilities Manager’s parent company, the Facilities Manager Guarantor, under a **Parent Company Guarantee**, between the Project Company, the Facilities Manager Guarantor and the Facilities Manager, dated 20 December 2005 (“**the Facilities Manager Guarantee**”).

- (d) The State must pay the Project Company specified performance-based fees, throughout the operations phase of the project, for providing these services, with deductions if the Project Company does not satisfy specified standards.
- (e) The State must lease each school site to the Project Company, under a series of ten **Leases**, from the completion and opening of each school until as-yet-undetermined dates to be specified in each lease (but until no later than 31 December 2035, and subject to automatic termination if there is any earlier termination of the Project Deed). The Project Company must lease each of these sites back to the State under a series of ten **Subleases**, again until as-yet-undetermined dates to be specified in these subleases.

The rent payable to the State under the Leases is specified in a **Master Rental Agreement: New Schools 2 Public Private Partnership Project** between the State and the Project Company, dated 28 February 2006 (“**the Master Rental Agreement**”), and an associated **Master Rental Side Letter** exe-

cuted by the State and the Project Company on the same date.

However, under the **Securitisations Agreement: New Schools 2 Public Private Partnership Project** between the State and JEM, dated 28 February 2006 (“**the Securitisations Agreement**”), JEM has agreed to purchase the State’s rights to receive these rent payments, and other specified payments under the Leases, in return for a one-off “securitisation payment” by JEM to the State upon the completion of all of the schools and, in specified circumstances, additional “securitised variation payments” during the operations phase of the project. (Among other things, these “securitised lease” arrangements are designed to address the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project. These taxation laws govern the availability of tax deductions for interest, depreciation and investment allowances when the end user of leased property is tax exempt.)

As already indicated in (b) above, the “securitisation payment” by JEM to the State will be equal to the “construction payment” to be made by the State to JEM, or as directed by JEM, on the same day, under the Payment Directions Deed and Payment Directions Side Letter.

- (f) On 31 December 2035, or upon any earlier termination of the Project Deed, the Project Company must hand over the school facilities to the State or to others as directed by the State.

Should the Project Company default on its obligations to the State during the project’s design and construction phase or its obligations under either of the Construction Contracts, or should there be an emergency, or should the Project Deed be terminated, then under the Project Deed, the Construction Contractors Collateral Warranty Deeds, a **New Schools 2 Public Private Partnership Project Side Deed** between the State, the Project Company and Hansen Yuncken dated 20 December 2005 (“**the Hansen Yuncken Construction Side Deed**”) and a **New Schools 2 Public Private Partnership Project Side Deed** between the State, the Project Company, St Hilliers Contracting and the Construction Contractor Guarantor dated 20 December 2005 (“**the St Hilliers Construction Side Deed**”) the State will be able to “step in” or (in the last of these situations) place a new contractor into the shoes of the Project Company under the Construction Contracts, so that design, construction and commissioning of the school facilities can continue.

Similarly, should the Project Company default on its obligations to the State during the project’s operations phase, or should there be an emergency, or should the Project Deed be terminated, then under the Project Deed, the Facilities

Manager Collateral Warranty Deed and a **New Schools 2 Public Private Partnership Project Side Deed** between the State, the Project Company, the Facilities Manager and the Facilities Manager Guarantor dated 20 December 2005 (“**the Facilities Management Side Deed**”) the State will be able to “step in” or (in the last of these situations) place a new contractor into the shoes of the Project Company under the Facilities Management Contract, so that the provision of services at the school facilities can continue.

Some of the rights and obligations of the State under the Project Deed, the Construction Side Deeds and the Facilities Management Side Deed are subject to restrictions or additional process requirements under the **New Schools 2 Public Private Partnership Project Financiers Tripartite Deed** between the State, the Project Company and the debt financiers’ Security Trustee and Bond Trustee, dated 28 February 2006 (“**the Financiers Tripartite Deed**”). As an example, this agreement requires the State to notify the Security Trustee and the Bond Trustee before it terminates the Project Deed for a default by the Project Company, giving them an opportunity to cure the default.

Under the **New Schools 2 Public Private Partnership Project Fixed and Floating Charge (“the State Security”)**, an agreement between the State and the Project Company dated 20 December 2005, the obligations of the Project Company to the State under the Project Deed, the Construction Site Licences granted under that deed, the Construction Side Deeds, the Construction Contractors Collateral Warranty Deeds, the Construction Contractor Guarantee, any other major construction subcontracts and their associated collateral warranties and guarantees, the Independent Certifier Deed, the Facilities Management Side Deed, the Facilities Manager Collateral Warranty Deed, the Facilities Manager Guarantee, any other major facility management subcontracts and their associated collateral warranties and guarantees, the Financiers Tripartite Deed, the State Security, the Leases, the Subleases, the Master Rental Agreement and the Securitisations Agreement are secured by a charge over the Project Company’s assets, undertakings and rights.

Priorities between this State Security and securities held by the project’s private sector debt financiers are governed by the Financiers Tripartite Deed, which also:

- Records the State’s consent to the private sector securities and the Security Trustee’s consent to the State Security
- Records the consents of the State and the Security Trustee to each other’s “step in” rights under the project contracts
- Regulates the exercise of these “step in” rights, and
- Records the Project Company’s consent to these arrangements.

The Construction Contractors, the Construction Contractor Guarantor, the Facilities Manager and the Facilities Manager Guarantor have also expressly consented to the State Security, in the Construction Side Deeds and the Facilities Management Side Deed.

2.3 Conditions precedent

Most of the provisions of the Project Deed and the other project contracts did not become binding until:

- The NSW Treasurer had approved the Project Deed, the Construction Side Deeds, the Construction Contractors Collateral Warranty Deeds, the Construction Site Licences, the Independent Certifier Deed, the Facilities Management Side Deed, the Facilities Manager Collateral Warranty Deed, the Leases, the Subleases, the Master Rental Agreement, the Securitisation Agreement, the State Security and the Financiers Tripartite Deed under section 20 of the Public Authorities (Financial Arrangements) Act (NSW).

On 28 February 2006 the Treasurer granted his approval, under section 20(1) of the Public Authorities (Financial Arrangements) Act, for the Department of Education and Training, an “authority” as defined in that Act, to enter into a “joint financial arrangement”, as defined in that Act, under which the Project Company would “finance, design, construct, commission and provide certain facilities management services for ten new schools” pursuant to a set of contracts between the DET and the Project Company listed in a schedule to the Treasurer’s approval.

The initial form of this approval did not grant approval for the Minister for Education and Training, a separate “authority” under the Public Authorities (Financial Arrangements) Act, to enter into this “joint financing arrangement”. It also defined the approved “joint financing arrangement” in terms of contracts executed or to be executed by the DET, rather than the Minister, and in doing so it did not expressly refer to equivalents of the Securitisation Agreement or the Payment Directions Deed.

On 19 April 2006, however, the Treasurer executed a document “confirming” that all references to the DET in the approval of 28 February 2006 should be interpreted as referring to the Minister for Education and Training and adding the Securitisation Agreement and the Payment Directions Deed to the list of contracts defining the approved “joint financing arrangement”.

This second document of 19 April 2006 has been regarded by all the parties to the contracts as achieving the full satisfaction of this condition precedent on and from 28 February 2006. All the parties to the contracts

have acted since 28 February 2006 on the basis that the Treasurer’s approval for the Minister for Education and Training to enter into the project, as defined by all the contracts listed in the condition precedent, has always been effective from that date.

- The execution and delivery of copies of specified project contracts. This condition precedent was satisfied on 28 February 2006, with the exception of yet-to-be-executed Construction Site Licences for the Ropes Crossing, Second Ponds Creek, Tullimbar, Hoxton Park South, Elderslie and Rouse Hill schools, for which the condition precedent was waived by the State, and copies of two securities to be provided to the Project Company by the Construction Contractors under the Construction Contracts, for which the condition precedent was again waived by the State.
- The completion of a specified series of formalities associated with any authorisations required by the Project Company, the Construction Contractors, the Construction Contractor Guarantor, the Facilities Manager, the Facilities Manager Guarantor or the project’s financiers (or any trustee or agent on their behalf) to enter into and perform the project’s contracts, the authorisation of representatives of the Project Company, the registration of the State Security, the provision of evidence of the payment of stamp duty, and the provision of evidence about the structure of, and equity and/or subordinated debt arrangements between, the Project Company and its shareholders.

These conditions precedent were satisfied on 28 February 2006, with the requirement for the State to receive evidence of the payment of stamp duty being waived by the State in the case of the Project Deed and the Master Rental Agreement.

- Insurance policies required under the Project Deed for the design and construction phase of the project had been taken out and were in full force. This condition precedent was satisfied on 28 February 2006.
- Binding rulings by the Australian Taxation Office, concerning the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the proposed project structures and arrangements, had been provided to the State’s Project Director for the project. This condition precedent was satisfied on 17 February 2006.
- If necessary, the State’s Project Director had received a certified copy of an unconditional approval by the Australian Treasurer advising that there is no objection, under the Foreign Acquisitions and Takeovers Act (Cth), to the foreign ownership of the Project Company or its

interests in the project. This condition precedent was satisfied on 16 December 2005.

- The State's Project Director had received evidence that the project's private sector financing facilities had become unconditional and available, or would do so immediately upon the satisfaction (or waiver by the State) of all the other conditions precedent. This condition precedent was satisfied on 28 February 2006.
- The Project Company had advised the State's Project Director of its rates for specified types of services that will be subject to "benchmarking" under the Project Deed (see section 3.3.8). This condition precedent was satisfied on 28 February 2006.
- The Project Director had received any other opinions, certificates or other documents he or she had reasonably requested. There were no such requests.
- On the day the last of the conditions precedent were satisfied or waived ("financial close"), the Project Director had received copies of the private sector participants' audited "base case" financial model for the project (as adjusted using the *Financial Close Protocol* agreed to by the State and the Project Company), a completed schedule to the Project Deed setting out the service payments to be made to the Project Company by the State during the project's operations phase (again as adjusted using the agreed *Financial Close Protocol*)

and associated materials, including an auditor's certificate on terms acceptable to the Project Director. This condition precedent was satisfied on 28 February 2006.

Accordingly, all the contracts to which the State is a party became binding on 28 February 2006.

Once the condition precedent concerning the Public Authorities (Financial Arrangements) Act had been satisfied, the Project Company became obliged to procure the satisfaction of all the other conditions precedent by a "target financial close date" of 28 February 2006 or a later date decided by the State's Project Director, following a request by the Project Company, in his or her absolute discretion. Had this deadline not been met, through either the satisfaction of the conditions precedent or their waiver by the State, the Project Director would have become entitled to terminate the project's contracts at any time, unless the failure to meet the deadline had resulted from a failure, despite the Project Company's best endeavours, to obtain the required binding rulings from the Australian Taxation Office, in which case the Project Director would have been required to reasonably consider any request by the Project Company for an extension of the deadline by no more than 60 days.

These provisions became redundant with the accepted satisfaction or waiver of all the other conditions precedent by 28 February 2006.

3 The Project Deed and associated certification, lease, payment and novation arrangements

3.1 General obligations on and acceptance of risks by the Project Company

3.1.1 The Project Company's principal obligations

The main obligations of the Project Company under the Project Deed are for it to:

- Finance, design, construct and commission specified “school facilities”, at its own cost,
 - By dates specified in two schedules to the Project Deed and, in greater detail, in design and works programs to be developed by the Project Company, and
 - In accordance with detailed requirements set out in an *Output Specification*, another schedule to the Project Deed (see section 3.2.1).

These “school facilities” are the ten schools listed in section 1.1 of this report and their associated facilities. They include all the schools’ buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, playgrounds, paths and gardens, except for items which the State specifies as items that will be provided by the State and/or the DET (*other than* demountable classrooms, for which special arrangements will apply, as described in section 3.3.10 of this report).

- Provide operational, cleaning, security, safety, utility, maintenance and repair services for each “school facility”, as detailed in the *Output Specification* and a series of operational plans required under the Project Deed, from the date on which the State formally accepts that the school facility has been completed and commissioned as required by the Project Deed, or a specified “target completion date” for the school facility if this is later, until 31 December 2035 or any earlier termination of the project’s contracts.
- Hand the “school facilities” over to the State, or a new contractor nominated by the State, on 31 December 2035 or upon any earlier termination of the Project Deed.

3.1.2 Project objectives and cooperation

The State and the Project Company have undertaken to perform their obligations under the Project Deed with the aim of satisfying “objectives” and “intentions” that:

- In return for a “construction payment” by the State upon the completion of all the schools, the Project Company will finance, design, construct and commission the “school facilities” in accordance with the Project Deed
- The State will pay fees to the Project Company for the provision of services in accordance with the Project Deed
- The Project Company will pay rent for each school facility, for the term of its Lease, in accordance with the Master Rental Agreement
- The Project Company will transfer possession of the school facilities and its facilities management responsibilities to the State, or as directed by the State, at the end of the operations phase of the project, in accordance with the Project Deed
- The State may choose to provide curriculum, teaching, pastoral support, career guidance, extra-curricular, remedial, training, vocational, scholastic and educational activities for the benefit of students at the schools, along with related parent, guardian and community liaison and administrative support functions and student, staff and community access to the schools (the Project Deed calls these activities and functions “**education functions**”)
- The design, construction and commissioning of the school facilities and the provision of these facilities and the Project Company’s services will allow the State to provide high-quality “education functions”, the only exceptions to this being functions of these types which the Project Company was not aware of before 20 December 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced school facility construction and maintenance contractor in its situation (these exceptions expressly include any

future regular scheduled classes on weekends or between 4:30 pm and 7 am on weekdays), and

- In carrying out its obligations under the Project Deed, the Project Company must accommodate, support and facilitate the provision of these foreseeable “education functions” and must not materially interfere with these functions, increase their costs or increase requirements for providing these functions.

The State and the Project Company have agreed to cooperate with each other to facilitate the performance of the project’s contracts. In particular, they have promised to avoid unnecessary complaints, disputes and claims and (subject to each other party’s performing its obligations and the State’s “step in” and contract termination rights) not to hinder, prevent or delay each other’s performance of its obligations.

They have also agreed that whenever they become entitled to assert a claim or seek a remedy against the other party they must take reasonable and appropriate steps to mitigate, prevent or eliminate the effects of the event or circumstance giving rise to the claim or remedy.

Throughout the project the State and the Project Company must participate in an six-person Project Co-ordination Group (PCG), chaired by the person appointed by the State as its Project Director for the project* and meeting at least monthly, that will discuss and review the project’s progress and operations and play an initial role in resolving any disputes (see section 3.4.8). Except for its dispute resolution role, the decisions of this PCG will not affect the rights or obligations of the State or the Project Company under the project’s contracts and the PCG will not have the power to require either of them to act or refrain from acting in any way.

Unless the project contracts expressly state otherwise, the Project Company may not unreasonably withhold or delay any decision or exercise of its discretion under the contracts.

Similarly, the State and its Project Director must act reasonably concerning any decision or exercise of their discretion they are required to make, including any conditions they may impose, under the Project Deed, the Independent Certifier Deed, the Financiers Tripartite Deed, the Construction Side Deeds and the Facilities Management Side Deed. These contracts make it clear, however, that the State and its Project Director will not be acting “unreasonably” if they are acting in accordance with relevant government policies, adopt a “whole of government” approach or act to protect their reputations.

3.1.3 No restrictions on the schools’ ‘education functions’

Except in terms of the project-specific commitments made by the State in the project’s contracts and summarised in this report, the Project Deed does not fetter the discretion of the State to exercise any of its functions under any laws.

More specifically, the Project Deed makes it clear that the project’s contracts and pre-contractual information documents do not contain any undertakings by the State, its Project Director, any other persons administering or managing the project for the State, the DET, any employees, agents or contractors of the State or the DET, any students, any persons using the schools for community uses or any persons visiting the schools at the invitation of the State or the DET that the schools’ “education functions” will be carried out at all or carried out in a particular manner or at a particular time.

3.1.4 General acceptance of risks by the Project Company

The Project Company has expressly acknowledged in the Project Deed that:

- It bears the risks of carrying out the project’s construction works and providing its services so as not to materially interfere with the schools’ foreseeable “education functions”, increase their costs or increase requirements for providing these functions
- Subject to any specific terms in the Project Deed, the State, the DET and their agents, contractors, advisers and employees:
 - Have not made any representations or promises or given any advice to the Project Company about the accuracy, completeness or current applicability of any information, concerning the project, the sites, the works or the school facilities, which they had provided to the Project Company or its agents, contractors, advisers, employees or invitees prior to the execution of the Project Deed
 - Have assumed no duty of care or other responsibility for this pre-contractual information
 - Will not be liable for any inaccuracy, omission, unfitness, inadequacy or incompleteness in this pre-contractual information, or for any reliance by the Project Company, any related corporation or any of their agents, contractors, advisers, employees or invitees on the information, even if it were “misleading or deceptive” or “false or misleading” under

* The State’s Project Director is the agent of the State and may delegate his or her powers, duties, discretions and authorities under the Project Deed. References in this report to the Project Director should therefore be understood as references both to the Project Director and to any such delegate whose appointment has been notified to the Project Company.

the Trade Practices Act (Cth) or equivalent State legislation, and

- ◻ Will not be liable for any failure to make information about the project available to the Project Company.
- In entering into the Project Deed, the Project Company:
 - ◻ Has not relied on any pre-contractual information from the State, the DET, any of their agents, contractors or employees or anyone else on behalf of the State, or any other information for which the State is or might be responsible.
 - ◻ Has examined the Project Deed, its *Output Specification*, the school sites, their surroundings and any other information made available by the State or anyone on behalf of the State, but has relied solely on its own investigations, assessments, skill, expertise and enquiries concerning all information that is relevant to the project's risks, contingencies and circumstances and its obligations under the project contracts.
 - ◻ Has been given the opportunity to undertake, and request others to undertake, tests, enquiries and investigations, for design and other purposes, into the matters addressed in pre-contractual information supplied by the State, the DET and their agents, contractors, and employees, and in particular has been given access, as required, to the school sites and has been given a full and adequate opportunity to review the project's draft *Output Specification* and contracts and identify and correct any defects, omissions and inconsistencies prior to executing the Project Deed.
 - ◻ Has satisfied itself that it will be able to satisfy its project obligations and has adequately allowed for the costs of doing so, that the *Output Specification* contains no defects, omissions or inconsistencies which would prevent it performing its obligations and that there is no inconsistency between the *Output Specification* and its ability to fulfil its obligations under the project's contracts.
 - ◻ Has informed itself on all of the project's employment and industrial relations matters.
- The State will have no liability for any loss or damage suffered by the Project Company as a result of incorrect or inaccurate assumptions by anyone concerning:
 - ◻ Existing taxation requirements
 - ◻ The availability of taxation rulings
 - ◻ Project revenues, or

- ◻ Project costs

unless the incorrectness or inaccuracy is caused by, or constitutes, a "compensation event", such as a serious breach of the Project Deed by the State which makes it impossible for the Project Company to perform its obligations, as discussed in section 3.4.11 below.

3.1.5 General indemnity by the Project Company

The Project Company has undertaken to indemnify the State, the DET and their officers, employees and agents, on demand, against any claims, losses or liabilities associated with any deaths, personal injuries, property losses or damage or third party claims, demands, penalties costs, charges or expenses arising directly or indirectly from:

- The Project Company's design, construction, operation or maintenance activities
- The Project Company's performance or non-performance of its obligations under the project's contracts
- The presence of the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees on the school sites, construction works or facilities, or their possession of or access to these school sites, construction works or facilities
- Any contamination or pollution on or from any of the school sites (subject to some specific limitations for the Kelso High School site, discussed in sections 3.2.5 and 3.4.11 below)
- Any breach of the project's main contracts by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees, or
- Any negligent or unlawful acts or omissions or wilful misconduct by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees

other than any claims, losses or liabilities caused by:

- Any negligent or unlawful acts or omissions or wilful misconduct by the State's Project Director, any other person responsible for the administration, management or implementation of any aspect of the project on behalf of the State, the DET, any DET or State employee, agent, contractor, subcontractor, consultant, licensee or authorised officer involved in providing any of the schools' "education functions", any other DET or State employee, agent or contractor (other than the Project Company and its related organisations) acting in the course of his

or her employment, any person using any of the school facilities for community uses, any of the schools' students or any State or DET invitee at any school facility, except to the extent that the claims, losses or liabilities result from a failure by the Project Company to provide its services

- Any breach by the State of its express obligations under the project's contracts, or
- In the case of actions or claims against the State by a third party, the Project Company's compliance with an express direction by the State or the State's Project Director, issued in accordance with the Project Deed.

The Project Company's liability under the Project Deed for any claim or loss is, however, capped at the higher of:

- \$50 million, indexed to the Consumer Price Index (CPI) from the December quarter of 2005, and
- The amount recoverable for the claim or loss, but for these arrangements, under the insurance policies which the Project Company is required to maintain under the Project Deed (or, if it has failed to comply with these obligations, the amount that would have been recoverable had it complied, had it diligently pursued the insurance payment and had the insurer met its liabilities).

The Project Deed and most of the other project contracts to which the State is a party expressly exclude the operation of the liability apportionment provisions of Part 4 of the Civil Liability Act (NSW), to the extent permitted by the law. The Project Company must incorporate similar exclusions in all its project subcontracts and sub-subcontracts, and has already done so in the Construction Contracts and the Facilities Management Contract.

3.2 Design, construction and commissioning of the school facilities

3.2.1 Scope of the works

As indicated in section 3.1.1, the Project Company must, at its own cost, design, construct and commission "school facilities" for the ten new schools, as specified in detail in the Project Company's *Proposals* for the project, which are reproduced as a schedule to the Project Deed, and the Project Deed's *Output Specification*,

- By dates specified in two other schedules to the Project Deed and, in greater detail, in design and works programs to be developed by the Project Company (see sections 3.2.3.1 and 3.2.7), and
- In accordance with detailed standards and other requirements set out in the *Output Specification*.

Changes to the scope of the works may be made by the State or the Project Company only in accordance with the procedures described in section 3.2.14 below or in the circumstances described in sections 3.4.10 or 3.4.11.

3.2.2 Planning approvals, other approvals and subdivisions

3.2.2.1 Development approvals

The State will be responsible for obtaining development approvals, under the Environmental Planning and Assessment Act (NSW) and if necessary the Environment Protection and Biodiversity Conservation Act (Cth), for the Ashtonfield primary school, the Halinda School for Specific Purposes, the Hamlyn Terrace primary school and the Kelso high school, and must give copies of these approvals to the Project Company as soon as practicable.

The Project Company must apply for and obtain development approvals for the other six schools, any development approvals required for subdivisions of any of the ten school sites (as discussed in section 3.2.2.3 below) and any modifications that might need to be made to the development approvals obtained by the State.

The Project Company's applications and development approvals must meet all relevant legal requirements, follow the Project Company's *Proposals* for the project and be consistent with school facilities that will meet or exceed the requirements of the *Output Specification*.

The Project Company had to give the State's Project Director drafts of its development approval applications for the Second Ponds Creek primary school by 6 March 2006 and the Ropes Creek and Tullimbar primary schools by 6 April 2006, and must give him or her drafts of its other development approval applications by 7 June 2006 for the Rouse Hill high school, 5 October 2006 for the Hoxton Park South primary school and 5 April 2007 for the Elderslie primary school, providing any additional information reasonably requested by the Project Director. It must give the Project Director its final applications by no later than one month after these dates. These deadlines may be extended under the arrangements described in sections 3.2.14, 3.4.10 and 3.4.11 below.

The State's Project Director may, but need not, review each draft application and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the draft application with the Project Deed, within ten business days of receiving the draft. If he or she does so, the Project Company must amend the draft application to reflect these comments and recommendations and resubmit the draft to the Project Director, and may not lodge the development approval application unless no further comments are received. If the Project Company and the Project Director cannot agree on appropriate

amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

If the Project Director or any other representatives of the State choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the applications, and the Project Company will remain solely responsible for ensuring the development approvals which it must obtain comply with the *Output Specification* and the other requirements of the Project Deed.

The State must provide reasonable assistance to the Project Company to help it obtain the development approvals for which the Project Company is responsible. In particular,

- If an application may be lodged only with the consent of a third-party owner of the site, the State must procure this consent in time for the Project Company to meet its deadlines (there are third-party owners at the Ropes Crossing, Second Ponds Creek, Tullimbar, Hoxton Park South, Elderslie and Rouse Hill sites), and
- If there are development approval conditions that can be performed only by the owner, such as the transfer or dedication of land, or conditions concerning the provision of “education functions” at the site, the State must assist in satisfying these conditions.

The requirement for the State to assist the Project Company expressly does not extend, however, to any payments or monetary allowances or to more general assistance with the satisfaction of development approval conditions.

If the State fails to procure the consent of a third-party owner in time for the Project Company to meet its deadline for the site in question, this will constitute a “compensation event”, potentially entitling the Project Company to claim compensation and/or obtain extensions of time and/or other relief from its Project Deed obligations under arrangements described in section 3.4.11 below.

The Project Company must obtain the required development approvals for the Second Ponds Creek, Ropes Creek, Tullimbar, Rouse Hill, Hoxton Park South and Elderslie schools by “target DA approval dates” specified in a schedule to the Project Deed—6 November 2006 for the Second Ponds Creek, Ropes Creek and Tullimbar primary schools, 7 May 2007 for the Rouse Hill high school and 5 November 2007 for the Hoxton Park South and Elderslie primary schools—and must give the State’s Project Director copies of these approvals as soon as they are received. These deadlines may be extended under the arrangements described in sections 3.2.14, 3.4.10 and 3.4.11 below.

The Project Company may contest any conditions attached to or proposed for a development approval for which it is responsible, provided it does so in good faith, in its own name, as permitted by law, at no cost to the State,

without exposing the State to any loss or claim and without any material risk to the delivery of the project or the schools’ foreseeable “education functions” in accordance with the project’s contracts.

The Project Company *must* contest a proposed development approval condition if it is directed to do so by the State’s Project Director within ten business days of his or her being informed of the proposed condition. In these circumstances the Project Director’s direction must be accompanied by an opinion that there is a meritorious basis for contesting the condition, the State must give the Project Company any reasonable assistance it requests, the State and the Project Company must equally share the costs of contesting the condition, and the direction by the Project Director will constitute a “relief event”, potentially entitling the Project Company to extensions of deadlines under the Project Deed and/or other relief under arrangements described in section 3.4.10 below.

The Project Company may not otherwise apply for or agree to any change to or relaxation or waiver of any development approval or any development approval conditions, and must ensure that the Construction Contractors, the Facilities Manager, its other subcontractors and sub-subcontractors and others under its control do not do so either.

If the Project Company is contesting a development approval condition, either at its own behest or in accordance with a direction by the State’s Project Director, it must keep the State informed about the progress and nature of this contest and consult with the Project Director in good faith about the conduct of the contest.

The Project Company must comply with the conditions of all the project’s development approvals, including those obtained by the State, other than any conditions which can only be performed by the owner of the site(s), such as conditions requiring the transfer or dedication of land, and conditions relating to the provision of “education functions”.

If:

- The Rouse Hill high school development approval that is to be obtained by the Project Company has a condition requiring the Project Company, any of its related corporations, the Construction Contractors, the Facilities Manager, the Project Company’s other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees to construct, provide or pay a contribution or levy towards an access road around the northern side of that school site, or any widening or upgrading of Withers Road other than for bus bays, drop-off zones, footpaths, landscaping and crossovers, and the total cost of this is not exactly \$250,000, *or*

- Any of the four development approvals to be obtained by the State contains a condition requiring the payment of contributions or levies or a condition affecting the construction works at these sites, and the total cost of these condition(s) is not exactly \$200,000 for the Ashtonfield primary school, \$100,000 for the Halinda School for Specific Purposes, \$500,000 for the Hamlyn Terrace primary school or \$200,000 for the Kelso high school,

and:

- These condition(s) are not contemplated by, or reasonably likely having regard to, the *Output Specification* and the Project Company's *Proposals* for the project, and
- There is no meritorious basis for contesting the condition(s) under the arrangements described above,

the project's works, services and/or contracts must be varied to take account of the condition(s), under "change procedure" arrangements described in section 3.2.14 below, as if the changes were requested by the State.

