New Schools 2
Public Private Partnership
Project
Project Deed

The Honourable Carmel Tebbutt Minister for Education and Training for and on behalf of the Crown in right of the State of New South Wales

Axiom Education NSW No. 2 Pty Limited

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Annexes
A.  Site Plans
NEW SCHOOLS 2 PUBLIC PRIVATE PARTNERSHIP PROJECT
PROJECT DEED

DATE

December 2005

PARTIES

The Honourable Carmel Tebbutt Minister for Education and Training (the Minister) for and on behalf of the Crown in right of the State of New South Wales (the State)

Axiom Education NSW No. 2 Pty Limited (ACN 114 474 565) (the Project Company)

RECITALS

A.

The Department invited proposals from the private sector for the Project and, based on the proposals submitted in response to that invitation, selected the proposal of the Project Company.

B.

The Minister and the Project Company have agreed on the terms and conditions pursuant to which the Project Company will finance, design and construct certain schools and related facilities in consideration of the Construction Payment and manage, maintain and provide certain other services in connection with those schools and facilities in consideration of the Service Payment, in accordance with the terms and conditions of this deed.

C.

The State has agreed to lease each Site to the Project Company pursuant to the terms of the Leases and the Project Company has agreed to lease each Site back to the State pursuant to the terms of the Subleases.

D.

JEM has agreed to provide finance to the Project Company and to enter into the Securitisation Agreement with the State.

E.

The Minister is entering into this deed for and on behalf of the State, for the provision of the School Facilities and the Services, which are necessary for the provision of education in the State of New South Wales.

OPERATIVE PROVISIONS

PART A – PROJECT PARAMETERS AND INTERPRETATION

1. INTERPRETATION AND GENERAL MATTERS

1.1 Definitions

The following definitions apply in this deed.

ABN AMRO Australia means ABN AMRO Australia Limited (ACN 000 862 297).
Abandon means:

(a) wholly or substantially ceases to carry out the Works contemplated by the Works Program for 20 consecutive Business Days or for 60 Business Days (whether consecutive or not) in any Contract Year and/or ceases to provide all or a substantial part of the Services for 15 consecutive Business Days or for 30 Business Days (whether consecutive or not) in any six month period, except to the extent relieved of the obligation to do so by the express provisions of this deed; or

(b) expresses or displays an intention to permanently cease performance of all or substantially all of the Works or the Services and the Project Company does not, within 5 Business Days of the Project Director giving to the Project Company written notice of such expression or display, recommence performance of the relevant Works or Services or otherwise satisfy the Project Director that it is not, and does not intend to, permanently cease performance of all or substantially all of the Works or the Services.

Account Bank Agreement means the document so entitled to be entered into between, amongst others, the Project Company and the Security Trustee.

Additional Work means any work requiring Capital Expenditure, other than in respect of the Works, to be carried out at or in relation to a Site or a School Facility, including any change in or addition to a School Facility, but excluding life cycle maintenance and refurbishment contemplated by or required for performance of the Services.

Additional Work Contractor means any person (other than the Project Company or a Project Company Related Party) engaged by the State to undertake Additional Work.

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

Adverse Rights means all (if any) interests, rights, affectations and encumbrances easements and covenants (including any rights, and easements and other affectations or encumbrances in respect of conduits) and other restrictions on use (excluding rights of light and air) affecting or impacting a Site as at the date of this deed.

Approval Conditions Event means a Relevant Authority requires as a condition to a Project Company Development Approval that the Project Company or a Project Company Related Party pays contributions or levies towards, or constructs or provides, subdivision infrastructure that is not within the boundaries of the Site which are not contemplated or reasonably likely having regard to the Output Specification and the Project Company Proposals, and where no meritorious basis exists for contesting such contributions, levies or conditions in accordance with clause 6.4 but, for the avoidance of doubt, excluding any infrastructure (whether within or outside the boundaries of the Site) required as a result of the construction, operation or use of the School Facilities or access to or egress from the School Facilities such as crossings, bus bays, parent drop-offs, cycle ways, footpaths, electrical substation, roundabouts, traffic signals and road widening.
Approval Conditions Variation means a Relevant Authority requires:

(a) as a condition to a Project Company Development Approval in relation to the School Facility to be constructed at Rouse Hill, that the Project Company or a Project Company Related Party pays contributions or levies towards, or constructs or provides, an access road from Withers Road extending along the northern frontage of the Rouse Hill Site to the roundabout situated at the western boundary of the Rouse Hill Site (including associated traffic control measures such as any requirements for the access road to provide access for bus and vehicular traffic to drop off zones and car park areas of the School Facility) or the widening or upgrading of Withers Road (except for any costs arising in connection with the provision of bus bays, drop off zones, footpaths, landscaping works and crossovers), the cost of which in total is less or greater than $250,000; or

(b) as a condition to a State Development Approval contributions or levies to be paid (including in respect of water or sewage) or conditions to be satisfied in relation to the Works, the cost of which in total is less or greater than:

(i) in the case of Hamlyon Terrace, $500,000;
(ii) in the case of Ashtonfield, $200,000; and
(iii) in the case of Halinda, $100,000,

in each case, which are not contemplated or reasonably likely having regard to the Output Specification and the Project Company Proposals, and where no meritorious basis exists for contesting such contributions, levies or conditions in accordance with clause 6.4.

Approval Delay Event means:

(a) an event or circumstance occurs so that a Project Company Development Approval is not available by the relevant Target DA Approval Date, other than where it is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or any Project Company Related Party, including any contest carried out in accordance with clause 6.4(b) but excluding a State Approval Delay Event; or

(b) the Project Director requires that a condition to a Consent be contested in accordance with clause 6.4(c).


Artefacts means any fossils, bones, artefacts, coins, articles of antiquity, structures, objects or other remains or things of scientific, geological, historical, archaeological or aboriginal interest or things otherwise of value.

Available has the meaning given to that term in schedule 5.

Auditor General means the New South Wales Auditor General, appointed pursuant to the Public Finance and Audit Act 1983.
**B&B Investments** means Babcock & Brown Schools 2 Investments Pty Limited (ACN 116 355 367).

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

**Bank Bill Rate** means, for a period, the rate, expressed as a yield per cent per annum (rounded up (if necessary) to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10.10 am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by about 10.30am then the Bank Bill Rate shall be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

**Base Case** means the base case financial model in the agreed form, as amended from time to time in accordance with this deed.

**Base Case Equity Return** means the nominal blended internal rate of return to Equity Investors, (before Equity Investor tax, but after Project Company tax), expressed as a percentage, as stated in the Base Case.

**Benchmark Date** means, for each of the Services or groups of Services set out in schedule 20, the date specified as the benchmark date for those Services.

**Benchmarked Insurances** means those insurances set out in paragraphs 7 and 9 of schedule 14.

**Benchmarking Exercise** has the meaning given to that term in clause 30.1.

**Beneficial Change in Law** means a Change in Law which results or would, if implemented, result in a Variation Saving.

**Bond Trust Deed** means the document so entitled to be entered into between, amongst others, the Bond Trustee and the Project Company.

**Bond Trustee** means AET Structured Finance Services Pty Limited (ABN 12 106 424 088) as trustee under the Bond Trust Deed.

**Bond Underwriting and Subscription Agreement** means the agreement so entitled to be entered into between, amongst others, ABN AMRO Bank N.V. (Australian Branch) (ABN 84 079 478 612) (as the underwriter) and the Project Company.

**Building Code** means the Building Code of Australia as adopted by Law and any other requirements of the EPA Act and associated regulations of that legislation in relation to buildings.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the city of Sydney, New South Wales.
**Capital Expenditure** means, at any time, expenditure which would be classified as capital expenditure in accordance with the then current Australian accounting standards issued by the Australian Accounting Research Foundation, or any successor or replacement of such body, on behalf of the professional accounting bodies.

**Change in Control** means, in respect of an entity, any event occurs such that a change occurs in the Control of that entity.

**Change in Law** means the coming into effect or implementation after the date of this deed of:

(a) Legislation, other than any Legislation which, on the date of this deed, has been published or is reasonably foreseeable; or

(b) any applicable judgement of a relevant court of law which changes a binding precedent; or

(c) a Policy, other than a Policy which, on the date of this deed, has been published or is reasonably foreseeable.

**Change Procedure** means the procedure set out in schedule 16.

**Claim** includes any suit, claim, action, demand, proceeding, penalty, fine, order or adverse judgement (at common law or in equity) under, arising out of, or in any way in connection with, this deed or the Project.

**Collateral Warranty** means a collateral warranty in favour of the State by (as the case may be) a Material Subcontractor on the terms set out in schedule 10.

**Commencement Certificate** means a certificate issued by the Project Director in accordance with clause 13.3 in the form contained in part B of schedule 13.

**Commencement Date** means, for each School Facility, the date so stated in the Commencement Certificate for that School Facility in accordance with clause 13.4.

**Commercially Sensitive Information** means any information relating to the Financing Facilities, the Project Company’s cost structure or profit margins, any of the Project Company’s Proprietary Material, any other information which is commercially sensitive, in that it provides a competitive advantage or unique characteristic to the Project Company, its shareholders, its financiers or its Subcontractors.

**Commissioning** means any installation, commissioning, testing or running in of plant, equipment, machinery or facilities required to ascertain the ability of each School Facility, or any part of it, to comply with the Output Specification to the extent they apply to that School Facility, and any training, education, familiarisation and support required to ascertain the ability of each School Facility, or any part of it, to comply with the Output Specification to the extent they apply to that School Facility and any installations of State Provided Items required in accordance with the Output Specification prior to the Commencement Date for a relevant School Facility.

**Commissioning Plan** means the plan for the Commissioning Works developed in accordance with clause 11.3.
**Commissioning Works** means the process of carrying out the Commissioning of a School Facility.

**Community Use** means use (whether or not commercial use) of a School Facility (or any part of it) in accordance with Community Use Policy, where such use is introduced or facilitated other than by the Project Company, excluding School Use.

**Community Use Agreement** means an agreement entered into, in accordance with the Community Use Policy, by or on behalf of the State, with respect to Community Use of all or any part of a School Facility provided that any Community Use Agreement in respect of a School Facility must include a provision that the relevant Community Users are responsible for their own damage and actions affecting the School Facility.

**Community Use Policy** means the Community Use of School Facilities Policy Statement and Implementation Procedures NSW Department of Education and Training 2004 as such policy may be amended, supplemented or replaced from time to time.

**Community User** means a group which enters into a Community Use Agreement with the State.

**Comparable Services** has the meaning given to that term in clause 30.2.

**Compensation Event** means each of:

(a) a breach by the State of its obligations under this deed which substantially frustrates or renders it impossible for the Project Company to perform any of its obligations (including, for the avoidance of doubt, where its obligations are to be performed by a certain time or to achieve a KPI, to perform its obligations by that time or to achieve that KPI respectively) or exercise any of its rights under the Project Documents;

(b) a failure by the State to fulfil its obligations under clause 6.1(a)(ii) but only to the extent such failure causes the Project Company to fail in obtaining a Project Company Development Approval by the Target DA Approval Date for that Project Company Development Approval;

(c) a Discriminatory Change in Law;

(d) a Qualifying Change in Law;

(e) the exercise by the State of its Emergency Step In Rights;

(f) the implementation of Additional Work other than by the Project Company, including the impact on the Services of Additional Work provided other than by the Project Company and any defects arising in respect of such Additional Work carried out other than by the Project Company, except to the extent dealt with in accordance with the Change Procedure;

(g) a Native Title Application;

(h) the discovery of an Artefact;
(i) a Department Relocatable Unit not being in the condition required by clause 22.8 or not being made available in accordance with clauses 22.8(b) and (e), other than where that circumstance is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party;

(j) any legal proceedings challenging the validity of a State Development Approval, the modification, withdrawal, revocation, suspension or replacement of a State Development Approval, in each case other than due to an application for a Project Company Development Approval, any Project Company Variation Proposal, or any other action or inaction, as the case may be, of the Project Company or any Project Company Related Party;

(k) a State Provided Item not being made available in accordance with clause 11.9, or a latent defect or deficiency in a State Provided Item not reasonably discoverable by the inspection and testing required by clause 11.9, in each case other than where that circumstance is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party;

(l) an Approval Conditions Event;

(m) a State Approval Delay Event;

(n) an official or unofficial strike, lockout, go slow or other dispute by staff employed by the State or the Department, other than where it is caused directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party;

(o) comments made by the Project Director under clause 10.4(e) in relation to non-compliance of draft Detailed Design, Works Program or Management Plan documentation with the requirements of this deed, where:

(i) the Project Company disputes the comments; and

(ii) the Project Company is unable to proceed to the next stage of Detailed Design, Works Program or Management Plan development; and

(iii) the dispute resolution process under this deed results in a final and binding determination that the relevant documentation did comply with the requirements of this deed; and

(p) a Site not being a serviced site as at the relevant site access date for that Site as set out in the Site Access Schedule, by virtue of the unavailability of Utilities infrastructure to the boundary of the relevant Site to service the relevant Site.

Completion means:

(a) in respect of the Works for a School Facility, the stage of construction where:

(i) the Works for the relevant School Facility are complete in accordance with the terms of this deed, save only for any minor omissions or defects which, individually or in aggregate, do not have an adverse effect on the occupation of the School Facility and do not have an adverse effect on the State's ability
to provide the Education Functions or the Project Company's ability to provide the Services in accordance with this deed and, in each case, where the process of rectification of such defects, agreed in accordance with clause 13.2, will not have any such adverse effect;

(ii) Commissioning of the relevant School Facility, including all plant and equipment, has been carried out in accordance with the Commissioning Plan and the Output Specification;

(iii) all Consents necessary for the occupation of the relevant School Facility for Education Functions and its use for its intended purpose have been issued and conditions of those Consents (to the extent they are necessary for safe occupation) have been satisfied;

(iv) any work required under clause 13.5 has been carried out, including the Final Contamination Assessment and the Final Site Audit Statement where relevant;

(v) removal of rubbish and Temporary Works used in connection with the Works for the relevant School Facility and any other work required for the occupation of the relevant School Facility for Education Functions and its use for its intended purpose has been completed;

(vi) Utilities infrastructure has been provided and Utilities connection verified in accordance with the Output Specification;

(vii) the Operations Manual as it applies to the relevant School Facility has been completed or updated in accordance with this deed and the Output Specification; and

(viii) in respect of the relevant School Facility the insurances referred to, and to be taken out and maintained as detailed, in part B of schedule 14 are in full force and effect; and

(b) in respect of a Milestone, when the Milestone is completed in accordance with the terms of the requirements of this deed.

**Conditions Precedent** means the conditions set out in schedule 1.

**Consents** means all permits, authorisations, approvals, licences, exemptions, clearances, consents, permissions, notifications, applications, filings, registrations, lodgements, deeds, certificates, directions, declarations or exemptions, or similar decisions of any kind which are required from, by or with a Relevant Authority for the performance of the Project or any part of it, including:

(a) each Development Approval;

(b) any Construction Certificate (as defined in the EPA Act) required for a Development Approval;

(c) any Occupation Certificate (as defined in the EPA Act) required for the occupation of a School Facility;

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8.
(d) a building certificate issued pursuant to s149B of the EPA Act;
(e) any environmental protection licences;
(f) any approval under the Heritage Act 1977 (NSW);
(g) any approval under the Roads Act 1993 (NSW); and
(h) any approval required under the Water Act 1912 (NSW) or the Water Management Act 2000 (NSW).

Construction Contract means each design and construction contract, in the agreed form, between the Project Company and a Construction Contractor relating to the Works or any part of the Works.

Construction Contractor means each of St Hilliers Contracting Pty Limited (ABN 60 082 594 563) and Hansen Yuncken Pty Limited (ABN 38 063 384 056), or such other replacement contractor or contractors as the Project Company may, subject to clause 7, appoint to carry out the Works or any part of the Works.

Construction Contractor Guarantor means St Hilliers Holdings Pty Limited (ABN 71 069 565 331), or such other party as may be substituted for the Construction Contractor Guarantor in accordance with the Project Documents.

Construction Letter of Credit means the letter of credit to be issued by ABN AMRO Bank N.V. (Australian Branch) (ABN 84 079 478 612) (as the issuer) to the Security Trustee under and in accordance with the terms of the LC Facility Agreement.