More generally, this "change procedure" must also be followed if any other development approval condition(s) necessitate a variation to the project's works, services and/or contracts, with the Project Company's request for the variation again being deemed to have been made by the State.

If the Project Company fails to obtain any of the development approvals for which it is responsible by the "target DA approval dates" specified in a schedule to the Project Deed (6 November 2006 for the Second Ponds Creek, Ropes Creek and Tullimbar primary schools, 7 May 2007 for the Rouse Hill high school and 5 November 2007 for the Hoxton Park South and Elderslie primary schools), or by any extended deadlines as varied under the arrangements described in sections 3.2.14, 3.4.10 and/or 3.4.11 below, and

- This failure is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees (other than any contesting of a proposed development approval condition as directed by the State's Project Director), and
- The failure is not caused directly by the State's not owning the relevant site, an inconsistent zoning of the site or a failure to effect a subdivision of the site,

the failure will constitute a "relief event", potentially entitling the Project Company to extensions of deadlines under the Project Deed and/or other relief under arrangements described in section 3.4.10 below.

Similarly, if:

- The State fails to obtain any of the development approvals for which it is responsible by its "target DA approval date" as specified in the same schedule to the Project Deed (28 February 2006 for the Ashtonfield primary school—in practice, this approval was obtained on 20 March 2006—and 8 May 2006 for the Halinda School for Specific Purposes, 21 August 2006 for the Hamlyn Terrace primary school and 28 August 2006 for the Kelso High School), and this failure is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees
- The Project Company fails to obtain any of the development approvals for which it is responsible by their "target DA approval dates", as listed above, and this failure is directly caused by the State's not owning the relevant site, an inconsistent zoning of the site or a failure to effect a subdivision of the site
- There is a legal challenge to the validity of any of the development approvals for which the State is responsible, or any of these development approvals is modified, withdrawn, revoked, suspended or replaced, for reasons other than any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees (including any application by the Project Company for another development approval, an amendment to a development approval or a change to the project), or
- Any of the development approvals for which the Project Company is responsible has condition(s) requiring the Project Company, any of its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees to construct, provide or pay a contribution or levy towards subdivision infrastructure outside the relevant school site, *other than* infrastructure required because of the school's construction, operation or use or for access to and from the school (such as crossings, bus bays, parent drop-offs, cycleways, footpaths, electrical substations, roundabouts, traffic signals and roundabouts), and
 - These condition(s) are not contemplated by, or reasonably likely having regard to, the *Output Spec-*

ification and the Project Company's *Proposals* for the project, and

- There is no meritorious basis for contesting the condition(s) under the arrangements described above,

these circumstances will constitute a "compensation event", potentially entitling the Project Company to claim compensation and/or obtain extensions of time and/or other relief from its Project Deed obligations under arrangements described in section 3.4.11 below.

3.2.2.2 Other approvals, licences and consents

In addition to the development approvals described above, the Project Company must:

- Obtain all other statutory, court and tribunal approvals, licences and consents required for the project, including construction, occupation and building certificates under the Environmental Planning and Assessment Act, any necessary environmental protection licences and any necessary approvals under the Heritage Act, Roads Act, Water Act or Water Management Act
- Give the State's Project Director copies of all the approvals, licences and consents it obtains, and
- Comply with the terms of these approvals, licences and consents and ensure the project is carried out without any breaches of their terms.

The Project Company may contest any conditions attached to or proposed for any of these approvals, licences and consents, subject to the same limitations as those applying for the contesting of development approval conditions, and it *must* contest a proposed approval, licence or consent condition if directed to do so by the State's Project Director, again subject to the same limitations and with the same consequences as those applying for any directed contesting of development approval conditions.

If any condition(s) necessitate a variation to the project's works, services and/or contracts, the Project Company must request a variation under the "change procedure" arrangements described in section 3.2.14 below, with the variation being determined as if it had been requested by the State.

3.2.2.3 Subdivisions and consolidations of the school sites

The Project Company must procure the preparation of draft plans of subdivision and any other plans, instruments and documents required for the consolidation of each school site into a single, separate lot and/or any transfer or dedication of land required by a development approval.

These draft plans and instruments must comply with the relevant development approvals, the *Output Specification*, the Project Company's *Proposals* for the project and any other relevant requirements of the Project Deed, and must be submitted for review by the State's Project Director. The

Project Company must also provide any additional information concerning the subdivision plans and instruments that is reasonably requested by the Project Director.

The Project Deed does not specify any timeframes for these actions.

The State's Project Director may, but need not, review each draft subdivision plan and instrument. If he or she chooses to do so, he or she will not assume any duty to ascertain errors, omissions, defects or non-compliances in the draft.

The Project Director may reject a draft subdivision plan or instrument, within ten business days of receiving it, if it is inconsistent with the relevant development approval(s), the *Output Specification* or the Project Company's *Proposals* for the project. If the Project Company disagrees with the rejection, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

Following any review by the Project Director, the Project Company must make any changes to the draft subdivision plan or instrument that are required by the Project Director to ensure it complies with the Project Deed, the requirements of the NSW Department of Lands and the requirements of any other government, council, government department, statutory authority, court or tribunal.

If the Project Director does not respond to the Project Company within ten business days of receiving a draft subdivision plan or instrument, the Project Company may proceed with this form of the plan or instrument.

The Project Company must obtain consents to the proposed subdivision(s) from all persons with an interest in the land in question and all relevant governments, councils, government departments, statutory authorities, courts and/or tribunals. After receiving the relevant certificates of title from the State's Project Director, it must register the subdivision plans and instruments with the NSW Department of Lands, notify the Project Director and give him or her the new certificates of title. The Project Director must provide reasonable assistance to the Project Company in these registration processes, as requested, but will not be liable to make any monetary payments or allowances.

3.2.3 Design obligations and intellectual property

3.2.3.1 Development of detailed designs

The Project Company's principal design obligations are to develop and complete detailed designs for each of the schools in accordance with:

- The Project Company's *Proposals* for the project, as reproduced in a Schedule to the Project Deed
- Timeframes set out in a schedule to the Project Deed and a *Detailed Design Program* prepared by the Project Company, with all schematic design documentation for

a school to be completed at least four months before the school's "target DA approval date" (see section 3.2.2.1) and all detailed design documentation for the school to be completed within one month of the granting of the school's development approval

- Design review procedures set out in the Project Deed, described below
- Good industry practices, and
- A *Quality Standards (Works) Plan* to be developed by the Project Company as specified in the *Output Specification* (see section 3.2.9.1 below),

so that:

- The constructed school facilities will be fit for their intended purposes—the provision of services by the Project Company in accordance with the *Output Specification* and the provision of "education functions" by the State or the DET (i.e. curriculum, teaching, pastoral support, career guidance, extra-curricular, remedial, training, vocational, scholastic and educational activities for the benefit of students at the schools, plus related parent, guardian and community liaison and administrative support functions and student, staff and community access to the schools)—but not necessarily for "education functions" of types which the Project Company was not aware of before 20 December 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced school facility construction and maintenance contractor in its situation (as already indicated, these exceptions expressly include any future regular scheduled classes on weekends or between 4:30 pm and 7 am on weekdays), and
- The school facilities and the services to be provided by the Project Company will meet or exceed the requirements of the *Output Specification* and comply with all applicable development approvals, all other applicable approvals, licences and consents and all other applicable legal requirements.

The Project Company must give the State's Project Director drafts of its detailed design documentation, including information specified in the Project Deed and the *Output Specification*, and must provide any further information on the development of the detailed designs reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within 20 business days of receiving the drafts. If he or she does so, the Project Company must amend the draft detailed designs to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to the next

stage of design development in accordance with its *Detailed Design Program* or construct the works set out in the draft designs unless no further comments are received.

If the Project Company and the Project Director cannot agree on appropriate amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8. If this results in a final and binding determination that the original draft detailed designs did not comply with the Project Deed, or if the State's actions constitute a breach of the Project Deed and frustrate the ability of the Project Company to fulfil any of its obligations or exercise any of their rights under the project's contracts, the State may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the "compensation event" arrangements described in section 3.4.11.

If the Project Director or any other representatives of the State choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the designs, and the Project Company will remain solely responsible for ensuring its designs comply with the *Output Specification* and the other requirements of the Project Deed.

3.2.3.2 Intellectual property and moral rights

The Project Company has warranted to the State that its development and use of detailed designs and any other documents or articles for the project's design, approvals, construction, commissioning, operation or facilities management will not infringe any intellectual property rights, moral rights or other legal rights or give rise to any liability make royalty or other payments.

It has also:

- Granted the State an irrevocable, perpetual, royalty-free and non-exclusive licence to use any of these materials for the purposes of the project or any other project involving the current project's works, the school facilities or the school sites (ownership of the intellectual property in the materials will remain with the Project Company and/or the applicable third parties)
- Warranted that it holds all the rights and interests in these licensed materials or has the rights to sub-license rights and interests owned by others, that there are and will be no encumbrances over its rights and interests preventing the licensed materials from being used in accordance with the licence, and that it will not deal with its rights and interests in the licensed materials in any way that would conflict with or reduce these rights and interests
- Indemnified the State and its employees, agents and permitted sub-licensees against any claims or losses

resulting from a breach of these intellectual property and moral rights warranties, and

- Undertaken not to register or patent any intellectual property rights which it develops, discovers or first puts into practice during the project if this would conflict with or derogate from the licence granted to the State.

3.2.4 Construction site access, utilities and security

The State has granted non-exclusive Construction Site Licences, dated 28 February 2006, to the Project Company, the Construction Contractors, any other construction subcontractors and sub-subcontractors and the Project Company's other agents, employees, licensees and invitees, under which they may enter, occupy and use the Ashtonfield, Halinda, Hamlyn Terrace and Kelso sites solely for carrying out the construction works for these schools and associated preparatory works.

These Construction Site Licences commenced on 28 February 2006 and will continue in each case until the end of the construction at the relevant site. At Kelso the Construction Site Licence will also continue, after the new school facilities are completed, for any areas required for "Phase 3" of the Kelso works, the removal of the footings and services of this school's current demountable buildings and the reinstatement of its games field.

Similar Construction Site Licences must be granted to the Project Company, the Construction Contractors, any other construction subcontractors and sub-subcontractors and their officers, advisers, employees and agents by "site access dates" set out in a schedule to the Project Deed (8 January 2007 for the Ropes Crossing, Second Ponds Creek and Tullimbar construction sites, 9 July 2007 for the Rouse Hill site and 7 January 2008 for the Hoxton Park South and Elderslie sites).

The Project Company must pay the State a "fee" of \$1 per year, plus GST, for each of the Construction Site Licences.

The Construction Site Licences are and will be subject to any statutory rights of access by any government, council, government department, statutory authority, court or tribunal, the State's rights to access the sites and the construction works (see section 3.2.9) and any existing easements, covenants or other encumbrances.

The State will not be liable for any claims, losses or delays suffered by the Project Company, the Construction Contractors or any other construction subcontractors or sub-subcontractors under these site access arrangements, unless the circumstances amount to a "relief event" or a "compensation event" under the arrangements described in sections 3.4.10 and 3.4.11 below.

If the Project Company needs access to any other land to carry out the project, this will be its sole responsibility and entirely at its own risk. The State will not be liable for any claims, losses or delays incurred by the Project Company, the Construction Contractors or any other construction subcontractors or sub-subcontractors if they cannot obtain unrestricted access to the additional land.

The Project Company will be responsible for the provision and separate metering of any water, electricity, gas, communications, drainage, sewerage and other utility services required for it to construct the works at the school sites. However, if a school's construction site is not a serviced site with utilities infrastructure to its boundaries by its "site access date" (as listed above, or by 6 March 2006 for the Ashtonfield and Halinda sites, 1 April 2006 for the Kelso site and 16 October 2006 for the Hamlyn Terrace site), this will constitute a "compensation event", and while the Project Company will remain liable to provide the utilities it may also be entitled to compensation, and/or extensions of time and/or other relief from its Project Deed obligations, under arrangements described in section 3.4.11 below.

The Project Company will have full responsibility for the security of the construction sites and any adjacent or nearby properties on which utilities are being connected or installed or any construction work is being carried out.

3.2.5 Site conditions and contamination

The Project Company has accepted all of the construction sites, other than the Kelso High School site, in their current physical conditions, including any latent defects or contamination, and the State is not responsible for any claims or losses incurred by the Project Company because of the state or condition of any of the sites other than the Kelso High School site.

However, if:

- A school's construction site is not a serviced site with utilities infrastructure to its boundaries by its "site access date" (see section 3.2.4)
- A heritage artefact is discovered (see section 3.2.13)
- The Project Company has to carry out any demolition, earthworks, site preparation or site remediation works on any part of the Kelso site, expressly including any works directly resulting from the site's condition or any contamination on the site on 20 December 2005, or
- During the subsequent operations phase, the Project Company is served with an environmental notice or otherwise required to take action concerning contamination that was on the Kelso site on 20 December 2005 but was not disturbed by the Kelso construction works, these circumstances will constitute a "compensation event", potentially entitling the Project Company to claim compen-

sation and/or obtain extensions of time and/or other relief from its Project Deed obligations under arrangements described in section 3.4.11 below.

In addition, the State has promised that it will remove all the demountable buildings that are currently on the Kelso High School site within two months of the completion of the new school facilities at this site, so that the Project Company can carry out “Phase 3” of the works for this school, the removal of the demountables’ footings and services and the reinstatement of the school’s games field.

3.2.6 General construction obligations

The Project Company must construct the school facilities and carry out all of its associated construction works in accordance with:

- The Project Company’s *Proposals* for the project, as reproduced in a schedule to the Project Deed
- The *Output Specification*
- Timeframes set out in a schedule to the Project Deed and *Works Programs* to be prepared, maintained and updated by the Project Company (see section 3.2.7)
- The detailed designs (see section 3.2.3.1)
- Construction-phase management plans, including *Quality Standards (Works) Plans* and *Commissioning Plans*, to be developed, maintained and updated by the Project Company (see sections 3.2.9.1 and 3.2.15.1)
- All applicable laws, including the Building Code of Australia and the building requirements of the Environmental Planning and Assessment Act (NSW)
- Good industry practices,

and using good quality new and undamaged materials and exercising the skills, care and diligence reasonably expected of professional engineers and builders for facilities of this nature, so that:

- The works do not materially interfere with the schools’ foreseeable “education functions”, increase their costs or increase requirements for providing these functions
- The works do not damage the school sites or adjacent and nearby properties
- The constructed school facilities will be, and will remain, fit for their intended purposes (the provision of services by the Project Company in accordance with the *Output Specification* and the provision of foreseeable “education functions” by the State or the Department of Education and Training)
- The school facilities comply with all applicable development approvals, all other applicable approvals, licences and consents and all other legal requirements, and

- The school facilities and the services to be provided by the Project Company will be able to meet or exceed the requirements of the *Output Specification*.

Any materials removed from the sites by the Project Company will (as between the State and the Project Company) become the property of the Project Company unless the State’s Project Director, the Project Deed or any other legal requirement directs otherwise, while all chattels and other non-fixtures forming part of the school facilities will (as between the State and the Project Company) become the property of the State.

As already indicated, the school facilities to be constructed or installed by the Project Company include the schools’ buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, playgrounds, paths and gardens, but the State may specify items of furniture, fittings and equipment that will be provided by the State and/or the DET. If it does so, it must give the Project Company at least five business days’ notice of the delivery and installation of these items and ensure they are delivered and installed by specialist contractors, and the Project Company must inspect and test the delivered items, notify the State’s Project Director of any defects or deficiencies and ensure any damaged, defective or deficient items are not installed or used in the schools.

If an item to be provided by the State or the DET under these arrangements is not made available, or if a State/DET-provided item has a latent defect that is not reasonably discoverable by the Project Company within five business days of its delivery, the Project Company may be entitled to compensation, and/or other relief from its Project Deed obligations, under the “compensation event” arrangements described in section 3.4.11 below, provided these circumstances have not been caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company’s other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees.

The Project Deed makes it clear, however, that the State has made no representations or promises about any State/DET-provided items and that, apart from these “compensation event” arrangements, the Project Company will not be entitled to any compensation or other relief from its obligations as a result of these items’ location, condition, age or fitness-for-purpose or any effects they may have on the Project Company’s operations-phase services.

Similarly, apart from the “compensation event” arrangements, the State, the DET and their officers, employees and agents will not be liable for any claims or losses suffered by the Project Company in connection with State/DET-provided items unless they have been caused by negligent or unlawful acts or omissions or wilful misconduct by the State,

the State's Project Director, any other person responsible for the administration, management or implementation of any aspect of the project on behalf of the State, the DET, any DET or State employee, agent, contractor, subcontractor, consultant, licensee or authorised officer involved in providing "education functions", any other DET or State employee, agent or contractor (other than the Project Company and its related organisations) acting in the course of his or her employment, any person using any of the school facilities for community uses, any of the relevant school's students or any State or DET invitee at the school facility.

In addition to their obligations to the Project Company under the Construction Contracts, the Project Company's two Construction Contractors, Hansen Yuncken and St Hilliers Contracting, have made a series of promises directly to the State, under the Construction Contractors Collateral Warranty Deeds, concerning, among other things, their compliance with the Construction Contracts, the quality of their work, materials and equipment, their selection and supervision of their employees, agents, contractors and suppliers, State inspections of their work, their insurance arrangements and their prompt notification of any material default by the Project Company under the Construction Contracts. Identical undertakings must be made by any other significant construction subcontractors appointed by the Project Company under arrangements described in section 3.2.8.2.

3.2.7 Construction timeframes

The Project Company must complete the ten schools' facilities—and, in the case of Kelso High School, the subsequent "Phase 3" removal of the footings and services of this school's current demountable buildings and reinstatement of its games field—by "**target completion dates**" specified in the Project Deed and a schedule to the Project Deed.

As already indicated, the "target completion dates" for the school facilities are currently 8 January 2007 for the Ashtonfield primary school, 21 April 2007 for the Halinda School for Specific Purposes, 15 October 2007 for the Hamlyn Terrace primary school, 7 January 2008 for the Ropes Crossing, Second Ponds Creek and Tullimbar primary schools, 28 April 2008 for the new Kelso high school facilities and 5 January 2009 for the Hoxton Park South and Elderslie primary schools and the Rouse Hill high school. The current "target completion date" for the Kelso high school's subsequent "Phase 3" works is 29 August 2008.

These deadlines may be extended if there are changes to the *Output Specification*, the Project Company's *Proposals*, the completed detailed designs, the works or the schools' *Works Programs* (other than the routine *Works Program* changes discussed immediately below) under the "change procedures" arrangements described in section 3.2.14 below,

or if a "relief event" or "compensation event" occurs, under the arrangements described in sections 3.4.10 and 3.4.11.

Within this overall "target completion date" framework, the Project Company must develop, maintain, update and comply with a detailed *Works Program* for each of the schools, the requirements for which are set out in the Project Deed, the *Output Specification* and another schedule to the Project Deed.

Initial drafts of these *Works Programs* must be provided to the State's Project Director at least two months before the Project Company is granted access to the relevant schools' construction sites under the arrangements described in section 3.2.4, and the Project Company must provide any further information on the development of the *Works Program(s)* reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within 20 business days of receiving the drafts. If he or she does so, the Project Company must amend the draft *Works Program(s)* to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to construct the relevant works unless no further comments are received.

If the Project Company and the Project Director cannot agree on appropriate amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8. If this results in a final and binding determination that the original draft *Works Program(s)* did comply with the Project Deed, or if the State's actions constitute a breach of the Project Deed and frustrate the ability of the Project Company to fulfil any of its obligations or exercise any of their rights under the project's contracts, the State may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the "compensation event" arrangements described in section 3.4.11.

If the Project Director or any other representatives of the State choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the *Works Program(s)*, and the Project Company will remain solely responsible for ensuring these programs comply with the *Output Specification* and the other requirements of the Project Deed.

The initial *Works Programs* established under these arrangements must then be updated by the Project Company when it finalises the detailed designs for each of the schools and then, for each school, on a monthly basis, with the amended *Works Programs* being promptly submitted to the State's Project Director, in the latter case at least seven business days before the end of each month. The final "target completion dates" for the works at each of the

schools may be altered under these updating arrangements only if they have been changed more generally under the “change procedures” described in section 3.2.14 or following a “relief event” or “compensation event”, under the arrangements described in sections 3.4.10 and 3.4.11.

If the Project Company fails to complete a “milestone” component of the works (as specified in a *Works Program*) by the date specified in the *Works Program*, it must submit a written *Construction Milestone Failure Report* to the State’s Project Director, within five business days, setting out the reasons the deadline was not met, the date by which completion of the works component is now expected and the effects of the delay on the completion of the relevant school facility and the completion of all of the school facilities.

If the State’s Project Director believes (in response to a *Construction Milestone Failure Report* or, more generally, at any time) that the Project Company will not complete a school facility by its “target completion date”, he or she must direct the Project Company, in writing, to prepare and submit a draft *Corrective Action Plan* to him or her within ten business days, detailing the current state of the works and the actions it will pursue in order to meet the “target completion date”, including acceleration of the works.

Within ten business days of receiving the draft *Corrective Action Plan* the Project Director must either approve the plan, in which case the Project Company must diligently pursue the actions set out in the plan, amending the relevant *Works Program(s)* accordingly, or reject the plan and advise the Project Company of the reasons for this rejection, in which case the Project Director and the Project Company must meet to discuss and establish an acceptable *Corrective Action Plan*.

If the Project Director and the Project Company cannot agree on a *Corrective Action Plan*, the dispute resolution procedures summarised in section 3.4.8 will apply.

These arrangements will not relieve the Project Company of any of its other obligations under the Project Deed or any other legal requirement.

3.2.8 Construction workforce and subcontractors

3.2.8.1 Employment conditions

The Project Company must comply with a series of conditions concerning its own employees, the employees of the Construction Contractors, the employees of any other construction “subcontractors” it appoints to carry out the works, under arrangements summarised in section 3.2.8.2 below, and the employees of these subcontractors’ “sub-subcontractors”. (The term “employee” includes anyone engaged in the project, including independent contractors.)

Under these conditions,

- All employees must be appropriately qualified, skilled and experienced for their assigned tasks
- The Project Company must comply with any DET requirements, policies and procedures for staff conduct, ensure its officers, employees, agents, subcontractors and sub-subcontractors do likewise and take disciplinary action against any employee who breaches the DET’s requirements, policies and procedures, notifying the State’s Project Director in writing
- Employees engaged in construction work at the Halinda, Kelso or Rouse Hill sites must:
 - Satisfy all relevant requirements of the Child Protection (Prohibited Employment Act (NSW), the Child Protection (Offenders Registration) Act (NSW), the Commission for Children and Young People Act (NSW) and the Education Act (NSW), including their training requirements
 - Successfully complete a “working with children” check, and
 - Comply with any other legal and DET requirements, policies and procedures for employees in child-related employment
- The Project Company must investigate the criminal, medical and employment histories of all prospective employees and make the findings of these investigations available to the State’s Project Director before job offers are made, undertaking further investigations and providing further information if he or she directs it to do so
- The Project Director may direct the Project Company, within 20 business days, to deny employment if the Project Company’s investigation(s) indicate a prospective employee would not be an appropriate employee at a site
- The Project Director may carry out his or her own investigations, including police and security checks, with the consent of the prospective employee(s), and require the dismissal of employees from the project if they have not complied or do not comply with the requirements described above or are unsuitable or unqualified
- The Project Company and its subcontractors and sub-subcontractors must establish and comply with “human resources” and industrial relations policies, provide healthy and safe working conditions and comply with employment laws
- The Project Company must regularly inform the Project Director about any industrial action that might affect the works and promptly inform him or her if industrial action causes a suspension or cessation of the works, providing information about the actions it has taken or

proposes to take to overcome or minimise the effects, and

- The Project Company and its subcontractors and sub-subcontractors will otherwise be entirely responsible for the employment and conditions of their employees.

3.2.8.2 *Subcontracting*

In addition to the Project Company's Construction Contracts with the Construction Contractors, the Project Company may enter into contracts with other "subcontractors" for the development, construction and/or commissioning of any part of the works.

If it does so, the Project Company must:

- Ensure the subcontractor and any sub-subcontractor(s) are reputable, have (or have access to) sufficient experience and expertise to perform their obligations to the standards required by the Project Deed and take out workers' compensation, public liability and professional indemnity insurance consistent with the Project Company's own insurance obligations under the Project Deed (see section 3.4.2.1), as applicable to the relevant works
- Comply with its obligations under the subcontract and ensure the subcontractor does likewise, both under the subcontract and under any sub-subcontract(s)
- Obtain the State's prior written consent if the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or sub-subcontractor and its related corporations, will exceed \$1 million or if the relevant works are nominated as "critical" by the State's Project Director (the Project Deed calls these subcontracts and sub-subcontracts "**material subcontracts**")
- In the case of "material subcontracts",
 - Promptly give the State's Project Director a copy of each proposed or executed subcontract or sub-subcontract
 - Ensure the subcontractor executes a Collateral Warranty Deed, in favour of the State, on terms set out in a schedule to the Project Deed and equivalent to those already executed by the two current Construction Contractors under the existing Construction Contractors Collateral Warranty Deeds
 - Obtain the Project Director's prior written consent if any departure from or variation, amendment, assignment, replacement or termination of the subcontract or any compromise or waiver of the Project Company's rights under the subcontract might affect the rights of the State or the ability of the Project Company to satisfy its obligations under the project's contracts, and

- Immediately notify the Project Director of any termination or material amendment of the subcontract

- Ensure the State obtains the benefit of any warranties and guarantees offered by the subcontractor and any suppliers, and
- Provide monthly reports to the Project Director on its payments to the subcontractor and any formal disputes with the subcontractor.

These Project Company obligations also apply in the case of the two existing Construction Contracts, both of which are "material subcontracts". If the new subcontractor is *replacing* one or both of the current Construction Contractors, the Project Company must also ensure the new subcontractor executes a Construction Side Deed with the State on terms set out in a schedule to the Project Deed and equivalent to those already executed by the two current Construction Contractors under the existing Construction Side Deeds.

3.2.9 *Construction management plans, records, reports, inspections and audits*

3.2.9.1 *Management plans and records*

The Project Company must develop construction-phase management plans for each of the schools, as specified in the *Output Specification*, in accordance with:

- The Project Company's *Proposals* for the project, as reproduced in a schedule to the Project Deed
- The *Output Specification*
- Timeframes set out in a schedule to the Project Deed, and
- The requirements of one of the construction-phase management plans to be developed for each school, a *Quality Standards (Works) Plan*, and one of the operations-phase plans to be developed for each school, a *Quality Standards (Services) Plan* (see section 3.3.5.1),

and with an "appropriate" level of professional care, so that the works comply with the relevant development approval(s), all other relevant approvals, licences and consents and all other legal requirements.

The management plans required for each school site are an overall *Project Management Plan*, a *Construction Management Plan*, a *Quality Standards (Works) Plan*, a *Community Consultation and Public Relations Plan*, an *Energy and Water Management Plan*, an *Occupational Health, Safety and Rehabilitation Plan* (see section 3.2.10), an *Environmental Management Systems Plan* (see section 3.2.11), an *Industrial Relations Management Plan*, *Training Plan*, *Training Management Plan* and *Aboriginal Participation Plan* (see section 3.2.8.1), a *Local Industry Participation Plan*, a *Project Cost Plan* and a *Commissioning Plan* (see section 3.2.15.1).

Initial drafts of all of these plans except the *Commissioning Plans*, which are separately discussed in section 3.2.15.1 below, must be provided to the State's Project Director at least two months before the Project Company is granted access to the relevant schools' construction sites under the arrangements described in section 3.2.4, and the Project Company must provide any further information on the development of the draft plans reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within 20 business days of receiving the drafts. If he or she does so, the Project Company must amend the draft management plan(s) to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to construct the relevant works unless no further comments are received.

If the Project Company and the Project Director cannot agree on appropriate amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8. If this results in a final and binding determination that the original draft management plan(s) did comply with the Project Deed, or if the State's actions constitute a breach of the Project Deed and frustrate the ability of the Project Company to fulfil any of its obligations or exercise any of their rights under the project's contracts, the State may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the "compensation event" arrangements described in section 3.4.11.

If the Project Director or any other representatives of the State choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the management plan(s), and the Project Company will remain solely responsible for ensuring these plans comply with the *Output Specification* and the other requirements of the Project Deed.

The Project Company must audit its compliance with each school's *Quality Standards (Works) Plan* at least every three months, in accordance with an audit program that has been agreed with the State's Project Director. The quality of the works will also be independently audited, as described in section 3.2.9.4 below.

3.2.9.2 Construction reports

The Project Company must give the State's Project Director monthly reports, for each of the schools and by the fifth business day of each month, on the progress of construction, revisions to the school's *Works Program* (see section 3.2.7), expenditures and any significant items potentially affecting

the *Works Program*, any adjustments to its progressive payment or drawdown schedules, the status of activities, budgets, works, payments and any disputes under the Construction Contracts and all other subcontracts and sub-subcontracts, the results on any quality assurance audits in the preceding month, the results of any other testing required by the *Output Specification*, any serious accidents or dangerous events and the progress of any works by a government or council authority on the extension, adjustment or relocation of water, electricity, gas, communication or other utilities.

The Project Director may, but need not, review these reports and give the Project Company written comments and recommendations concerning the compliance of the works with the requirements of the Project Deed. If he or she does so, he or she will not become responsible in any way for ascertaining errors, omissions, defects or non-compliances in the works.

The Project Company must also:

- If requested by the Project Director, give him or her copies of site-specific occupational health and safety records, registers and documents, as described in section 3.2.10 below.
- Promptly inform the Project Director about any industrial disputes affecting the works, as already described in section 3.2.8.1
- Promptly inform the Project Director about any material defects or damage to the works or school facilities if the cost of repairs is more than \$3,000, indexed to the CPI from the December quarter of 2005, informing him or her the actions it is taking to correct the damage or defect and the estimated time the correction will require (see also section 3.4.2.2)
- Immediately inform the Project Director about any events or circumstances reasonably likely to constitute or cause an "emergency" as defined in the Project Deed, meaning any situation which, in the Project Director's opinion,
 - Prevents a continuation of the works (or, in the operations phase, the provision of the services) under normal circumstances
 - Seriously threatens, has caused or will cause material damage or disruption to personal health and safety, the environment, property or the safe and secure performance of the works (or, in the operations phase, the provision of the Project Company's services), or
 - Will require the provision of materially greater services,

and the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of this "emergency".

- Immediately inform the Project Director about any other incident causing the suspension or cessation of any part of the works or which might materially impede the provision of foreseeable “education functions”, and the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of the incident.

3.2.9.3 Site inspections, site meetings and State comments

In addition to the monthly or more frequent meetings of the Project Co-ordination Group (see section 3.1.2),

- The State’s Project Director and his or her representatives may enter any of the constructions sites, at any reasonable time and after giving reasonable notice, to inspect the works and any associated drawings, documents, test results, samples and specifications, provided they do not cause unnecessary disruption and comply with reasonable safety and security requirements
- The Project Company must give the Project Director and his or her representatives an opportunity to attend monthly or more frequent site meetings
- The Project Director may, but need not, give the Project Company written comments and recommendations concerning the compliance of the works with the requirements of the Project Deed
- If he or she does so, the Project Company and the Project Director must meet to discuss and establish rectification measures or changes to the works, and if they cannot agree the dispute resolution procedures summarised in section 3.4.8 will apply.

If the Project Director’s exercises his or her rights to inspect or make comments on the works he or she will not become responsible in any way for ascertaining errors, omissions, defects or non-compliances in the works.

3.2.9.4 Independent and State audits

In addition to its own quality audits, as referred to in section 3.2.9.1, the Project Company must have its compliance with its *Quality Standards (Works) Plans* for each school’s works audited at least every 12 months by an independent auditor acceptable to the State’s Project Director.

The Project Director or his or her representative will be entitled to be present during these audits and an audit report must be delivered to the Project Director within a reasonable time.

The State will also have the right to conduct its own quality audits, at its own cost, at any time prior to the completion of all ten of the schools. Should such an audit reveal any non-compliance with quality assurance plans by the Project Company, the Construction Contractors, any other subcontractor or any subsubcontractor, the Project Company must reimburse the State for its auditing costs.

These quality assurance and audit arrangements will not relieve the Project Company of any of its other obligations under the Project Deed.

3.2.10 Occupational health and safety

For the purposes of the Occupational Health and Safety Regulation (NSW), the Project Company has been appointed as the “principal contractor” for the project’s construction work and may exercise any State powers that are necessary for it to discharge this responsibility.

This appointment is not affected by the Construction Contracts or any other subcontracting of the construction work by the Project Company.

If the Project Company fails to comply with its duties as a “principal contractor”, the State may carry out these duties itself, or have them carried out by others, and the Project Company must pay the State for the costs it incurs, as a debt, upon demand.

If requested by the State’s Project Director, the Project Company must give him or her copies of its site-specific *Occupational Health, Safety and Rehabilitation Plans* (section 3.2.9.1), the *Safe Work Method Statements* which it, the Construction Contractors and any other construction work subcontractors and subsubcontractors have prepared and all other registers, records and documents which the Project Company must prepare and maintain as the “principal contractor”.

The Project Company must notify the Project Director of any serious accidents or dangerous occurrences, confirming that WorkCover has also been notified as required.

3.2.11 Environmental requirements

Throughout the construction phase of the project, and in most cases during the subsequent operational phase as well, the Project Company must, in performing the construction works and providing its services,

- Comply with all environmental laws and all relevant industry standards and codes of practice
- Not contaminate or pollute any construction site, school facility or adjacent or nearby property
- Not bring any waste onto any construction site or school facility
- Keep the construction sites and school facilities in a good and safe condition, so that they do not present any health, safety or environmental risk
- Undertake any remediation work that is needed to ensure that upon the completion of work at each construction site the site presents no risk of harm to the environment and is suitable for use as a school
- Adopt good industry practices to ensure the safety of people and protect the environment from harm

- Immediately notify the State’s Project Director if there is an incident that might breach an environmental law or there is a complaint about contamination or pollution
- Give the Project Director any information they have about contamination or pollution
- Promptly comply with any environmental law direction or order served on the Project Company or the State by any court, tribunal or relevant government authority (this liability will continue after the end of the project in 2035 if it arises because of contamination, pollution or waste disposal during the term of the project), and
- Give the Project Director a copy of any environmental law direction it receives within seven days, and then promptly give him or her, as requested, copies of all reports, invoices and other documents relating to the direction or its compliance with the direction.

As part of the procedures preceding final completion of the works on each construction site (see section 3.2.15.2), the Project Company must undertake a final assessment of contamination on the site, undertake any remediation work which this assessment shows is required and subject its assessment and remedial actions to independent review by an accredited site auditor under the Contaminated Land Management Act, jointly appointed by the State and the Project Company.

3.2.12 Native title claims

If there is a native title claim over any part of any of the construction sites, the Project Company:

- Must continue to perform its obligations under the Project Deed unless it is ordered not to by the State’s Project Director, a court, tribunal or other relevant authority or any other legal requirement
- Must provide all reasonable assistance to the State, as requested by the State’s Project Director, in the State’s involvement with the native title claim, and
- May be entitled to compensation and/or relief from its contractual obligations under the “compensation event” arrangements described in section 3.4.11.

3.2.13 Heritage artefacts

Any heritage artefacts discovered on or under any of the construction sites will (as between the State and the Project Company) be the absolute property of the State.

The Project Company must:

- Take every precaution to prevent the removal, disturbance, damaging or destruction of any artefacts
- Immediately notify the State’s Project Director if any artefacts are discovered

- Comply with any directions concerning these artefacts imposed by a court, tribunal or other relevant authority on the State, the DET or the Project Company, including any requirements under a development approval or any other approval, licence or consent, and
- Continue to perform its obligations under the Project Deed unless this is prevented by such a direction.

If heritage artefacts are discovered the Project Company may also be entitled to compensation and/or relief from its contractual obligations under the “compensation event” arrangements described in section 3.4.11.

3.2.14 Variations

If the State or the Project Company wishes to make any change to the works, the *Output Specification*, the Project Company’s *Proposals*, a completed detailed design or a *Works Program* (other than under the procedures described in section 3.2.7 above), it may do so only in accordance with a formal and very detailed “change procedure” set out in a schedule to the Project Deed. (Separate arrangements for the provision of demountable classrooms are described in section 3.3.10.)

The Project Deed’s “change procedure” also applies to:

- Changes which either of the parties wishes to make to the services to be provided by the Project Company during the operations phase at any of the schools, the operations phase aspects of the *Output Specification* or the Project Company’s *Proposals* or an operations-phase *Operations Manual* (other than under the procedures described in section 3.3.5.1 below) (see sections 3.3.9 and 3.4.2.3)
- Changes identified by the Project Company which it *must* propose, even if it does not wish to, because the changes would result in an “improvement, innovation or time or cost saving”, and
- Changes which are *deemed* to be changes requested by the State, even if they are in practice requested by the Project Company, because:
 - The proposed changes have been necessitated by specified types of unexpected development approval conditions for the Ashtonfield, Halinda, Hamlyn Terrace, Kelso or Rouse Hill schools, as detailed in section 3.2.2.1, or more generally by any other development approval condition or condition attached to any other approvals, licences or consents for any of the schools
 - The proposed changes concern the effects on the Project Company’s services of any additional capital works by a third party contractor appointed by the State, during the operations phase of the project, following a rejection by the State of an earlier

Project Company proposal to carry out these additional works itself, in response to a State request for the additional works,

- The proposal for the changes has directly resulted from a “compensation event” (see section 3.4.11), or
- The proposal is for a site or school affected by a *force majeure* event that has continued for more than 180 days to no longer be subject to the Project Deed (see section 3.4.12.2)

The only exceptions to the requirement to use the formal “change procedure”, other than those referred to above, are “minor changes”, directed by the State’s Project Director, with an estimated cost effect—as determined in accordance with a schedule to the Project Deed, and in aggregate in the case of changes which in substance amount to a single variation—of \$10,000 or less, indexed to the Consumer Price Index from the December quarter of 2005. In these cases, the Project Company will not be entitled to any extension of time or other relief from its obligations concerning the changed matters, and will be entitled to be compensated only for the amounts it actually incurs in relation to the change.

For variations under the “change procedure” the processes to be followed, the procedural cost-sharing arrangements, the types of compensation and/or other relief available, the adjustments to be made to the “construction payment” and “securitisation payment” under the arrangements described in section 3.2.17 (and the associated rent payments specified in the Leases and the Master Rental Agreement, under the arrangements described in section 3.3.2.2 and 3.3.2.3), the adjustments to be made to the State’s operations-phase payments to the Project Company under the arrangements described in section 3.3.7.1 (either way, depending on whether the change is expected to produce additional costs or savings), the variation financing and compensation payment arrangements and (in some situations) the right (or otherwise) of the State to terminate the Project Deed during the procedures and pay compensation as if this termination were a “voluntary” termination as described in section 3.5.2 all vary, depending on:

- The type of change being contemplated
- The party requesting or deemed to be requesting the change
- Whether the State initially and finally accepts or rejects the Project Company’s variation proposals (which must be prepared by them even for State-initiated changes)
- The estimated cost effects of the change (as calculated in accordance with a detailed “estimated cost effect” schedule to the Project Deed)
- Whether “additional work” is involved

- Whether the State chooses to have the Project Company carry out part or all of any such “additional work” or call for tenders from third parties
- Whether the change is a “facilities removal” variation would make a site or school facility no longer subject to the Project Deed (see sections 3.4.2.3 and 3.4.12.2)
- Whether the Project Company has taken all reasonably necessary steps to mitigate and minimise the effects of the change, and
- Whether the change will necessitate new or amended development approvals and/or other approvals, licences or consents.

In broad terms, however,

- Variations requested or deemed to be requested by the State and variations compulsorily requested by the Project Company because they would result in an “improvement, innovation or time or cost saving” will potentially entitle the Project Company to an extension of time, relief from its other obligations and/or compensation payments, with the details depending on the “change procedure” and “estimated cost effect” schedules to the Project Deed, but
- Other variations requested by the Project Company will not entitle it to any extensions of time, other relief or compensation, unless otherwise agreed by the State.

In the case of a variation that produces a cost saving, other than a “facilities removal” variation, the saving must be equally shared by the State and the Project Company if the variation was proposed by the Project Company, but if the variation was proposed by the State or deemed to be proposed by the State the State will be entitled to all of the saving.

If the State’s Project Director accepts a variation proposal the Project Company must give him or her a revised and audited “base case” financial model for the project, and a revised schedule of payments for the operations phase of the project (see section 3.3.7.1), both of them reflecting the approved change. The State’s Project Director may either approve these revisions, in which case the amended versions will replace their earlier equivalents, or propose amendments, in which case the Project Company and the Project Director must consult in good faith and use reasonable endeavours to establish agreed amendments. If they cannot agree within ten business days, or if no consultations are held within 12 business days, the dispute must be referred to an independent expert under the dispute resolution procedures summarised in section 3.4.8. The Project Director’s participation in these processes will not make the State responsible in any way for ascertaining errors, omissions, defects or non-compliances in the “base case” financial model or the payments schedule.

If the State engages a party other than the Project Company to carry out “additional work”,

- The Project Company must not hinder or delay the State and this contractor from undertaking the work
- The State may request the Project Company to enter into a coordination and interface agreement with the contractor concerning part or all of the design, construction, commissioning, completion, handing over and facilities management of the “additional work”
- The Project Company must comply with all such requests
- Unless the Project Director decides otherwise, the Project Company will be responsible for all aspects of the services to be provided for the additional works after they are completed, with the resultant changes in the Project Company’s services and payments being determined in accordance with the “change procedure”, and
- The State, the Minister for Education and Training, the DET and their delegates, employees, contractors and agents will not be liable for any claim or loss suffered by the Project Company, the Construction Contractors or any other subcontractor or sub-subcontractor as a result of the “additional work”, unless the circumstances amount to a “compensation event” under the arrangements described in section 3.4.11.

3.2.15 Commissioning and completion of the works

3.2.15.1 Commissioning Plans

The Project Deed sets out requirements and procedures—supplementing the general procedures for all construction-phase management plans already described in section 3.2.9.1—for the Project Company to:

- Submit a draft *Commissioning Plan* for each school’s works to the State’s Project Director and the Independent Certifier at least four months before the school’s “target completion date” (see section 3.2.7), detailing, in accordance with requirements in the *Output Specification*, how the Project Company will install, commission and test plant, equipment and facilities and educate, familiarise, train and support teachers and other DET employees, contractors, consultants and licensees who will be providing the school’s “education functions”, so that the school facilities comply with the *Output Specification*
- Amend these draft plans if directed to do so by the Project Director under review and amendment arrangements similar to those for the other construction-phase management plans described in section 3.2.9.1, but with

only ten business days for each of the Project Director’s reviews, and

- Develop, amend and update the *Commissioning Plans* throughout the rest of the construction phase for each school, submitting each amended plan to the Project Director and the Independent Certifier and further developing, amending and updating the plans if directed to do so, with the dispute resolution procedures described in section 3.4.8 applying if the Project Director and the Project Company cannot agree on the necessary amendments.

3.2.15.2 Commissioning and completion

The Project Deed and the Independent Certifier Deed set out detailed requirements and procedures for the completion of the works at each school, including:

- A final assessment by the Project Company of contamination at each construction site, followed by remediation work if the assessment shows this is required and then an independent review of the assessment and the remedial actions by a site auditor accredited under the Contaminated Land Management Act and jointly appointed by the State and the Project Company, with copies of the contamination assessment and review reports being given to the State’s Project Director and the Independent Certifier (see also sections 3.2.5 and 3.2.11)
- The identification and listing of minor omissions and defects which, in aggregate, will not adversely affect occupation of the school or the provision of foreseeable “education functions”
- Formal notification by the Project Company once it considers it has completed the construction and commissioning of the school’s works (or, in the case of Kelso High School, the works other than its “Phase 3” works, the removal of the footings and services of this school’s current demountable buildings and the reinstatement of its games field), apart from the correction of minor omissions and defects
- Following this, specified consultations and information exchanges, site visits and inspections, testing, training and support, the installation of any State- or DET-provided items or equipment by specialist contractors appointed by the State’s Project Director, the verification by the Independent Certifier, acting independently but with the DET’s assistance, that all State- or DET-provided items and equipment have been commissioned and tested (if applicable), and the verification by the Project Company, with the State’s assistance, that all items or equipment provided by the Project Company have been commissioned and tested (if applicable) and all the education, training and support specified in the

Project Deed's requirements for "completion" have been completed

- The rectification by the Project Company of any deficiencies identified by the Independent Certifier, acting independently
- Following further inspection(s), certification by the Independent Certifier, acting independently, that all the requirements for "completion" of the school's works (or, in the case of Kelso High School, the works other than its "Phase 3" works) have in fact been satisfied
- Within two business days of this certification, the issuing by the State's Project Director of a notice:
 - Formally confirming to the Project Company that completion of the school's works (or, in the case of Kelso High School, the works other than its "Phase 3" works) has occurred, and
 - Specifying a "**commencement date**" for the school, which must be the later of the date of the notice and the "target completion date" for the school (see section 3.2.7).

The Project Deed makes it clear that the Project Director's notification of the completion of a school's works will not constitute an approval by the State of the Project Company's performance of its obligations or evidence that the school facilities comply with the *Output Specification*.

Any remaining minor omissions or defects identified and listed under these arrangements must be completed or rectified to the reasonable satisfaction of the Independent Certifier, acting independently, as soon as practicable, and in any event in accordance with a "minor defects rectification program" agreed to by the Independent Certifier, the State's Project Director and the Project Company before the Independent Certifier certified "completion" of the school's works. The Independent Certifier must inspect these minor rectification works and certify their completion.

In the case of Kelso High School,

- The State must ensure the demountable buildings currently located on this site are removed within two months of the "commencement date" for the school's new facilities, and
- The processes described above, up to and including the Independent Certifier's certification of "completion" and the correction of minor defects, must be repeated for the commissioning and completion of the school's "Phase 3" works.

The costs and expenses of the Independent Certifier, including its fees, must be paid equally by the State and the Project Company. The Independent Certifier's obligations may be amended, added to or deleted by the State and the Project Company through joint notices that may be issued at

any time under arrangements set out in the Independent Certifier Deed.

Within 60 days of the "commencement date" for a school facility the Project Company must give the State's Project Director a complete set of "as executed" drawings of the school in hard copy and electronic form, and within 180 days of the "commencement date" it must give him or her a detailed survey of the completed facilities by a registered surveyor nominated by the Project Director, with the surveyor's certification that the completed works are located in accordance with the relevant detailed designs.

3.2.16 Post-completion correction of defects

In addition to the arrangements for the rectification of minor defects described in section 3.2.15.2, the Project Company must rectify any defect in each school's facilities, including any latent defect,

- As soon as reasonable after the Project Company becomes aware of the defect, taking account of the nature of the defect and its effects on the school's "education functions" and the Project Company's services, or
- In the case of a defect that causes the Project Company to fail to meet "key performance indicator" standards for its services, as set out in the *Output Specification*, within rectification periods specified in another schedule to the Project Deed (see sections 3.3.1 and 3.3.7.1).

3.2.17 'Construction' and 'securitisation' payments

Under the Project Deed the State must pay the Project Company a "construction payment" on the "commencement date" of the last of the ten schools to be completed (not counting the Kelso High School "Phase 3" works). (The Project Deed calls this date the "**full service commencement date**".)

Under the Payment Directions Deed, however, the Project Company has irrevocably directed the State to make this payment to JEM, or as directed by JEM, instead of the Project Company.

The amount to be paid will be calculated, at the time, using a formula specified in the Payment Directions Deed and input parameters for this formula which are set out in the associated Payment Directions Side Letter and were determined on 28 February 2006, as required by the Project Deed, in accordance with the *Financial Close Protocol*.

It will be equal to a "securitisation payment" that must be paid to the State by JEM on the same day, as part of arrangements for JEM to purchase the State's right to receive rent from the Project Company under the ten schools' Leases and its right to receive "early payout amounts" under these Leases if the Project Deed is terminated before 31 December 2035 because of a Project Company default, as

detailed in the Securitisation Agreement, the Master Rental Agreement, the associated Master Rental Side Letter, the form of the Leases set out in a schedule to the Project Deed, the Payment Directions Deed and the associated Payment Directions Side Letter (see sections 3.3.2 and 3.5.5).

The State will have no obligation to pay the “construction payment” to JEM, or as directed by JEM, unless it receives the “securitisation payment” from JEM under the Securitisation Agreement, and will not be liable to pay any “construction payment” amount exceeding the “securitisation payment” amount actually received from JEM.

The State may not set off any amounts due and payable to it by the Project Company against the “construction payment”.

The amounts to be paid by the State as the “construction payment” and paid to the State as the “securitisation payment” may be adjusted only if:

- A variation is agreed, under the arrangements described in section 3.2.14, prior to the “full service commencement date”
- There is a “compensation event” and the compensation payable to the Project Company, as calculated in accordance with a schedule to the Project Deed and under arrangements described in section 3.4.11, is agreed to prior to the “full service commencement date”, or
- The State and the Project Company otherwise agree to the adjustment, in writing, prior to the “full service commencement date”.

If the “construction payment” amount is increased or decreased, the “securitisation payment” must be increased or decreased by the same amount, with the rents that would otherwise be payable to the State under the Leases, as specified in the Master Rental Agreement, being adjusted so as to achieve this result, provided JEM confirms in writing that these rent increases are subject to the Securitisation Agreement.

Any and all Project Company rights, titles or interests in the school facilities will pass to the State when the State pays the “construction payment” on the “full service commencement date”.

3.3 Facilities management, cleaning, maintenance and repair services

3.3.1 The Project Company’s general ‘operations phase’ obligations

The Project Company must provide services specified in the *Output Specification* at the ten schools throughout each school’s “operations phase”, from the school’s “commencement date (see section 3.2.15.2) until 31 December 2035 or any earlier termination of the Project Deed.

The services it must provide are:

- Maintenance services for the school buildings, grounds furniture, fittings and equipment, comprising planned preventative and programmed maintenance, reactive maintenance, condition surveys, lift services and pest control
- Security and safety services, including the securing and opening of the schools’ facilities, the provision and operation of security surveillance systems, access controls and responses to security and safety incidents
- Energy and utility supply and management services, including electricity, gas, communications, water, sewerage and drainage services
- Cleaning and waste management services, complying with specified minimum cleaning standards and requirements for programmed and reactive cleaning and waste collection and disposal
- Janitorial and general portering services, including the movement and rearrangement of furniture, fittings and equipment and the setting up and dismantling of audio-visual equipment and public address systems
- The installation, commissioning, maintenance and removal of DET demountable classrooms and other DET demountable buildings (see section 3.3.10), and
- “General” services, comprising:
 - Management support services, including the preparation, maintenance and updating of specified operations-phase management plans, manuals and programs (see section 3.3.5.1)
 - Performance monitoring and reporting services (see section 3.3.5.2), and
 - Helpdesk services.

All of these services must be provided punctually and in accordance with:

- Detailed requirements in the *Output Specification*
- An *Operations Manual*, a *Quality Standards (Services) Plan* and all the other operations-phase management plans that the Project Company must develop for each of the schools (see section 3.3.5.1)
- Good industry practices
- The requirements of all of the project’s major contracts
- All applicable approvals, licences, other consents and other legal requirements
- The detailed designs for each of the schools, and
- In the case of Kelso High School, the *Works Program* and other construction-phase management plans for its “Phase 3” works (the removal of the footings and

services of this school's current demountable buildings and the reinstatement of its games field)

so that:

- Each school is, and at all times remains, fit for its intended purposes—the provision of the Project Company's services and the provision of "education functions" by the State or the DET—but not necessarily for "education functions" of types which the Project Company was not aware of before 20 December 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced school facility construction and maintenance contractor in its situation (as already indicated, these exceptions expressly include any future regular scheduled classes on weekends or between 4:30 pm and 7 am on weekdays), and
- Subject to any planned and programmed maintenance and any express provisions of the Project Deed, including the "relief event" and "compensation event" arrangements described in sections 3.4.10 and 3.4.11, the school facilities are available at all times to the State, the DET, DET and other education staff, contractors and consultants, school students and school visitors for the purposes of foreseeable "education functions".

Consistently with the general commitments to cooperation described in section 3.1.2, the services must also be performed in an "appropriate, effective and efficient, dependable and cooperative" manner.

The Project Company must obtain and maintain all the court, tribunal and statutory approvals, licences and other consents required for the provision of its services, continue to comply (as applicable) with the environmental requirements described in section 3.2.11, allocate all the necessary resources and staff for the provision of its services, pay for the telephone and other electronic communication services it needs to perform its services (the State must pay for the use of other telephone and other electronic communication services at the schools), monitor its performance of the services in accordance with procedures set out in the *Output Specification* and have its compliance with its operations-phase management plans, manuals and programs audited as required by the *Output Specification* (see section 3.3.5.5).

The Project Company must consult with the State, from time to time, on the best method of integrating its services with the schools' "education functions", and the resultant integration requirements must be reflected in each school's *Operations Manual* (see section 3.3.5.1).

In addition, it may not modify its work practices or change the way it provides its services in any way that increases the costs of the "education functions" or any other

aspect of the operation of the schools unless it obtains the prior written consent of the State's Project Director.

If the State or the Project Company wishes to change the *Output Specification*, the services to be provided by the Project Company, the *Operations Manual* (other than under the procedures described in section 3.3.5.1), the Project Company's *Proposals*, a school facility or the use of a school facility (see section 3.3.3), it must use the formal "change procedure" described in section 3.2.14, unless the change constitutes a "minor change" as discussed in section 3.2.14 (see section 3.3.9) or involves the provision of additional "learning spaces" and/or the installation, commissioning or removal of demountable classrooms or other demountable buildings (see section 3.3.10).

However, the State's Project Director or the relevant school's Principal may at any time direct the Project Company to reschedule any maintenance or other services in that month's monthly maintenance program or cleaning schedules for a school. If they do so, the formal "change procedure" will not apply and the Project Company must implement the required rescheduling, amend its relevant schedules, programs and plans and resubmit them to the Project Director and the Principal.

Changes to the services and the *Operations Manual(s)* etc may also be able to be made following a "relief event" or a "compensation event", under the arrangements described in sections 3.4.10 and 3.4.11.

The Project Company must reasonably endeavour to "continuously" improve and increase the cost efficiencies of its services, taking account of the scope of these services, the standards set for each of the services, its own performance, risk management, health, safety and environmental issues, legal requirements, any changes in the law potentially allowing savings to be made (see section 3.4.7), feedback from the State's Project Director, the schools' education staff and other "stakeholders", possible ways of improving the schools' functional and operational performance, education staff satisfaction, the useful life of the school facilities and the Project Company's monitoring and reporting performance, possible ways of reducing whole-of-life costs and, more generally, possible ways of increasing cost efficiencies.

Where necessary, the Project Company must propose changes to the *Operations Manual(s)* (see section 3.3.5.1), and/or wider changes under the "change procedure" (see sections 3.2.14 and 3.3.9), to implement any improvements or cost efficiencies it identifies.

In addition to its obligations to the Project Company under the Facilities Management Contract, the Project Company's operations-phase subcontractor, the Facilities Manager, has made a series of promises directly to the State, under the Facilities Manager Collateral Warranty Deed, concerning, among other things, its compliance with the Facili-

ties Management Contract, the quality of its work, materials and equipment, its selection and supervision of its employees, agents, contractors and suppliers, State inspections of its work, its insurance arrangements and its prompt notification of any material default by the Project Company under the Facilities Management Contract. Identical undertakings must be made by any other significant operations-phase subcontractors appointed by the Project Company under arrangements described in section 3.3.4.2.

3.3.2 Subdivisions, leases and licences

Arrangements for any necessary subdivisions or consolidations of the schools' sites have already been described in section 3.2.2.3 above.

3.3.2.1 Granting of the Leases and Subleases

On each school's "commencement date" (see section 3.2.15.2),

- The State must grant and the Project Company must accept a Lease of the school's site, which must be in a form set out in a schedule to the Project Deed, and
- The Project Company must grant and the State must accept a Sublease of the school's site, which must also be in a form set out in a schedule to the Project Deed.

The Project Deed sets out procedures for the preparation, execution, registration and provision of certified copies of these leases. If the State were to fail to grant a Lease as required, the State and the Project Company would nonetheless be bound as if the Lease and the relevant Sublease had been executed and granted.