Construction Payment means the payment by the State to the Project Company on the Full Service Commencement Date as determined in accordance with the Financial Close Protocol.

Construction Phase means, in respect of a Site or a School Facility, the period commencing on the date when the Project Company is granted access to the relevant Site or School Facility under a Works Program, and ending on the Commencement Date for the School Facility.

Construction Report means each report provided in accordance with clause 11.4.

Construction Side Deed means the side deed, substantially in the form set out in schedule 6, between the State, the Project Company, the Construction Contractor and the Construction Contractor Guarantor as the context may require, or any replacement of such document entered into in accordance with the Project Documents.

Contamination has the same meaning as in section 5 of the Contaminated Land Management Act 1997 (NSW).

Contract Variation means a variation to the Output Specification, the Project Company's Proposals, the Detailed Design, the Works Program (other than changes to the Works Program which may be made in accordance with clause 11.2), the Works, the Operations Manual (other than changes to the Operations Manual which may be made in accordance
with clause 15.2), a School Facility (including its use) or the Services, and, as the context may require, any consequential amendments to this deed as a result of such a variation.

**Contract Year** means each period of 12 months during the Term commencing on 1 January, provided that:

(a) the first Contract Year shall be the period commencing on the date of this deed and ending on the immediately following 31 December; and

(b) the final Contract Year shall be the period commencing on 1 January immediately preceding the last day of the Term and ending on the Termination Date.

**Control** means, with respect to an entity, the ability or capacity to determine the outcome of decisions about that entity's financial and operating policies.

**CPI** means the "Weighted Average of Eight Capital Cities: All Groups Consumer Price Index" as maintained and published quarterly by the Australia Bureau of Statistics (**ABS**) provided that:

(a) if for any reason the CPI is not published for any quarter, or if publication is delayed until after the relevant date under the Project Documents or other date in respect of which a determination is to be made, the interim number determined by the Reserve Bank of Australia for application in regard to Commonwealth of Australia Treasury Indexed Bonds will be used for the purposes for which the actual CPI figure would have been applied. If no such interim number is determined by the Reserve Bank of Australia then the CPI published for the previous quarter will apply in the interim. In the event of subsequent publication of the actual CPI figure for that quarter by the ABS, adjustment to the payment will be made;

(b) if the ABS ceases to publish the CPI and publishes another index which is stated to be in replacement of the CPI, then that will be used for the relevant determination;

(c) if the ABS ceases to publish the CPI without publishing a replacement index, or if any change is made to the coverage, periodicity, or basic calculation of the CPI which, in the opinion of the Treasurer of the Commonwealth of Australia, constitutes a change in the CPI which is materially detrimental to the interests of Commonwealth of Australia Treasury Indexed Bond holders then, in such circumstances, the index to be announced by the Treasurer of the Commonwealth of Australia for use with Commonwealth of Australia Treasury Indexed Bonds will be substituted for the CPI. In the event of no such index being established, the President of the Institute of Actuaries of Australia or his/her nominee acting as an independent arbitrator will be called upon to calculate an index which he/she determines to be appropriate as a general indication of the rate of price change for consumer goods and services in the capital cities of Australia; and

(d) if the reference base of the CPI is changed, the index which will be used will be the CPI numbers expressed on the new base as published by the ABS.
**Critical Area** means the gymnasium and/or hall and its supporting student facilities plus any other spaces required for use during a Critical Period nominated by the Project Director pursuant to clause 17.2.

**Critical Period** means a critical period for uninterrupted delivery of Services, such as trial exam and exam periods, notified in accordance with clause 17.2.

**Dangerous Good** has the same meaning as in the latest edition of the Australian Code for the Transport of Dangerous Goods by Road and Rail.

**Deduction** has the meaning given to that term in schedule 5.

**Defect** means any latent or patent defect in any of the School Facilities, or any part of them, attributable to:

(a) defective design;

(b) defective workmanship or defective materials, plant or machinery used in the construction of such School Facilities, or any part of them;

(c) defective installation of anything in or on the School Facilities, or any part of them or a Site, having regard to Good Industry Practice and to applicable standards and codes of practice current at the date of such installation; or

(d) defective preparation of a Site.

**Department** means the New South Wales Department of Education and Training.

**Department Demountable Units** means transportable or demountable learning spaces owned by the State but excluding Modular Design Ranges.

**Department Relocatable Units** means Department Demountable Units and Modular Design Ranges (as applicable).

**Design Data** means all material calculations, designs, design information, specifications, plans, programs (other than computer programs), drawings, graphs, sketches, models, samples, test results, engineering and other forms of material data in whatever medium prepared or to be prepared by or on behalf of the Project Company for the implementation of the Project.

**Detailed Design** means, for a School Facility, the complete design development documentation, including detailed specifications, reports and schedules of accommodation developed and finalised in accordance with clause 10.4.

**Detailed Design Program** means, the program for development of the Detailed Design for each School Facility to be prepared by the Project Company by the date set out in part A of schedule 12 and in accordance with the Output Specification.

**Development Approval** means each development consent or other approval and assessments required under the EPA Act and the EPBC Act in relation to the Project, including the State Development Approvals.
Disputed Amount has the meaning given to that term in clause 29.4.

Discriminatory Change in Law means a Change in Law, the terms of which apply to:

(a) the Project and not to similar projects procured by the State; or

(b) the Project Company and not to other persons; or

(c) a Site, the Works or a School Facility and not to other similarly situated land, facilities or works; or

(d) projects procured or established under the Guidelines or other policies in respect of privately financed projects and not to other projects.

Distribution means any distribution by the Project Company to its shareholders or related bodies corporate, whether by way of dividend, return of capital, redemption, purchase, buy back, cancellation, payment, repayment or otherwise, in respect of the share capital of the Project Company or the subordinated debt of the Project Company, or any payment, loan or financial accommodation by the Project Company to a related body corporate, other than on arm's length terms.

Education Functions means all curriculum, teaching, pastoral support, career guidance, extra-curricular, remedial, training, vocational, scholastic and educational activities provided for the benefit of students, and related parent, guardian and community liaison and administrative support functions to be undertaken at each School Facility, including all activities and services that would reasonably be expected, as at the date of this deed, to be undertaken in connection with or which are incidental or ancillary to such functions and activities, but excluding the Services and Unforeseeable Education Functions. In the context of the availability of a School Facility, Education Functions includes access required by Education Staff in order to discharge their respective responsibilities and obligations in the course of their employment, and access required by students and other members of the community to receive the benefit of the Education Functions.

Education Functions Disruption means a material interference with or increase in the costs or requirements for the provision of Education Functions.

Education Staff means employees, agents, contractors, subcontractors, consultants, licensees and authorised officers of the Department or the State, involved in provision of any part of the Education Functions.

Eligible Community Group means those community groups which may be charged utility and other incremental costs or market rates with respect to the provision of School Facilities for Community Use, as set out in the Community Use Policy.

Eligible Community Use Costs means, in respect of any Community Use, the aggregate of the direct utility and other incremental costs incurred by the Project Company, so far as they are additional to the costs which the Project Company would have incurred in connection with the provision of the Services, in making available any part of the School Facilities for such Community Use, to the extent only that such Community Use is provided to an Eligible Community Group.
Emergency means a situation in relation to the Project, which, in the bona fide opinion of the Project Director, determined having regard to the facts then known to the Project Director:

(a) prevents provision of the Services or continuation of the Works under normal circumstances;

(b) poses a serious threat to, or causes or will cause material damage or material disruption to:

(i) the health or safety of persons;

(ii) the Environment;

(iii) private or public property; or

(iv) the safe and secure performance of the Works or provisions of the Services or operation of a School Facility; or

(c) will require the provision of the Services or alternate services materially greater than that required in the Output Specification,

whether caused by a breach by the Project Company of any of its obligations under any Project Document or not.

Emergency Step In Rights means the exercise by the State of its Step In Rights, in circumstances where there is no breach by the Project Company of its obligations under any Project Document.

Employee Requirements means the requirements relating to the Project Company and the Subcontractors set out in schedule 22.

Energy Benchmark Date means the date which occurs five years after the first Commencement Date and each fifth, or multiple thereof, anniversary of the first Commencement Date.

Energy Component means the energy component of the Service Payment set out in schedule 5 as amended in accordance with clause 30.6.

Environment means all components of the earth, including:

(a) land, air and water;

(b) any layer of the atmosphere;

(c) flora and fauna;

(d) any organic or inorganic matter and any living organism including humans;

(e) human made or modified structures and areas;

(f) the aesthetic characteristics of the components of the earth, including appearance, sound, odour, taste and texture; and
(g) ecosystems with any combinations of the above.

**Environmental Law** means any Law:

(a) relating to the storage, handling or transportation of Waste, Dangerous Goods or Hazardous Material;

(b) relating to occupational health and safety; or

(c) which has as one of its purposes or effects the protection of the Environment.

**Environmental Notice** means any direction, order, demand or other requirement to take any action or refrain from taking any action in respect of a Site, the Works or a School Facility or its use:

(a) from any Relevant Authority;

(b) whether written or otherwise; and

(c) in connection with any Environmental Law.

**EPA** means the New South Wales Environment Protection Authority, and any successor to such authority.

**EPA Act** means the *Environmental Planning and Assessment Act 1979 (NSW).*

**EPBC Act** means the *Environment Protection and Biodiversity Conservation Act 1999 (Cth).*

**Equity Investor** means a person who holds an equity interest in the Project Company and/or a provider of subordinated debt, which is, in substance, equivalent to equity, to the Project Company.

**Equity Underwriting and Subscription Agreement** means the agreement so entitled to be entered into between the Equity Investors, the Project Company, ABN AMRO Australia, B&B Investments and the Security Trustee.

**Estimated Cost Effect** means the cost effect of an event or variation calculated in accordance with schedule 19.

**Excluded Purposes** means each of the following:

(a) the provision of Education Functions, other than by the State or the Department; and

(b) any purpose which is inconsistent with or constitutes a breach of Consents or applicable Law.

**Expiration Date** means 31 December 2035.

**Facilities Management Contract** means each facilities management contract, in the agreed form, between a Facilities Manager and the Project Company relating to the Services or any part of the Services.
**Facilities Manager** means Spotless P&F Pty Limited (ABN 83 072 293 880), or such other replacement contractor as the Project Company may, subject to clause 7, appoint to perform the facilities management Services or any part of them.

**Facilities Manager Guarantor** means Spotless Group Limited (ABN 77 004 376 514), or such other party as may be substituted for the Facilities Manager Guarantor in accordance with the Project Documents.

**Facilities Management Side Deed** means the side deed, substantially in the form set out in schedule 6 between the State, the Project Company, the Facilities Manager and the Facilities Manager Guarantor, or, as the context may require, any replacement of such document entered into in accordance with the Project Documents.

**Facilities Removal Contract Variation** means a Contract Variation which is required as a result of a notice given under clause 23.9, clause 28.3(b)(ii) or any State Variation Request which results in a School Facility ceasing to be subject to this deed.

**Final Contamination Assessment** means an assessment of the nature and extent of Contamination of a Site on completion of the Works on that Site.

**Final Site Audit Statement** means a statement issued by the Site Auditor which reports on the findings of an independent review of the Final Contamination Assessment and any remediation work undertaken following the Final Contamination Assessment.

**Finance Security** means each of the Security Interests granted in favour of the Financiers to secure the obligations of the Project Company under the Financing Facilities.

**Financial Close** means the date on which the Project Director gives notice of satisfaction of the Conditions Precedent under clause 3.1 or the date on which satisfaction of the conditions precedent is deemed to have occurred in accordance with clause 3.1.

**Financial Close Protocol** means the financial close protocol in the agreed form.

**Financiers** means each provider of Financing Facilities from time to time and may, where the context permits, include any agent or trustee of such Financiers.

**Financiers Construction Contract Tripartite Deed** means:

(a) the document to be entered into between St Hilliers Contracting Pty Limited (as a Construction Contractor), the Construction Contractor Guarantor, the Security Trustee and the Project Company; and

(b) the document to be entered into between Hansen Yuncken Pty Limited (as a Construction Contractor), the Security Trustee and the Project Company.

**Financiers Facilities Management Tripartite Deed** means the document to be entered into between, amongst others, the Project Company, the Facilities Manager and the Security Trustee.

**Financiers Tripartite Deed** means the document to be entered into between the State, the Project Company and the Financiers substantially in the form set out in schedule 7, or, as
the context may require, any replacement of such document entered into in accordance with the Project Documents.

**Financing Agreements** means each of the following documents in the agreed form, and any additions to or replacements for such agreements, in accordance with clause 9.1:

(a) Short and Long Term Loan Agreement;
(b) each Finance Security;
(c) Equity Underwriting and Subscription Agreement;
(d) Bond Underwriting and Subscription Agreement;
(e) Security Trust Deed;
(f) Bond Trust Deed;
(g) Shareholders Agreement;
(h) Construction Letter of Credit;
(i) LC Facility Agreement;
(j) Account Bank Agreement;
(k) Subordinated Loan Agreement;
(l) Financiers Facilities Management Tripartite Deed; and
(m) each Financiers Construction Contract Tripartite Deed.

**Financing Facilities** means the facilities, financial arrangements or accommodation provided, or to be provided in accordance with the Financing Agreements, to the Project Company or JEM for the purpose of carrying out the Project.

**Fit for Intended Purpose** means being fit for the purpose of the provision of the Services and the Education Functions.

**Force Majeure Event** means the occurrence of a Relief Event which exists or occurs or the impacts of which exist or occur, or can reasonably be expected to exist or occur, for a continuous period exceeding 180 days, and that directly causes either party to be unable to comply with any of its obligations under this deed.

**Full Service Commencement Date** means the date on which the Commencement Date for all School Facilities has occurred.

**General Change in Law** means a Change in Law which is not a Discriminatory Change in Law.

**Good Industry Practice** means that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced operator, engaged in the same type of undertaking as that of the
Project Company or Subcontractor, as the case may be, under the same or similar circumstances.

GST means:

(a) the same as in the GST Law; and

(b) any other goods and services tax, or any Tax applying to this transaction in a similar way.

GST Law means the same as in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Guidelines means, as the context requires, the New South Wales government memorandum 2000-11 (Disclosure of Government Contracts) and New South Wales guidelines for privately financed projects dated 5 November 2001, each as amended or replaced from time to time.

Handover Audit has the meaning given to that term in clause 36.1.

Handover Condition means the required condition of the School Facilities and the Sites as at the Expiration Date as set out in schedule 25.

Hazardous Material means material which, because it is toxic, corrosive, flammable, explosive or infectious or possesses some other dangerous characteristic, is potentially dangerous to the Environment:

(a) when stored or handled; or

(b) when any part of the Environment is exposed to it.

Helpdesk means the telephone and email service to be provided by the Project Company for reporting service failures and issues at the School Facilities.

Holding Company means Axiom Education NSW No.2 Holdings Pty Limited (ACN 114 474 350).

Illegality Event means the occurrence of any of the following events:

(a) the Project Company or a Subcontractor ceasing to hold a Consent or breaching applicable Law, and such failure or breach is, in the opinion of the Project Director, material to the performance of the Project Company's obligations under this deed and is not remedied within 60 days of the failure or breach occurring; or

(b) any Project Document being revoked, repudiated or terminated or ceasing to be legal, valid and binding and enforceable against the Project Company or any other person (other than the State), other than as contemplated by or permitted in accordance with the Project Documents, or a Project Document becomes or is claimed to be invalid, void or voidable in any material respect, and, the event is not remedied within 60 days of the relevant event occurring or, in the event of a claim, is shown, within 60 days, to the satisfaction of the Project Director, to be frivolous, vexatious or without proper legal basis; or
(c) it is or becomes unlawful for the Project Company or a Key Subcontractor to perform any of its obligations under the Project Documents, provided that where such event occurs as a direct result of a General Change in Law implemented by the State, the relevant event is not remedied within 60 days of the relevant event occurring.

**Independent Certifier** means the person appointed from time to time under the Independent Certifier Deed.

**Independent Certifier Deed** means the deed to be entered into, substantially in the form set out in schedule 9.

**Information Document** means:

(a) any information or Material provided to the Project Company or any Project Company Related Party by or on behalf of the State or the State Related Party prior to the date of this deed; and

(b) any other information or Materials which are referred to or incorporated by reference in information or a document referred to in paragraph (a), unless such information or document is otherwise expressly stated to form part of this deed.