The Sublease to be granted by the Project Company for the Kelso High School site will be subject to the Kelso Construction Site Licence granted of 28 February 2006, which will continue, after this school's "commencement date", for any areas required for "Phase 3" of the Kelso works, the removal of the footings and services of this school's current demountable buildings and the reinstatement of its games field.

The Leases and Subleases will apply until as-yet-undetermined dates to be specified in each Lease and Sublease, but until no later than 31 December 2035. All of the Leases and Subleases will be automatically terminate if there is any earlier termination of the Project Deed, and any of the Leases will also automatically terminate if there is any earlier termination of the Sublease for the same school site.

Arrangements concerning the rents payable under the Leases are discussed below. The rent payable by the State to the Project Company under each of the Subleases will be \$1 per year.

3.3.2.2 Initial 'securitised lease' arrangements

As already indicated, the rents payable to the State under the Leases are specified in the Master Rental Agreement. They

will be calculated, at the time of each quarterly rent payment date specified in the Master Rental Agreement, using a formula specified in a schedule to the Master Rental Agreement and input parameters for this formula which are set out in the associated Master Rental Side Letter and were determined on 28 February 2006, as required by the Project Deed, in accordance with the *Financial Close Protocol*.

However, under the Securitisation Agreement, which is part of "securitised lease" arrangements that are designed to address the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project, JEM has agreed that on the project's "full service commencement date" (see section 3.2.17) it will purchase the State's rights to receive:

- The rents payable under the Leases, as calculated under Master Rental Agreement as it stood on 28 February 2006
- Any additional rents payable under the Master Rental Agreement as a result of a variation (see sections 3.2.14 and 3.3.9) or "compensation event" (see section 3.4.11) prior to the "full service commencement date", provided JEM confirms in writing that these rent increases are subject to the Securitisation Agreement, and
- Any "early payout amounts", as calculated using a formula set out in another schedule to the Master Rental Agreement, that would be payable by the Project Company to the State under the Leases if the Project Deed were terminated before 31 December 2035 because of a Project Company default (see section 3.5.4).

The "securitisation payment" to be paid by JEM to the State on the "full service commencement date" for the purchase of these rights will be:

- Calculated using a formula specified in the Payment Directions Deed and input parameters for this formula which are set out in the associated Payment Directions Side Letter and were determined on 28 February 2006, as required by the Project Deed and the Securitisation Agreement, in accordance with the *Financial Close Protocol*, and
- Equal to the "construction payment" to be made by the State to JEM, or as directed by JEM, on the same day, under the Payment Directions Deed and Payment Directions Side Letter (see section 3.2.17), as calculated using another formula specified in the Payment Directions Deed and input parameters for this formula which are set out in the associated Payment Directions Side Letter.

3.3.2.3 Effects of variations and 'compensation events' on the 'securitised lease' arrangements

If there is a variation (see sections 3.2.14 and 3.3.9) or a "compensation event" (see section 3.4.11) prior to the "full

service commencement date” and this results in an increase or reduction in the operations-phase payments the State must make to the Project Company under the arrangements described in section 3.3.7.1,

- The “securitisation payment” and “construction payment” to be paid on the “full service commencement date” must both be adjusted, if JEM is providing debt finance to the Project Company, in accordance with the “estimated cost effect” schedule to the Project Deed, and
- The Master Rental Agreement’s specifications for the rents that would otherwise be payable to the State under the Leases, were it not for the “securitised lease” arrangements, must be adjusted so that the revised “securitisation payment”, as calculated using the relevant formula in the Payment Directions Deed, will be equal to the revised “construction payment”, again as calculated using the relevant formula in the Payment Directions Deed.

Similarly, if there is a variation (see section 3.3.9) or a “compensation event” (see section 3.4.11) *after* the “full service commencement date” and this results in an increase in the operations-phase payments the State must make to the Project Company under the arrangements described in section 3.3.7.1, on the day the variation’s works or any works implemented in relation to the “compensation event” are completed:

- The State must sell JEM, and JEM must buy, the State’s rights to receive any increase in the rents payable by the Project Company under the Leases and the Master Rental Agreement, provided JEM has agreed in writing that this increase in the rents will be subject to the “securitised lease” arrangements
- JEM must make a “securitisation payment” to the State for the purchase of these rights, calculated using the same methodology as that used to calculate the initial “securitisation payment” on the “full service commencement date” but with variables to be determined at the time, in accordance with the “estimated cost effect” schedule to the Project Deed and as notified to the State by JEM
- The State must make a “securitised variation payment” to the Project Company—or to JEM, or as directed by JEM, if the Project Company has borrowed from JEM to fund construction works arising from the variation or “compensation event”—with this payment, calculated in accordance with the “estimated cost effect” schedule to the Project Deed, being equal to JEM’s corresponding “securitisation payment” to the State on the same date, and
- The Master Rental Agreement’s specifications for the rents that would otherwise be payable to the State under

the Leases, were it not for the “securitised lease” arrangements, must be adjusted so that the “securitisation payment” associated with the variation, calculated as described above, will be equal to the “securitised variation payment”, again calculated as described above.

The State will have no obligation to pay any “securitised variation payment” to the Project Company, JEM or as directed by JEM unless it receives the corresponding “securitisation payment” from JEM under the Securitisation Agreement.

The State may not set off any amounts due and payable to it by the Project Company against a “securitised variation payment”.

3.3.3 Uses of the school facilities

The school facilities must be made available for:

- “School uses”, for foreseeable “education functions”, by the State, teachers, other DET employees, contractors, consultants and agents and students, as the first priority
- “Community uses”—in accordance with the DET’s 2004 *Community Use of School Facilities Policy Statement and Implementation Procedures* and any later amendments or replacements, but excluding uses introduced or facilitated by the Project Company—as the second priority, and
- Other (“third party”) uses, by users making arrangements with the Project Company, as a third priority.

Each school must be available for “school uses”, 24 hours per day and seven days per week, both on regular school days and at any other times notified to the Project Company from time to time by the DET or the school’s Principal, who must take account of the requirements of the Project Company’s *Operations Manual* for the school (see section 3.3.5.1).

However, as already indicated, the Project Deed makes it clear that the schools’ “foreseeable” “education functions”—and hence their “school uses”—do not include any regular scheduled classes on weekends or between 4:30 pm and 7 am on weekdays.

The State’s Project Director must notify the Project Company at least one month before each school’s “commencement date” (see section 3.2.15.2), and subsequently by no later than December each year, of the school term dates for the following year and, in particular, “critical” areas and periods for the uninterrupted delivery of the Project Company’s services, such as halls during examination periods. These “critical periods” may not exceed 40 days per year. The Project Company must ensure these requirements are taken into account in its *Operations Manuals*.

Each school must also be available for “community uses”, 24 hours per day and seven days per week, at any times notified to the Project Company from time to time by the DET or the school’s Principal, who again must take account of the

requirements of the Project Company's *Operations Manual* for the school.

The State's Project Director or the schools' Principals must give the Project Company copies of any agreements entered into by or on behalf of the State for community uses of the schools, and the Project Company must take these community use requirements into account in its *Operations Manuals*. The Project Director or the schools' Principals must also, as much as is practicable, facilitate direct agreements between the Project Company and each community group using the facilities, and notify the Project Company of any suspension or termination of a community use.

The community use agreements entered into by the schools and the Project Company may provide for direct payments by the community group users or the school principal to the Project Company to cover any additional costs to the Project Company from this use of the school facilities. If they do not, the State must pay these additional costs to the Project Company as part of its regular monthly payments described in section 3.3.7.1 below. Apart from this liability, the State (or the school Principal on its behalf) will be entitled to retain any income received from community groups for the use of the school facilities.

The Project Company may enter into agreements for other ("third party") uses of the school facilities provided:

- These uses do not involve foreseeable "education functions" other than those provided by the State or the DET, are consistent with the school's development approval and other approvals, licences and consents and any other legal requirements, and are not reasonably expected to impair the DET's ability to provide foreseeable "education functions" or limit or hinder "school" or "community" uses of the school facilities
- The State's Project Director has granted his or her prior written consent, and
- The Project Company notifies the Project Director of any suspension or termination of a third party use.

The Project Company may charge fees to third party users. Its net income from third party uses, after deducting its additional costs from these uses, must be shared 50:50 with the State, under procedural arrangements detailed in the Project Deed. If there is a dispute under these arrangements and the State's Project Director issues a formal notice of the dispute, the matter must be dealt with under the dispute resolution procedures described in section 3.4.8.

Regardless of any earlier approvals, the State's Project Director may at any time, by issuing a notice to the Project Company, prohibit the use of any school facility by any

person or on any occasion if he or she reasonably believes this use:

- Does not comply with DET design standards for school facilities, as specified in the *Output Specification*, or any other relevant Commonwealth, State or DET policies, rules, guidelines, procedures or requirements
- Is not being provided in an "appropriate" manner
- Might embarrass the State or cause a loss by the State
- Might interfere with foreseeable "education functions" or conflict with the Project Director's requirements for "school" or "community" use, or
- Is incompatible with other uses of the school facilities, or if the use in question is a "third party" use and the requirements described above are no longer being met.

3.3.4 Operations phase workforce and subcontractors

3.3.4.1 *Employment conditions*

The Project Company must comply with a series of conditions concerning its own employees, the employees of the Facilities Manager, the employees of any other operations-phase "subcontractors" it appoints to provide its services, under arrangements summarised in section 3.3.4.2 below, and the employees of these subcontractors' "sub-subcontractors". (The term "employee" includes anyone engaged in the project, including independent contractors.)

Under these conditions,

- All employees must be appropriately qualified, skilled and experienced for their assigned tasks
- The Project Company must comply with any DET requirements, policies and procedures for staff conduct, ensure its officers, employees, agents, subcontractors and sub-subcontractors do likewise and take disciplinary action against any employee who breaches the DET's requirements, policies and procedures, notifying the State's Project Director in writing
- All employees must:
 - Satisfy all relevant requirements of the Child Protection (Prohibited Employment Act (NSW), the Child Protection (Offenders Registration) Act (NSW), the Commission for Children and Young People Act (NSW) and the Education Act (NSW), including their training requirements
 - Successfully complete a "working with children" check, and
 - Comply with any other legal and DET requirements, policies and procedures for employees in child-related employment
- The Project Company must investigate the criminal, medical and employment histories of all prospective

employees and make the findings of these investigations available to the State's Project Director before job offers are made, undertaking further investigations and providing further information if he or she directs it to do so

- The Project Director may direct the Project Company, within 20 business days, to deny employment if the Project Company's investigation(s) indicate a prospective employee would not be an appropriate employee at a school
- The Project Director may carry out his or her own investigations, including police and security checks, with the consent of the prospective employee(s), and require the dismissal of employees from the project if they have not complied or do not comply with the requirements described above or are unsuitable or unqualified
- The Project Company and its subcontractors and sub-subcontractors must establish and comply with "human resources" and industrial relations policies, provide healthy and safe working conditions and comply with employment laws
- The Project Company must regularly inform the Project Director about any industrial action that might affect the services and promptly inform him or her if industrial action causes a suspension or cessation of the services, providing information about the actions it has taken or proposes to take to overcome or minimise the effects, and
- The Project Company and its subcontractors and sub-subcontractors will otherwise be entirely responsible for the employment and conditions of their employees.

3.3.4.2 Subcontracting

In addition to the Project Company's Facilities Management Contract with the Facilities Manager, the Project Company may enter into contracts with other "subcontractors" for the performance of any of its services.

If it does so, the Project Company must:

- Ensure the subcontractor and any sub-subcontractor(s) are reputable, have (or have access to) sufficient experience and expertise to perform their obligations to the standards required by the Project Deed and take out workers' compensation, public liability and professional indemnity insurance consistent with the Project Company's own insurance obligations under the Project Deed (see section 3.4.2.1), as applicable to the relevant services
- Comply with its obligations under the subcontract and ensure the subcontractor does likewise, both under the subcontract and under any sub-subcontract(s)

- Obtain the State's prior written consent if the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or sub-subcontractor and its related corporations, will exceed \$250,000 per year (indexed to the CPI from the December quarter of 2005), if the term of the subcontract will exceed five years or if the State's Project Director nominates the relevant services as "critical" during the term of the Project Deed or "important" to the operation of one or more of the school facilities after 31 December 2035 or any earlier termination of the Project Deed (the Project Deed calls these operations-phase subcontracts and sub-subcontracts "**material subcontracts**")
- In the case of "material subcontracts",
 - Promptly give the State's Project Director a copy of each proposed or executed subcontract or sub-subcontract
 - Ensure the subcontractor executes a Collateral Warranty Deed, in favour of the State, on terms set out in a schedule to the Project Deed and equivalent to those already executed by the current Facilities Manager under the existing Facilities Manager Collateral Warranty Deed
 - Obtain the Project Director's prior written consent if any departure from or variation, amendment, assignment, replacement or termination of the subcontract or any compromise or waiver of the Project Company's rights under the subcontract might affect the rights of the State or the ability of the Project Company to satisfy its obligations under the project's contracts, and
 - Immediately notify the Project Director of any termination or material amendment of the subcontract
- Ensure the State obtains the benefit of any warranties and guarantees offered by the subcontractor and any suppliers, and
- Provide monthly reports to the Project Director on its payments to the subcontractor and any formal disputes with the subcontractor.

These Project Company obligations also apply in the case of the existing Facilities Management Contract, which is a "material subcontract". If the new subcontractor is *replacing* the current Facilities Manager, the Project Company must also ensure the new subcontractor executes a Facilities Management Side Deed with the State on terms set out in a schedule to the Project Deed and equivalent to those already executed by the current Facilities Manager under the existing Facilities Management Side Deed.

3.3.5 Operations phase management plans, reports, surveys, inspections and audits

3.3.5.1 Management plans and Operations Manuals

As already indicated in section 3.3.1, the Project Company must develop, complete, comply with and from time to time amend and update a large number of operations-phase plans, programs, protocols and manuals.

In particular, it must develop, complete, comply with and from time to time amend and update:

- An *Operations Manual* for each school, detailing how it intends to comply with its services obligations, in accordance with the *Output Specification* and a *Quality Standards (Services) Plan* it must also develop for the school. Among other things, this *Operations Manual* must incorporate all the plans, programs, protocols and manuals stipulated in the *Output Specification* for each of the services listed in section 3.3.1, including a *Maintenance Program* setting out all planned maintenance activities for the next year and 16 other individual plans, programs and manuals expressly specified in the *Output Specification*, and
- A *Programmed Maintenance Plan* for each school, detailing its planned preventative and programmed maintenance services for the next five years.

The Project Company must submit a draft of its initial *Operations Manual* for each school, for review by the State's Project Director, at least two months before the school's "commencement date" (section 3.2.15.2), and must provide any further information on the development of the draft *Manuals* reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within ten business days of receiving the drafts. If he or she does so, the Project Company must amend the draft *Operations Manual(s)* to reflect these comments and recommendations and resubmit them to the Project Director, and may not consider them finalised unless and until no further comments are received.

If the Project Company and the Project Director cannot agree on appropriate amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

If the Project Director or any other representatives of the State choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the *Operations Manual(s)*, and the Project Company will remain solely responsible for ensuring

its services comply with the *Output Specification* and the other requirements of the Project Deed.

During the course of the operations phase of the project the initial *Operations Manuals*, including their *Maintenance Programs*, must be updated by the Project Company, whenever necessary and in any event at least once every 12 months and by no later than 31 January each year, to take account of any changes in law (see section 3.4.7), any changes in the projects approvals, licences and other consents, any changes in government, council, government department, statutory authority, court or tribunal requirements or the requirements of utility providers, any changes in the manner in which the relevant school facilities are being used, any changes in the ways schools' foreseeable "education functions" are being provided, any changes in good industry practices, any variations (see sections 3.2.14 and 3.3.9), any omissions from or deficiencies in the *Manuals* and, more generally, as required by the *Output Specification*. Each updated *Operations Manual* and *Maintenance Program* must be promptly submitted for review by the State's Project Director, along with any other strategies, methodologies, variations or amendments the Project Company has developed for "continuous improvement" in its services (see section 3.3.1).

Each school's five-year *Programmed Maintenance Plan* must also be reviewed and updated by the Project Company as part of its annual updating of the *Operations Manuals*, with the proposed modifications again being submitted to the Project Director for his or her review.

The schools' annual *Maintenance Programs* may be materially amended only with the prior written approval of the Project Director.

The Project Director may require the Project Company, as part of its development and updating of the *Operations Manuals*, to meet and consult with relevant "stakeholders" and/or conduct workshops and meetings and make presentations and submissions to the Project Director, other representatives of the State, other "stakeholders" and their consultants and advisers. If he or she does so, the Project Company must address the comments and requirements of these parties and accommodate them in the *Manuals*, provided they are consistent with the Project Deed.

The Project Company must provide up-to-date copies of the relevant *Operations Manuals* to the schools' Principals, and must also ensure the State's Project Director, all other persons responsible for the administration, management or implementation of the project on behalf of the State, all DET and State employees, agents, contractors, subcontractors, consultants, licensees and authorised officers involved in providing "education functions" at the schools, all other

relevant DET and State employees, agents and contractors and all relevant “community users”, students and State or DET invitees at the schools are:

- Made aware of relevant provisions of the *Operations Manual(s)*, and
- Given adequate training concerning the Project Company’s practices and procedures in providing its services, including the operation of its helpdesk.

If the State’s Project Director reasonably believes:

- Operations complying with an *Operations Manual* would no longer comply with the Project Deed or would disrupt or increase the costs of the school’s foreseeable “education functions”, or
- The Project Company has failed to update an *Operations Manual* as required,

he or she may direct the Project Company to amend or further amend the *Operations Manual*, telling it why the amendments are required and specifying a reasonable time within which they must be made. The Project Company must then comply with this direction and resubmit an amended version of the *Operations Manual* for review by the Project Director.

3.3.5.2 Project Company monitoring and reports

The Project Company must monitor its performance of its services in accordance with detailed requirements in the *Output Specification*.

The *Output Specification* specifies many requirements for regular (daily, monthly and annual) and event-triggered reporting to the State’s Project Director on specific aspects of the Project Company’s services, too numerous and detailed for inclusion in this summary of the contracts.

The Project Company must give the State’s Project Director at least quarterly reports verifying its systems and reconciling its helpdesk records with monthly *Performance and Payment Reports* which it is required to provide to the Project Director as part of monthly payment arrangements described in section 3.3.7.1.

It must also report on the findings of annual asset condition surveys which it must conduct at each of the schools to identify future planned maintenance and repair requirements.

In addition, as already indicated, the Project Company must give the State’s Project Director monthly reports on its payments to its subcontractors (see section 3.3.4.2) and any disputes with these subcontractors, and financial reports are also required, as described in section 3.4.3 below.

3.3.5.3 Customer satisfaction surveys

The Project Company must ensure a “customer satisfaction survey” is carried out at least once each year, through a ques-

tionnaire distributed to the schools’ teachers, other education staff and other users and “stakeholders” or another survey method agreed to by the State’s Project Director, in order to:

- Assess respondents’ satisfaction with the quality, efficiency and effectiveness of the Project Company’s services
- Monitor the Project Company’s compliance with the *Output Specification*, and
- Assist the Project Company in meeting its “continuous improvement” obligations (see section 3.3.1).

These surveys must comply with all relevant legal requirements. Subject to this stipulation, the Project Director must provide reasonable assistance and information to the Project Company for the surveys to be carried out.

The Project Company must prepare a summary of each survey’s results, in a form reasonably required by the Project Director, within 30 business days of its completion, and must provide any further details the Project Director reasonably requires, including copies of completed questionnaires.

3.3.5.4 Inspections

The State’s Project Director and his or her representatives may carry out inspections of the schools and any related systems, registers, manuals, records, plans and programs to assess whether the Project Company is complying with its obligations under the Project Deed.

Unless there are circumstances potentially leading to termination of the Project Deed under the arrangements described in sections 3.5.3 and 3.5.4, or unless an earlier inspection has revealed any other non-compliance(s) with the Project Deed, these inspections may be carried out at any individual school no more than twice each calendar year.

The Project Director must give the Project Company at least five business days’ written notice of each inspection, and must consider any reasonable requests by the Project Company for the inspection to be carried out on a different date because it would materially prejudice its ability to provide its services, provided these requests are made at least two business days before the scheduled inspections.

The Project Company must provide reasonable assistance for the inspections, including making records etc available, and the inspectors must minimise their disruption of services as much as reasonably practicable.

If an inspection reveals a breach of the Project Deed’s requirements, the Project Director must notify the Project Company, providing details and specifying a reasonable period for the breach to be remedied. The Project Company must comply with this notice and remedy the breach, and the Project Director may carry out a further inspection to check whether it has.

The State will bear the costs of these inspections unless such a breach is discovered, in which case the Project Company must reimburse these costs and any reasonable associated administrative costs, or unless there are continuing circumstances potentially leading to termination of the Project Deed under the arrangements described in sections 3.5.3 and 3.5.4.

3.3.5.5 Independent and State performance audits

In addition to its own monitoring of its performance, the Project Company must:

- Have its compliance with its management plans, programs, manuals, procedures, standards, policies, systems and records audited at least every 12 months by an independent auditor acceptable to the State's Project Director, with the Project Director and his or her representatives being entitled to be present during these audits, and deliver the audit reports to the Project Director within a reasonable time, and
- More specifically, have the implementation and integrity of its monitoring, reporting and monthly payment calculation mechanisms (see section 3.3.7.1) audited by an independent auditor acceptable to the State's Project Director during the first quarter (or part-quarter) of each school's operation and then at least once every 12 months.

Further, in addition to its inspection rights, described above, the State may:

- Require additional audits of whether the Project Company's management plans, programs, manuals, procedures, standards, policies, systems and records comply with the *Output Specification*, with the costs being borne by the State unless an audit reveal non-compliance(s), in which case the Project Company must reimburse the State for the costs of the audit and any subsequent audit to confirm the non-compliance(s) have been rectified, and
- At any time, audit the Project Company's compliance with its *Operations Manuals* or any part of these *Manuals*, giving it at least 20 business days' notice.

Financial audits are also required, as described in section 3.4.3 below.

3.3.6 Notification of safety and industrial relations issues, emergencies, defects and damage

Throughout the operations phase of the project the Project Company must:

- Identify and enquire into any activity performed as part of its services which might give rise to health and safety risks for the schools' teachers and other education staff, its own employees, agents and consultants, its subcontractors and subsubcontractors and their employees,

agents and consultants, and notify the State's Project Director as soon as reasonably practicable if any are identified

- Identify and enquire into any accidents or other incidents involving any loss, injury or damage to persons or property (including any deaths), or the risks of such a loss etc, in connection with the services, and again give the Project Director a detailed written report as soon as reasonably practicable
- Regularly inform the Project Director about any industrial action that might affect its services
- Promptly inform the Project Director if industrial action causes a suspension or cessation of the services, providing information about the actions it has taken or proposes to take to overcome or minimise the effects
- Promptly inform the Project Director if industrial action affecting the Project Company, the Facilities Manager, any other subcontractors or sub-subcontractors or any of their employees might impede the schools' foreseeable "education functions"
- Immediately inform the Project Director about any events or circumstances reasonably likely to constitute or cause an "emergency" as defined in the Project Deed, meaning any situation which, in the Project Director's opinion,
 - Prevents the provision of the services under normal circumstances
 - Seriously threatens, has caused or will cause material damage or disruption to personal health and safety, the environment, property or the safe and secure provision of the services, or
 - Will require the provision of materially greater services,

and the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of this "emergency"

- Immediately inform the Project Director about any other incident causing the suspension or cessation of any part of the services or which might materially impede the provision of foreseeable "education functions", and the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of the incident, and
- Promptly inform the Project Director about any material defects or damage to the school facilities if the cost of repairs is more than \$3,000, indexed to the CPI from the December quarter of 2005, informing him or her the actions it is taking to correct the damage or defect and the estimated time the correction will require (see also section 3.4.2.2).

3.3.7 Monthly payments

3.3.7.1 Monthly 'service payments' by the State to the Project Company

The State must make payments to the Project Company for the period between each school's "commencement date" (section 3.2.15.2) and the start of the next calendar month, and then for each successive calendar month until 31 December 2035 or any earlier termination of the Project Deed.

Each of these payments will comprise:

- A performance-based "monthly service payment" calculated in accordance with a "service payment" schedule to the Project Deed, and
- Adjustments to reflect any amounts owing to the State by the Project Company under other provisions of the Project Deed, if the State chooses to exercise its rights of set-off, and/or any GST.

Under the "service payment" schedule to the Project Deed, the starting bases for calculating each month's "monthly service payment", in all cases prior to any performance-based adjustments, are:

- A single "monthly service fee" for all of the schools then operating, calculated by:
 - Applying an indexation factor, based on movements in the Consumer Price Index since the December quarter of 2005, to a defined "indexable" component of an "initial quarterly service payment" that is specified in the private sector parties' "base case" financial model for the project and in the Project Deed's "service payments" schedule
 - Adding this indexed amount to any "unindexable" component of the "initial quarterly service payment", again as specified in the project's "base case" financial model and the "service payments" schedule, to produce a "quarterly service payment" amount for the calendar quarter under consideration (under the "base case" financial model at the time of financial close on 28 February 2006, none of the "initial quarterly service payment" was "unindexable")
 - Converting this "quarterly service payment" amount to a monthly amount, for the particular month in question, on the basis of the number of days in that month (or, in the case of the first school's opening, the portion of the month that it is open), and
 - Adjusting this monthly amount—by multiplying it by a "ramp up factor", as specified in the "service payments" schedule, that reflects the relative capital costs of the schools that have opened so far, and will progressively increase to 100% as the schools

are progressively completed—to derive a monthly amount which the Project Deed calls the "monthly service fee".

- A "monthly lifecycle payment", fixed at 6.752665% of the month's "monthly service fee".
- A quarterly electricity, gas, water and sewerage "energy component", payable only for the third month of each quarter, calculated using prices and estimated quantities that are specified in the "base case" financial model and a formula specified in the "service payments" schedule (the prices are subject to adjustments following "benchmarking" every five years, as described in section 3.3.8).
- A quarterly "insurance component", also payable only for the third month of each quarter, calculated by adding the quarterly components of annual insurance premiums for each operating school's public and products liability, third party property, third party motor vehicle and industrial special risks insurance, as benchmarked every three years (see section 3.3.8) and as specified for each school in a table in the "service payments" schedule (see sections 3.3.8 and 3.4.2.1).
- A "demountable adjustment" for the month, calculated by applying unit prices specified in the "service payment" schedule to the numbers of demountable classrooms and other demountable buildings ("modular design ranges") installed at, serviced at and removed from the schools during the month.
- A "non-usage rebate adjustment" for the month, calculated by applying a rebate rate specified in the "service payment" schedule to any "surplus areas" at the schools, as agreed between the State's Project Director and the Project Company, which have not been used for foreseeable "education functions".

The actual monthly "service payment" to be made by the State is then calculated, in accordance with a formula in the "service payment" schedule, by:

- Adding:
 - The month's "monthly service fee"
 - The month's "energy component" (if any), "insurance component" (if any) and "demountable adjustment" (if any), as adjusted in each case to reflect quarterly changes in the CPI since the December quarter of 2005
- Subtracting, from this sum,
 - The month's "monthly lifecycle payment" (as described in section 3.3.7.2 below, this amount is to be paid instead into a "lifecycle sinking fund"), and
 - The month's "non-usage rebate adjustment" (if any), as adjusted to reflect quarterly changes in the CPI, and

- Subtracting, from the resultant amount, deductions, described below, for:
 - Any “**whole school unavailability events**” during the month, as defined in the “service payment” schedule
 - Other “**unavailability failures**” during the month, with the amount deducted being adjusted to reflect quarterly changes in the CPI
 - Any “**performance failures**” during the month, including failures contributing to a “whole school unavailability event” and again with the amount deducted being adjusted to reflect quarterly changes in the CPI, and
 - Any “**reporting failures**” (failures to accurately report earlier “unavailability failures”, “performance failures” or “reporting failures”) during the month, again with the amount deducted being adjusted to reflect quarterly changes in the CPI.