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

(a) if an application is made (other than for a frivolous or vexatious reason) for the winding up of a party and, where an application has been made for the dismissal or withdrawal of the application for winding up within 10 Business Days, the application is not dismissed or withdrawn within 30 Business Days;

(b) an order is made for the winding up of a party, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the Project Director before that order is made where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of the approval;

(c) if a party passes a resolution for its winding up, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the Project Director before that resolution is passed where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of that approval;

(d) if a receiver, receiver and manager, liquidator provisional liquidator, compulsory manager trustee for creditors or in bankruptcy or analogous person is appointed to, or the holder of a Security Interest takes (or appoints an agent to take) possession of, any property of a party or otherwise enforces its Security Interest;

(e) if a party or any other person appoints an administrator to the party, or takes any step to do so;

(f) if a party:
(i) suspends payment of its debts (other than as the result of a failure to pay a
debt or claim which is the subject of a good faith dispute);

(ii) ceases or threatens to cease to carry on all or a material part of its business;

(iii) is or states that it is unable to pay its debts; or

(iv) is deemed insolvent by virtue of its failure to comply with a statutory
demand; or

(g) if a party enters into a readjustment or rescheduling of its indebtedness or makes a
general assignment for the benefit of or a composition with its creditors, without the
prior consent of the State.

**Insurance Benchmark Date** means the date which occurs three years after the first
Commencement Date and each third, or multiple thereof, anniversary of the first
Commencement Date.

**Insurance Component** means the insurance component of the Service Payment set out in
schedule 5 as amended in accordance with clause 30.5.

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

(a) all rights in all applications to register these rights;

(b) all renewals and extensions of these rights; and

(c) all rights in the nature of these rights,

but excluding Moral Rights.

**JEM** means a subsidiary of JEM Bonds Limited (ACN 068 273 503) or such other entity
approved by the State.

**Key Subcontract** means each of the Construction Contract and the Facilities Management
Contract.

**Key Subcontractor** means each Facilities Management Contractor and each Construction
Contractor.

**Key Subcontractor Guarantor** means each Construction Contractor Guarantor and each
Facilities Manager Guarantor.

**KPI** means Key Performance Indicator as defined in the Output Specification.

**Land Tax** means land tax payable in accordance with the provisions of the Land Tax
Legislation.

Law means:

(a) Legislation;

(b) common law or principles of equity; and

(c) requirements and Consents of Relevant Authorities (including conditions in respect of those Consents).

LC Facility Agreement means the agreement so entitled to be entered into between ABN AMRO Bank N.V. (Australian Branch) (ABN 84 079 478 612) and JEM (as the issuer).

Leases means the leases to be granted in accordance with clause 5.9.

Legislation means, in relation to New South Wales or the Commonwealth of Australia:

(a) any act of parliament or statute;

(b) any subordinate legislation, rules, regulations or by-laws, or Policy; and

(c) guidelines and codes of practice of the Commonwealth, the State or local councils and authorities with which the Project Company is legally required to comply.

Licence means each licence granted in accordance with clause 5.1.

Longstop Date means, in respect of a School Facility, the date described as its longstop date in schedule 3, as may be extended in accordance with this deed.

Loss includes any cost, expense (including legal expenses on an indemnity basis), loss, charges, fees, payments (including payments made under indemnities), damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, fixed or unascertained, actual or contingent.

Maintenance Program has the meaning given to that term in the Output Specification.

Management Plans mean, in respect of the Works to be carried out at each Site, the management plans required pursuant to the Output Specification, as prepared and provided in accordance with clause 10.3.

Master Rental Agreement means the agreement between the State and the Project Company pursuant to which the parties agree the amount of rent payable in respect of the Leases.

Material means any document, article or other thing in tangible form, in whatever medium, including documented methodologies, processes, instructions, business rules, specifications, plans, drawings, maps, requirements, manuals, guides and reports.

Material Risk means during the Operations Phase for each School Facility, those risks required to be insured under paragraphs 7 and 9 of schedule 14.
**Material Subcontract** means a Subcontract:

(a) the term of which exceeds five years; or

(b) relating to the Works or the Services which are nominated by the Project Director as being critical works or services, or works or services which are important to the operation of one or more School Facilities after the Termination Date; or

(c) in respect of which the total amount payable to the relevant Subcontractor, and its related bodies corporate, under that Subcontract and other Subcontracts exceeds:

(i) during the Construction Phase, $1,000,000; and

(ii) during the Operations Phase, $250,000 per annum (indexed by reference to the CPI).

**Material Subcontractor** means each Key Subcontractor and each other Subcontractor who is a party to a Material Subcontract.

**Milestone** means each milestone or critical path activity within a School Facility nominated in schedule 3.

**Minister** includes the minister of the Crown in right of the State of New South Wales who is administering the *Education Act 1990* (NSW) from time to time, and, as the context permits, any of his or her properly authorised delegates.

**Minor Change** means any variation or addition to the Works or the Services which, together with related variations or additions, which in aggregate, in substance, constitute one variation or addition, the Estimated Cost Effect of which does not exceed $10,000 (indexed by reference to the CPI).

**Modular Design Ranges** means transportable or demountable spaces owned by the State but excluding Department Demountable Units.

**Monthly Invoice** has the meaning given to that term in clause 29.2.

**Monthly Lifecycle Payment** has the meaning given to that term in schedule 5.

**Monthly Service Fee** has the meaning given to that term in schedule 5.

**Monthly Service Payment** has the meaning given to that term in schedule 5.

**Moral Rights** means rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed, and rights of a similar nature conferred by statute that exist, or may come to exist, anywhere in the world.

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

**Notice of Completion** means a duly completed certificate in the form of part A of schedule 13, certifying each of the requirements set out in the notice and listed in Annex A of the notice.
Operating Month means each calendar month from the first Commencement Date until the end of the Term. For the avoidance of doubt, if the first Commencement Date falls part way through a calendar month, the first Operating Month begins on the Commencement Date and ends at the end of that calendar month, and the last Operating Month will begin on the first day of the calendar month in which the Termination Date falls and end on the Termination Date. Each other Operating Month will begin on the first day of each calendar month and end on the last day of that calendar month.

Operations Manual means, for each School Facility, a manual which is developed, maintained and updated in accordance with clause 15.2 and the Output Specification.

Operations Phase means, in respect of a School Facility, the period from and including the Commencement Date for that School Facility until the end of the Term.

Output Specification means each of the requirements set out in schedule 4, as amended in accordance with the Change Procedure.

Performance and Payment Report has the meaning given to that term in clause 29.6.

Persistent Breach has the meaning given to that term in clause 33.2.

Plan of Subdivision and Instrument means the plan of subdivision, instrument and any other related documents required to be registered pursuant to clause 5.12(a).

Policy means any rule, guideline, regulation, policy, standard, procedures and requirement relating to the execution of any part of the Works or the provision of a service included in the Services as may be and published by the Commonwealth of Australia, the State or the Department from time to time, and includes the Schools Facilities Standards.

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

Pre-refinancing Equity Return means the internal rate of return of Equity Investors over the Term, taking into account the actual Distributions to date and forecast Distributions over the remainder of the Term.

Prescribed Rate for a period, means 3% per cent per annum above the Bank Bill Rate for that period.

Pro Forma Invoice means the form of invoice set out in section 14 of schedule 5, which must meet the requirements from time to time of a tax invoice.

Programmed Maintenance Plan has the meaning given to that term in the Output Specification.

Project means:

(a) the financing, design, construction and commissioning of the School Facilities;

(b) facilities management of the School Facilities, including maintenance and repair;

(c) the provision of the other Services; and
(d) handover of the School Facilities on the Termination Date,

each in accordance with this deed.

**Project Company Development Approvals** means all Development Approvals, other than the State Development Approval (but including any modification or replacement to the State Development Approval) required in order to implement the Project Company Proposals and satisfy the Output Specification including any Development Approvals with respect to any subdivision required for the Project.

**Project Company Group** means the Project Company and any related body corporate identified as a member of the Project Company Group in schedule 2, and any related body corporate which becomes a member of the Project Company Group pursuant to a consent given in accordance with clause 39.3.

**Project Company Proposals** means the proposals set out in schedule 27.

**Project Company Related Party** means:

(a) an officer, employee or agent of the Project Company or any related body corporate of the Project Company and any officer, employee or agent of such a person;

(b) any Subcontractor and any of their respective officers, employees or agents; and

(c) any person on or at any of the Sites, the Works or the School Facilities at the express or implied invitation of the Project Company or any Subcontractor (other than a State Related Party).

**Project Company Representative** means the person from time to time appointed in accordance with clause 4.6.

**Project Company Termination Event** means any of the events set out in clause 34.1.

**Project Company Variation Proposal** means a notice issued pursuant to paragraph 1 of schedule 16.

**Project Co-ordination Group** means the committee established in accordance with clause 4.7.

**Project Default** has the meaning given to that term in clause 33.1.

**Project Director** means the person from time to time appointed in accordance with clause 4.2.

**Project Documents** means:

(a) this deed;

(b) the Construction Side Deed;

(c) the Facilities Management Side Deed;

(d) the Independent Certifier Deed;
(e) the Financiers Tripartite Deed;
(f) the Leases;
(g) the Subleases;
(h) each Licence;
(i) each Material Subcontract and any guarantee (including the Collateral Warranty) given in connection with it;
(j) the State Security;
(k) the Securitisation Agreement; and
(l) the Master Rental Agreement.

**Proprietary Material** means:

(a) the Detailed Designs, the Works Program and the Operations Manual;
(b) any Material prepared or created by or on behalf of the Project Company or a Subcontractor in conjunction with any application for or modification of any Development Approval or Consent; and
(c) any other Material created by or on behalf of the Project Company or a Subcontractor in connection with the design, construction, commissioning, operation, or facilities management (including maintenance or repair) of the whole or any part of the School Facilities and any other Material required to use or maintain the whole or any part of the School Facilities, and, in each case, which is the subject of any Intellectual Property Right or Moral Right.

**Qualifying Change in Law** means any General Change in Law, other than a General Change in Law with respect to Tax, which requires the Project Company to incur, during the Operations Phase for one or more School Facilities, Capital Expenditure or operating expenditure in respect of such School Facilities, other than where such additional operating expenditure resulting from the relevant General Change in Law affects businesses generally, provided that Changes in Law affecting only the provision of services at schools that are similar to the Services will be deemed not to affect businesses generally.

**Quality Standard (Works) Plan** means the quality standard plans for the Works developed in accordance with the Output Specification.

**Quality Standards (Services) Plan** means the quality standard plans for the Services developed in accordance with the Output Specification.

**Quarter** has the meaning given to that term in schedule 5.

**Quarterly Service Payment** has the meaning given to that term in schedule 5.

**Rates** means all rates, taxes or charges or other amounts which any Relevant Authority levies by reference to the School Facilities or the Site, but excluding head works costs or
other contributions levied by reference to the Works or the Services and excluding any Land Tax levied by reference to a School Facility or a Site.

**Refinancing** means:

(a) any amendment to any Financing Agreement;

(b) the exercise of any right, or the request for any waiver or consent, under any Financing Agreement;

(c) any other step or arrangement that has a substantially similar effect to (a) or (b); or

(d) any new contractual or financing arrangements entered into in relation to the Project,

but excluding any action set out in (a) to (d) above that is specifically taken into account in the Base Case at Financial Close,

which is likely to:

(a) give rise to a Refinancing Gain; or

(b) increase or change the profile of the liabilities of the State under a Project Agreement.

**Refinancing Case** means the project financial model produced by the Project Company demonstrating the effect of a Refinancing proposal, produced on the assumptions that:

(a) the Refinancing will proceed as proposed; and

(b) the State Refinancing Share will be paid as a single amount on the Refinancing date.

**Refinancing Case Equity Return** means the nominal blended internal rate of return to Equity Investors (before Equity Investor tax but after Project Company tax) expressed as a percentage as stated in the Refinancing Case.

**Refinancing Gain** means an amount equal to the greater of zero and (A - B) - C, where:

A  =  the net present value of the Distributions (taking into account the effect of the Refinancing and using the Base Case current immediately prior to the Refinancing but without reference to payment to the State of the State Refinancing Share) to be made to each Equity Investor over the Term.

The recovery by State and Project Company of legal costs, swap breakage costs and other reasonable professional fees and expenses, which are properly incurred as a direct result of the Refinancing, shall be taken into account in calculating the Distributions available.

B  =  the net present value of the Distributions (but without taking into account the effect of the Refinancing and using the Base Case current immediately prior to the Refinancing) to be made to each Equity Investor over the Term.
C = any adjustment required to raise the Pre-Refinancing Equity Return to the Base Case Equity Return, being the notional amount which, if received by the Equity Investors as at the proposed date for the Refinancing, would increase the Pre-Refinancing Equity Return to the Base Case Equity Return.

The discount rate used to calculate A and B shall be the Base Case Equity Return.

**Refinancing Report** has the meaning given to that term in clause 9.3.

**Relevant Authority** means any court or tribunal with the relevant jurisdiction, any local, state, national or supra-national government, council, agency, authority, inspectorate, department, ministry, official or public or statutory person.

**Relief Event** means:

(a) fire, explosion, storm, lightning, cyclone, hurricane, tempest, flood, ionising radiation, earthquakes, war (declared or undeclared), armed conflict, terrorism, riot and civil commotion (including protests);

(b) failure by any Relevant Authority or providers of Utilities, to carry out works or provide services;

(c) shortage of power, fuel, transport or Utilities;

(d) any event or occurrence which causes loss or damage to the Works or a School Facility;

(e) pressure waves caused by devices travelling at supersonic speeds;

(f) any blockade or embargo;

(g) any official or unofficial strike, lockout, go slow or other dispute generally affecting the construction or facilities management industry or a significant sector of it, but excluding such industrial action affecting only one or more Sites or School Facilities;

(h) any event or occurrence which causes a deprivation of possession of or access to a Site or a School Facility when the same is outside the control of either the State or the Project Company; and

(i) an Approval Delay Event,

but excluding any of the events or occurrences which occurs or arises (directly or indirectly) as a result of the action or inaction (as the case may be) of the Project Company or any Project Company Related Party.

**Rent Payment Amount** means the rent payment by the Project Company as determined in accordance with the formula set out in schedule 1 of the Master Rental Agreement.

**Representative** has the meaning given to that term in clause 40.1.

**Reserved Matters** means:
(a) all (if any) Adverse Rights, and any other affectations or encumbrances shown on or described in the Information Documents provided to the Project Company by the State prior to the date of this deed; and

(b) title to those Sites for which legal and beneficial title has not yet vested in the State, being the Sites for the School Facilities other than Hamlyn Terrace, Ashtonfield, and NW Sector No 3.

Resolution Period means the period of 5 Business Days from the date on which a referral notice described in clause 4.7(h) or clause 40.1 is served.

Schedule of Generic Quantities means the schedule of rates provided by the Project Company and included in the Project Company Proposal setting out the rates applicable for each item of the Works for a typical school site as described in that schedule.

School Day means, in respect of a School Facility, the period between the hours of 0700 hours and 1630 hours (or such earlier or later times as the School Principal may agree in writing with the Project Company) on each day on which the School Facility is required by the Department for the delivery of Education Functions and including, for the avoidance of doubt, each day on which teachers are required to be at the School Facility, even if the relevant day is a student free day.

School Facility means each school described in schedule 3 and its associated facilities, including buildings, fixtures, fittings, equipment, electrical goods and furniture, and including grounds, playgrounds, paths and gardens on the relevant Site but excluding State Provided Items other than any Department Re relocatable Units, provided or to be provided in accordance with the Output Specification relevant to that school.

School Principal means, in respect of each School Facility, a person designated and appointed as or acting as the principal of that School Facility.

School Use means use of a School Facility (or any part of it) by the State, State Related Parties and students for the provision or receipt of Education Functions.

Schools Facilities Standards has the meaning given to that term in the Output Specification.

Securitisation Agreement means the agreement dated on or about the date of Financial Close between the State and JEM.

Securitisation Payment means the amount payable by JEM to the State under the Securitisation Agreement in relation to the assignment of rent payable under the Leases and the Master Rental Agreement and, in relation to a Contract Variation arising prior to the Full Service Commencement Date, the amount payable by JEM to the State in relation to the corresponding increase in rental.

Securitised Variation Payment means an amount payable by the State to the Project Company in relation to a Contract Variation or implementation of works in relation to a Compensation Event arising after the Full Service Commencement Date where the Project Company has agreed to an increase in rent payable under the Master Rental Agreement in relation to that Contract Variation, in each case in accordance with schedule 19.
**Security Interest** means:

(a) a mortgage, charge, pledge, bill of sale, lien, hypothecation, title retention, right of set-off or right to withhold payment of a deposit or other money;

(b) any profit a prendre, easement, restrictive covenant, any equity or interest in the nature of an encumbrance, garnishee order, writ of execution, lease, licence or agreement to use or occupy, assignment of income or monetary claim; and

(c) an agreement to create or give any arrangement referred to in paragraphs (a) or (b) of this definition.

**Security Trust Deed** means the security trust deed to be entered into between, amongst others, the Security Trustee, JEM and the Project Company.

**Security Trustee** means AET Structured Finance Services Pty Limited (ABN 12 106 424 088) as trustee under the Security Trust Deed.

**Service Payment** means the fees payable to the Project Company in respect of the Services, calculated in accordance with schedule 5.

**Services** means the service or services described in or required to be provided to satisfy the Output Specification.

**Shareholders Agreement** means the agreement so entitled dated 29 September 2005 between the Project Company, the Holding Company, Babcock & Brown International Pty Limited (ACN 108 617 483), B&B Investments, ABN AMRO Australia and ABN AMRO Infrastructure Investments No. 3 Pty Limited (ACN 102 644 486).

**Short and Long Term Loan Agreement** means the agreement so entitled to be entered into between the Project Company and JEM to provide financing for the Project.

**Side Deed** means each of the Construction Side Deed and the Facilities Management Side Deed and, where the context permits, any other side deed executed in accordance with clause 7.2(c) in the form of schedule 6.

**Sinking Fund Account** has the meaning given to that term in clause 29.11(a).

**Sinking Fund Invoice** has the meaning given to that term in clause 29.11(d).

**Site** means each of the sites outlined on the Site Plans.

**Site Access Schedule** means the site access schedule set out in schedule 3.

**Site Auditor** means a person who is accredited as a site auditor under the *Contaminated Land Management Act 1997* (NSW) and who is jointly appointed by the State and the Project Company to act as the site auditor for the purposes of this deed.

**Site Conditions** means the conditions of each Site, including climatic, hydrological, geological, ecological, environmental, geotechnical, archaeological, and atmospheric surface and subsurface conditions or characteristics.
Site Plan means each of the site plans, as set out in Schedule 27.

State means the Crown in right of the state of New South Wales.

State Approval Delay Event means each of:

(a) an event or circumstance occurs so that a State Development Approval is not available by the Target DA Approval Date for that State Development Approval, other than where it is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or any Project Company Related Party; and

(b) a Project Company Development Approval is not available by the relevant Target DA Approval Date, where such Project Company Development Approval cannot be sought or issued as a direct result of:

(i) the State not owning the relevant Site;

(ii) the Site zoning not being consistent with the issue of the relevant Project Company Development Approval; or

(iii) a subdivision of the relevant Site not being effected.

State Default means each of the following events:

(a) an expropriation, sequestration or requisition of a material part of the assets and/or shares of the Project Company by a Relevant Authority in New South Wales;

(b) a failure by the State to make payment to the Project Company of:

(i) any amount specified in a Monthly Invoice or any part thereof; or

(ii) any other amount of money exceeding, in aggregate, $100,000 (indexed by reference to the CPI) that is due and payable by the State under this deed (excluding, for the avoidance of doubt, payment by the State to the Project Company of the Construction Payment or a Securitised Variation Payment in circumstances where the State has not received payment from JEM of the corresponding Securitisation Payment),

in each case, within 20 Business Days of service of a formal written demand by the Project Company (for the avoidance of doubt, an amount disputed under clause 29.4 is not to be taken into account for the purposes of this paragraph (b)); and

(c) a breach by the State of its obligations under this deed which substantially frustrates or renders it impossible for the Project Company to perform its obligations under this deed for a continuous period of two months.

State Development Approval means each of the development consents given under the EPA Act to construct and operate the following School Facilities at:

(a) Hamlyn Terrace;

(b) Ashtonfield; and
State Provided Items means any furniture, fittings and equipment which may be provided by the State and/or the Department and includes any item, which when installed upon a Site or a School Facility, becomes, by operation of Law, a fixture.

State Refinancing Share means 50% of any Refinancing Gain.

State Related Party means:

(a) the Project Director and any other person responsible for the administration or management or implementation of the Project, or any aspect of the Project, for and on behalf of the State;

(b) the Department, any Education Staff, or any other employees, agents or contractors of the State or the Department acting in the course of his or her employment;

(c) in relation to any School Facility during any period of Community Use, any person using the School Facility for that purpose; and

(d) in relation to any School Facility, any student of that School Facility, or any person visiting that School Facility at the invitation (whether express or implied) of the State or the Department,

but excluding in each case the Project Company and any Project Company Related Party.

State Security means the Security Interest granted by the Project Company in favour of the State to secure performance of the Project Company's obligations under this deed and the other Project Documents in the form contained in schedule 8.

State Surveyor means a person who is a registered surveyor and who is nominated by the Project Director and appointed by the Project Company to act as the state surveyor for the purposes of this deed.

State Variation Request means a notice issued pursuant to paragraph 2 of schedule 16 or, where the context requires, a proposal deemed to take effect as the State Variation Request.

Step In Rights means the step in rights set out in clause 19.3.

Subcontract means each Key Subcontract, each Material Subcontract and any other contract or agreement entered into by the Project Company and/or any Subcontractor in connection with the performance of the Works or the Services or any part of the Works or the Services.

Subcontractor means each of the Material Subcontractors and any other subcontractor or sub-subcontractor appointed in accordance with clause 7.

Subleases means the subleases to be granted in accordance with clause 5.10.

Subordinated Loan Agreement means the document so entitled to be entered into between, amongst others, the Holding Company and the Project Company to provide finance for the Project.
Target Completion Date means, in respect of each Milestone and School Facility, the date described as its target completion date in schedule 3, as may be extended under the terms of this deed.

Target DA Approval Date means, in respect of a School Facility, the date described as its target DA approval date in schedule 3, as may be extended under the terms of this deed.

Target Financial Close Date means 28 February 2006, or as may be extended under clause 3.1.

Target Full Service Commencement Date means the last occurring Target Completion Date specified in schedule 3, as may be extended under the terms of this deed.

Tax means any present or future tax, levy, impost, deduction, charge, duty, compulsory loan or withholding, including the GST, (together with any related interest, penalty, fine or expense in connection with any of them) levied or imposed by any government agency, other than any imposed on net overall income.

Temporary Works means temporary works, facilities, fencing, utilities and structures required for storage, security, staff meetings and amenities and other activities necessary for and incidental to the carrying out the Works, but not forming part of the Works or the School Facilities.

Term means the period which begins on the date of this deed and ends on the Expiration Date, or, if earlier, upon termination of this deed pursuant to clause 34 or clause 23.5 or clause 28.3(b).

Termination Date means the last day of the Term.

Termination Notice has the meaning given to that term in clause 34.2.

Third Party Use means use (whether or not commercial use) of a School Facility (or any part of it), but excluding Community Use and School Use.

Unavailable has the meaning given to that term in schedule 5.

Unavailability Termination Event means either:

(a) in any period of 3 consecutive Operating Months, Whole School Unavailability Events have occurred with respect to the same School Facility for at least 10 days in aggregate; or

(b) in any Monthly Invoice, the Deduction incurred exceed 15% of the Monthly Service Fee,

but excluding the effect of events and Deductions directly caused by a Relief Event.

Unforeseeable Education Functions means functions and services provided or to be provided by the State or the Department at the School Facilities, of which the Project Company was unaware prior to the date of this deed and which a prudent and competent contractor experienced in the construction and maintenance of similar school facilities would not have reasonably foreseen, notwithstanding that it had done all those things
which such a contractor would reasonably have done (including reviewing all documents and information provided to the Project Company or otherwise generally reasonably available) for the purposes of submitting a proposal for the Project (including everything the Project Company warrants it has done under clause 2.4) and, for the avoidance of doubt, the ongoing provision of regular scheduled classes for teaching of State curriculum on week-ends, or outside of the hours of 0700 hours to 1630 hours, shall be deemed to be Unforeseeable Education Functions.

Uninsurable means, in relation to a risk, either that:

(a) insurance required pursuant to clause 26.1 is not available in the recognised international insurance market in respect of that risk and coverage is not available under the Terrorism Insurance Act or similar legislative scheme; or

(b) the insurance premium payable for insuring that risk is at such a level or the terms and conditions are such that the risk is not generally being insured against in the insurance market by prudent, competent and experienced providers of services similar to the Services.

Utility means any utility service, including water, electricity, gas, telecommunications and electronic communications (including voice and data), drainage, and sewerage and supply of all supporting structures and media necessary for such services.

Variation Proposal means a report issued pursuant to schedule 16, setting out the following:

(a) the effect of the proposed Contract Variation on:

(i) the workmanship, quality, appearance or durability of any part of the relevant Works, School Facility or Site;

(ii) the design, construction and Completion of the Works;

(iii) the ability of the Project Company to deliver the School Facilities or provide the Services;

(iv) the Project Company's performance of any other obligation under this deed (including its ability to meet any of the Target Completion Dates or the Target Full Service Commencement Date);

(v) a School Facility or Site (including maintenance and lifecycle requirements and forecast costs thereof) and delivery of the Services after the Expiration Date; and

(vi) the delivery of the Education Functions;

(b) the time within, and the manner in which the Project Company proposes to implement the Contract Variation;

(c) whether or not the required capital expenditure can be accommodated within the next planned refurbishment or renovation of areas within that School Facility;
(d) the increase or decrease in costs as a result of the proposed Contract Variation, calculated in accordance with schedule 19, including calculations supporting the requirements for:

(i) staged payments matching the payments to relevant Subcontractors;

(ii) if appropriate:

(A) a lump sum amount for the capital component of any Contract Variation together with the Project Company’s proposal in relation to the timing of such payment; and

(B) any associated changes in the Quarterly Service Payment as a result of any consequential operating costs or savings; or

(C) any increase or decrease to the Quarterly Service Payment to cover the relevant capital cost or savings and operating costs or savings (including any changes to the Construction Payment, the Securitised Variation Payment or the Securitisation Payment and any increase or decrease in the amount of rent payable under the Master Rental Agreement); and

(D) details of the way in which the Project Company proposes to fund the proposed Contract Variation; and

(e) the time period required to seek funding for the Contract Variation; and

(f) any necessary amendments to the Output Specification, the Operations Manual, the Detailed Design, the Works and the Works Program.

Variation Saving has the meaning given to that term in paragraph 19 of schedule 19.

Warning Notice has the meaning given to that term in clause 33.2.

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

Works means in respect of each School Facility, the development, design, creation of Proprietary Material, demolition and remediation works (if necessary), construction and Commissioning Works for that School Facility, including all site investigations and testing, all connection and installation of Utilities, and procurement of associated plant, equipment and material, all in accordance with the Project Documents.

Works Program means, for each School Facility, the detailed program of Works for that School Facility, based on the Detailed Design for that School Facility, and showing the sequences of activities constituting the critical path and the inter-dependencies between activities, developed and provided in accordance with clause 10.2 and updated in accordance with clause 11.2.
1.2 Rules for interpreting this deed

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this deed, except where the context makes it clear that a rule is not intended to apply.

(a) A reference to:

(i) Legislation is to that Legislation as amended, re-enacted or replaced;

(ii) a document or deed, or a provision of a document or deed, is to that document, deed or provision as amended, supplemented, replaced or novated;

(iii) a party to this deed or to any other document or deed includes a permitted substitute or a permitted assign of that party;

(iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;

(v) anything (including a right, obligation or concept) includes each part of it;

(vi) a schedule, annexure or exhibit are references to schedules, annexures or exhibits to this deed and a reference to a Project Document includes any schedule, annexure or exhibit to that Project Document;

(vii) a reference to the Corporations Act is a reference to the Corporations Act 2001 (Cth); and

(viii) a reference to day or month means a reference to a calendar day or calendar month respectively.

(b) A reference to the Phrase "indexed by reference to the CPI" means multiplied by CPI_{n+1}/CPI_{0} where:

\[ \text{CPI}_{n+1} = \text{the highest published CPI from Financial Close until the first day of the relevant month} \]

\[ \text{CPI}_{0} = \text{the most recently published CPI at the time of Financial Close} \]

\[ n = \text{the number of months from the month occurring one month prior to Financial Close} \]

(c) A singular word includes the plural, and vice versa.

(d) A word which suggests one gender includes the other genders.

(e) If a word is defined, another part of speech has a corresponding meaning.
(f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.

(g) A reference to any document in an agreed form means the document which has been accepted and agreed by the parties to this deed, and certified and initialled by the parties to this deed for the purposes of identification.

(h) A reference to dollars or $ is to the lawful currency of Australia.

(i) The words subsidiary, holding company and related body corporate have the same meanings as in the Corporations Act.

1.3 No joint venture

Nothing in any Project Document constitutes a joint venture, partnership, agency or fiduciary relationship between the State and the Project Company.

1.4 Business Days

If the day on or by which a person must do something under this deed is not a Business Day:

(a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and

(b) in any other case, the person must do it on or by the previous Business Day.

1.5 Multiple parties

If a party to this deed is made up of more than one person, or a term is used in this deed to refer to more than one party:

(a) an obligation of those persons is joint and several;

(b) a right of those persons is held by each of them severally; and

(c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

1.6 Contra proferentum

In the interpretation of this deed, no rule of construction applies to the disadvantage of one party on the basis that the party put forward or drafted this deed or any provision in it.

1.7 Approvals and consents

(a) Unless expressly stated otherwise, all approvals, consents, decisions or exercises of discretion required to be given or made by the Project Company under this deed must not be unreasonably withheld or delayed.
(b) For the avoidance of doubt, all approvals, consents, decisions or exercises of discretion required to be given or made by the State or a Project Director:

(i) relating to, or arising under or in connection with this deed;

(ii) relating to the satisfaction of a condition precedent pursuant to the terms of this deed; or

(iii) sought in relation to or in connection with, or referable to, or determinative of, the occurrence of, any Project Company Termination Event,

and regardless of whether the requirement of the approval, consent, decision or exercise of discretion is express or implied, the State or the Project Director (as the case may be), has or have the right to give or make its approval, consent or decision or exercise its discretion conditionally or unconditionally or to withhold its approval, consent, decision or exercise of discretion but in giving or withholding its approval, consent, decision or exercise of discretion, or in imposing any conditions, the State or the Project Director (as the case may be) must act reasonably.

(c) Without limitation, the State or the Project Director will not be acting unreasonably if, in giving or withholding any approval or consent, or in imposing any conditions, the State or the Project Director:

(i) acts in accordance with relevant government policies;

(ii) adopts a "whole of government" approach; or

(iii) acts to protect the State's reputation.

(d) The Project Company acknowledges that the State and the Project Director, in granting any approval, consent or endorsement, will not assume any duty of care, responsibility or liability to the Project Company or any other person and will not be taken to have agreed that any matter the subject of any approval, consent or endorsement is in compliance with the Project Documents.

1.8 Discontinuance of bodies or associations

(a) If an authority, institution, association or body referred to in this deed is reconstituted, renamed or replaced, or if its powers or functions are transferred to another organisation, this deed refers to that new organisation.

(b) If an authority, institution, association or body referred to in this deed ceases to exist, this deed refers to the organisation which serves the same purpose or object as that authority, institution, association or body.

1.9 No restriction

This deed does not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the State to exercise any of its functions pursuant to any applicable laws. This clause 1.9 does not limit the contractual obligations of the State pursuant to this deed, provided that, anything which the State is required to do under any Law will not be deemed to be an act or omission by the State under this deed or any other Project.
Document (except to the extent that the relevant act or omission would, but for this clause, be a Compensation Event), and will not entitle the Project Company to make any claim against the State arising out of the subject matter of this deed and the other Project Documents.