A “**whole school unavailability event**” will arise if, on any 7:00 am to 4:30 pm school day, more than 30% of a school’s “education function” “areas” or 65% of its “toilet areas”, as defined in the *Output Specification*, or 25% of its “critical areas” (such as halls during examination periods), as nominated by the State’s Project Director (see section 3.3.3), fail to meet minimum maintenance and performance standards so as to ensure the areas’ availability, as detailed in the *Output Specification*, for two hours or more.

If such an event occurs, and the Project Company fails to complete any temporary rectification measures it may have proposed within a period accepted by the State’s Project Director, the “monthly service payment” to the Project Company will be reduced by the proportion of the “monthly service fee” that would otherwise be paid for that school for that day, *on top of* any reductions for “unavailability failures” (at other times) and “performance failures” (at any time) under the arrangements described below.

“**Unavailability failures**” are *any* failures to comply with minimum maintenance and performance standards, as specified in detail in the *Output Specification*, so as to ensure the availability of a school “area”, as defined and specified in detail in the *Output Specification*.

Under arrangements set out in detail in the “service payment” schedule to the Project Deed, the “monthly service payment” to the Project Company will be reduced, through an “unavailability deduction”, if an “unavailability failure”:

- Is not temporarily rectified within a period agreed to by the State’s Project Director, if the Project Company has proposed and he or she has accepted temporary rectification measures, or
- Is not permanently rectified within a rectification period specified in a “priority table” in the *Output Specification*,

or (if temporary rectification measures have been agreed) an amended period agreed to by the Project Director and the Project Company

unless:

- Alternative accommodation of the required standards has been provided for the affected “education functions” and has been accepted by the Project Director
- The Project Director is reasonably satisfied the “unavailability failure” has directly resulted from a “compensation event” (see section 3.4.11) or planned preventative and programmed maintenance in accordance with the school’s current five-year *Programmed Maintenance Plan* (see section 3.3.5.1)
- A “performance failure” has affected the same “area” of the school on the same day and the associated “performance deduction” (as described below) is greater than the “unavailability deduction” would be, or
- In the case of Kelso High School, the “unavailability failure” is a failure to make part of the site for that school’s “Phase 3” works available at any time before 29 August 2008 or any extended target date for the completion of these works

or unless (and to the extent that) the “unavailability” deduction period overlaps with a day for which a “whole school unavailability deduction” applies.

If an event that has caused an “unavailability failure” recurs in the same “area” within three school days of the rectification of the initial failure, the second “unavailability failure” will commence immediately, with no allowance for a second rectification period.

The “unavailability deduction” for each “unavailability failure” is to be calculated by:

- Multiplying monetary amounts set out in a table in the “service payment” schedule—with higher amounts being specified for more important “areas” and (within each category of “area”) higher amounts for “unavailability failures” with more serious consequences—by the duration of the period between the deadline for rectification and the achievement of rectification, with each school day in this “deduction period” after the third school day being counted as two day unless the failure has resulted from a “relief event” (see section 3.4.10)
- Multiplying the result by a “ratchet factor” of 1.5 for the third or subsequent “unavailability failure” in the same “area” within any three-month period, not counting any failures directly resulting from a “relief event” (see section 3.4.10), and
- Adding \$300 (indexed to the CPI) if a “critical area”, such as a school hall during an examination period, has been unavailable (see section 3.3.3).

This deduction will be halved, however, for any “unavailability failures” at a school during its first three months of operations (i.e. during the three months following its “commencement date”), and there will also be a variable cap on the school’s total daily “unavailability deduction” and “whole school unavailability deduction” if the failure has resulted from a “relief event” (see section 3.4.10), with the cap depending on the Project Company’s insurance coverage and the seriousness of the effects.

“**Performance failures**” are any failures to meet “key performance indicators” (“KPIs”) that are specified in the *Output Specification* for all the services described in section 3.3.1.

Under arrangements set out in detail in the “service payment” schedule to the Project Deed, if a “performance failure” is not rectified within timeframes (called “repeat performance failure rectification periods”) that are stipulated for each KPI in the *Output Specification*, the “monthly service payment” to the Project Company will be reduced, through a “performance deduction”, *unless*:

- The Project Director is reasonably satisfied the “performance failure” has directly resulted from a “compensation event” (see section 3.4.11) or planned preventative and programmed maintenance in accordance with the school’s current five-year *Programmed Maintenance Plan* (see section 3.3.5.1)
- An “unavailability failure” has affected the same “area” of the school on the same day and the associated “unavailability deduction” (as described above) is greater than the “performance deduction” would be, or
- In the case of Kelso High School, the “performance failure” has occurred on any part of the site for that school’s “Phase 3” works at any time before 29 August 2008 or any extended target date for the completion of these works.

The “performance deduction” for each “performance failure” is to be calculated by multiplying:

- A monetary amount of between \$20 and \$100 per incident, as set out in a table in the “service payment” schedule, depending on the seriousness of the failure, as categorised for each KPI in the *Output Specification*
- The number of “repeat performance failure rectification periods”, as specified for the relevant KPI in the *Output Specification*, which have elapsed since the failure was first notified to the Project Company’s helpdesk, *plus* one, and
- A “ratchet factor” of 1.5 for the third or subsequent “performance failure” for the same KPI within any three-month period, not counting any failures directly resulting from a “relief event” (see section 3.4.10).

Again, however, this deduction will be halved for any “performance failures” at a school during its first three months of operations.

“**Reporting failure**” deductions will be applied if there has been a failure to correctly report an “unavailability failure”, “performance failure” or “reporting failure” that would otherwise have led to a deduction in a previous month. The deductions to be applied, as specified in the “service payment” schedule, are 50% on top of the deductions to be made for the unreported failures.

It is possible, at least in theory, for the total amount deducted from a performance-based monthly payment by the State to the Project Company as a result of “unavailability failures”, “performance failures” and “reporting failures” be as high as the month’s “monthly service fee”, but it may not exceed this amount. (The overall “monthly service payment” to be paid by the State could still be less than zero, however, because of the required withholding of the “monthly lifecycle payment” and the other adjustments and potential deductions discussed above, in which case the Project Company would have to pay this amount to the State, as described below.)

Under procedural requirements in the Project Deed for implementing these payment arrangements,

- The bases for the payment adjustments and deductions, if any, must be presented in a monthly *Performance and Payment Report* which the Project Company must submit to the State’s Project Director before the eighth day of each operating month
- The Project Company must submit an invoice in a form specified in the Project Deed
- The State must pay the Project Company within 20 business days of receiving both the *Performance and Payment Report* and this invoice, unless the invoice shows a net amount is owed to the State (as a result of the combined effects of the adjustments and deductions), in which case the Project Company must pay the State within 20 business days unless the State’s Project Director permits it to carry the amount over to the following month, offsetting the State’s future liabilities
- In making these monthly payments the State may set off any amounts due and payable to it by the Project Company (the Project Company has no equivalent set-off rights), and
- Any late payments will attract daily interest at 3% pa above the BBSY bank bill rate.

If the State’s Project Director disputes any amount set out in a monthly invoice, the State may withhold its payment of this amount while the issue is resolved under the dispute resolution procedures described in section 3.4.8, but it will be liable to pay the Project Company daily interest (at 3% pa

above the BBSY bank bill rate) if it is determined Company was entitled to the disputed amount. Conversely, if it is determined that the Project Company has been overpaid, it must pay interest at this rate on the overpaid amount, on top of its repayment to the State.

Analogous provisions apply for any disputes about any set-off deductions by the State.

3.3.7.2 Lifecycle sinking fund

As already indicated in section 3.3.7.1, the monthly “service payments” to be paid to the Project Company by the State exclude the month’s “monthly lifecycle payment”, a sum fixed at 6.752665% of the month’s “monthly service fee”, and the State must instead pay this amount into a “lifecycle sinking fund” account.

The Project Company may withdraw funds from this interest-bearing account at any time, by presenting an invoice to the State, but not more than once per calendar month. Any amount remaining in the account on 31 December 2035 or upon any earlier termination of the Project Deed will remain the property of the State.

3.3.8 Benchmarking and market testing of services and insurance and energy costs

The Project Company may—and, if so directed by the State’s Project Director, must—conduct a “benchmarking” exercise, to determine the relative quality and competitiveness of its cleaning, security, grounds maintenance and pest control services and any other “soft” facilities management services nominated by the Project Director, on any or all of 28 February 2011, 28 February 2016, 28 February 2021, 28 February 2026 and 28 February 2031.

Any such “benchmarking” exercise must be conducted in good faith and in accordance with procedures specified in the Project Deed and a schedule to the Project Deed and agreed between the State and the Project Company, with each party bearing its own costs.

Under these procedures the differences (if any) between the Project Company’s costs for each of the benchmarked services and the costs of “reputable organisations possessing an appropriate degrees of skill resources, reputation and financial standing” in the provision of equivalent services are to be agreed between the Project Director and the Project Company. If they cannot agree, the Project Director may require the relevant services to be subjected to competitive market testing, as described below. If he or she does not take this course, either party may refer the matter for determination under the dispute resolution procedures summarised in section 3.4.8.

Competitive market testing will also be required if the cost difference for any service disclosed by the benchmarking exercise is greater than 15%, or if there is a determination

under the dispute resolution procedures that market testing of any of the benchmarked services is required.

Timeframes and procedures for any market testing—including the “grouping” of the services to be tendered, the identification and selection of tenderers and the awarding of contract(s) to the tenderer(s) identified by the Project Company as providing the best value for money—are set out in the same schedule to the Project Deed. The successful tenderer(s) will replace the Project Company’s previous subcontractor(s) or sub-subcontractor(s) in providing the relevant services.

If a benchmarking exercise (or any subsequent market testing exercise) shows the Project Company’s costs for any of the particular services in question have been more than 5% above or below the market costs of providing the same services, there must be adjustments to the State’s monthly “service payments” to the Project Company reflecting this difference, using procedures set out in the schedule to the Project Deed, and the private sector parties’ “base case” financial model for the project must also be amended, so as to preserve the original “base case” equity return.

If the difference between the Project Company’s costs and the market costs is 5% or less, no adjustments will be made.

The Project Deed also sets out arrangements for the “benchmarking” of the Project Company’s public and products liability, third party property, third party motor vehicle and industrial special risks insurance costs every three years after the “commencement date” of the first of the schools to open (see section 3.4.2.1) and the “benchmarking” of its electricity, gas and water costs every five years after this date.

If the benchmarked insurance premium costs are higher or lower than their equivalents (as adjusted for changes in the CPI) on the first school’s “commencement date” or the last time the “insurance component” of the State’s monthly “service payments” to the Project Company was adjusted (see section 3.3.7.1), after ignoring any increases or decreases caused by the performance or insurance history of the Project Company or its subcontractor(s) and sub-subcontractor(s), this “insurance component” of the monthly “service payments” to the Project Company must be correspondingly adjusted.

Similarly, if the benchmarked electricity, gas and/or water costs are 10% or more higher or lower than the unit prices used to calculate the “energy component” of the State’s monthly “service payments” to the Project Company (see section 3.3.7.1), the “energy component” must be adjusted by the amount by which the benchmarks would increase the “energy component” beyond 100% of its current value or decrease it beyond 90% of its current value.

3.3.9 Changes to the schools or services

If the State or the Project Company wishes to make any change to a school's facilities, the *Output Specification*, the services to be provided by the Project Company (other than the rescheduling of services by the State's Project Director or a school Principal as described in section 3.3.1) or an *Operations Manual* (other than under the procedures described in section 3.3.1 and 3.3.5.1), it may do so only in accordance with the Project Deed's formal "change procedure", set out in a schedule to the Project Deed, which has already been discussed in section 3.2.14. (Separate arrangements for the provision of demountable classrooms are described in section 3.3.10 below.)

As indicated in section 3.2.14, the only exceptions to the requirement to use the "change procedure", other than those referred to above, are "minor changes", directed by the State's Project Director, with an estimated cost effect—as determined in accordance with a schedule to the Project Deed, and in aggregate in the case of changes which in substance amount to a single variation—of \$10,000 or less, indexed to the CPI from the December quarter of 2005. In these cases, the Project Company will not be entitled to any other relief from its obligations concerning the changed matters, and will be entitled to be compensated only for the amounts it actually incurs in relation to the change.

If a variation *prior to* the "full service commencement date" (see section 3.2.17) results in an increase or reduction in the monthly "service payments" the State must make to the Project Company (see section 3.3.7.1), or if a variation *after* the "full service commencement date" results in an increase in these monthly "service payments", the project's "securitised lease" arrangements must be adjusted as described in section 3.3.2.3.

3.3.10 Additional 'learning spaces' and demountable classrooms

The *Output Specification* envisages the provision of additional "learning spaces"—classrooms and other rooms used by students—during the operational phases of the school facilities, to cater for future growth in the schools' enrolments.

If additional learning spaces are required at a school facility, the State's Project Director must give the Project Company at least three months' notice of this, specifying the date by which the new spaces are required. The Project Company must then:

- Provide the additional learning spaces in accordance with the *Output Specification*, ensuring they are fully functional by the date specified in the Project Director's notice, and

- Ensure its services for the additional spaces fully comply with the Project Deed.

If the Project Company proposes to use DET "demountable units" (demountable learning spaces) or "modular design ranges" (other DET-owned demountable buildings) in responding to the Project Director's requirements, as provided for in the designs of the schools, it must notify the Project Director of this within two weeks of receiving his or her notice.

The State must then decide whether it wishes to use "demountable units" or "modular design ranges" and deliver the necessary units and/or modules, in a condition satisfying the *Output Specification's* standards at the time, at least two weeks before the deadline for providing the extra learning spaces.

The Project Company will be fully responsible for inspecting, installing, commissioning and providing operational services for the delivered units and/or modules.

It will be paid for its provision of the additional learning spaces and associated services through the "demountable adjustments" that will form part of its monthly "service payments", under the arrangements described in section 3.3.7.1. The provision of the extra learning spaces will not amount to a variation under the arrangements described in sections 3.2.14 or 3.3.9, and the Project Company will not be able to make a claim under the "change procedure" described in section 3.2.14.

If the State fails to deliver the necessary demountable units and/or modular design ranges on time and in a condition satisfying the *Output Specification's* standards, and this failure is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees, the Project Company may be entitled to claim compensation and/or other relief from its Project Deed obligations under the "compensation event" arrangements described in section 3.4.11.

3.3.11 Special arrangements for the last three years of operations

Approximately three years before the termination of the Project Deed on 31 December 2035, and again approximately one year before this date, the State's Project Director may procure an independent audit of the schools' facilities and sites to:

- Assess whether they have been and are being maintained as required under the Project Deed, and
- Determine the amount of money that will need to be spent during the remaining period to 31 December 2035—not counting any amounts that are to be paid by

the Project Company during this period for scheduled maintenance or lifecycle replacements—in order to:

- Ensure the schools’ facilities and sites will be in a specified “handover condition”, with specified residual lives for various building elements as set out in a schedule to the Project Deed, on 31 December 2035, and
- Rectify any breaches of the Project Company’s obligations.

The State’s Project Director must give the Project Company at least ten business days’ notice of the date on which it wishes such a “handover audit” to be conducted. He or she must consider any reasonable request by the Project Company for the audit to be carried out on a different date in order to avoid material prejudice to its ability to provide its services, provided this request is made at least five business days before the originally notified date.

The independent auditor is to be appointed by agreement between the State and the Project Company or, if they cannot agree within two business days of a nomination by the State, the President of the Australian Institute of Quantity Surveyors. The State and the Project Company must equally share the audit’s costs.

The Project Company must provide reasonable assistance, free of charge, to any person carrying out the audit, and the State’s Project Director must promptly give it a copy of the audit report when he or she receives it.

Within 20 days of receiving the audit report the Project Company must give the Project Director an unconditional bank guarantee in favour of the State, from an Australian bank with specified minimum credit ratings, in a form specified in a schedule to the Project Deed and expiring no earlier than 31 December 2036, with a face value of no less than the amount of money the auditor reports as being necessary for the purposes described above.

If the termination audit reveals rectification work is required, the State’s Project Director must notify the Project Company of the required work, specifying a reasonable period within which it must be completed, and the Project Company must carry out this work within the specified period and at its own cost.

If the Project Company fails to carry out the necessary rectification and/or maintenance work with appropriate professional care, in accordance with good industry practices and within the specified timeframe for these works, the State may carry out the works itself, or procure others to do so. The Project Company will be liable to pay the costs incurred as a debt to the State. The State may deduct or set off this amount against any amount payable to the Project Company, or take enforcement action including action under the bank guarantee, if the debt is not paid.

The Project Company must ensure that all documents and computer records containing information on any of the schools’ students, teachers or other education staff that are in its own possession, custody or control, or the possession, custody or control of any of its subcontractors or sub-subcontractors, are delivered to the State’s Project Director by no later than 31 December 2035 or the date of any earlier termination of the Project Deed.

3.3.12 Transition to the State or another contractor

During the three months ending on 31 December 2035, or during the period after any notice by the State that it is terminating the Project Deed under the “voluntary” termination arrangements described in section 3.5.2 or terminating the Project Deed for a breach by the Project Company under the arrangements described in section 3.5.4, and then for the following 12 months, the Project Company must fully cooperate with the transfer of any or all of its services to the State or any new contractor providing the same or similar services.

Among other things, it must:

- Transfer all its title to and interests and rights in the project, the works, the school facilities and the school sites to the State or the new contractor, free of any encumbrances
- Liaise with the State’s Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer
- Give the new contractor access to the school facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with their services
- Give the Project Director and/or the new contractor all the documents and other information about the works, the school facilities, the sites and the services needed for an efficient transfer, and
- More generally, facilitate a smooth transfer of responsibility for the services and take no action at any time, before or after the expiry or early termination of the Project Deed, to prejudice or frustrate the transfer.

3.4 Miscellaneous general provisions of the State’s project contracts

3.4.1 Liabilities for taxes, rates, charges and stamp duty

The State must pay:

- All rates and land taxes for each school site from the school’s “commencement date” (see section 3.2.15.2) until 31 December 2035 or any earlier termination of the Project Deed, and

- All NSW stamp duty on the Project Deed, the Leases, the Subleases, the Securitisation Agreement and the Construction Site Licences, but not any stamp duty on the other project contracts or any fines or penalties for late lodgment etc.

The Project Company is and will be liable for all other taxes, levies and charges, other than GST (for which there are separate arrangements) and income tax, in connection with the negotiation, preparation, execution, stamping and registration of the Project Deed and the other major project contracts, the transactions contemplated in these contracts and any amendments to or consents, approvals, waivers, releases or discharges of or under the contracts.

3.4.2 Insurance and loss or damage

3.4.2.1 Insurance

The Project Company must take out and maintain the following insurance policies, as specified in a schedule to the Project Deed:

- Contracts works all risks insurance for the full reinstatement value of the construction works (until one year after the completion of the relevant works)
- Advance consequential loss insurance covering any loss of anticipated gross profit and increased costs arising from any construction delays caused directly by physical loss or damage to the works, for an amount not less than the full project financing and claim preparation costs arising from a delay of up to 26 weeks (until the completion of the relevant works)
- Asbestos removalists liability insurance for any intended asbestos removal work, and any other insurance a responsible corporation would take out to cover unintentional disruption of asbestos or other potentially harmful substances (until one year after the “full service commencement date” (see section 3.2.17))
- Public and products liability insurance for at least \$50 million per occurrence during construction and then, from dates at least one month before the Project Company formally notifies the State and the Independent Certifier that it has completed and commissioned each school’s works, at least \$50 million per occurrence, or higher amount(s) directed by the State’s Project Director, throughout the operations phase of the project
- Compulsory third party motor vehicle insurance (throughout the project)
- Third party property damage plant and motor vehicle insurance for at least \$20 million per occurrence during construction and then, from dates at least one month before the Project Company formally notifies the State and the Independent Certifier that it has completed and

commissioned each school’s works, at least \$20 million per occurrence, or higher amount(s) directed by the State’s Project Director, throughout the operations phase of the project

- Statutory workers’ compensation insurance (throughout the project) and additional insurance covering other employers’ liabilities at common law for at least \$50 million per event during construction and then, from dates at least one month before the Project Company formally notifies the State and the Independent Certifier that it has completed and commissioned each school’s works, at least \$50 million per occurrence, or higher amount(s) directed by the State’s Project Director, throughout the operations phase of the project
- Professional indemnity insurance for at least \$20 million per claim and \$40 million in total (until seven years after the “full service commencement date”), and
- Industrial special risks insurance, for the full reinstatement value of the school facilities, sites and all other property or material relevant to the Project Company’s services and for business interruptions of up to 26 weeks (from dates at least one month before the Project Company formally notifies the State and the Independent Certifier that it has completed and commissioned each school’s works, and then throughout the operations phase for each school).

The terms of these insurance policies must comply with requirements set out in the schedule to the Project Deed, including requirements for their coverage of the State.

The State’s Project Director may increase the required insurance cover for the operations-phase public and products liability insurance, plant and motor vehicle third party property damage insurance and/or common law workers’ compensation insurance if he or she obtains an opinion from a reputable broker that this is necessary under contemporary prudent insurance practices, but may not do so more than once every three years.

Other insurance requirements in the project contracts include Independent Certifier Deed provisions specifying the types of insurance policies that must be effected by the Independent Certifier.

3.4.2.2 Loss or damage

The Project Company bears the risks of loss or damage to the construction works, the completed school facilities and the schools’ sites, and has agreed to indemnify the State, the DET and their officers, employees and agents, on demand, against any claims, losses or liabilities associated with any deaths, personal injuries, property losses or damage or third party claims, demands, penalties costs, charges or expenses arising from the project on terms already described in section 3.1.5.

In particular, the State will not be liable to the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees for any loss of or damage to any part of a school facility or school site caused by the State, the State's Project Director, any other person responsible for the administration, management or implementation of any aspect of the project on behalf of the State, the DET, any DET or State employee, agent, contractor, subcontractor, consultant, licensee or authorised officer involved in providing any of the schools' "education functions", any other DET or State employee, agent or contractor (other than the Project Company and its related organisations) acting in the course of his or her employment, any person using any of the school facilities for community uses, any of the schools' students or any State or DET invitee at any of the school facilities.

The Project Company has agreed to indemnify the State, the DET and their officers, employees and agents, on demand, against any claims, losses or liabilities associated with any deaths, personal injuries, property losses or damage or third party claims, demands, penalties costs, charges or expenses arising from the project on terms already described in section 3.1.5.

As indicated in section 3.3.6, the Project Company must promptly advise the State's Project Director of any material defects or damage to the school facilities if the cost of repairs is more than \$3,000, indexed to the CPI from the December quarter of 2005, informing him or her the actions it is taking to correct the damage or defect and the estimated time the correction will require.

The Project Company must promptly repair or replace any damaged or lost parts of the works or school facilities so that, to the greatest possible extent, it can continue to comply with its obligations under the project's contracts.

In doing so it must minimise the impacts on its works, the school facilities and sites and their "education functions" and keep the Project Director informed of its progress.

All insurance proceeds received for loss or damage to any part of the project's works or the school facilities or sites must be applied by the Project Company to repair, reinstate and/or replace the relevant works or the affected parts of the school facilities or sites. The project debt financiers' Security Trustee and Bond Trustee have promised the State that, notwithstanding any other provisions in the project's financing agreements, they will permit any insurance proceeds to be applied only for these purposes and will take no action to prevent this from happening. The Project Company may not exercise any option for a cash settlement under any of the insurance policies described in section 3.4.2.1 without the State's prior written consent.

If an event causing loss or damage to the works or a school facility:

- Is causing or is likely to cause a delay in:
 - The completion of any part of the Project Company's works by the relevant "target completion date" (see section 3.2.7), as specified in a schedule to the Project Deed and/or a *Works Program* or as extended under the arrangements described in sections 3.2.14, 3.4.10 and /or 3.4.11, or
 - The full completion of a school's works by a "long-stop date" specified for each school in the same schedule to the Project Deed (these dates may also be extended), or
- Is affecting the ability of the Project Company to perform its obligations and exercise its rights under the Project Deed,

the Project Company may seek relief from its contractual obligations under the "relief event" arrangements described in section 3.4.10. In more extreme circumstances, the *force majeure* provisions described in section 3.4.12 may apply.

3.4.2.3 Uninsurable risks

Notwithstanding the insurance requirements described above, the Project Company is not required to insure against risks which are, or become, "uninsurable" risks, in the sense that:

- The insurance otherwise required under the Project Deed is not available, in the recognised international insurance market, for that risk, and is not covered by the Terrorism Insurance Act (Cth) or a similar legislative scheme, or
- The insurance premium for the risk would be so high or the terms and conditions so onerous that the risk is generally not being insured against, in the recognised international insurance market, by prudent, competent and experienced providers of services similar to those of the Project Company.

If a risk that would otherwise have to be covered by an insurance policy becomes uninsurable, the Project Company must notify the State's Project Director within five business days.

If the State agrees the risk is uninsurable, or if this is the conclusion of dispute resolution procedures as summarised in section 3.4.8, and the "uninsurability" has not been caused by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees, the State and the Project Company must meet to discuss how the risk should be managed, including possible self-insurance.

Provided these requirements are satisfied, if an uninsurable risk that would otherwise have to be insured under an

operations-phase public and products liability insurance policy, third party motor vehicle insurance policy, plant and motor vehicle third party property damage insurance policy or industrial special risks insurance policy then eventuates, but the State and the Project Company cannot agree on how to manage it,

- The Project Deed will continue
- The monthly “service payments” to the Project Company (section 3.3.7.1) must be adjusted to deduct an amount equal to the premium payable for the risk immediately before it became uninsurable, and
- The State’s Project Director must, at his or her option, either:
 - Pay the Project Company an amount equal to the insurance proceeds it would have received had the insurance continued to be available, in which case the Project Company must apply this payment to repair, reinstate and/or replace the affected works or parts of the school facilities, *or*
 - If the risk that has eventuated is a risk that would otherwise have had to be insured against under an operations-phase industrial special risks insurance policy,
 - If only some of the sites or school facilities are affected, request a “facilities removal” contract variation, under the “change procedures” discussed in sections 3.2.14 and 3.3.9, under which the affected sites or school facilities would cease to be subject to the Project Deed, *or*
 - If all of the sites or school facilities are affected, terminate the Project Deed and pay the Project Company an amount specified in a “termination payments” schedule to the Project Deed and described in section 3.5.1.

If the State’s Project Director requests a “facilities removal” contract variation, he or she may not decide not to proceed with the variation. The Project Company’s compensation under this variation must be calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for an uninsurable risk (see section 3.5.1.2) and must be paid as a lump sum, and the State must also make a “securitisation refund payment” to JEM within 90 days of the variation, again calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for an uninsurable risk under arrangements described in section 3.5.1.2. In addition, the *Output Specification*, the rent payable under the Master Rental Agreement (sections 3.3.2.2 and 3.3.2.3), the State’s monthly “service payments” to the Project Company (section 3.3.7.1) and the value of any bank guarantee provided under the pre-hand-over arrangements described in section 3.3.11 must be simi-

larly reduced to reflect the excision of the relevant school site(s) and/or facility or facilities from the project.

3.4.3 Financial reporting and audits

The Project Deed sets out requirements for the Project Company to:

- Maintain accounts and other financial and financial planning records and have them audited annually
- Ensure the Construction Contractors, Facilities Manager and any replacement subcontractors do likewise
- Make its financial records available to the State’s Project Director for inspection, on five business days’ notice, as described in section 3.3.5.4
- Submit annual business plans and budgets—for each calendar year during the operations phase, for each school, and both for itself and for the Facilities Manager and any replacement operations-phase subcontractors—to the Project Director by no later than the preceding 30 September
- Provide unaudited financial statements to the State’s Project Director every six months
- Provide annual audited financial statements to the Project Director, for itself, for the Construction Contractors and any replacement construction subcontractors (or their guarantors) during the construction phase and for the Facilities Manager and any replacement operational subcontractors (or their guarantors) during the operations phase, by no later than 31 October each year, and
- Promptly give the Project Director copies of all the documents, reports, plans, materials, certificates and notices it provides to the project’s financiers.

The State’s Project Director may arrange an independent financial audit of the Project Company’s annual financial statements and other financial information, giving it notice of this audit at any time until 30 June 2036 or a date six months after any earlier termination of the Project Deed.