2. **PROJECT PARAMETERS**

2.1 **Objectives**

The State and the Project Company acknowledge and agree that the parties' intentions in entering into the Project Documents are that:

(a) in consideration of the State paying the Construction Payment to the Project Company in accordance with this deed, the Project Company will finance, design, construct and commission the School Facilities in accordance with this deed;

(b) the State may provide the Education Functions in connection with the School Facilities;

(c) the design, construction and commissioning of the School Facilities, and the provision of the School Facilities and the Services, will enable the State to provide high quality Education Functions;

(d) the State will pay fees to the Project Company to provide the Services, in accordance with this deed;

(e) the Project Company will pay rent in accordance with the Master Rental Agreement;

(f) the Project Company will transfer possession of and facilities management responsibility for the School Facilities to, or in accordance with the direction of, the State at the end of the Term, in accordance with this deed; and

(g) the Project Company must carry out its obligations under this deed so as to accommodate, support and facilitate the provision of the Education Functions and, without limiting the foregoing, so as not to cause an Education Functions Disruption.

2.2 **Interface with Education Functions**

(a) The Project Company acknowledges that it will bear the risk of the provision of the Services and carrying out of the Works so as not to cause an Education Functions Disruption.

(b) Without limiting the provisions of the Output Specification or clause 2.2(a), the Project Company must consult with the State from time to time on the best method of coordinating and integrating the Services and the Works with the Education Functions, and the Operations Manual must implement such coordination and integration requirements.

(c) Nothing in the Information Documents or the Project Documents is to be implied as giving undertakings by the State or any State Related Party that it will carry out the
Education Functions, or that the Education Functions will be carried out in a particular manner or at a particular time.

(d) Without limiting the foregoing, except as expressly provided by this deed:

(i) no representation, warranty or advice of any kind has been or is given by or on behalf of the State regarding the Education Functions;

(ii) the Project Company releases and indemnifies the State, the Department and their respective officers, agents and employees in respect of any Claims or Losses which the Project Company may suffer in connection with the Education Functions; and

(iii) the Project Company will not be entitled to any relief from obligations, nor any compensation in respect of the carrying out of the Education Functions or the impact the Education Functions may have on performance of the Works or Services.

(e) The Project Company must not, without the prior written consent of the Project Director, modify its work practices or change how it provides the Services in any way which causes or may cause an Education Functions Disruption or, without limiting the foregoing, increases the costs of providing the Education Functions or of otherwise operating the School Facilities.

2.3 Adherence to Objectives

(a) Each party must, in accordance with and subject to the provisions of this deed, perform its obligations under this deed having regard to and with the aim of satisfying the objectives referred to in clause 2.1.

(b) Where a party to this deed (the First Party) is entitled to assert against the other party to this deed any claim or to obtain any benefit, relief or remedy, pursuant to or arising out of this deed, the First Party will be obliged to take reasonable and appropriate steps to mitigate, prevent or eliminate the effects of the event or circumstance in respect of which the claim, benefit, relief or remedy has arisen.

(c) Each party to this deed (the First Party) undertakes to cooperate in good faith with the other (the Second Party) in order to facilitate the performance of the Project Documents, and in particular must (and must procure that those for whom it is responsible will):

(i) use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party; and

(ii) subject to compliance by the Second Party with its obligations under this deed and the State's rights under clauses 19, 32 and 34, not interfere with the rights and obligations of the Second Party under the Project Documents and not in any way hinder, prevent or delay the Second Party from performing its obligations under this deed.
2.4 Project Company Acknowledgments

(a) The Project Company acknowledges that, except as expressly provided by this deed, no representation, warranty or advice of any kind has been or is given by or on behalf of the State, the Department or any officer, agent, contractor, adviser or employee of any of them, in respect of the accuracy, completeness or current application of any information, data or material provided on or before the date of this deed to the Project Company or its officers, agents, contractors, advisers or employees in respect of the Project, the Sites, the Works, or the School Facilities, and that none of the State, the Department or any officer, agent, contractor, adviser or employee of any of them assumes any duty of care or other responsibility for any such Information Document or any other information, data or material.

(b) The Project Company hereby releases and indemnifies the State, the Department, and their respective officers, employees and agents, on demand, from and against any Loss or Claim incurred, suffered or arising from:

(i) any reliance or use by the Project Company or any Project Company Related Party on Information Documents or any other information, data or material provided to the Project Company, any Project Company Related Party or its officers, agents, contractors, advisers or employees in respect of the Project, a Site, the Works, or a School Facility by the State, the Department or any officer, agent or employee of any of them, including any information, data or material which is "misleading or deceptive" or "false or misleading" (within the meaning of those terms in sections 52 and 53 (respectively) of the Trade Practices Act 1974 (Cth) or any equivalent provision of state or territory legislation);

(ii) any inaccuracy, omission, unfitness for any purpose or inadequacy or incompleteness of any kind whatsoever in the Information Documents or any other information, data or material provided on or before the date of this deed to the Project Company or its officers, agents or employees in respect of the Project; and

(iii) any failure to make available to the Project Company any information, data, material or other information relating to the Project.

(c) The Project Company warrants that prior to the date of this deed it:

(i) examined this deed (including, for the avoidance of doubt, the Output Specification), the Sites, and their surroundings, and any other information that was made available by the State, or any other person on behalf of the State, to the Project Company for the purpose of submitting a proposal for the Project;

(ii) examined, and relied solely upon its own investigations, assessment, skill, expertise and enquiries in respect of all information relevant to the risks, contingencies and other circumstances having an effect on its proposal for the Project and its obligations under the Project Documents;
(iii) satisfied itself that there is nothing in the Output Specification which is inconsistent, or would prevent it from performing and satisfying, its obligations to provide the Services or perform its other obligations under this deed;

(iv) satisfied itself as to the correctness and sufficiency of its proposal to satisfy its obligations under the Project Documents, has made adequate allowance for the costs of complying with all the obligations of the Project Company, and of all matters and things necessary for the due and proper performance and completion of the Works and the performances of the Services in accordance with the Project Documents;

(v) informed itself of all matters relevant to the employment of labour at each Site, the Works and each School Facility and all industrial matters relevant to each Site, the Works, each School Facility and the Services; and

(vi) was given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:

(A) relating to the subject matter of Information Documents; and

(B) for design purposes and otherwise,

and for this purpose was given access to such parts of the Sites as it required.

(d) The Project Company:

(i) acknowledges that the Information Documents do not form part of this deed;

(ii) warrants that it did not in any way rely upon:

(A) any Information Document or any other information, data, representation, statement or document made, or provided to the Project Company, by the State or anyone on behalf of the State or any other information, data, representation, statement or document for which the State is responsible or may be responsible whether or not obtained from the State or anyone on behalf of the State;

(B) the accuracy, adequacy, suitability or completeness of such Information Document or any other information, data, representation, statement or document,

for the purposes of entering into this deed;

(iii) agrees that it enters into this deed solely based on its own independent investigations, interpretations, deductions, information and determinations; and

(iv) acknowledges that it is aware that the State has entered into this deed relying upon the warranties, acknowledgments and agreements in this clause 2.4.
(c) The Project Company acknowledges and agrees that:

(i) the Project Company accepts full responsibility for performing the Works and the Services to satisfy the Output Specification and for the performance of its obligations under the Project Documents and confirms that the Output Specification does not contain any defects, omissions or inconsistencies which would prevent the performance of the Works or the Services satisfying the Output Specification or the performance of its obligations under the Project Documents, and it will not be relieved of any of its obligations under this deed, or otherwise arising out of or in connection with the Project, notwithstanding:

(A) that the draft Output Specification were proposed by the State; or

(B) the existence, in the Output Specification, of requirements which are inconsistent with, or compliance with which would prevent the Project Company from performing and satisfying, its obligations to provide the Services;

(ii) the Project Company has been given full and adequate opportunity to undertake a review and investigation of the draft Output Specification and Project Documents, and identify and correct all such inconsistencies, defects and omissions, prior to the date of this deed; and

(iii) the Project Company will not, subject to the express provisions of this deed to the contrary, be entitled to any compensation or relief under the Project Documents as a result of any such inconsistencies, defects and omissions.

(f) The Project Company acknowledges and agrees that the State has no liability for any damage, expense, loss or liability which the Project Company suffers or incurs in respect of the incorrectness or inaccuracy of any assumption by any person made in the calculation of the investment in the Project or elsewhere relating to:

(i) existing taxation requirements;

(ii) the availability of taxation rulings;

(iii) Project revenue; or

(iv) Project costs, including the costs of financing, designing, constructing, commissioning and maintaining the School Facilities and providing the other Services,

except where that incorrectness or inaccuracy is due to, or constitutes, a Compensation Event.

2.5 Appointment of Project Company

(a) The State appoints the Project Company to carry out the Project in accordance with and subject to the terms of the Project Documents.
(b) Subject to clause 3.1, this deed and the rights and obligations of the parties under it will take effect on the execution of this deed by both parties.

2.6 Compliance with Law

(a) Each party must comply with all Law and requirements of all Relevant Authorities applicable to its obligations in respect of the Project.

(b) The Project Company must promptly give the Project Director:

(i) copies of all notices, orders or directions given to or received by it, its related bodies corporate or the Subcontractors in connection with the Project pursuant to any Law; and

(ii) copies of all documents given by it or its related bodies corporate or the Subcontractors to a Relevant Authority in connection with the Project pursuant to any Law.

2.7 Exclusion of Civil Liability Act 2002 (NSW)

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

(b) The Project Company agrees that:

(i) in each Subcontract, it will include provisions that, to the extent permitted by Law, effectively exclude the operation of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all rights, obligations or liabilities arising under or in relation to that Subcontract howsoever such rights, obligations or liabilities are sought to be enforced; and

(ii) it will require and ensure that each Subcontractor will include in any further sub-subcontract, supply agreement or consultancy agreement (collectively called sub-subcontract) that it enters into with others for the carrying out of any part of the Works or any part of the Services, provisions that, to the extent permitted by Law, each such further sub-subcontract will include provisions that effectively exclude the operation of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all rights, obligations or liabilities arising under or in relation to such further sub-subcontract howsoever such rights, obligations or liabilities are sought to be enforced.

PART B – PRELIMINARY MATTERS

3. CONDITIONS, REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS

3.1 Conditions Precedent

(a) The rights and obligations of the parties under this deed will not commence unless and until this deed and the other Project Documents entered into or to be entered
into by the State have received the approval of the Treasurer of New South Wales under section 20 of the Public Authorities (Financial Arrangements) Act (NSW).

(b) The rights and obligations of the parties under this deed (other than the provisions of clauses 3.1, 3.2, 3.3, 4.2, 4.3, 4.4, 4.5, 4.6, 6, 7, 8, 14, 20, 21, 22, 23, 24, 25, 38, 39, 40, 41 and 42) and each other Project Document will not commence unless and until the Conditions Precedent have been satisfied, or waived by the State.

(c) The Project Company must procure the satisfaction of the Conditions Precedent by the Target Financial Close Date.

(d) If the Conditions Precedent have not been satisfied or waived by 5pm on the Target Financial Close Date, the Project Director may, in its absolute discretion, terminate this deed and each other Project Document at any time after the Target Financial Close Date and this deed will then be without further effect, except in relation to rights and obligations arising before such termination.

(e) When the Project Company is of the opinion that a Condition Precedent has been satisfied it will give the Project Director written notice and the Project Director will give written notice to the Project Company whether or not it agrees that the Condition Precedent has been satisfied. If such notice is not given by the Project Director within 10 Business Days of receipt of the written notice from the Project Company, the Condition Precedent will be deemed to have been satisfied.

(f) Upon request by the Project Company, the Project Director may, in its absolute discretion, extend the Target Financial Close Date by notice in writing to the Project Company.

3.2 Representation and warranties

(a) The State represents and warrants that:

(i) it has the power to execute, deliver and perform its obligations under the Project Documents and all necessary action has been taken to authorise such execution, delivery and performance;

(ii) the Project Documents to which the State is party are the State's valid and binding obligations enforceable against the State in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, Laws relating to the enforcement of creditors' rights;

(iii) the execution, delivery and performance of the Project Documents to which the State is a party by the State will not contravene any Law to which the State is subject; and

(iv) subject to the Reserved Matters, the State has or will, in accordance with the Site Access Schedule, have full and proper right to use, licence and lease each of the Sites for the purposes of the Project in accordance with this deed.

(b) The Project Company represents and warrants that:
(i) it is a company, duly incorporated and existing under Australian law and has the capacity and power to execute, deliver and perform its obligations under the Project Documents and all necessary corporate and other action has been taken to authorise that execution, delivery and performance;

(ii) the information provided by the Project Company to the State, its officers, employees, advisers or agents in connection with the Project Documents is true, accurate and complete in all material respects and not misleading in any material respect (including by omission);

(iii) the legal and beneficial ownership of each member of the Project Company Group, and the Project Company Group structure, are as set out in Schedule 2, subject to changes consented to by the State in accordance with clause 39.3;

(iv) the Project Documents to which the Project Company is a party are the Project Company's valid, legal and binding obligations enforceable against the Project Company in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;

(v) the execution, delivery and performance of the Project Documents by the Project Company will not contravene any Law to which the Project Company is subject, or any deed or arrangement binding on the Project Company;

(vi) the Project Company has not at any time since its incorporation and does not conduct any business other than the Project;

(vii) the Project Company is not acting as trustee of any settlement or as agent for or on behalf of any other entity;

(viii) the Project Company does not (in any capacity) have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);

(ix) the Project Company is not in default of its material obligations under any Project Document to which the Project Company is expressed to be a party;

(x) no Project Company Termination Event has occurred and is continuing;

(xi) no circumstances, proceedings or obligations exist or are threatened which may have a material adverse effect upon the Project Company or its ability to perform its financial or other obligations under any Project Document or Subcontract to which the Project Company is expressed to be a party;

(xii) prior to the date of this deed, it had no knowledge of any part of the proposal by any other proponent for the Project and has not directly or indirectly communicated any part of its proposal for the Project to any other proponent; and
(xiii) it has not entered into any contract or arrangement or arrived at any understanding with any other proponent in relation to the Project to the effect that it will pay money to or confer any benefit upon any other proponent as a result of entering into this deed or providing its proposal for the Project.

(c) Except where otherwise disclosed in writing to the State by the Project Company and accepted in writing by the State, each representation and warranty contained in this deed:

(i) is made on the date of this deed; and

(ii) other than those contained in clauses 3.2(b)(xii) and (xiii), will be deemed to be repeated on Financial Close and on each anniversary of the date of this deed,

with references to the facts and circumstances then subsisting.

(d) Each party enters into this deed in reliance upon the warranties and representations made by the other in this deed.

3.3 Project Company General Undertakings

The Project Company must:

(a) immediately upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings, which may adversely affect the Project and/or the Project Company's or a Key Subcontractor's ability to perform its obligations under the Project Documents, have been commenced or threatened, give the State notice of such litigation, arbitration, administrative or adjudication or mediation proceedings;

(b) not without the prior written consent of the State (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Project Company to perform its obligations under the Project Documents;

(c) not cease to be resident in Australia or transfer in whole or in part its undertaking, business or trade outside Australia;

(d) not undertake the performance of its obligations under the Project Documents for the provision of the Works and/or the Services otherwise than through itself or a Subcontractor;

(e) not without the prior written consent of the State incorporate any company or purchase or acquire or subscribe for any shares in any company, save where such company is involved in the provision of the Services or Works;

(f) not without the prior written consent of the State make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent)
in respect of any obligation of any other person except in the ordinary course of
business and/or as contemplated by the Project Documents and/or Financing
Agreements; and

(g) not change or cease its business or start any other business other than that to be
carried on by it under the Project Documents.

3.4 Status of Obligations

All warranties, representations, undertakings, indemnities and other obligations made,
given or undertaken by the Project Company in the Project Documents are cumulative and
none shall be given a limited construction by reference to any other.

4. PROJECT MANAGEMENT

4.1 Minister

The Minister enters into this deed for and on behalf of the State. The rights and obligations
of the Minister under this deed are the rights and obligations of the State and may be
exercised and satisfied accordingly.

4.2 Appointment of Project Director

The State must appoint, and ensure that at all times there is appointed, a natural person to
be the Project Director, who will:

(a) exercise the powers, duties, discretions and authorities as are delegated by the State
to be exercised by the Project Director under the Project Documents as agent for the
State; and

(b) have the full power and authority, subject to the powers of delegation by the State,
to act for and on behalf of and to bind the State under the Project Documents to the
extent of the delegation and in compliance with the delegation.

4.3 Notification of details of Project Director

(a) The State must procure that the Project Company is notified within 5 Business Days
after the date of this deed of the identity and address of the Project Director and as
soon as practicable of any changes in the identity or address of the Project Director.

(b) Nothing in this clause 4 restricts the ability of the State to replace the Project
Director at any time.

4.4 Delegation by Project Director

(a) The Project Director may from time to time:

(i) appoint one or more individuals to assist the Project Director in exercising
his or her powers, duties, discretions or authorities; or

(ii) vary or terminate in whole or part the appointment of, or the powers, duties,
discretions or authorities of such representatives.
(b) The appointment of a representative by the Project Director does not prevent the Project Director from exercising any of his or her powers, duties, discretions and authorities.

(c) The Project Director must, as soon as practicable after any appointment of an individual in accordance with paragraph (a), notify the Project Company Representative of such appointment and the extent of such appointment.

4.5 Management of Project Documents

(a) The Project Company must comply with the directions of the Project Director made under, or purported to be made under, a provision of a Project Document.

(b) A direction of the Project Director includes any instruction, order, request, requirement, or authorisation of the Project Director and may be given orally. If given orally, a direction must be promptly confirmed in writing by the Project Director.

(c) Actions of the Project Director and its delegates in accordance with clause 4 are binding on the State to the extent set out in clause 4.2, including where rights and obligations under the Project Documents are expressed to be rights and obligations of the Project Director.

(d) No direction or consent of the Project Director is to be taken as approval of any Services that do not conform to the Output Specification or this deed, and the Project Director has no authority orally to waive any provision of, or release the Project Company from, its obligation under the Project Documents. Without limiting clause 4.10, any such approval, waiver or release must be expressly identified as such, can only be given in writing, and is only effective if signed by the Project Director and, for the avoidance of doubt, no delegate of the Project Director is authorised or empowered to give any such approval, waiver or release.

4.6 Project Company Representative

The Project Company must:

(a) appoint and ensure that at all times there is appointed a natural person to be the Project Company Representative, who:

   (i) may exercise the powers, duties, discretions and authorities of the Project Company under the Project Documents as agent for the Project Company; and

   (ii) will have the full power and authority to act for and on behalf of and to bind the Project Company under the Project Documents; and

(b) notify the State within 5 Business Days after the date of this deed of the identity and address of the Project Company Representative and of any changes as soon as practicable in the identity or address of the Project Company Representative.
4.7 Project Co-ordination Group

(a) Before the Project Company commences the Works, and until the Termination Date, the State and the Project Company must establish a committee (to be known as the Project Co-ordination Group) comprising:

(i) three representatives of the Project Company;
(ii) two representatives of the State;
(iii) the Project Director.

The Project Director shall be the chairperson of the Project Co-ordination Group.

(b) Members of the Project Co-ordination Group may, at their own cost, arrange for such advisers, consultants and subcontractors, as they require from time to time to attend meetings of the Project Co-ordination Group.

(c) During the Construction Phase for each of the School Facilities, the Project Co-ordination Group must meet at intervals of not less than one month or more frequently if agreed by the Project Director and the Project Company to discuss and review any matters relating to the relevant Works including:

(i) development, design, construction and commissioning issues;
(ii) the Works Program;
(iii) preparation of and compliance with the Management Plans;
(iv) issues arising from the reports or documents provided by the Project Company to the Project Director, including the Construction Reports; and
(v) resolve any dispute referred to it under clause 4.7(h).

(d) During the Operations Phase for each of the School Facilities the Project Co-ordination Group must meet at intervals of not less than one month or such other period as is agreed by the Project Director and the Project Company, to discuss any matters relating to the relevant School Facilities, including:

(i) the provision of the Services;
(ii) preparation of and compliance with the Operations Manual for the relevant School Facility;
(iii) issues arising from the reports or documents provided by the Project Company to the State, including notices and reports given under clause 18 and reports given in accordance with clause 29.6;
(iv) coordination, management and scheduling of maintenance, refurbishment, and cleaning services;
(v) facilities management and maintenance issues generally; and
(vi) resolve any dispute referred to it under clause 4.7(h).

(e) Meetings of the Project Co-ordination Group must be conducted in such manner and in accordance with such procedures as its members may from time to time agree, provided that the Project Director and at least one representative from the Project Company must be present in order for there to be a quorum at a meeting of the Project Co-ordination Group.

(f) The Project Co-ordination Group will not have any legal responsibility to the State or the Project Company and will not have any power to require the State or the Project Company to act or refrain from acting in any way.

(g) Subject to clauses 4.7(h) to (j), the decisions of the Project Co-ordination Group do not affect the rights or obligations of either the State or the Project Company under any of the Project Documents, except as set out in this clause 4.

(h) If any dispute arises between the Project Company and the State, either party may by notice to the other party refer the dispute to the Project Co-ordination Group for resolution. The referral notice must specify in reasonable detail the nature of the dispute.

(i) A decision of the Project Co-ordination Group in respect of matters referred to it under clause 4.7(h) may only be made by unanimous agreement of the members of the Project Co-ordination Group.

(j) If a dispute is referred to the Project Co-ordination Group, the Project Co-ordination Group will meet to resolve the dispute. If the dispute is not resolved within the Resolution Period, either the State or the Project Company may refer the dispute to the Representatives in accordance with clause 40.1(a).

5. SITES

5.1 Site Licences

(a) The Minister must grant, by the site access date for a Site set out in the Site Access Schedule, or procure the grant, to the Project Company, its relevant Subcontractors and any officer, adviser, employee or agent of any of them, subject to the terms and conditions set out in schedule 11, and in accordance with and subject to any restrictions in the Output Specification, a licence to enter, occupy and use that Site during the Construction Phase for that Site, as may be reasonably necessary for, or in anticipation of, the Temporary Works and the performance of the Works.

(b) The licence granted in accordance with this clause 5.1 is subject to:

(i) the statutory right of any Relevant Authority to have access to the Sites;

(ii) the rights of the State to have access to the Sites and the Works; and

(iii) Adverse Rights.

(c) The Project Company acknowledges and agrees that, except to the extent a Compensation Event applies, the State has no liability for any Claim or Loss, delay
or any other effects which the Project Company or its Subcontractors suffer or incur in connection with the activities set out in clauses 5.1(a) and (b), and the Project Company will not be entitled to any compensation or relief under the Project Documents for such Claim, Loss, delay or any other effect.

(d) The Project Company acknowledges that access to any land other than the Sites, to which access is required for the purposes of carrying out the Project or any part of it, is the sole responsibility and risk of the Project Company, and the Project Company acknowledges and agrees that the State has no liability for any Claim, Loss, delay or any other effects which the Project Company or its Subcontractors suffer or incur due to inability to obtain, or restrictions on, access to that land, and the Project Company will not, subject to the express provisions of this deed to the contrary, be entitled to any compensation or relief under the Project Documents for any such Claim, Loss, delay or any other effect on the ability of the Project Company or its Subcontractors to comply with the Project Company's obligations under this deed caused by inability to obtain, or restrictions on, access to land other than the Sites.

5.2 Site Condition

(a) Subject to the express provisions of this deed, the State makes no representation and gives no warranty, and the Project Company accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) in relation to:

(i) each Site in its current location, state and physical condition (including latent and patent defects in any Site); and

(ii) Site Conditions, including any existing Contamination or Artefacts or structures or other things on or adjacent to the Sites, including the existence, location, condition and availability of Utilities, and the suitability or otherwise of any material on or in the Sites for use in the Project.

(b) Without limiting the Project Company's other obligations under schedule 17, to the extent paragraph (p) of the definition of 'Compensation Event' applies, the Project Company must provide, or procure provision, of the relevant Utilities infrastructure to satisfy its obligations under clause 5.7(a).

5.3 Security

During the Construction Phase for each Site, the Project Company will have full responsibility for the security of such Site and any other Adjoining Property on which connection and installation of Utilities or any other part of the Works or Temporary Works is being carried out.

5.4 Environmental obligations

In undertaking the Works and providing the Services, the Project Company must:

(a) comply with all Environmental Laws and all relevant industry standards and codes of practice;
(b) not Contaminate or Pollute the Sites, the School Facilities or Adjoining Property, or any part of them;

(c) not bring any Waste on to a Site or School Facility;

(d) keep the Sites and School Facilities in a good and safe condition so that they do not present a risk to the health or safety of any person or a risk of harm to the Environment;

(e) ensure, in accordance with Good Industry Practice, the safety of people and the protection of the Environment from harm;

(f) notify the Project Director immediately if, in the course of the Works or the provision of the Services:

   (i) an incident occurs which could be a breach of an Environmental Law; or

   (ii) the Project Company becomes aware that a complaint has been made in relation to Contamination of or Pollution of or from a Site or School Facility;

(g) provide the Project Director with any information held or controlled by the Project Company relating to any Contamination affecting, or Pollution of or from, any part of the Sites or the School Facilities;

(h) undertake all necessary remediation work so that each Site does not present a risk of harm to the Environment and is suitable for the proposed use as a school;

(i) promptly comply with any Environmental Notice served on the Project Company or the State:

   (i) during the Term; and

   (ii) after the Term, if relating to Contamination of, Pollution of or from or the disposal of Waste to a Site or a School Facility at any time during the Term; and

   (j) within seven days of receipt of any Environmental Notice served on the Project Company, provide a copy of the same to the Project Director and promptly provide to the Project Director copies of all reports, invoices and other documents relating to the Project Company’s compliance with the Environmental Notice and any other information relating to the Environmental Notice or the Project Company’s compliance with it as the Project Director may request.

5.5 Artefacts

All Artefacts discovered on or under the surface of any Site will, as between the State and the Project Company, be the absolute property of the State. The Project Company must:

   (a) at its expense, take every precaution to prevent Artefacts being removed, disturbed, damaged or destroyed;
(b) immediately upon discovery of any Artefact notify the Project Director of such discovery;

(c) comply with any Consent relating to the Artefact;

(d) without limiting paragraph (c) above, comply with any directions or orders to suspend or cease undertaking Works or Services, imposed by any Relevant Authority upon the State, the Department or the Project Company in respect of such Artefact; and

(e) continue to perform its obligations under this deed, except to the extent compliance with this clause prevents such performance.

5.6 **Native Title Application**

(a) If there is a Native Title Application with respect to a Site, or any part of it, the Project Company must continue to perform its obligations under this deed, unless otherwise:

   (i) directed by the Project Director;

   (ii) ordered by a Relevant Authority; or

   (iii) required by Law.

(b) For the purposes of clause 5.6(a)(i), the Project Director may by written notice direct the Project Company to suspend any or all of its obligations under this deed until such time as the Project Director gives the Project Company further written notice.

(c) If there is a Native Title Application with respect to a Site, the Project Company must, at the request of the Project Director, provide all reasonable assistance in connection with the State’s involvement with such Native Title Application (including giving to the State and any other person authorised by the State, access to the relevant Site or that part of the Site which is the subject of the Native Title Application when reasonably required by the State for that purpose).

5.7 **Utilities and Rates**

(a) The Project Company must arrange for extension, relocation, adjustment, connection, obtaining, provision and separate metering of any Utilities which the Project Company needs to perform its obligations under the Project Documents and which are required to provide the Education Functions.

(b) On and from the Commencement Date for each School Facility, the Project Company must ensure the continuous supply of Utilities to that School Facility at all times, at its cost, and in accordance with the Output Specification.

(c) On and from the Commencement Date in respect of each School Facility, the State must pay for telecommunications and electronic communications (including voice and data) usage in respect of that School Facility, except for telecommunications and electronic communications (including voice and data) usage attributed to
provision of the Services and use by Project Company Related Parties. The Project Company must ensure that telecommunications usage by Project Company Related Parties is separately metered and paid for by the Project Company.

(d) The State must pay for Rates and Land Tax, if any, in respect of each Site from the Commencement Date until the Termination Date.

5.8 Ownership of Certain Property

(a) If the Project Company removes any material from the Sites (whether or not required by any Relevant Authority) then, unless otherwise required by Law, prescribed by this deed or directed by the Project Director, as between the Project Company and the State, ownership in all such material transfers to the Project Company immediately on the material leaving the relevant Site.

(b) As between the Project Company and the State, all chattels and non-fixtures comprising the School Facilities, will be and remain the property of the State.

5.9 Grant of Leases

On the Commencement Date for a School Facility (in this clause 5, the Lease Date):

(a) the Minister must grant a Lease of the relevant Site to the Project Company; and

(b) the Project Company must accept that Lease.

5.10 Grant of Subleases

On the relevant Lease Date:

(a) the Project Company must grant a Sublease of the relevant Site to the State; and

(b) the State must accept that Sublease.

5.11 Procedure for Completion and Execution of Lease Documents

(a) The Project Director must prepare a Lease and a Sublease in advance of the relevant Lease Date, which must be in the form of schedule 23 and schedule 24 respectively.

(b) The Project Director must give each Lease and Sublease to the Project Company on or before the relevant Lease Date.

(c) The Project Company must execute the Lease and the Sublease and give the executed Lease and Sublease to the Project Director within 10 Business Days of receiving them.

(d) The Project Director must after receiving the executed Lease and Sublease from the Project Company under paragraph (c):

(i) arrange for the State to execute the Lease and Sublease;

(ii) arrange for the Lease and the Sublease to be stamped (including paying all stamp duty due and payable on the Lease and Sublease); and
(iii) lodge the Lease and the Sublease for registration at the NSW Land Property Information.

(c) Despite clause 5.9, if the Minister is not able to grant a Lease of a Site on the Lease Date for that Site, from the relevant Lease Date until the Project Company executes the relevant Lease and the relevant Sublease, and gives them to the Project Director, the State and the Project Company are bound as if the relevant Lease and the Sublease of the relevant Site had been executed on the relevant Lease Date.

(f) The Project Company irrevocably authorises the State's solicitors to:

(i) date each Lease and Sublease on the day the relevant State signs the relevant Lease and Sublease (respectively);

(ii) insert the relevant Commencement Date as the commencing date of each Lease and Sublease; and

(iii) insert all details required to complete each Lease and the Sublease and enable registration of each Lease and Sublease.

(g) The Project Director must give the Project Company certified copies of each registered Lease and Sublease within 20 Business Days of it being registered at the NSW Land Property Information.

5.12 Subdivision

(a) Without limiting its obligations under clause 6, the Project Company must:

(i) procure the preparation of the following:

(A) a plan of subdivision which creates single and separate parcels of land for:

(I) each Site to the extent it does not constitute a separate lot in a registered plan; and

(II) any land being transferred or dedicated to a Relevant Authority in accordance with a Development Approval;

(B) one or more instruments created pursuant to section 88B of the Conveyancing Act 1919 (NSW); and

(C) any other plans, instruments or documents required to effect the relevant Subdivision;

(ii) submit the draft Plan of Subdivision and Instrument to the Project Director for review;

(iii) ensure that the Plan of Subdivision and Instrument complies with the Development Approvals, the Project Company Proposals, the Output Specification and any other requirements set out in this deed;
(iv) following the Project Director’s review of the draft Plan of Subdivision and Instrument under clause 5.12(c), make any changes to the Plan of Subdivision and Instrument as required by the Project Director to ensure compliance with this deed, any Relevant Authority and Land and Property Information (NSW);

(v) procure the consent of all persons with an interest in the land the subject of the draft Plan of Subdivision and Instrument and all Relevant Authorities in order to achieve registration of the Plan of Subdivision and Instrument;

(vi) following production of the relevant certificates of title by the Project Director in accordance with clause 5.12(g), register the Plan of Subdivision and Instrument at Land and Property Information (NSW); and

(vii) notify the Project Director when the Plan of Subdivision and Instrument have been registered on title and deliver to the Project Director the certificates of title issued by Land and Property Information (NSW) as a result of the registration of the Plan of Subdivision and Instrument.