If the Project Director takes this action, the auditor will be appointed by the Project Director and the audit will be carried out at the State’s cost. If the audit uncovers inaccuracies or incompleteness in the accounts or records, the Project Company must fix these deficiencies, appropriate adjustments must be made to the State’s monthly “service payments” (section 3.3.7.1) if the deficiencies have affected past payments, and the Project Company must reimburse the State for the costs of the audit.

3.4.4 Substitutions and restrictions on changes of ownership or control, assignments, encumbrances and refinancing

3.4.4.1 *Changes in entities, ownership or control*

If any authority, institution, association or body referred to in the Project Deed is reconstituted, renamed or replaced, or its powers or functions are transferred to another organisation, the Project Deed will be taken to refer to that new organisation. Similarly, if the authority etc ceases to exist, the Project Deed will be taken to refer to the organisation which serves the same purpose or objects.

The Project Company has promised the State that there will be no changes in:

- The legal or beneficial ownership of the Project Company and the entities that own it, as described in section 2.1.2 (the “Project Company group”), other than changes in the ownership of shares, units or other equity interests listed on a prescribed financial market or transfers of equity interests between related corporations, or
- The ownership structure described in section 2.1.2 prior to the “commencement date” (see section 3.2.15.2) of the first of the schools to be completed.

After that date, the State’s prior written consent is required before there may be any such changes in the Project Company group’s ownership or the ownership structure.

If an entity ultimately controlling any member of the Project Company group is listed on a prescribed financial market, and there is a change in the control of the Project Company or any other member of the Project Company group as a result of a change in the ownership of this listed entity, the Project Company must promptly notify the State’s Project Director, providing full details and any other information reasonably needed by the State for it to decide whether to consent to the change.

The State will then have 20 business days to notify its acceptance or rejection of the change in control. If it rejects the change, the Project Company must, within 90 days, procure an end to the equity holdings, voting power or other control that produced the change in control, without causing any further change in control other than a reversal or a change approved in advance by the State.

Similarly, if there is a change in the control of a Construction Contractor, the Facilities Manager or any replacement subcontractor, for any reason, the Project Company must promptly notify the State’s Project Director, providing full details and any other information reasonably needed by the State for it to decide whether to consent to the change.

If the State rejects the change, the Project Company must, at its own cost and within 60 days, terminate the relevant subcontract and appoint a replacement subcontractor

to carry out the same works or services, in accordance with the subcontracting arrangements described in sections 3.2.8.2 and 3.3.4.2 and tendering procedures set out in a schedule to the Project Deed.

However, if the State’s reason for rejecting a change of control of a Construction Contractor, the Facilities Manager or any replacement subcontractor is *not* because:

- The subcontractor no longer has sufficient expertise, ability or financial and commercial standing to properly carry out its obligations, or
- The new controller is not a reputable entity to properly carry out the subcontractor’s obligations or is otherwise unsuitable, having regard to its activities or businesses and their compatibility with the subcontractors’s obligations,

the State must pay the Project Company:

- Any costs it incurs directly as a result of terminating the subcontract, including redundancy payments and demobilisation costs
- Any reasonable costs it incurs that are directly associated with its contracting with the replacement subcontractor, and
- Any increased costs it incurs in carrying out its works or providing its services using the replacement subcontractor, and the monthly “service payments” to be paid by the State to the Project Company (section 3.3.7.1) must be adjusted accordingly, in accordance with the processes and threshold arrangements applying for adjustments to these payments following “benchmarking” or market testing of the Project Company’s services (see section 3.3.8).

If the Independent Certifier Deed is terminated, under arrangements set out in that deed, or if an incumbent Independent Certifier ceases to act in this role, the State’s Project Director and the Project Company must, unless they agree otherwise, appoint an appropriately qualified, experienced and independent replacement by no later than ten business days after the termination or cessation. If they cannot agree on the identity of the replacement, they must appoint a nominee of the President of the Royal Australian Institute of Architects.

3.4.4.2 *Transfers and encumbrances*

The State and the Project Company may not deal separately with their interests under the Project Deed, the Leases or the Subleases, and any dealings with their interests under these documents must occur at the same time, on substantially the same terms and with the same parties.

The State must not grant any security interest or encumbrance over or otherwise dispose of any or all of its rights, obligations or interests under the project’s contracts without the Project Company’s prior written consent, except in the

case of a transfer of its interests under the contracts to any governmental body, agency or department constituting the State or guaranteed by the State.

Similarly, the Project Company must not grant any security interest or encumbrance over or otherwise dispose of any or all of its rights, obligations or interests under the project's contracts without the State's prior written consent, except in the case of the granting of security interests in accordance with the project's financing agreements.

The Security Trustee and its representatives may not assign or dispose of any property that is subject to the project financiers' securities except in accordance with the Financiers Tripartite Deed.

More specifically, the Security Trustee and the Bond Trustee have agreed in the Financiers Tripartite Deed that:

- They will not transfer or dispose of any of their rights or obligations under the project's financing agreements, including the Financiers Tripartite Agreement, unless the transferee is acceptable to the State or meets specified criteria for appointment as a replacement Security Trustee or Bond Trustee and has entered into a tripartite deed with the State on substantially the same terms as the Financiers Tripartite Deed
- They will not permit any of the project's financiers, other than JEM in the case of bonds issued by JEM, to transfer or dispose of any of their rights or obligations under the project's financing agreements unless the transferee is acceptable to the State, and
- They and the Project Company will not declare a trust over or otherwise create an interest in their rights under the Financiers Tripartite Deed without the State's consent.

In addition,

- There are also restrictions, under the Project Deed, on the assignment or replacement of the Construction Contracts, the Facilities Management Contract or any other "material" subcontract and sub-subcontract if there is likely to be an effect on the State's rights or the ability of the Project Company to meet its Project Deed obligations, as already described in sections 3.2.8.2 and 3.3.4.2
- The Construction Contractors and the Facilities Manager have promised, in the Construction Contractors Collateral Warranty Deeds and the Facilities Manager Collateral Warranty Deed, that they will not transfer or otherwise deal with these deeds without the State's consent, and
- The Construction Contractors, the Construction Contractor Guarantor, the Facilities Manager and the Facilities Manager Guarantor have promised, in the Construction Side Deeds and the Facilities Management Side Deed, that they will not dispose of their rights under these

deeds or declare a trust over or otherwise create an interest in these rights without the State's consent.

3.4.4.3 Refinancing

The project's financing agreements may be materially amended or waived by the Project Company only in accordance with these agreements and only with the consent of the State's Project Director.

The Project Director's consent is also required before the Project Company may enter into any new financing agreements other than debt obligations incurred in the ordinary course of business.

More specifically, the Project Company may not refinance the project without the Project Director's consent, except in ways already contemplated in the financing agreements and the private sector participants' "base case" financial model as it was on 28 February 2006, if this would:

- Produce a financial gain for the project's equity investors, after deducting the direct costs of the refinancing to the State and the Project Company and making other adjustments specified in the Project Deed, or
- Increase or change the profile of the State's liabilities under the project's contracts.

If such a refinancing is proposed, the Project Company must submit a "refinancing report" to the State's Project Director, explaining the proposal and its impacts on the State's liabilities and rents under the Leases and the Master Rental Agreement and providing detailed financial information as specified in the Project Deed, including a calculation of the total expected refinancing gain, expressed in net present value terms.

If the State consents to the refinancing, it will be entitled to receive 50% of the estimated refinancing gain. It may elect to take this as a lump sum payment when the refinancing occurs, through reductions in its monthly "service payments" to the Project Company under the arrangements described in section 3.3.7.1 or through a combination of both of these approaches.

3.4.5 Amendments to and waivers of the project contracts

The terms of the Project Deed may be amended only by a document signed by or on behalf of the State and the Project Company. Analogous provisions are included in most of the other project contracts to which the State is a party, and the State has also agreed, in the Financiers Tripartite Deed, that it will not materially amend any of the project contracts in ways that might affect the interests of the project's financiers without the Security Trustee's consent, which may not be unreasonably withheld or delayed.

Any non-exercise of or delay in exercising a power or right under the Project Deed or most of the other contracts

will not operate as a waiver, and a full or partial waiver or consent by any of the parties will be effective only if it is given or confirmed in writing.

The Project Deed reinforces these general principles with several specific denials of waivers that might otherwise be suggested by State actions or inaction, some of which have already been cited.

The Project Deed makes it clear that the State's Project Director has no authority to orally waive any of the obligations of the Project Company or release it from these obligations, and that any State waiver or release must be expressly identified as such, in writing, and signed personally by the Project Director and not any of his or her delegates.

There are also restrictions, under the Project Deed, on amendments to and waivers of rights under the Construction Contracts, the Facilities Management Contract and any other "material subcontract", as already been described in sections 3.2.8.2 and 3.3.4.2.

3.4.6 Confidentiality

The Project Deed, the Construction Side Deeds, the Independent Certifier Deed, the Facilities Management Side Deed, the Financiers Tripartite Deed and the Securitisation Agreement all contain confidentiality restrictions applying to specified contents of the project's contracts.

These confidentiality restrictions are, however, subject to a series of exemptions, including:

- The tabling of the major project contracts in State Parliament
- Disclosures required by law
- Disclosures of documents which the Project Company, acting reasonably, has agreed do not contain any information about the project's financing facilities, the Project Company's cost structures or profit margins, the project's detailed designs, *Works Programs*, *Operations Manuals* or other proprietary material created by or for the Project Company, or any other commercially sensitive information that provides a competitive advantage or unique characteristic to the Project Company, its shareholders, its financiers or its subcontractors
- Disclosures by the State's Project Director to any State Government department or agency
- Disclosures to prospective investors and financiers, and
- Disclosures to the Auditor-General in accordance with the Public Finance and Audit Act (NSW).

3.4.7 Changes in law

The Project Deed's definition of "change in law" encompasses changes resulting from legislation (including subordinate legislation and legally enforceable guidelines) that was not reasonably foreseeable on 20 December 2005, court

decisions that change binding precedents, and new or amended rules, guidelines, regulations, policies, standards, procedures and requirements by the Commonwealth or NSW Governments or the DET that were not reasonably foreseeable on 20 December 2005, including new or amended forms of DET *Schools Facilities Standards* listed in the *Output Specification*.

The Project Company is not generally entitled to any compensation, extension of time or other relief from its obligations under the Project Deed as a result of any such "change in law".

However,

- The State must use all reasonable endeavours to give the Project Company access to any relief, implementation arrangements or programs that are extended to the DET, for DET-operated schools in general, in response to a "change in law"
- If a "change in law" results in cost savings for the project, the monthly "service payments" by the State to the Project Company (section 3.3.7.1) must be adjusted to reflect this saving, with all of the savings flowing to the State
- If a "change in law" is a "**discriminatory change in law**"—applying to this project but not to other similar projects procured by the State, applying to the Project Company but not to others, applying to any or all of this project's construction sites, works or school facilities but not to other similarly situated land, works or facilities, or applying to privately financed projects such as this project but not to other projects—the Project Company may be entitled to apply for relief from its obligations, and/or claim compensation, under the "compensation event" arrangements described in section 3.4.11, and
- The Project Company may also be entitled to apply for relief from its obligations and/or claim compensation under these "compensation event" arrangements if the "change in law" is a "**qualifying change in law**", meaning any "change in law", other than a change in tax law, that requires the Project Company to incur:
 - Capital expenditure at any of the schools during its operations phase, or
 - Additional operating expenditure at any of the schools during its operations phase, other than cost increases affecting businesses generally.

This expressly includes changes in law causing additional operating expenditure if they affect only the provision of services in schools that are similar to the Project Company's services.

Although compensation may be payable by the State under the "compensation event" arrangements following a "qualifying change in law", the State can be liable for

(at most) only a portion of the Project Company's net increase in costs, as specified in the "estimated cost effect" schedule to the Project Deed (see sections 3.2.14, 3.3.9 and 3.4.11).

3.4.8 Dispute resolution

The Project Deed sets out detailed procedures which may (and in specified circumstances must) be followed for the resolution of disputes between the State and the Project Company, other than disputes concerning the Independent Certifier Deed, which must be settled under different dispute resolution procedures set out in the Independent Certifier Deed.

The Project Deed's dispute resolution procedures essentially involve three sequential stages, with the procedures starting in most cases at the first stage. In some cases, however, the Project Deed stipulates that a dispute may or must be resolved through procedures starting at the second stage, so in these cases the first stage may or must be bypassed, and in two cases the Project Deed stipulates that a dispute may or must be resolved through independent expert determination, one of the options for the third stage, so in these cases the first two stages may or must be bypassed.

The "normal" sequence of stages is:

- (1) Any dispute between the State and the Project Company, other than the exceptions described above, may be referred by either of the parties for resolution by the Project Co-ordination Group, whose other roles are described in section 3.1.2, simply by giving the other party a notice to this effect, providing reasonable details about the nature of the dispute.

The Project Co-ordination Group may resolve disputes only through unanimous decisions.

- (2) If the Project Co-ordination Group fails to resolve a dispute referred to it within five business days, the dispute may be referred by either of the parties for determination by the Director-General of the DET and the chief executive officer of the Project Company (or their delegates).

These persons must then meet to resolve the dispute. If they do resolve the dispute, they must issue their joint decision in writing and it will be contractually binding on the parties.

- (3) If the DET's Director-General and the Project Company's CEO or their delegates do not resolve a dispute within five business days of its referral to them, or if they do not meet within this period, the Project Co-ordination Group must, within the next two business days, refer the dispute to independent expert

determination or arbitration, under arrangements set out in the Project Deed, or to some other dispute resolution procedure.

If the DET's Director-General and the Project Company's CEO have not met, or if the Project Co-ordination Group cannot agree on which of the options for "stage 3" dispute resolution should be adopted, they may ask the President of The Institute of Arbitrators and Mediators Australia to make this choice. Similarly, if the DET's Director-General and the Project Company's CEO have not met, or if the Project Co-ordination Group cannot agree on the expert or arbitrator to be appointed, the independent expert or arbitrator will be selected by the State's Project Director from a panel of three experts or three arbitrators nominated by the President of The Institute of Arbitrators and Mediators Australia, or, if the Project Director fails to do so within three business days of the nomination of the panel, the Project Company.

The processes for independent expert determinations and arbitrations are set out in the Project Deed. Arbitrations must be conducted in accordance with the Commercial Arbitration Act (NSW).

Any determination by an independent expert will be binding on all the parties unless the dispute is referred to arbitration or litigation within ten business days of the decision. Any award by an arbitrator will be final and binding on the parties.

The State and the Project Company must continue to perform their obligations under the Project Deed, notwithstanding the dispute, throughout all these dispute resolution processes.

If a "formal" dispute arises under a Construction Contract, the Facilities Management Contract or any other subcontract or sub-subcontract, the Project Company must immediately inform the State's Project Director of the dispute and its effects, if any, on the operation of the Project Deed. If the State consents, the Project Company and the relevant subcontractor or sub-subcontractor may use the dispute resolution procedures set out in the Project Deed, provided the subcontractor or sub-subcontractor agrees to be bound by the results.

Under the Independent Certifier Deed's dispute resolution procedures—which that deed states must be exhausted before a dispute may be litigated—if a dispute arises either party may refer it for resolution by the relevant chief executive officers by giving the other parties a notice to this effect, providing reasonable details about the matters in dispute. The chief executive officers or their delegates must then meet and use reasonable endeavours, acting in good faith, to resolve the dispute within ten business days or any later date agreed to by the parties. If they do resolve the dispute, they must issue their joint decision in writing and it will be contractually binding on the parties. The Independent

Certifier must continue to perform its obligations while the dispute is being resolved.

3.4.9 Emergencies

As already indicated in section 3.3.6, throughout the operations phase of the project the Project Company must immediately inform the State's Project Director about any events or circumstances reasonably likely to constitute or cause an "emergency" as defined in the Project Deed, meaning any situation which, in the Project Director's opinion,

- Prevents the provision of the services under normal circumstances
- Seriously threatens, has caused or will cause material damage or disruption to personal health and safety, the environment, property or the safe and secure provision of the services, or
- Will require the provision of materially greater services, and advise the Project Director of the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of this emergency.

If an emergency of this nature occurs, the Project Director may instruct the Project Company to:

- Immediately suspend its services
- Perform any of its services for which it is not fulfilling its obligations, and/or
- Procure additional or alternative services, as and when required by the Project Director,

to deal with the emergency and ensure normal operation of the relevant school facilities and site resumes as soon as reasonably practicable.

The Project Company must give the financiers' Security Trustee and Bond Trustee copies of any such direction.

If the emergency was caused, directly or indirectly, by any negligence, wilful misconduct or contractual breach by the Project Company, any related corporation, a Construction Contractor, the Facilities Manager, the Project Company's other subcontractors or sub-subcontractors or any of their officers, employees, agents or invitees, the Project Company must bear the costs of any additional or alternative services it is directed to provide.

Otherwise, however, the State must pay for any additional third party costs incurred by the Project Company or its subcontractors and sub-subcontractors in providing any additional or alternative services as directed.

If the State's Project Director:

- Reasonably believes action must be taken to respond to an emergency as described above, but the Project Company has either failed to promptly remedy a breach of its obligations that caused the emergency or is unable

or unwilling to provide additional or alternative services as directed, or

- Reasonably believes that the Project Company must suspend its services and/or that the State must "step in" to discharge a legislative, public or constitutional duty,

he or she may exercise specific emergency State "step in" rights that are set out in a schedule to the Project Deed.

These rights are in addition to general State "step in" powers described in sections 3.5.3.1 and 3.5.3.3 to 3.5.3.5 and any "step in" rights that might be able to be exercised by the debt financier's Security Trustee in the circumstances, under arrangements described in sections 3.5.3.5 and 3.5.3.6.

If the State's Project Director decides to exercise the State's emergency "step in" rights, he or she must notify the Project Company of the action the State wishes to take, the reasons for and likely timeframes of this action and, if practicable, the effects of the proposed action on the Project Company and its obligations to provide its services. The Project Company must give the Security Trustee and the Bond Trustee copies of this notice.

The State may then take the notified action and any additional, consequential action it reasonably believes to be necessary, and the Project Company must provide all reasonable assistance.

If the action taken by the State prevents the Project Company from providing any part of its services, the Project Company will be relieved of these particular obligations during the period they cannot be performed. If the State's action is being taken because of a breach of the Project Deed by the Project Company, the costs incurred by the State in taking the action and an estimate by the State of any Project Company savings through its not providing the affected services will be deducted from the monthly "service payments" to the Project Company by the State (section 3.3.7.1). On the other hand, if the State's action was not necessitated by a Project Company breach the Project Company may be entitled to compensation and/or relief from its Project Deed obligations under the "compensation event" arrangements described in section 3.4.11.

The State must reasonably endeavour to complete its emergency "step in" action promptly, except in the case of an action that is being taken because of a breach of the Project Deed by the Project Company. The State's Project Director must give the Project Company reasonable notice of the completion or cessation of the action, the Project Company must give copies of this notice to the Security Trustee and the Bond Trustee, and the State must complete or end its action in accordance with the notice, after which the Project Company must immediately resume any services it had been prevented from carrying out.

3.4.10 'Relief events'

"Relief events" are defined in the Project Deed as any:

- Fire, explosion, storm, lightning, flood, ionising radiation, earthquake, war, armed conflict, terrorism, civil commotion or protest
- Failure by any government, council, government department, statutory authority, court or tribunal or any electricity, gas, communications, water, sewerage, drainage or other utility service provider to carry out works or provide services
- Shortage of power, fuel or transport or electricity, gas, communications, water, sewerage, drainage or other utilities
- Event causing loss or damage to the works or a school facility (see section 3.4.2.2)
- Supersonic shock waves
- Blockade or embargo
- Official or unofficial strike, lockout or other industrial dispute or industrial action affecting the construction industry, the facilities management industry or significant sectors of these industries in general, but not any industrial dispute or action affecting only the project's site(s) or one or more of its school facilities
- Event beyond the control of the State or the Project Company which prevents possession of or access to a school site or facility
- Direction by the State's Project Director requiring the Project Company to contest a condition attached to a development approval or any other approval, licence or consent (see sections 3.2.2.1 and 3.2.2.2), or
- Inability by the Project Company to obtain any of the development approvals for which it is responsible by its "target DA approval date" as specified in a schedule to the Project Deed (see section 3.2.2.1) or extended under the arrangements described in sections 3.2.14, 3.4.10 (see below) and/or 3.4.11, provided this inability:
 - Is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees (other than any contesting of a proposed development approval condition as directed by the State's Project Director), and
 - Is not caused directly by the State's not owning the relevant site, an inconsistent zoning of the site or a failure to effect a subdivision of the site,

other than any such event directly or indirectly caused by any action or inaction by the Project Company, its related corpo-

rations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees.

If any of these "relief events" occurs, and it :

- Causes or is likely to cause a delay in:
 - Obtaining a development approval until or beyond a date 30 business days after its "target DA approval date" (see section 3.2.2.1)
 - The completion of any part of the Project Company's works by the relevant "target completion date", as specified in a schedule to the Project Deed and/or a *Works Program* (see section 3.2.7) or as extended under the arrangements described in sections 3.2.14, 3.4.10 (see below) and /or 3.4.11, or
 - The full completion of a school's works by a "long-stop date" specified for each school in the same schedule to the Project Deed (these dates are currently 9 July 2007 for the Ashtonfield primary school and the Halinda School for Specific Purposes, 15 April 2008 for the Hamlyn Terrace primary school, 7 July 2008 for the Ropes Crossing, Second Ponds Creek and Tullimbar primary schools, 27 October 2008 for the new Kelso high school facilities and 6 July 2009 for the Hoxton Park South and Elderslie primary schools and the Rouse Hill high school, but again they may be extended), or
- Affects the ability of the Project Company to perform its obligations and exercise its rights under the Project Deed,

the Project Company may apply for relief from its Project Deed obligations, in accordance with rights, obligations and procedures set out in a "relief event" schedule to the Project Deed.

Any claim for relief in these circumstances must be lodged by the Project Company as soon as practicable and by no later than ten business days after it first becomes aware of the "relief event" and its effects. Full details must then be provided to the State's Project Director within five business days of this claim, or every two months if it has continued and then within five business days of the end of the "relief event".

Provided these notification requirements are met, the Project Director must grant reasonable extensions to the relevant "target" dates (sections 3.2.2.1 and 3.2.7) and/or "longstop dates" and provide other reasonable relief under the Project Deed, but only to the extent that would be required if the Project Company were taking reasonable steps to mitigate the effects of the "relief event", even if it is not doing so. The Project Company will not be entitled to

any compensation for increased costs or lost revenue, and the State’s monthly “service payments” will not be affected.

If the Project Company is more than five business days late in notifying the Project Director of the “relief event” or providing full details, it will not be entitled to any relief for the period of the delay.

If the Project Company becomes aware of any new information about the “relief event”, it must notify the Project Director and the relief granted must be amended accordingly.

If the parties disagree about whether a “relief event” has occurred, whether there is an entitlement to relief or the extent of the relief required, either of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.4.8.

If a “relief event” or its effects continue or can reasonably be expected to continue for a continuous period of more than 180 days, directly causing the State or the Project Company to be unable to comply with its obligations under the Project Deed, the *force majeure* provisions described in section 3.4.12 will apply.

3.4.11 ‘Compensation events’

“Compensation events” are defined in the Project Deed as any:

- State breach of the Project Deed which substantially frustrates or makes it impossible for the Project Company to perform its obligations or exercise its rights under the project’s contracts
- Failure by the State to obtain any of the development approvals for which it is responsible by its “target DA approval date” as specified in a schedule to the Project Deed (28 February 2006 for the Ashtonfield primary school—in practice, this approval was obtained on 20 March 2006—and 8 May 2006 for the Halinda School for Specific Purposes, 21 August 2006 for the Hamlyn Terrace primary school and 28 August 2006 for the Kelso High School), provided this failure is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company’s other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees
- Failure by the Project Company to obtain any of the development approvals for which it is responsible by its “target DA approval date” (see section 3.2.2.1), as specified in the same schedule to the Project Deed or as extended under the arrangements described in sections 3.2.14, 3.4.10 and/or 3.4.11 (see below) (these target dates are currently 6 November 2006 for the Second Ponds Creek, Ropes Crossing and Tullimbar primary

schools, 7 May 2007 for the Rouse Hill high school and 5 November 2007 for the Hoxton Park South and Elderslie primary schools), provided this failure:

- Is directly caused by the State’s not owning the relevant site, an inconsistent zoning of the site or a failure to effect a subdivision of the site, or
 - Is caused by a failure by the State to procure any necessary consent to the lodgment of the Project Company’s development approval application by a third-party owner of the relevant school site(s)
- Legal challenge to the validity of any of the development approvals for which the State is responsible, or any modification, withdrawal, revocation, suspension or replacement of these development approvals, for reasons other than any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company’s other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees (including any application by the Project Company for another development approval, an amendment to a development approval or a change to the project)
 - Inclusion in a development approval for which the Project Company is responsible of condition(s) requiring the Project Company, any of its related corporations, the Construction Contractors, the Facilities Manager, the Project Company’s other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees to construct, provide or pay a contribution or levy towards subdivision infrastructure outside the relevant school site, *other than* infrastructure required because of the school’s construction, operation or use or for access to and from the school (such as crossings, bus bays, parent drop-offs, cycleways, footpaths, electrical substations, roundabouts, traffic signals and roundabouts), provided:
 - These condition(s) are not contemplated by, or reasonably likely having regard to, the *Output Specification* and the Project Company’s *Proposals* for the project, and
 - There is no meritorious basis for contesting the condition(s) under the arrangements described in section 3.2.2.1
 - Failure by the State’s Project Director and the Project Company to agree on appropriate amendments to a draft Project Company detailed design, *Works Program* or construction-phase management plan in response to comments by the Project Director on the draft’s compliance with the Project Deed (see sections 3.2.3.1, 3.2.7 and 3.2.9.1), followed by a final and binding determination, under the dispute resolution procedures described

in section 3.4.8, that the original draft detailed design, *Works Program* or management plan *did* comply with the Project Deed

- Failure to ensure a school's construction site is a serviced site, with utilities infrastructure to its boundaries, by its "site access date" (see section 3.2.4), as specified in a schedule to the Project Deed or as extended under the arrangements described in sections 3.2.14, 3.4.10 and/or 3.4.11 (see below) (these dates are currently 6 March 2006 for the Ashtonfield and Halinda sites, 1 April 2006 for the Kelso site, 16 October 2006 for the Hamlyn Terrace site, 8 January 2007 for the Ropes Crossing, Second Ponds Creek and Tullimbar construction sites, 9 July 2007 for the Rouse Hill site and 7 January 2008 for the Hoxton Park South and Elderslie sites)
- Native title claim (see section 3.2.12)
- Discovery of a heritage artefact (see sections 3.2.5 and 3.2.13)
- Requirement for the Project Company to carry out any demolition, earthworks, site preparation or site remediation works on any part of the Kelso site, including any works directly resulting from the site's condition or any contamination on the site on 20 December 2005 (see section 3.2.5)
- Failure by the DET to make an item that was to be provided by the State or DET available under arrangements described in section 3.2.6, or any latent defect in a State/DET-provided item that is not reasonably discoverable by the Project Company within five business days of its delivery, provided in both cases that the circumstances have not been caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees
- Implementation of "additional work" by a third party at a school site or facility, involving capital expenditure on works beyond the currently defined works and beyond any additional works already dealt with under the "change procedure" (see section 3.2.14), and any defects arising from the additional work or consequential effects on the services to be provided by the Project Company
- Failure by the DET to deliver "demountable units" and/or "modular design ranges", as required for the provision of additional "learning spaces" in any of the schools (see section 3.3.10), on time and in a condition satisfying the *Output Specification's* standards, provided this failure is not caused, directly or indirectly, by any action or inaction by the Project Company, its related

corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees

- Service of an environmental notice on the Project Company during Kelso High School's operations phase, or the imposition of any other operations-phase legal requirement on the Project Company, forcing it to take action concerning contamination that was on the Kelso site on 20 December 2005 but was not disturbed by the Kelso construction works
- Official or unofficial strike, lockout or other industrial dispute or industrial action by State or DET employees, provided it is not caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractors, the Facilities Manager, the Project Company's other subcontractors and sub-subcontractors or any of their officers, employees, agents or invitees
- "Discriminatory change in law" (see section 3.4.7)
- "Qualifying change in law" (see section 3.4.7), or
- Exercise by the State of its emergency "step in" rights, as described in section 3.4.9, provided the State's action is not being taken because of a Project Company breach of the Project Deed or any of the other major project contracts.