(b) If required by the Project Director, the Project Company must make available at the cost and expense of the Project Company, such further information as the Project Director may reasonably request relating to the Plan of Subdivision and Instrument, in such form as the Project Director may reasonably request.

(c) Subject to the Project Company having complied with any reasonable requests of the Project Director under clause 5.12(b), within 10 Business Days after receiving the draft Plan of Subdivision and Instrument, the Project Director may review such Plan of Subdivision and Instrument and reject the Plan of Subdivision and Instrument if the Plan of Subdivision and Instrument are not consistent with the relevant Development Approval, the Project Company Proposals or the Output Specification.

(d) If the Project Director fails to respond to the Project Company in respect of the submission of the Plan of Subdivision and Instrument for review under clause 5.12(c) within 10 Business Days of the date of submission, the Project Company may proceed with the form of the Plan of Subdivision and Instrument.

(e) The Project Company acknowledges that any participation by the Project Director in the review of the Plan of Subdivision and Instrument is solely for the benefit of the State, and the Project Director is not under any obligation to review the Plan of Subdivision and Instrument, and will not, in reviewing such Plan of Subdivision and Instrument, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

(f) If the Project Company does not agree with a rejection under clause 5.12(c) or (d), such dispute will be dealt with in accordance with clause 40.

(g) At the request of the Project Company, the Project Director will provide reasonable assistance to the Project Company in registering a Plan of Subdivision and Instrument, excluding payment or allowance of money, but including arranging for the production of the relevant certificates of title at Land and Property Information...
(NSW) for the purpose of enabling the Project Company to register a Plan of Subdivision and Instrument which is in accordance with this clause 5.12.

6. APPROVALS AND CONSENTS

6.1 Development Approvals

(a) The State must:

(i) provide to the Project Company a copy of each State Development Approval as soon as practicable after it is issued by the Relevant Authority; and

(ii) where a Project Company Development Approval application can only be lodged with the consent of a third party as owner of the relevant Site, procure that such consent is obtained within sufficient time to enable the Project Company to meet its obligations under clause 6.1(b).

(b) The Project Company must:

(i) apply for, and obtain by the Target DA Approval Date for a School Facility, all Project Company Development Approvals for that School Facility;

(ii) apply for and obtain any Development Approvals with respect to any subdivision required for the Project; and

(iii) ensure that all Project Company Development Approvals:

(A) comply with, give effect to and satisfy the conditions and requirements of the applicable Law and all relevant and applicable planning instruments and controls;

(B) are in accordance with the Project Company Proposals;

(C) are prepared by the dates set out in schedule 12;

(D) are consistent with the School Facilities satisfying or exceeding the Output Specification.

(c) The Project Company must submit to the Project Director for review drafts of Project Company Development Approval applications and other materials relevant to the applications in accordance with the Output Specification and this clause 6.1.

(d) If required by the Project Director, the Project Company must make available such further information as the Project Director may reasonably request relating to the Project Company Development Approval applications, in such form as the Project Director may reasonably request.

(e) Subject to the draft Project Company Development Approval application documentation complying with this clause 6.1, and the Project Company having complied with any reasonable requests of the Project Director, within 10 Business Days after receiving the draft Project Company Development Approval application,
the Project Director may review the draft Project Company Development Approval application documentation and give the Project Company comments, recommendations and representations regarding the draft Project Company Development Approval application documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Project Company Development Approval application with the requirements of this deed.

(f) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Project Company Development Approval application documentation, the Project Company must amend the draft Project Company Development Approval application documentation to reflect the Project Director's comments, recommendations or representations and the draft Project Company Development Approval application documentation must be re-submitted in accordance with this clause 6.1. The Project Company must not submit any Project Company Development Approval application to a Relevant Authority or otherwise progress draft Project Company Development Approval application documentation unless and until it has received no comments from the Project Director in accordance with clause 6.1(c) in respect of submitted draft documentation and/or it has complied with its obligations under this clause 6.1(f).

(g) The Project Company acknowledges that any participation by the Project Director or any other representatives of the State or other stakeholders in the Development Approval application process is solely for the benefit of the State, and the Project Director, any other representatives of the State and other stakeholders, as the case may be, are not under any obligation to participate in the Project Company Development Approval process, and will not, in reviewing the draft Project Company Development Approval application documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

(h) The Project Company acknowledges that participation by the Project Director, or any other representatives of the State or other stakeholders in the Project Company Development Approval process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 6.1 are solely for the purpose of monitoring the performance of the Project Company, and:

(i) the Project Company is solely responsible for ensuring that each Project Company Development Approval is obtained in accordance with the Output Specification and the Project Company's obligations under this deed, and no action or inaction of the Project Director, or any other representatives of the State or other stakeholders in the Project Company Development Approval process will be taken to constitute acceptance that the Project Company Development Approval, or compliance with it, will satisfy the Output Specification; and

(ii) no action or inaction of the Project Director, or any other representatives of the State or other stakeholders in the Project Company Development Approval process under this clause 6.1 will entitle the Project Company to make any claim under this deed or in any way relieve, alter, limit or change the Project Company's obligations under the Project Documents.
(i) If the Project Company and the Project Director are unable to agree appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 6.1, such dispute will be dealt with in accordance with clause 40.

(j) The State must provide all reasonable assistance to the Project Company, excluding the payment of or allowance of any money or satisfaction of other conditions (other than conditions and those parts of conditions that can only be performed by the owner, such as the transfer or dedication of land or conditions relating to the provision of Education Functions at the relevant Site), to the Project Company to obtain the Project Company Development Approvals.

6.2 Other Consents

The Project Company must in a timely manner, obtain, or procure the obtaining of all other Consents, and the Project Company must perform its obligations, exercise its rights and carry out the Project so as not to cause a breach of the terms of any of the Consents in effect from time to time.

6.3 Copies of Approvals and Consents

The Project Company, upon receipt by it, must provide to the Project Director a copy of every Consent obtained in relation to the Project and any amendments to or notices relating to such Consents.

6.4 Conditions and Costs of Consents

(a) The Project Company must comply with, carry out and fulfil all conditions and requirements imposed under or in connection with all Consents obtained in relation to the Project (including, for the avoidance of doubt the State Development Approvals), including payment of relevant fees, contributions and levies, but excluding conditions and those parts of conditions that can only be performed by the owner, such as the transfer or dedication of land or conditions relating to the provision of Education Functions at the relevant Site.

(b) Where a Relevant Authority provides, or indicates that it will provide, a Consent (other than a State Development Approval) subject to certain conditions, the Project Company may contest the imposition of such conditions, but only if such contest:

(i) is made in good faith by appropriate proceedings;

(ii) does not involve any material risk to the delivery of the Project or the Education Functions in accordance with the Project Documents;

(iii) is made at no cost to the State and does not expose the State to any potential Loss or Claim;

(iv) is permitted by, and is conducted in accordance with, applicable Law; and

(v) is conducted by and in the name of the Project Company.
(c) Where the Project Director gives written direction within 10 Business Days of receipt of an advice regarding a proposed condition to a Consent, which direction must be accompanied by an opinion that a meritorious basis exists for contesting such condition, to contest the imposition of that condition, the Project Company must contest the imposition of such condition, provided that:

(i) the Project Company and the State must each pay half the costs of such contest;

(ii) the State will provide the Project Company with reasonable assistance relating to the contest as may be requested by the Project Company; and

(iii) such direction will constitute a Relief Event.

(d) The Project Company must keep the State informed of the progress and nature of any contest under this clause 6.4, and must consult in good faith with the Project Director regarding the conduct of any such contest.

(e) Where a condition to a Consent:

(i) constitutes an Approval Conditions Variation, such condition and its consequences will be deemed to be a State Variation Request; or

(ii) necessitates a Contract Variation,

the Project Company must, subject to the provisions of this clause 6.4, implement the condition in accordance with clause 22.

(f) Except as expressly provided in this clause 6.4, the Project Company must not (and will procure that any other person over whom it has control, including the Subcontractors, does not) without the prior written consent of the Project Director apply for or agree to any change, relaxation or waiver of any Consent, or of any condition attached to it.

7. SUBCONTRACTS

7.1 Subcontracting

(a) The Project Company must not subcontract the performance of the Works and/or the Services or any part of them except in accordance with this clause 7.

(b) The Project Company is not relieved of any of its liabilities or obligations under this deed as a result of any subcontracting of the Works and/or the Services or approval of any Subcontractor, and the Project Company is at all times responsible for the performance of all Subcontractors.

7.2 Subcontract Requirements

(a) The Project Company must promptly provide to the Project Director a copy of each Material Subcontract entered into or proposed to be entered into involving any of the Works or the Services.
(b) The Project Company must ensure that no Material Subcontractor is engaged in connection with the Works or the Services without the relevant Subcontractor having delivered to the Project Director a duly executed Collateral Warranty.

(c) The Project Company must ensure that no Key Subcontractor is engaged in connection with the Works or the Services without the Project Company and the relevant Subcontractor having delivered to the Project Director a duly executed Side Deed in respect of its Key Subcontract.

7.3 **Subcontracting Obligations**

The Project Company must:

(a) comply with its obligations under and enforce the terms of any Subcontract to which it is a party;

(b) ensure that the relevant Subcontractor complies with the obligations imposed on the Subcontractor under the Subcontract to which it is a party;

(c) not later than the tenth day of each month provide a certificate to the Project Director that:

(i) all amounts payable under Subcontracts to which it is a party due for the month immediately preceding have been paid or otherwise discharged by the Project Company except for those amounts genuinely in dispute; and

(ii) includes a list of each formal dispute with a Subcontractor arising in connection with the Works or the Services;

(d) not without the Project Director's prior written consent permit any variation or amendment to, departure from, termination or assignment or replacement of a Material Subcontract, where it may impact the rights of the State or the ability of the Project Company to satisfy its obligations under the Project Documents;

(e) give the Project Director notice of the termination or material amendment of a Material Subcontract immediately upon the Project Company becoming aware of such termination or material amendment;

(f) not without the Project Director's prior written consent, compromise or waive any claim it may have against a Material Subcontractor, where it may impact the rights of the State or the ability of the Project Company to satisfy its obligations under the Project Documents;

(g) not engage any new subcontractor, who would become a Material Subcontractor on such engagement, without the State's prior written consent; and

(h) obtain and ensure that the State has the benefit of warranties and guarantees offered by Subcontractors and suppliers with respect to any part of the Works or any part of the Services.
7.4 Ability to Perform Obligations

The Project Company must ensure that each Subcontractor is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by this deed.

7.5 Insurance

The Project Company must ensure that no Subcontractor in connection with the Works or the Services is engaged without the relevant Subcontractor having taken out workers compensation insurance, public liability insurance and professional indemnity insurance in the manner required under schedule 14, to the extent, and for insured amounts, applicable to the relevant Works or Services to be performed by the Subcontractor.

7.6 Agreed Form

Unless otherwise agreed in writing by the Project Director, each Key Subcontract must be in an agreed form.

7.7 Amendment and Termination

The Project Company agrees that, no amendment to, departure from, termination or assignment or replacement of a Material Subcontract made without the written consent of the Project Director will be binding on the State or affect or prejudice the rights of the State against the Project Company under this deed, or under a Side Deed or a Collateral Warranty, or in any other way.

8. WORKFORCE

8.1 Employee Requirements

(a) The Project Company must ensure that each employee of the Project Company and each Subcontractor engaged in the provision of any of the Works or the Services must be appropriately qualified, skilled and experienced to perform their assigned tasks and must complete the training detailed in the Employee Requirements from time to time and meet all other Employee Requirements, provided that employees not engaged in the provision of Works or Services on or at a Site or engaged only in the provision of Works on or at Sites other than the Halinda Site and the Rouse Hill Site will not be required to satisfy the requirements set out in the Employee Requirements.

(b) Prior to, and as a condition of employment by the Project Company or any Subcontractor in relation to the Project, the Project Company must make an investigation of each prospective employee. This investigation shall include an investigation by the Project Company of the prospective employee's criminal history, medical and employment histories. The results of the investigation made by the Project Company or Subcontractor will be made available to the Project Director prior to an offer of employment being made to a prospective employee.

(c) The Project Director may require the Project Company to deny employment to a prospective employee if the background investigation reveals information indicating that that person would not be an appropriate employee at a Site or a
School Facility. The Project Director may require the Project Company to undertake further investigations before confirming whether an offer of employment may be made to the prospective employee. The Project Director will notify the Project Company of its decision within 20 Business Days of a request being made by the Project Company, or of further information being provided to the Project Director.

(d) For the purposes of this clause 8, employees shall include any person employed or engaged in any way in the provision of the Project.

8.2 State Checks

(a) Notwithstanding the making of searches, enquiries, checks and completion of all forms by the Project Company pursuant to clause 8.1, the Project Director may carry out a police check in respect of each person notified by the Project Company to the Project Director pursuant to clause 8.1 and may, from time to time, carry out such other searches, enquiries and checks, including security checks, to ensure the Project Company’s and each Subcontractor’s compliance with this clause 8.

(b) The Project Company must procure, and provide to the Project Director, the consent of each prospective employee of the Project Company or the Subcontractor to the making of the searches, enquiries and checks referred to in paragraph (a) above.

(c) The Project Director may require that the Project Company or a Subcontractor discontinue employment of any person if:

(i) the Project Director’s searches, enquiries and checks reveal information indicating that that person does not comply with the requirements of this deed;

(ii) the Employee Requirements are not met at all times by that person, other than where they are not applicable in accordance with clause 8.1(a); or

(iii) if the Project Director considers that that person is unsuitable or unqualified to perform the part of the Services or the Works assigned to that person.

8.3 Conduct of Staff

(a) Whilst engaged in the provision of the Works or Services on or at the Sites, the Project Company must comply with the rules, regulations, policies, procedures, protocols and requirements relating to the conduct of staff as may be made and enforced by the Department from time to time and must ensure that its officers, employees, agents and Subcontractors do likewise.

(b) The Project Company must give written notice to the Project Director and take or procure appropriate disciplinary action against any person employed by the Project Company or any Subcontractor who transgresses any such rules, regulations, policies, procedures, protocols or requirements.
8.4 Project Company's and Subcontractor's Employees

Other than as expressly provided in this deed, the Project Company will be entirely responsible for the employment and conditions of service of the Project Company's employees and must procure that any Subcontractor is likewise responsible for its employees, and that the Subcontractor complies with the same obligations and requirements as required of the Project Company under this clause.

8.5 Labour Relations

The Project Company must, and must procure that any Subcontractor must:

(a) establish, maintain and administer a human resources policy and an industrial relations policy for the Works and the Services so as to ensure the timely and economical completion of the Works and the Services; and

(b) ensure that all persons employed or engaged in the Works and/or the Services are paid all amounts, receive such benefits and allowances and are employed subject to such conditions to which they may be or become entitled to as a result of their employment on the Works and/or the Services by virtue of any applicable Law.

8.6 Independent Contractors and Subcontractors

(a) The Project Company and all Subcontractors are independent contractors and nothing contained in this deed will be construed as constituting any relationship with the State other than, with respect to the Project Company, that of principal and independent contractor, nor will it be construed as creating any relationship whatsoever between the State and the Project Company's and Subcontractors' employees.

(b) Neither the Project Company nor any Subcontractors, nor any of their employees, are or will be deemed, by virtue of this deed, or any subcontract, to be employees of the State or the Department.

(c) The Project Company indemnifies, and must procure that any Subcontractor indemnifies, and at all times holds the State fully and effectively indemnified against any and all Claims and Losses arising directly or indirectly out of or in connection with any claim that the State is the employer of the Project Company's employees or any Subcontractor's employees.

(d) Without limiting paragraphs (a), (b) or (c) above, the Project Company is responsible for, and must procure that any Subcontractor is responsible for:

(i) remuneration and benefits, including superannuation contributions, annual leave, sick leave, long service leave, overtime and penalty rates and provision of accommodation and sustenance;

(ii) work care levies, group tax, payroll tax, fringe benefits tax, superannuation guarantee charges and other imposts or levies imposed by law; and

(iii) any payment upon termination of service,
8.7 **Workplace health and safety obligations**

In undertaking the Works and providing the Services, the Project Company must:

(a) keep each of the Sites and School Facilities in a good and safe condition so that they do not present a risk to the health or safety of any person; and

(b) ensure the safety of people from harm in providing the Works, the School Facilities and the Services.