If any of these "compensation events" occurs, and it:

- Causes or is likely to cause a delay in:
 - Obtaining a development approval until or beyond a date 30 business days after its "target DA approval date" (see section 3.2.2.1)
 - The completion of any part of the Project Company's works by the relevant "target completion date", as specified in a schedule to the Project Deed and/or a *Works Program* (see section 3.2.7) or as extended under the arrangements described in sections 3.2.14, 3.4.10 and /or 3.4.11 (see below), or
 - The full completion of a school's works by a "long-stop date" specified for each school in the same schedule to the Project Deed (see section 3.4.10),
- Affects the ability of the Project Company to perform its obligations and exercise its rights under the Project Deed, or
- Causes the Project Company to incur additional costs or lose revenue associated with the project,

the Project Company may apply for relief from its obligations under the Project Deed, and/or claim compensation, in accordance with rights, obligations and procedures set out in a "compensation event" schedule to the Project Deed.

Any claim for relief and/or compensation in these circumstances must be lodged by the Project Company as soon as practicable and by no later than 15 business days after it first became aware of the “compensation event” or its effects.

Full details, including the steps taken to mitigate, prevent or eliminate the effects of the “compensation event”, must then be provided to the State’s Project Director within ten business days of this claim or, if the “compensation event” is continuing and is not a “discriminatory change in law” or a “qualifying change in law”, every two months until the end of the “compensation event” and its effects and then (in a final notice) within ten business days of the end of the event and its effects. The Project Director may request any further information he or she needs to assess the claim.

Provided these notification requirements are met, the Project Director must grant reasonable extensions to the relevant “target dates” (sections 3.2.2.1 and 3.2.7) and/or “longstop dates” (section 3.4.10), provide other reasonable relief from the Project Company’s obligations under the Project Deed and pay the Project Company compensation as calculated in accordance with the “estimated cost effect” schedule to the Project Deed, but only to the extent that would be required if the Project Company were taking reasonable steps to mitigate the effects of the “compensation event”, even if it is not doing so.

If the Project Company is more than five business days late in notifying the Project Director of the “compensation event” or providing full details, it will not be entitled to any relief or compensation for the period of the delay.

If the Project Company becomes aware of any new information about the “compensation event” and its effects, it must notify the Project Director and the parties must meet to agree on any necessary amendments to the relief and compensation granted, in accordance with the “estimated cost effect” schedule to the Project Deed and with repayments to the State if the revised compensation is less than the amount already paid.

If the parties disagree about whether a “compensation event” has occurred, whether there is an entitlement to relief, the extent of any delay incurred, the extent to which the Project Company has been prevented from performing its other obligations under the Project Deed, the impact on costs or revenue or the extent of the relief and compensation sought, either of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.4.8.

3.4.12 Force majeure

3.4.12.1 General force majeure provisions

A “relief event” (section 3.4.10) will become a “*force majeure* event”, as defined in the Project Deed, if it or its effects continue or can reasonably be expected to continue for a continuous period of more than 180 days, directly causing the State or the Project Company to be unable to comply with its obligations under the Project Deed.

If a “*force majeure* event” occurs, the Project Company must notify the State’s Project Director as soon as practicable, including details of the event and its effects.

The parties must then consult with each other, in good faith and as soon as practicable, and attempt to agree on appropriate terms to mitigate the effects of the “*force majeure* event” and facilitate continued performance of the Project Deed.

The State and the Project Company must at all times use reasonable endeavours to prevent and mitigate the effects of any delay following a “*force majeure* event”, and the Project Company must do everything required under good industry practice to overcome or minimise the effects of the event.

If the Project Company provides evidence to the State’s Project Director that a “*force majeure* event” has occurred, that it is unable to comply with its obligations, that the effects of the event could not reasonably have been mitigated or recovered from by acting in accordance with good industry practice but without incurring material expenditure, and that it is using its best endeavours to perform its obligations under the Project Deed, the State must grant it “appropriate” relief, taking account of the likely effects of delays.

The State’s entitlement to make deductions from its monthly “service payments” to the Project Company under the arrangements described in section 3.3.7.1 must not be affected by any response to the “*force majeure* event” or relief provided by the State, although the quantum of these deductions may be changed.

If there is a dispute about whether a “*force majeure* event” has occurred or the relief to which the Project Company is entitled, the matter must be referred for resolution under the dispute resolution procedures described in section 3.4.8.

The Project Company must notify the State’s Project Director if it become aware of any new information about a “*force majeure* event” or anything demonstrating any previously submitted information is materially inaccurate or misleading, and the relief the State previously granted must be amended accordingly.

If a “*force majeure* event” ends or it no longer prevents an affected party from performing its obligations under the Project Deed, the affected party must notify the other party as soon as practicable and from that point the Project Deed must continue to be performed on the same terms as immediately before the “*force majeure* event”.

3.4.12.2 Force majeure ‘facilities removal’ contract variations

If a “*force majeure* event” prevents the Project Company from carrying out its Project Deed obligations at only one or some of the school sites or facilities, but not at all of them, and this continues to be the case 180 or more days after the occurrence of the “relief event” that has become a “*force majeure* event”, either party may propose a “facilities removal” contract variation, under the “change procedures” discussed in sections 3.2.14 and 3.3.9, under which the affected school site(s) and/or facility or facilities would cease to be subject to the Project Deed.

If such a variation is requested by the Project Company it will be deemed to be a request by the State, entitling the Project Company to compensation and relief from its obligations, as already indicated in section 3.2.14. Unlike other variation proposals, however, the State’s Project Director may not decide not to proceed with the variation. The Project Company’s compensation must be calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for *force majeure* (sections 3.4.12.3 and 3.5.1.2) and must be paid as a lump sum, and the State must also make a “securitisation refund payment” to JEM within 90 days of the variation, again calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for *force majeure* (see sections 3.5.1.2).

In addition, the *Output Specification*, the rent payable under the Master Rental Agreement (sections 3.3.2.2 and 3.3.2.3), the State’s monthly “service payments” to the Project Company (section 3.3.7.1) and the value of any bank guarantee provided under the pre-handover arrangements described in section 3.3.11 must be similarly reduced to reflect the excision of the relevant school site(s) and/or facility or facilities from the project.

3.4.12.3 Notices of termination or continuation following a ‘force majeure event’

If the State and the Project Company cannot agree on how to mitigate the effects of a “*force majeure* event” and facilitate continued performance of the Project Deed within 180 days of the start of the relevant “relief event”, and the “relief event” and/or its effects are still continuing and have prevented the affected party or parties from complying with the Project Deed for more than 180 days, either of the parties may give the other party 20 business days’ notice that it intends to terminate the Project Deed for *force majeure*.

The Project Company must give the Security Trustee and the Bond Trustee copies of any such notice within five business days.

If the notice of termination is issued by the Project Company, the State’s Project Director must either:

- Issue a notice, in response, within ten business days, specifying that the whole of the Project Deed must continue, or
- Accept the notice, in which case the arrangements described in section 3.5.1 will apply.

If he or she chooses the former course,

- The State’s monthly “service payments” to the Project Company (section 3.3.7.1) must be calculated as if the Project Company were satisfying all of its service obligations under the Project Deed—with the only permitted reductions in these payments being for any costs the Project Company does not incur as a result of not providing all of these services—from:
 - In the case of a “*force majeure* event” occurring during a school’s construction phase, the school’s “target completion date”, as specified in a schedule to the Project Deed (section 3.2.7) and as extended (if applicable) under any earlier variation(s) (section 3.2.14), any earlier extension(s) of up to 180 days under the “relief event” provisions described in section 3.4.10 and/or any further extension(s) under the “*force majeure* event” relief provisions described above, or
 - In the case of a “*force majeure* event” occurring during a school’s operations phase (i.e. after the school’s “commencement date”), the date after the Project Deed would have terminated if the Project Director had accepted the Project Company’s notice of termination, and
- The Project Deed will otherwise continue to apply unless the State decides to terminate it, giving the Project Company at least 30 business days’ notice, in which case the arrangements described in section 3.5.1 will apply.

3.5 Defaults and termination of the Project Deed

The following sections of this *Summary of Contracts* describe the main provisions of the Project Deed, the Financiers Tripartite Deed and the project’s other “side deeds” for:

- Termination of the project’s contracts for the occurrence of an uninsurable risk affecting all the school sites or facilities (section 3.4.2.3) or for *force majeure* (section 3.4.12.3)
- “Voluntary” termination of the project’s contracts by the State

- The handling of breaches of the contracts, and
- Termination of the project's contracts for various types of serious defaults.

3.5.1 Termination for an uninsurable risk or for *force majeure*

3.5.1.1 General termination arrangements

If the State's Project Director terminates the Project Deed following the occurrence of an uninsurable risk that would otherwise have had to be insured against under an operations-phase industrial special risks insurance policy, in the circumstances described in section 3.4.2.3, or if the Project Deed is terminated for *force majeure* under the arrangements described in section 3.4.12.3,

- The Leases and Subleases will also terminate (if they have commenced)
- The State must pay compensation to the Project Company, in the form of a "termination payment" as prescribed in a "termination payments" schedule to the Project Deed and described in section 3.5.1.2 below, with any amounts equal to or less than the amounts the Project Company owes to JEM under the project's debt financing arrangements being paid instead to JEM, or as directed by JEM, under arrangements set out in the Payment Directions Deed
- The State must also pay JEM a "securitisation refund payment" under arrangements set out in the Securitisation Agreement and the "termination payments" schedule to the Project Deed and described in section 3.5.1.2 below
- The Project Company must pay the State the net amount of any insurance proceeds it receives, in connection with the event leading to the termination, which is not spent on repairs, reinstatements or replacements
- The State's Project Director may require the Project Company, at no cost to the State beyond the State's "termination payment", to:
 - Transfer its title, interests and rights in any of its works or any of the school facilities, and
 - Novate the Construction Contracts, the Facilities Management Contract and/or any other replacement subcontracts to the State or a replacement contractor, with the State or the replacement contractor stepping into the shoes of the Project Company under these subcontracts
- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer, and

- More specifically, the Project Company must give the State's Project Director and/or any new contractor all the documents and other information about the works, the school facilities, the sites and the services needed for an efficient transfer.

3.5.1.2 'Termination' and 'securitisation refund' payments

Under the Project Deed, following a termination of the Project Deed for an uninsurable risk or *force majeure* the Project Company will be entitled to receive a "termination payment" from the State equal to:

- The amount payable by the Project Company to JEM under the project's debt financing arrangements, on the termination date, *plus*
- Half of the par value of all share capital in the Project Company *plus* its subordinated debts, as shown on its balance sheet on the termination date, *less*
- Any gains which have accrued or will accrue to the Project Company as a result of the termination, *less*
- Any amounts it owes to the State under the project's contracts on the termination date, *less*
- The net amount of any insurance proceeds which it will receive (or would have received had it complied with its obligations under the Project Deed),

with adjustments, if necessary, to avoid any "double payments" as a result of any earlier "compensation event" compensation payments (see section 3.4.11) and any other adjustments that are needed to avoid "double counting".

As already indicated, under arrangements set out in the Payment Directions Deed the Project Company has irrevocably directed the State to pay any portion of this "termination payment" that is equal to or less than the amounts the Project Company owes to JEM under the project's debt financing agreements directly to JEM, or as directed by JEM.

The "termination payment" must be paid:

- As a single lump sum within 90 days of the termination of the Project Deed, or
- If the State so chooses, in its absolute discretion, through:
 - Instalments payments, paid on the dates the Project Company would otherwise be due to make principal repayments under the project's debt financing agreements, with each instalment payment being equal to the amount that would otherwise have been payable by the Project Company, *plus*
 - If the State's total "termination payment" liability exceeds the project's total senior debt (i.e. the amount payable to holders of the bonds issued by JEM) on the termination date, a lump sum payment of the difference within 90 days of the termination.

Under either arrangement, interest will accrue on unpaid amounts from the termination date, at the interest rate for the project's bonds specified in the private sector parties' "base case" financial model for the project.

The State must also make a "securitisation refund payment" to JEM, within 90 days of the termination of the Project Deed, equal to:

- The total senior debt (i.e. the amount payable to holders of the bonds issued by JEM) on the termination date, *plus*
- If the State elects to make a lump sum "termination payment" under the arrangements described above, any amounts payable to the project's financiers as a result of early repayments under the financing agreements, provided the Project Company, JEM and the financiers mitigate these costs as much as reasonably possible, *less*
- The amount the Project Company owes to JEM under the financing agreements on the termination date, *less*
- Any bank account credit balances held by the financiers on behalf of the Project Company or JEM on the termination date, *less*
- If the State elects to make a lump sum "termination payment", any amounts payable by the project's financiers to the Project Company or JEM as a result of early repayments under the financing agreements.

Again, interest will accrue on unpaid "securitisation refund payment" amounts from the termination date, at the interest rate for the project's bonds specified in the "base case" financial model.

If the State elects to pay its "termination payment" by instalments, it may at any time require the Project Company to novate the Project Company's rights and liabilities under the project's debt financing arrangements to the State or a nominee of the State, in which case the Project Company must arrange this within 20 business days, the State's "termination payment" liability will be reduced by the principal then owed to the project's financiers and, if requested by the State, JEM must also novate its rights and liabilities under specified financing agreements to the State or a nominee of the State.

3.5.2 'Voluntary' termination by the State

3.5.2.1 General termination arrangements

The State may terminate the Project Deed at any time—even if there have been no defaults by the Project Company, no uninsurable risk events and no *force majeure* events—by giving the Project Company at least 120 business days' written notice.

If the State issues such a "voluntary termination" notice, the Project Company must give the Security Trustee and the Bond Trustee copies of the notice and:

- The Project Deed—and, if they have commenced, the Leases and Subleases—will terminate at the end of the notice period
- The State must pay compensation to the Project Company, in the form of a "termination payment" as prescribed in a "termination payments" schedule to the Project Deed and described in section 3.5.2.2 below, with any amounts equal to or less than the amounts the Project Company owes to JEM under the project's debt financing arrangements being paid instead to JEM, or as directed by JEM, under arrangements set out in the Payment Directions Deed
- The State must also pay JEM a "securitisation refund payment" under arrangements set out in the Securitisation Agreement and the "termination payments" schedule to the Project Deed, as already described in section 3.5.1.2
- The Project Company must pay the State the net amount of any insurance proceeds it receives, in connection with the event leading to the termination, which is not spent on repairs, reinstatements or replacements
- The State's Project Director may require the Project Company, at no cost to the State beyond the State's compensation payment, to:
 - Transfer its title, interests and rights in any of its works or any of the school facilities, and
 - Novate the Construction Contracts, the Facilities Management Contract and/or any other replacement subcontracts to the State or a replacement contractor, with the State or the replacement contractor stepping into the shoes of the Project Company under these subcontracts
- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer, and
- More specifically, the Project Company must give the State's Project Director and/or any new contractor all the documents and other information about the works, the school facilities, the sites and the services needed for an efficient transfer

In addition, as already discussed in section 3.3.12, during the notice period and then for the following 12 months, the Project Company must fully cooperate with the transfer of

any or all of its services to the State or any new contractor providing the same or similar services.

Among other things, it must:

- If it has not already done so, transfer all its title to and interests and rights in the project, the works, the school facilities and the school sites to the State or the new contractor, free of any encumbrances
- Liaise with the State's Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer, and
- Give the new contractor access to the school facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with their services.

3.5.2.2 'Termination' and 'securitisation refund' payments

Under the Project Deed, following a "voluntary" termination of the Project Deed by the State the Project Company will be entitled to receive a "termination payment" from the State equal to:

- The amount payable by the Project Company to JEM under the project's debt financing arrangements, on the termination date, *plus*
- An amount which, in combination with any dividend, interest, principal or other payments made by the Project Company to the project's equity investors prior to the termination of the Project Deed, will give these investors an internal rate of return equal to the return forecast in the project's "base case" financial model, *plus*
- Any amounts reasonably payable by the Project Company to the Construction Contractors, the Facilities Manager or any other arms-length subcontractor or sub-subcontractor upon the termination of the Project Deed, provided the Project Company and the relevant subcontractors and sub-subcontractors have made reasonable mitigation efforts, *less*
- Any amounts the Project Company owes to the State under the project's contracts on the termination date, *less*
- Any gains which have accrued or will accrue to the Project Company as a result of the termination of the Project Deed and the other project contracts, not counting any amounts payable by the project's financiers to the Project Company or JEM as a result of early repayments under the project's financing agreements, *less*
- The net amount of any insurance proceeds which it will receive (or would have received had it complied with its obligations under the Project Deed),

with adjustments, if necessary, to avoid any "double payments" as a result of any earlier "compensation event" com-

penation payments (see section 3.4.11) and any other adjustments that are needed to avoid "double counting".

The arrangements for the payment of this "termination payment", the formula for calculating the State's "securitisation refund payment" and the arrangements for making this payment are identical to those already described in section 3.5.1.2.

3.5.3 Actions to remedy Project Company contract 'breaches' and 'defaults'

3.5.3.1 The State's general powers to seek remedies and perform the Project Company's obligations if it breaches these obligations

If the Project Company fails to perform or comply with any of its obligations under the Project Deed or any other project contract,

- The State may pursue any statute-based, common law or equitable remedies available to it in the circumstances, and
- The State may (but need not) itself perform or secure the performance of these obligations, with the costs it incurs in doing being payable by the Project Company, as a debt, on demand.

The State's Project Director must give the Project Company as much notice as practicable if the State intends to take the latter action. If advance notice is not practicable, the Project Company must be promptly advised after the action is taken.

These general provisions are supplemented by much more detailed provisions allowing the State and/or the Security Trustee to "step in" in particular circumstances, as already discussed for emergencies (section 3.4.9) and as detailed in the rest of this section 3.5.3.

3.5.3.2 Procedures following contractual and other defined 'breaches' by the Project Company

The Project Deed specifies that a series of defined situations, in addition to failures by the Project Company to comply with its obligations under the Project Deed, will constitute "breaches" for the purposes of the Project Deed.

Under these provisions, a "breach" will occur if:

- The Project Company commits a "material" breach of any of its obligations under the Project Deed, the Construction Side Deeds, the Construction Contractors Collateral Warranty Deeds, the Construction Site Licences, the Independent Certifier Deed, the Facilities Management Side Deed, the Facilities Manager Collateral Warranty Deed, the Leases, the Subleases, the Master Rental Agreement, the Securitisation Agree-

ment, the State Security or the Financiers Tripartite Deed, *other than*:

- A failure to complete a design or construction “milestone” by its “target completion date” (see section 3.2.7), or
- Any of a series of more serious breaches potentially entitling the State to terminate the Project Deed, as set out in the Project Deed’s definition of “Project Company termination event” and listed in section 3.5.3.5 below
- Any representation or warranty given by the Project Company in any of these contracts proves to be untrue
- The Project Company, a Construction Contractor, the Facilities Manager or any other subcontractor or sub-subcontractor engages in fraud or collusive, misleading or deceptive conduct in performing any part of the project
- The Project Company fails to comply with a *Corrective Action Plan* which it has produced, in response to a direction by the State’s Project Director, to ensure a school facility will be completed by its “target completion date” (see section 3.2.7), or
- An obligation to provide debt financing for the project is terminated, withdrawn or cancelled.

If any of these “breaches” occurs, the State’s Project Director may issue a formal “breach notice” to the Project Company, giving reasonable details of the breach. The Project Company must give copies of this notice to the debt financiers’ Security Trustee and Bond Trustee within five business days.

If the “breach” can reasonably be remedied within five business days of this notice, the Project Company must do so.

If the “breach” can be remedied, but not reasonably within five business days, the Project Company must start diligently pursuing a remedy within five business days and must submit a detailed *Cure Plan* to the Project Director within seven business days of his or her notice, setting out the steps it has taken and will take to remedy the breach and mitigate its effects. This *Cure Plan* must be acceptable to the Project Director and must be diligently implemented in accordance with its terms.

If the “breach” cannot be remedied, the Project Company must submit a detailed *Prevention Plan*, within five business days of the Project Director’s notice, setting out the steps it will take to prevent any recurrence of the breach. This *Prevention Plan* must be acceptable to the Project Director and must be diligently implemented in accordance with its terms.

If the Project Company fails to remedy the “breach” or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, the State may be entitled to terminate the Project

Deed, subject to the rights of the Security Trustee under the Financiers Tripartite Deed, under the arrangements described in sections 3.5.3.5 and 3.5.4.

In addition to the State’s rights to take action itself following a Project Company breach, as described above, the State has expressly acknowledged and consented to rights of the Security Trustee and the Bond Trustee, under the debt financing agreements, to remedy, procure the remedy of or prevent any breach of the project’s contracts by the Project Company.

These rights include “stepping in” by the Security Trustee, or an agent, manager, receiver, receiver/manager or administrator appointed by the Security Trustee, to assume the rights and obligations of the Project Company under the project’s contracts, in the specific circumstances described in sections 3.5.3.5 and 3.5.3.6 and under arrangements described in those sections.

3.5.3.3 The State’s remedy and ‘step in’ rights under the Construction Side Deeds during the construction phase

Under the Construction Side Deeds, if the Project Company breaches either of the Construction Contracts the relevant Construction Contractor may not terminate that contract, or give the Project Company a notice of termination under the terms of the Construction Contract, without giving the State at least 60 days’ written notice of its intention to do so, providing details of the grounds for termination, the proposed termination date and any amounts owed or expected to be owed by the Project Company.

The relevant Construction Contractor must then give the State at least weekly updates on whether the Project Company’s default has been remedied.

If the Project Company fails to remedy its breach, the State may, in its sole discretion and at any time during the 60 days following the Construction Contractor’s initial notification, elect to make its own arrangements to remedy the breach, short of a full assumption by the State of the Project Company’s rights and obligations under the Construction Contract in accordance with other Construction Side Deed provisions described below.

If the State makes this election, it must notify the relevant Construction Contractor within a reasonable period and the Construction Contractor must then use its best endeavours to reach an agreement with the State on these arrangements. The Construction Contractor may not terminate the Construction Contract, or exercise any of its other powers under the Construction Contract concerning the Project Company’s breach, unless:

- Such an agreement with the State is not reached within 60 days of the State’s notice, and

- The State has not “stepped in” and taken over all the rights of the Project Company under the relevant Construction Contract, under provisions described below, or exercised its powers under the State Security (see section 4.1)—subject to priorities set out in the Financiers Tripartite Deed (see section 4.2)—to appoint an agent, manager, receiver, receiver/manager or administrator to do likewise.

Under the Construction Side Deeds the State or an agent, manager, receiver, receiver/manager or administrator appointed under the State Security may, but need not, “step in” and assume the rights of the Project Company under either of the Construction Contracts if:

- The State is already exercising its “step in” rights following an emergency, as described in section 3.4.9, *or*
- The relevant Construction Contractor has notified the State of a Project Company breach of the Construction Contract and the 60-day period following this notice has not expired, *or*
- A “Project Company termination event” has occurred and is continuing, under arrangements described in section 3.5.3.5 below, even if the relevant Construction Contractor has never notified the State of any Project Company breach of the Construction Contract,

and the Security Trustee has not exercised its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.5.3.5 or section 3.5.3.6 below.

If the State decides to take this action, it must give the relevant Construction Contractor at least two days’ written notice, including, where relevant, reasonable details of the background events.

During any “step in” by the State or its agent, manager, receiver, etc under a Construction Contract,

- The relevant Construction Contractor must continue to perform all its obligations under the Construction Contract
- The State may enforce any of the Project Company’s rights under this contract, and
- The Construction Contractor may terminate the Construction Contract only if:
 - Before the “step in”, it had not been paid any amount owing to it under the Construction Contract at the time it originally notified the State of the Project Company’s breach (as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc)
 - It is not paid any amount falling due to it under the Construction Contract during the 60 days after it originally notified the State of the Project Company’s breach, or any other previously unknown

amount which becomes payable to it after this original notification, within 30 days of notifying the State of this liability (again as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc), or

- Grounds for termination of the Construction Contract under its own terms arise after the “step in”.

If the State has “stepped in” but the Security Trustee then exercises its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.5.3.5 or section 3.5.3.6, the State must “step out” for the duration of the Security Trustee’s “step in” period.

The State may terminate the “step in” at any time by giving the Construction Contractor at least 30 days’ written notice.

The Project Company must pay the State, on demand, for all the costs, losses, liabilities, claims, expenses and taxes it incurs in exercising its “step in” and other rights under the Construction Side Deeds.

3.5.3.4 The State’s remedy and ‘step in’ rights under the Facilities Management Side Deed during the operations phase

The State’s rights and procedures for the remedying of operations-phase Project Company breaches of the Facilities Management Contract, under the provisions of the Facilities Management Side Deed, are precisely analogous to its rights and procedures just described in section 3.5.3.3 for the remedying of construction-phase Project Company breaches of the Construction Contracts under the provisions of the Construction Side Deeds.

3.5.3.5 The State’s remedy, ‘step in’ and termination rights and the Security Trustee’s ‘step in’ and transfer rights following a ‘Project Company termination event’

Under the Project Deed a “**Project Company termination event**” will occur if:

- The construction of any of the schools is not completed by its “longstop date”, as specified in a schedule to the Project Deed or as extended under the arrangements described in sections 3.2.14, 3.4.10 and /or 3.4.11 (these dates are currently 9 July 2007 for the Ashtonfield primary school and the Halinda School for Specific Purposes, 15 April 2008 for the Hamlyn Terrace primary school, 7 July 2008 for the Ropes Crossing, Second Ponds Creek and Tullimbar primary schools, 27 October 2008 for the new Kelso high school facilities and 6 July 2009 for the Hoxton Park South and Elderslie primary schools and the Rouse Hill high school)

- The State reasonably believes any of the schools will not be completed by its “longstop date”
- The Project Company “**abandons**” the project by:
 - Wholly or substantially stopping works contemplated in one or more of its construction-phase *Works Programs* (section 3.2.7) for 20 consecutive business days or during any 60 business days in any calendar year, without having been granted relief from these obligations under the arrangements described in sections 3.2.14, 3.4.10 and /or 3.4.11
 - Not providing all or a substantial part of its operations-phase services for 15 consecutive business days or during any 30 business days in any six-month period, again without having been granted relief from these obligations under the arrangements described in sections 3.2.14, 3.3.9, 3.4.10 and /or 3.4.11
 - Expressing or displaying an intention to permanently stop performing all or a substantial part of its works or services, followed by a failure to resume the performance of its obligations or satisfy the State’s Project Director that it is not abandoning the project within five business days of the Project Director’s notifying the Project Company of its expressed or displayed intention
- There is a Project Company “insolvency event”
- There is an “insolvency event” related to either of the Construction Contractors, any replacement construction subcontractor, the Construction Contractor Guarantor, the Facilities Manager, any replacement operations-phase subcontractor or the Facilities Manager Guarantor, *and* the relevant organisation is not replaced, within 90 days, by a reputable and solvent subcontractor or guarantor that has the resources and experience to perform the relevant obligations and complies with the Project Deed’s requirements for subcontractors (sections 3.2.8.2 and 3.3.4.2)
- There is a breach of the law by the Project Company, either of the Construction Contractors, the Facilities Manager or any other subcontractor or sub-subcontractor, including any failure to continue to hold all approvals and licences required for the project, *and* the State’s Project Director believes this breach materially affects the performance of the Project Company’s obligations under the Project Deed, *and* the breach is not remedied within 60 days
- The Project Deed or any of the other major project contracts:
 - Is revoked, repudiated or terminated, or
 - Ceases to be legal, valid and binding and enforceable against the Project Company or any other party other than the State, *except* as contemplated by the project contracts
- and this situation is not remedied within 60 days
- There is a claim that the Project Deed or any of the other major project contracts is invalid in any material respect, and the State’s Project Director is not satisfied, within 60 days, that this claim is frivolous, vexatious or without a proper legal basis
- A change in law implemented by the State, other than a “discriminatory change in law” (section 3.4.7), directly makes it unlawful for the Project Company, a Construction Contractor or the Facilities Manager to perform its obligations under the project contracts, and this is not remedied within 60 days
- The Project Company breaches the Project Deed’s restrictions on assignments, encumbrances and changes in ownership or control (section 3.4.4)
- There are “whole school unavailability events” (section 3.3.7.1) at any individual school on ten or more days in any three consecutive calendar months during the school’s operations phase, not counting the effects of any “relief events” (section 3.4.10)
- The deductions incurred for any monthly “service payment” to the Project Company exceed 15% of the relevant month’s “monthly service fee” (section 3.3.7.1), not counting deductions directly caused by any “relief events” (section 3.4.10)
- The Project Company fails to remedy a “breach” (as defined in section 3.5.3.2) or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, under the arrangements described in section 3.5.3.2, or
- There is a “**persistent breach**” of the Project Deed by the Project Company, which under the definitions in the Project Deed will arise if:
 - The Project Company breaches any of its obligations under the Project Deed, the Construction Side Deeds, the Construction Contractors Collateral Warranty Deeds, the Construction Site Licences, the Independent Certifier Deed, the Facilities Management Side Deed, the Facilities Manager Collateral Warranty Deed, the Leases, the Subleases, the Master Rental Agreement, the Securitisation Agreement, the State Security or the Financiers Tripartite Deed
 - Each of these breaches is either:
 - A failure to complete a design or construction “milestone” by its “target completion date” (section 3.2.7), *or*
 - A breach that, by itself, is *not* a “material” contractual breach or any of the other types of

“breaches” covered by the separate arrangements described in section 3.5.3.2 above)

- In aggregate, however, the breaches materially affect the school(s) foreseeable “education functions” or the administration, performance or implementation of the project
- The State’s Project Director serves a formal warning notice on the Project Company, providing reasonable details of the breaches and warning that if any of them continues or recurs the Project Deed may be terminated
- One or more of the breaches continues or recurs more than 30 days and less than 12 months after this notice
- The Project Director serves a final warning notice on the Project Company, warning it that if the relevant breach(es) continue or recur four times within the next six months there will be a “persistent breach”, and
- The relevant breach(es) do continue or recur four or more times within the next six months.

The Project Company must immediately notify the State’s Project Director if it becomes aware of a “Project Company termination event” or anything likely to become a “Project Company termination event”, and it must give copies of this notification to the Security Trustee and the Bond Trustee within five business days.

Action by the State to overcome the effects of a ‘Project Company termination event’

The State may take any action it considers appropriate or necessary to overcome the effects of a subsisting “Project Company termination event” or preserve the project, with the costs it incurs in doing so being payable by the Project Company on demand.

Among other things, this action may include State representatives’ entering and remaining on or in a site or school facility and, as already indicated in sections 3.5.3.3 and 3.5.3.4, “stepping in” by the State or an agent, manager, receiver, receiver/manager or administrator appointed under the State Security (section 4.1), as expressly permitted by the Construction Side Deeds and the Facilities Management Side Deed, to assume the rights of the Project Company under either or both of the Construction Contracts and/or the Facilities Management Contract, *provided* the Security Trustee has not exercised its own “step in” rights under the Financiers Tripartite Deed arrangements described below. If the State or its representative does “step in” under any of these Side Deeds, the “step in” and “step out” arrangements described in section 3.5.3.3 and referred to in section 3.5.3.4 will apply.

‘Stepping in’ by the Security Trustee

Under the Project Deed the State may terminate the Project Deed for a subsisting “Project Company termination event” simply by giving the Project Company 20 business days’ written notice (see section 3.5.4.1).

Under the Financiers Tripartite Deed, however, the State has:

- Expressly acknowledged and consented to the rights of the Security Trustee and the Bond Trustee, under the debt financing agreements, to remedy, procure the remedy of or prevent any Project Company breach of the major project contracts, and
- Promised not to issue a termination notice for a subsisting “project company termination event” without first giving the Security Trustee and the Bond Trustee at least ten business days’ written notice of its intention to do so, specifying the proposed date for the termination notice and providing details of the “Project Company termination event”.

At any time after receiving a State notice that it intends to terminate the Project Deed for a “Project Company termination event”, but no later than one business day before the proposed date for the State’s issuing of the termination notice, the Security Trustee may—but need not—notify the State that it intends to exercise its rights under the Financiers Tripartite Deed to “step in” itself, or have an agent, manager, receiver, receiver/manager or administrator appointed under the financing securities “step in”, from a specified date within the next 20 business days.

If the Security Trustee decides not to “step in”, and the “Project Company termination event” is still subsisting, the State may issue a termination notice under the Project Deed at any time after the latest date on which a “step in” notice may be given, and the arrangements described in section 3.5.4 will apply.

However, if the Security Trustee does issue a notice that it intends to “step in”, the State may not terminate the Project Deed prior to the proposed “step in” date, the Security Trustee must give the State details about its proposed agent, manager, receiver, receiver/manager or administrator and the State and the Security Trustee must consult with each other, within five business days, to:

- Determine the content of a *Step-In Report* which they must jointly produce, at the Project Company’s cost, setting out:
 - The Project Company’s outstanding obligations to the State under the Project Deed
 - A program to remedy breaches of the Project Deed and/or the other major project contracts (and/or prevent the recurrence of breaches not able to be remedied)

- Details on the proposed performance of the Project Company's obligations during the "step in" period
- Details of the timing of the "step in" period and the proposed actions, and
- Details of proposed insurance arrangements, and
- Make any necessary arrangements if the State chooses to have an auditor and/or technical adviser verify any of the information in the *Step-In Report*.

Any "stepping in" agent, receiver, receiver/manager, administrator or other representative appointed by the Security Trustee must (in the State's Project Director's opinion) be suitable and appropriate for carrying out the project and must satisfy the Project Director that, in conjunction with appropriate contractors, they will be able to carry out the obligations of the Project Company under the Project Deed during the "step in" period.

State and Security Trustee rights and obligations during the Security Trustee's 'step in' period

During the Security Trustee's "step in" period,

- The State's rights and obligations under the Project Deed will continue, subject to the provisions of the Financiers Tripartite Deed
- The Security Trustee or its representative will "step into the shoes of" the Project Company under the contracts, in accordance with details set out in the Financiers Tripartite Deed
- The Security Trustee and its representative must not knowingly exercise their rights in any manner which interferes with the provision of the project, the delivery of services under the Project Deed or the State's exercising of its powers, and they must minimise any disturbance to the delivery of the services or the school(s)' "education functions"
- The Security Trustee must ensure its representative updates the *Step-In Report* and gives the State's Project Director detailed reports, at least monthly, on the status of the project and the implementation of the *Step-In Report*
- The Security Trustee must nominate a substitute representative within ten business days if the State's Project Director notifies it that he or she does not approve of the original representative, and if the substitute is not acceptable to the State either party may refer the selection of a representative for a binding decision by the President of the Institute of Chartered Accountants
- The State may terminate the Project Deed, by written notice to the Project Company, the Security Trustee, the

Bond Trustee and the Security Trustee's representative, only if:

- The Security Trustee or its representative notifies the State that it does not intend to cure the breach causing the "Project Company termination event"
- Prior to the preparation of the *Step-In Report*, the representative and the Project Company are not, in the State's Project Director's reasonable opinion, using all reasonable endeavours to remedy a continuing breach of the project's major contracts that would otherwise entitle the State to terminate the Project Deed
- After the preparation of the *Step-In Report*, the Security Trustee's representative is not curing a breach or performing an obligation in accordance with the *Step-In Report*, as updated, or
- A new "Project Company termination event" occurs, and it does not arise from a contract breach identified in and being addressed under the *Step-In Report*.

Extensions and termination of the Security Trustee's 'step in' period

The Security Trustee's initial "step in" period may not exceed 180 days. The Security Trustee may, however, seek an extension of the "step in" period, giving the State's Project Director an updated *Step-In Report* with a detailed description of the steps being taken and proposed by the Security Trustee. Extensions in response to these requests may be granted if the Security Trustee or its representative is diligently pursuing the cure of any contract breaches, and are limited to 120 days in total. In addition, in any other circumstances the Project Director may grant or reject an extension in his or her absolute discretion.

The Security Trustee's representative may at any time terminate the "step in" by giving the State ten days' written notice.

If the "Project Company termination event" which led to the "step in" is still continuing when the "step in" ends, the State will become entitled to terminate the Project Deed, by giving the Project Company 20 business days' written notice, and the arrangements described in section 3.5.4 will apply.

Replacement of the Project Company

At any time during the Security Trustee's "step in" period the Security Trustee may notify the State that it wishes to procure the novation (transfer) of the Project Company's rights and responsibilities under the Project Deed to a substitute contractor nominated by the Security Trustee and approved by the State.

The State's Project Director must notify the Security Trustee whether the proposed transferee is acceptable

within 30 days of receiving all the information the State needs to make this decision.

The State may, however, withhold or delay its decision for any reason, including:

- The Project Director's not being reasonably satisfied the proposed substitute contractor:
 - Has the necessary legal capacity, power or authority
 - Has the necessary technical competence and financial standing or resources, and
 - Is a suitable or appropriate organisation to have an interest in the school sites and facilities, and
- A direct or indirect and past or present association, in the Project Director's opinion, between the proposed substitute contractor and the Project Company.

Once the State has granted its consent, the Security Trustee may procure the novation of the Project Deed and the other major project contracts at any time, giving ten business days' notice to the State.

Once the transfer becomes effective, the "step in" will end but any existing grounds for the State to terminate the Project Deed will cease to have any effect, provided the substitute contractor remedies any continuing breaches within the times specified in the *Step-In Report*.

3.5.3.6 The Security Trustee's 'step in' and transfer rights following a finance default

The Security Trustee has "step in" and transfer rights following a default under the project's private sector debt financing agreements which are closely analogous to its rights following a "Project Company termination event", described in section 3.5.3.5 above.

The Security Trustee and the Bond Trustee must notify the State within two business days if they become aware of any finance default, providing reasonable details and indicating whether, when and how they intend to exercise their rights under the financing agreements. They must also promptly notify the State if their intentions change or they are instructed to take action to enforce the debt financiers' securities.

From that point on, the rights and obligations of the parties under the Financiers Tripartite Deed's arrangements are the same as those described in section 3.5.3.5 above.

3.5.4 Termination by the State for a 'Project Company termination event'

3.5.4.1 General termination arrangements

If a "Project Company termination event" occurs and the Security Trustee decides not to "step in", or the Security Trustee's "step in" period has expired (see section 3.5.3.5), the State may issue a termination notice to the Project

Company, giving it 20 business days' notice, and at the end of this notice period:

- The Project Deed will terminate
- The Leases and Subleases will also terminate, if they have commenced (as already indicated in section 3.3.2.2, under the project's "securitised lease" arrangements JEM will, on the project's "full service commencement date" (section 3.2.17), purchase the State's rights to receive "early payout amounts" that are to be paid by the Project Company, under the Leases, if the Leases are terminated for a "Project Company termination event", so the State will not be entitled to receive these payments)
- The State may elect to invite new tenders for the provision of the project's works and/or services, except in some specific circumstances discussed in section 3.5.4.2 below
- Unless the "Project Company termination event" leading to the termination of the Project Deed was an "abandonment" of the project as described in section 3.5.3.5, the State must pay compensation to the Project Company, in the form of a "termination payment" as prescribed in the "termination payments" schedule to the Project Deed and described in sections 3.5.4.2 to 3.5.4.4 below, with any amounts equal to or less than the amounts the Project Company owes to JEM under the project's debt financing arrangements being paid instead to JEM, or as directed by JEM, under arrangements set out in the Payment Directions Deed
- The State must also pay JEM a "securitisation refund payment" under arrangements set out in the Securitisation Agreement and the "termination payments" schedule to the Project Deed, as already described in section 3.5.1.2
- Again unless the "Project Company termination event" leading to the termination of the Project Deed was an "abandonment" of the project as described in section 3.5.3.5, the State may be liable to make monthly payments to the Project Company until the State pays the "termination payment" or a new contractor is appointed, as prescribed in the "termination payments" schedule to the Project Deed and described in sections 3.5.4.2 to 3.5.4.4 below
- The Project Company must pay the State the net amount of any insurance proceeds it receives, in connection with the event leading to the termination, which is not spent on repairs, reinstatements or replacements
- The State's Project Director may require the Project Company, at no cost to the State beyond the State's compensation payment, to:

- Transfer its title, interests and rights in any of its works or any of the school facilities, and
- Novate the Construction Contracts, the Facilities Management Contract and/or any other replacement subcontracts to the State or a replacement contractor, in accordance with procedures specified in the Construction Side Deeds, the Construction Contractors Collateral Warranty Deeds, the Facilities Management Side Deed and the Facilities Manager Collateral Warranty Deed, with the State or the replacement contractor stepping into the shoes of the Project Company under these subcontracts
- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer, and
- More specifically, the Project Company must give the State's Project Director and/or any new contractor all the documents and other information about the works, the school facilities, the sites and the services needed for an efficient transfer

In addition, as already discussed in section 3.3.12, during the notice period and then for the following 12 months, the Project Company must fully cooperate with the transfer of any or all of its services to the State or any new contractor providing the same or similar services.

Among other things, it must:

- If it has not already done so, transfer all its title to and interests and rights in the project, the works, the school facilities and the school sites to the State or the new contractor, free of any encumbrances
- Liaise with the State's Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer, and
- Give the new contractor access to the school facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with their services.

3.5.4.2 The State's right to elect to call new tenders following a termination for a 'Project Company termination event'

If the State terminates the Project Deed for a "Project Company termination event" it may elect to:

- Call new tenders for the provision of the project's works and/or services, as applicable, subject to conditions and procedures set out in the "termination payments" schedule to the Project Deed, *provided* criteria listed below are satisfied, or

- Require an expert determination of the "termination payment" payable to the Project Company, if any, as set out in the same schedule.

The option to call new tenders is available only if:

- The State notifies the Project Company that it intends to take this course within 20 business days after the termination of the Project Deed, *and*
- The Security Trustee did not exercise its "step in" rights, under the Financiers Tripartite Deed arrangements described in sections 3.5.3.5, for the "Project Company termination event" which has since entitled the State to terminate the Project Deed, *and*
- The Project Company and the Security Trustee have not procured a novation of the Project Deed from the Project Company to a suitable substitute contractor under the Financiers Tripartite Deed arrangements described in sections 3.5.3.5, and have failed to use all reasonable efforts to do so, *and*
- There is a "liquid" market, with at least two unrelated willing bidders for "public private partnership" or similar contracts for the provision of services similar to those specified in the Project Deed, that is sufficient for the price likely to be achieved through a tender to be a reliable indicator of "fair value".

3.5.4.3 Procedures and 'termination' and 'securitisation refund' payments if the State calls new tenders

If the State elects to call new tenders,

- The State's Project Director and the Project Company must follow procedures set out in the "termination payments" schedule to the Project Deed
- The "termination payment" will an amount be equal to:
 - The highest capital sum offered by any tenderer complying with the tender's qualification criteria, *plus*
 - All credit balances in bank accounts held by or on behalf of the Project Company on the date the successful tender was received, to the extent these amounts are not otherwise taken into account in the successful tender, *plus*
 - Any insurance proceeds and other amounts which are owed to the Project Company and which it is entitled to retain, to the extent these amounts are not included in the Project Company's bank balances and to the extent they are not otherwise taken into account in the successful tender, *plus*
 - Any reasonable rectification costs incurred by the State in remedying any Project Company defaults or procuring alternative performance of the project in the period between the termination of the Project Deed and the earlier of the date on which

all of the “termination payment” is paid and the date on which a new contract with the successful tenderer is entered into, to the extent these amounts are not otherwise taken into account in the successful tender, *less*

- Any amounts paid to the Project Company by the State during the same period under monthly post-termination payment arrangements described below, *less*
- The reasonable costs of the tender process to the State, and *less*
- Any amounts the State is entitled to set off or deduct under the Project Deed, including all its reasonable costs associated with the “Project Company termination event”

with adjustments, if necessary, to avoid any “double payments” as a result of any earlier “compensation event” compensation payments (section 3.4.11) and any other adjustments that are needed to avoid “double counting”.

- In the interim period between the termination of the Project Deed and the earlier of the date on which the all of the “termination payment” is paid and the date on which a new contract with the successful tenderer is entered into, the State must make monthly payments to the Project Company, again calculated in accordance with the “termination payments” schedule to the Project Deed, equal to:
 - A proportion of the relevant “quarterly service payment” that would have been used to calculate the Project Company’s monthly “service payment” under the arrangements described in section 3.3.7.1, *less*
 - All operating cost components that would have been used to calculate the monthly “service payment”, *less*
 - Any reasonable rectification costs incurred by the State in remedying any Project Company defaults or procuring alternative performance of the project during the month or part of a month for which the payment is being made

unless the “Project Company termination event” leading to the termination of the Project Deed was an “abandonment” of the project as described in section 3.5.3.5, in which case the Project Company will not be entitled to receive any interim monthly payments.

If the “termination payment” amount is negative, the State need not make any “termination payment” to the Project Company, the Project Company must pay the State this amount and the State will be released from all its liabilities to the Project Company for breaches and/or termination of the Project Deed or any other project contract, other than any

liability which arose before the Project Deed was terminated but has not been taken into account in calculating the “termination payment”.

In addition, as already indicated, if the “Project Company termination event” leading to the termination of the Project Deed was an “abandonment” of the project as described in section 3.5.3.5, the Project Company will not be entitled to receive any “termination payment”.

Otherwise, the arrangements for the payment of the (positive) “termination payment” amount are identical to those already described in section 3.5.1.2, except that:

- The State may not elect to pay the “termination payment” by instalments if it receives a lump sum payment from the successful tenderer, and
- In these circumstances, the deadline for making the lump sum “termination payment”, normally 90 days after the termination date, will be the later of this normal deadline and the date on which the State receives its lump sum from the successful tenderer.

Upon the payment of the “termination payment” the State will be released from all its liabilities to the Project Company for breaches and/or termination of the Project Deed or any other project contract, other than any liability which arose before the Project Deed was terminated but has not been taken into account in calculating the “termination payment”.

The formula for calculating the State’s “securitisation refund payment” and the arrangements for making this payment are also identical to those already described in section 3.5.1.2.

3.5.4.4 Procedures and ‘termination’ and ‘securitisation refund’ payments if new tenders are not called

If the State elects to require expert determination, or has no option but to use expert determination,

- The Project Company will be entitled to receive interim monthly payments, as described above, only if the State initially elected to call tenders and the “Project Company termination event” leading to the termination of the Project Deed was *not* an “abandonment” of the project as described in section 3.5.3.5.
- The independent expert, appointed by both the State and the Project Company, must estimate the fair market value of a contract on the same terms as the Project Deed, apart from specified exceptions, within 90 days of the termination of the Project Deed. This determination will be final and binding.
- The “termination payment” will an amount be equal to:
 - The independent expert’s estimate of the fair market value of a replacement for the Project Deed, *plus*

- All credit balances in bank accounts held by or on behalf of the Project Company on the date the expert made his or her determination, to the extent these amounts were not taken into account by the expert in estimating the fair market value, *plus*
- Any insurance proceeds and other amounts which are owed to the Project Company and which it is entitled to retain, to the extent these amounts are not included in the Project Company's bank balances and to the extent they were not taken into account by the expert, *plus*
- If the Project Company is entitled to receive interim monthly payments, any reasonable rectification costs incurred by the State in remedying any Project Company defaults or procuring alternative performance of the project in the period between the termination of the Project Deed and the date on which the quantum of the "termination payment" is agreed or determined, to the extent these amounts were not taken into account by the expert, *less*
- If the Project Company is entitled to receive interim monthly payments, any amounts paid to the Project Company by the State during the same period under these payment arrangements, *less*
- The reasonable costs incurred by the State in the arrangements for estimating the fair market value of a replacement for the Project Deed, and *less*
- Any amounts the State is entitled to set off or deduct under the Project Deed, including all its reasonable costs associated with the "project company termination event"

with adjustments, if necessary, to avoid any "double payments" as a result of any earlier "compensation event" compensation payments (section 3.4.11) and any other adjustments that are needed to avoid "double counting".

If the "termination payment" amount is negative, the State need not make any "termination payment" to the Project Company, the Project Company must pay the State this amount and the State will be released from all its liabilities to the Project Company for breaches and/or termination of the Project Deed or any other project contract, other than any liability which arose before the Project Deed was terminated but has not been taken into account in calculating the "termination payment".

In addition, as already indicated, if the "Project Company termination event" leading to the termination of the Project Deed was an "abandonment" of the project as described in section 3.5.3.5, the Project Company will not be entitled to receive any "termination payment".

Otherwise, the arrangements for the payment of the (positive) "termination payment" amount are identical to those already described in section 3.5.1.2, and upon the payment of the "termination payment" the State will be released from all its liabilities to the Project Company for breaches and/or termination of the Project Deed or any other project contract, other than any liability which arose before the Project Deed was terminated but has not been taken into account in calculating the "termination payment".

The formula for calculating the State's "securitisation refund payment" and the arrangements for making this payment are also identical to those already described in section 3.5.1.2.

3.5.5 Termination by the Project Company for a State default

If:

- Any breach of the Project Deed by the State substantially frustrates or makes it impossible for the Project Company to perform its obligations under the Project Deed for a continuous period of two months or more
- There is an expropriation or requisition of a material part of the Project Company's assets and/or shares by a government, council, government department, statutory authority, court or tribunal in New South Wales, or
- The State fails to pay the Project Company any undisputed amount specified in its monthly invoices (section 3.3.7.1)—or any other amount of money, totalling more than \$100,000 (indexed to the CPI from the December quarter of 2005), that is due to it under the Project Deed—within 20 business days of a formal demand by the Project Company,

the Project Company may issue a termination notice to the State, within 20 business days of becoming aware of the State's default, giving it 120 days' notice that it intends to terminate the Project Deed for the default, as specified in the notice. Copies of this notice must be sent to the Security Trustee and the Bond Trustee.

If the State fails to rectify or overcome the effect of the default within the notice period,

- The Project Deed—and, if they have commenced, the Leases and Subleases—will terminate at the end of this notice period
- The State must pay compensation to the Project Company, in the form of a "termination payment" as prescribed in the "termination payments" schedule to the Project Deed and calculated on exactly the same basis as compensation payable following a "voluntary" termination of the Project Deed by the State, as described in section 3.5.2.2, with any amounts equal to or less than the amounts the Project Company owes to JEM under

the project's debt financing arrangements again being paid instead to JEM, or as directed by JEM, under arrangements set out in the Payment Directions Deed

- The State must also pay JEM a “securitisation refund payment” under arrangements set out in the Securitisation Agreement and the “termination payments” schedule to the Project Deed, as already described in section 3.5.1.2
- The Project Company must pay the State the net amount of any insurance proceeds it receives, in connection with the event leading to the termination, which is not spent on repairs, reinstatements or replacements
- The State's Project Director may require the Project Company, at no cost to the State beyond the State's compensation payment, to:
 - Transfer its title, interests and rights in any of its works or any of the school facilities, and
 - Novate the Construction Contracts, the Facilities Management Contract and/or any other replace-

ment subcontracts to the State or a replacement contractor, with the State or the replacement contractor stepping into the shoes of the Project Company under these subcontracts

- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer, and
- More specifically, the Project Company must give the State's Project Director and/or any new contractor all the documents and other information about the works, the school facilities, the sites and the services needed for an efficient transfer.

The arrangements in these circumstances for payment of the “termination payment” are identical to those already described in section 3.5.1.2, and the formula for calculating the State's “securitisation refund payment” and the arrangements for making this payment are also identical to those described in section 3.5.1.2.

4 The State Security and interactions between the State’s securities and the debt financiers’ securities

4.1 The State Security

Under the New Schools 2 Public Private Partnership Project Fixed and Floating Charge (“the State Security”) the Project Company has granted the State fixed and floating charges over all its present and future real and personal property interests, including its interests under the project’s contracts, as security for:

- The prompt payment by the Project Company of all amounts owing to the State under the Project Deed or other project contracts, and
- The performance by the Project Company of all its other obligations to the State under the Project Deed and the other project contracts.

The Security Trustee, the Construction Contractors, the Construction Contractor Guarantor, the Facilities Manager and the Facilities Manager Guarantor have expressly acknowledged and consented to the creation of the charges.

The Project Company has warranted that there are and will be no encumbrances over the charged property other than those created under the project’s private sector debt financing securities and other project contracts and any liens arising in the ordinary course of business.

The Project Company has also promised that it will not, without the State’s consent, dispose of, permit the creation of an interest in or part with possession of any of its charged property, or deal with its charged property in any way other than in the ordinary course of its ordinary business, or permit anything that might render the charged property liable to surrender or forfeiture or otherwise materially decrease the value of the State’s security.

The relative priorities of the charges created by the State Security and the debt financiers’ securities are governed by the Financiers Tripartite Deed, as discussed in section 4.2 below. Under these arrangements, the charges created by the State Security rank behind the debt financiers’ securities but ahead of all other securities affecting the Project Company’s property.

To ensure the State’s charges will have priority over any subsequently registered charges, unless the State agrees

otherwise, the maximum prospective liability secured by the State’s charges has been set, for the purpose of determining priorities between the charges under Part 2K.3 of the Corporations Act and *only* for this purpose, at \$250 million, a figure much higher than the value of all of the Project Company’s interests in the project. The State Security makes it clear that notwithstanding this provision, the State’s charges may secure prospective liabilities that are higher than this “maximum” amount.

Subject to the priorities between securities and enforcement rights specified in the Financiers Tripartite Deed, the charges created by the State Security may be immediately enforced by the State, without notice, if:

- A “Project Company termination event” occurs (see section 3.5.3.5), or
- The Project Company fails to pay any amount owing to the State under the Project Deed or any other project contract or otherwise breaches its obligations to the State under the contracts.

In these circumstances, and again subject to the Financiers Tripartite Deed, the State may appoint receiver(s) and/or receiver(s)/manager(s) of the charged property, exercising powers set out in the State Security, and the State and its authorised representatives may exercise specified powers of attorney granted by the Project Company.

4.2 Consents to and priorities between the State and debt financiers’ securities

The Financiers Tripartite Deed formally records:

- The State’s consent to the debt financiers’ securities under the project’s private sector debt financing agreements, and
- As already indicated in section 4.1, the Security Trustee’s consent to the charges created by the State Security.

With the exception of what are termed “State priority amounts”—any amounts the Project Company owes to the State because the State has taken action, in accordance with

the terms of the project contracts, to remedy a default by the Project Company—each of the debt financiers’ securities has priority over any State security, up to the aggregate of all of the amounts outstanding under the financing agreements and all financing agreement enforcement costs. Beyond this limit, the financiers’ securities and the State’s charges will have equal priority.

Accordingly, any money received in enforcing the debt financiers’ securities or the State’s charges must be applied:

- First, to pay any “State priority amounts”
- Second, to pay the sums secured by the debt financiers’ securities, up to the limit described above, and
- Third, and on a 50:50 basis, to pay all other sums of money (if any) secured by the financiers’ securities and the State’s charges.

Until all the amounts secured by the debt financiers’ securities have been paid, the State may not take any action to enforce its charges or apply for insolvency action concerning the Project Company unless the Security Trustee agrees, the only exceptions to this being:

- State actions in response to an emergency (see section 3.4.9), and
- State actions to perform or procure performance of the Project Company’s obligations under the project’s contracts following a Project Company breach, under the arrangements described in section 3.5.3.1.

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This *Summary of Contracts* was written, edited, designed and produced for the New South Wales Department of Education and Training by Catalyst Communications, Suite 101A, 75 Archer Street, Chatswood, NSW 2067 (phone (02) 9413 1497, fax (02) 9415 1027, www.catalyst.com.au). The assistance of Blake Dawson Waldron, Ernst & Young, NSW Treasury Private Projects Branch, Department of Education and Training New Schools Project and NSW Audit Office staff is gratefully acknowledged.

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In accordance with the public disclosure requirements of the NSW Government *Working with Government: Guidelines for Privately Financed Projects*, this report presents only summaries of, and *not* complete reports on, the “New Schools 2” PPP contracts of greatest relevance to the public sector, and does not cover matters which might disclose the private sector parties’ cost structures, profit margins or intellectual property or otherwise place them at a disadvantage with their competitors.

This report was prepared for submission to the NSW Audit Office in March and April 2006, and is based on the “New Schools 2” PPP contracts as at 6 July 2006. Subsequent amendments or additions to these contracts, if any, are not reflected in this summary.

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