8.8 **Principal contractor under OH&S Regulation**

(a) For the purposes of Section 210 of the *Occupational Health and Safety Regulation 2001* (NSW) (the **OH&S Regulation**) the State hereby:

(i) appoints the Project Company as the 'principal contractor' for executing the construction work forming part of the Services and Works under this deed; and

(ii) authorises the Project Company to exercise such authority of the State as is necessary to enable the Project Company to discharge the responsibilities imposed on a 'principal contractor' by Chapter 8 of the OH&S Regulation.

(b) Without limiting the Project Company's obligations under this deed, the Project Company must comply with the duties of a 'principal contractor' under the OH&S Regulation.

(c) If the Project Company fails to comply with the duties of a 'principal contractor' referred to in this clause 8.8, the State may have the Project Company's obligations carried out by the State or by others, and the cost incurred by the State in having those duties carried out will be a debt due from the Project Company, payable on demand.

(d) The Project Company must, if requested by the Project Director, provide the Project Director with a copy of the site specific occupational health and safety management plan, the relevant Subcontractors' safe work method statements and other registers, records and documents that the Project Company is required to prepare and maintain in connection with its obligations as a 'principal contractor' under the OH&S Regulation.

(e) The Project Company will remain the 'principal contractor' under the OH&S Regulation, regardless of whether it subcontracts the performance of the Works and/or the Services, or any part of them, to any person.
9. **FINANCING**

9.1 **Financing Agreements**

The Project Company must not, without the prior written consent of the Project Director:

(a) enter into any financing agreements (including in respect of present or contingent indebtedness, deferred purchase or leasing arrangements or similar obligations, but excluding indebtedness incurred in the ordinary course of business) other than the Financing Agreements; or

(b) make any material amendment to or, waive, vary or change any term or provision of the Financing Agreements.

9.2 **Copies of Financing Agreements**

Without limiting clause 9.1, the Project Company must deliver to the Project Director a certified complete copy of each financing agreement entered into by the Project Company and each amendment, or waiver of any term or provision of the Financing Agreements, in each case within 10 Business Days of its execution or creation.

9.3 **Refinancing**

(a) The Project Company must:

   (i) not effect any Refinancing without the prior written consent of the Project Director; and

   (ii) submit to the Project Director a report in respect of any proposed Refinancing (a **Refinancing Report**).

(b) A Refinancing Report must include:

   (i) full details of the proposed Refinancing and the reasons why the Project Company wishes to effect it;

   (ii) any term sheet which will form the basis for any financing documentation or amendment to the Financing Agreements or other documents which are relevant to the proposed Refinancing;

   (iii) the impact that the proposed Refinancing will or may have on:

       (A) the liabilities of the State (whether actual or contingent) under the Project Documents; and

       (B) the Rent Payment Amount;

   (iv) information on the actual cash flow (including actual revenues and costs) of the Project Company from Financial Close to the date of the Refinancing Report (and estimated to the proposed date for the Refinancing), set out in the same format as the Base Case;
(v) details of the actual timing and amounts of investment in and Distributions to Equity Investors from Financial Close to the date of the Refinancing Report and estimated to the proposed date for the Refinancing;

(vi) a pre-Refinancing financial model (including actual cash flows referred to in clauses 9.3(b)(iv) and (v) above) with projections for the cash flow of the Project Company from the estimated date of the Refinancing to the end of the Term, including projected Distributions before taking the Refinancing into account;

(vii) a post-Refinancing financial model (including actual cash flows per clauses 9.3(b)(iv) and (v) above) with projections for the cash flow of the Project Company from the estimated date of Refinancing to the end of the Term, including projected Distributions after taking the Refinancing into account;

(viii) a calculation of the Refinancing Gain; and

(ix) such other information as requested by the Project Director including in relation to the assumptions for the projections in the pre-Refinancing financial model and post-Refinancing financial model required under clauses 9.3(b)(vi) and (vii) above.

(c) Without limiting the Project Company's obligations under clause 9.2, the Project Company must, within 5 Business Days of execution of any document in connection with a Refinancing, deliver to the Project Director a certified true copy of each such document together with a printed copy of the revised Base Case and one electronic copy of the revised Base Case (complete with all material formulae and data) in accordance with clause 29.10 and full details of the recalculation of the Rent Payment Amount (if applicable).

9.4 Payment to the State of Refinancing Gain

(a) The Project Company must (or must procure that the Equity Investors) pay or account to the State for the State Refinancing Share;

(b) The State may elect to receive the State Refinancing Share as:

(i) a single payment made on or about the date of the Refinancing;

(ii) a reduction in the Quarterly Service Payment over some of the remaining period of the Term; or

(iii) a combination of (i) and (ii) above.

(c) If the State elects to receive the State Refinancing Share under clause 9.4(b)(i) and the payment cannot be fully satisfied out of the first Distribution after the Refinancing, payment of the balance will be made by reductions in the Quarterly Service Payment in accordance with clauses 9.4(d) to (f) below.

(d) To the extent that the State elects to receive the State Refinancing Share over all or part of the remaining period of the Term, as a reduction of the Quarterly Service Payment, or will receive it in accordance with clause 9.4(c), the reduction will be
spread over the same term over which the Equity Investors receive their share of the Refinancing Gain.

(c) Any reduction in Quarterly Service Payment shall be calculated as the quarterly reduction in the Quarterly Service Payment which when inserted into the Refinancing Case (after adjusting for the treatment of the State Refinancing Share not being paid as a single amount) allowing for the taxation effects of the changes, produces an equity return in the post-refinancing model equal to the Refinancing Case Equity Return.

(f) The State Refinancing Share, whether in the form of a lump-sum payment or a reduction in Quarterly Service Payment, will not be contingent on the performance by the Project Company of its obligations under this deed.

(g) The Project Company must ensure that the benefit arising from a reduction in JEM's debt service obligations under the terms of the Financing Agreements as a result of a Refinancing is passed through to the Project Company.

PART C – DESIGN AND CONSTRUCTION OBLIGATIONS

10. DESIGN AND WORKS PROGRAMS

10.1 The Project Company's Detailed Design obligations

The Project Company must develop and complete the Detailed Design for each of the School Facilities:

(a) in accordance with the Project Company Proposals;

(b) by the dates specified in part A of schedule 12 and in accordance with the Detailed Design Program;

(c) in accordance with clause 10.4;

(d) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Standards (Works) Plan;

(e) so that the School Facilities and the Services are in accordance with or exceed the Output Specification;

(f) so that the School Facilities and the Services comply with all applicable Consents and Law; and

(g) so that the School Facilities (as constructed) are, and will remain at all times, Fit for Intended Purpose.

10.2 The Project Company's Works Program obligations

The Project Company must develop and complete the Works Program for each of the School Facilities:
(a) in accordance with the Project Company Proposals;
(b) by the date and in accordance with the requirements set out in part B of schedule 12;
(c) in accordance with clause 10.4;
(d) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Standards (Works) Plan and Quality Standards (Services) Plan;
(e) so that the School Facilities and the Services are in accordance with or exceed the Output Specification;
(f) so that the School Facilities and the Services comply with all applicable Consents and Law; and
(g) so that the School Facilities (as constructed) are, and will remain at all times, Fit for Intended Purpose.

10.3 The Project Company's Management Plans obligations

The Project Company must develop and complete the Management Plans for each of the School Facilities:

(a) in accordance with the Project Company Proposals;
(b) by the date set out in part D of schedule 12;
(c) in accordance with clause 10.4 and the requirements set out in the Output Specification;
(d) with the appropriate level of professional care and in compliance with the applicable Quality Standards (Works) Plan and Quality Standards (Services) Plan; and
(e) so that the Works comply with all applicable Consents and Law.

10.4 Preparation of Design and Works Documentation

(a) The Project Company must, submit to the Project Director for review by the Project Director the draft Detailed Design, Detailed Design Program, Management Plans and Works Program as and when required in accordance with schedule 12, each in hard copy and manipulable electronic format.

(b) The draft Detailed Design documentation submitted in accordance with clause 10.4(a) must contain the following information:

(i) identification of the School Facility and Site to which it relates;
(ii) identification of the part of the Detailed Design Program to which it relates;
(iii) any details and information required in accordance with clause 10.1(b);
(iv) a design development report demonstrating that issues of planning, design, materials selection, buildability and building services have been coordinated and integrated into the draft Detailed Designs,

(v) all relevant Design Data;

(vi) information relating to the changes to relevant documents and drawings from those previously submitted in accordance with this clause 10.4; and

(vii) any other information required by the Output Specification.

(c) The draft Management Plans, Detailed Design Program and Works Program documentation submitted in accordance with clause 10.4(a) must contain the following information:

(i) identification of the School Facility and Site to which it relates;

(ii) in the case of a draft Management Plan, the specific Management Plan to which it relates;

(iii) in the case of a draft Detailed Design Program, the specific Detailed Design documentation to which it relates;

(iv) in the case of a draft Works Program, the critical path timeline, including milestones and interdependencies; and

(v) any other information required by the Output Specification.

(d) If required by the Project Director, the Project Company must make available at the cost and expense of the Project Company, such further information as the Project Director may reasonably request relating to the development of the Detailed Design, Detailed Design Program, Management Plans and/or Works Program, in such form as the Project Director may reasonably request.

(e) Subject to the draft documentation complying with paragraph (b) or paragraph (c), whichever is applicable, and the Project Company having complied with any reasonable requests of the Project Director under paragraph (d), within 20 Business Days after receiving the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation, the Project Director may review the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation and give the Project Company comments, recommendations and representations regarding the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation with the requirements of this deed.

(f) If the Project Director gives the Project Company comments, recommendations and representations regarding the failure of the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation to comply with the requirements of this deed, the Project Company must amend the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program
documentation to reflect the Project Director's comments, recommendations or representations and the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation must be re-submitted in accordance with this clause 10.4. The Project Company must not proceed to the next stage of design development in accordance with the Detailed Design Program or the Works Program or to construct the Works set out in the draft Detailed Design unless and until it has received no comments from the Project Director in accordance with clause 10.4(e) in respect of draft materials submitted to the Project Director and/or it has complied with its obligations under this clause 10.4(f).

(g) The Project Company acknowledges that any participation by the Project Director or any other representatives of the State or other stakeholders in the design and works development process is solely for the benefit of the State, and the Project Director, any other representatives of the State and other stakeholders are not under any obligation to participate in the design and works development process, and will not, in reviewing draft Detailed Design, Detailed Design Program, Management Plans and Works Program documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

(h) The Project Company acknowledges that participation by the Project Director or any other representatives of the State or other stakeholders in the design and works development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 10.4 are solely for the purpose of monitoring the performance of the Project Company, and:

(i) the Project Company is solely responsible for ensuring that the design and construction of each School Facility complies with the Output Specification and the Project Company's obligations under this deed, and no action or inaction of the Project Director or any other representatives of the State or other stakeholders in the design and works development process will be taken to constitute acceptance that the Detailed Design, Detailed Design Program, Management Plans and Works Program or any part of them are in compliance with the Output Specification; and

(ii) no action or inaction of the Project Director or any other representatives of the State or other stakeholders in the design and works development process under this clause 10.4 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.

(i) If the Project Company and the Project Director are unable to agree appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this deed, such dispute will be dealt with in accordance with clause 4.7(h) and/or clause 40.

10.5 Proprietary Materials

(a) The Project Company represents and warrants that:
(i) neither the development nor use for or in relation to the Project of any Proprietary Material (or any component or any modification, adaptation or derivative of any Proprietary Material) will infringe any Intellectual Property Rights, Moral Rights or other rights of any person or otherwise contravene any Law or give rise to any liability to make royalty or other payments to any person;

(ii) there is not, and the Project Company must not create or allow, any Security Interest over any Intellectual Property Rights in any Proprietary Material (or any component or any modification, adaptation or derivative of any Proprietary Material) that prevents the Proprietary Material from being used in accordance with the licence granted under clause 10.5(b);

(iii) it holds all rights and interests (including all Intellectual Property Rights) in, or has obtained all necessary licences, consents and waivers (including in respect of Moral Rights) relating to, any Proprietary Materials to be licensed to the State under clause 10.5(b) and is not, and will not be, prevented from so licensing these rights and interests;

(iv) it has the right to sub-license to the State, on the terms of clause 10.5(b), any Proprietary Material the Intellectual Property Rights or Moral Rights in which are owned by a third party; and

(v) there has not, and will not be, any assignments, licences, options or other dealings with the Intellectual Property Rights or Moral Rights in the Proprietary Materials licensed to the State under the licence granted under clause 10.5(b), in a way that conflicts with or derogates from, or would conflict with or derogate from, these rights.

(b) The Project Company gives to the State an irrevocable, perpetual, fully paid-up royalty free, non-exclusive licence to use, anywhere in the world, any Proprietary Materials for the purposes of the Project or for any other project involving the Works, the Sites or the School Facilities.

(c) The licence granted under clause 10.5(b):

(i) includes a licence of all the Intellectual Property Rights in the Proprietary Materials, including rights to reproduce, distribute, publish, perform, communicate to the public, adapt and otherwise freely exploit the Proprietary Materials for the purposes referred to in clause 10.5(b);

(ii) includes the right to sub-licence use of any Proprietary Materials to any person for the purposes referred to in clause 10.5(b); and

(iii) will survive fundamental breach, repudiation, rescission, frustration, suspension, discharge, termination or expiration of this deed.

(d) The Project Company may register or patent any registrable or patentable Intellectual Property Right which it:

(i) develops;
(ii) discovers; or

(iii) first reduces to practice,

in respect of the Project, but in doing so, must not conflict with or derogate from the licence granted under clause 10.5(b).

(c) The State acknowledges that, except as provided for under this clause 10.5, the Project Company and applicable third parties retain ownership of the Intellectual Property Rights in all Proprietary Materials developed by the Project Company or those third parties in connection with the Project.

(f) The Project Company will be responsible for, and will release and indemnify each of the State, its employees and agents, and any sub-licensees permitted under the licence granted under clause 10.5(b), on demand, from and against all liability for:

(i) any Claims brought by any third party; and

(ii) any other Loss,

which may arise out of, or in consequence of, an actual, potential or alleged breach of a representation or warranty given under clause 10.5(a). The indemnity in this clause 10.5(f) (and the related provisions in clauses 10.5(g) and (h)) will survive fundamental breach, repudiation, rescission, frustration, suspension, discharge, termination or expiration of this deed.

(g) If there is, or is likely to be, a claim of the type described in clause 10.5(f), the Project Company must, at its expense, use its best endeavours to:

(i) modify or replace the Proprietary Materials or the aspect of the School Facility that is subject of the Claim so that the infringement (or alleged infringement) is removed; and

(ii) if the modification or replacement under sub-clause (i) cannot be achieved, promptly procure the right for the State to continue to use the Proprietary Materials or the aspect of the School Facility that is subject of the Claim.

(h) Without limiting clause 10.5(g), where the State wishes to contest a claim of the type described in clause 10.5(f):

(i) the State will give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim;

(ii) the State may either:

(A) require that the Project Company, at its own expense and with the assistance and co-operation of the State, have the conduct of the claim, including its compromise or settlement; or

(B) at the Project Company's expense and with the assistance and co-operation of the Project Company, have the conduct of the claim, including its compromise or settlement;
(iii) if the State wishes to have conduct of the claim, the Project Company will give reasonable security to the State for any cost or liability arising out of the conduct of the claim by the State; and

(iv) if the State wishes the Project Company to have conduct of the claim, the Project Company must not enter into any compromise or settlement of the claim without the prior written consent of the State.

11. SCHOOL FACILITIES CONSTRUCTION

11.1 The Project Company's obligation to construct

The Project Company must construct each School Facility and carry out all of the Works:

(a) in accordance with the Project Company Proposals;

(b) by the dates and in accordance with the requirements specified in the Works Program, the Output Specification and this deed;

(c) in accordance with Good Industry Practice, and using good quality new and undamaged materials and with a level of skill, care and due diligence reasonably expected of the engineering and construction profession for facilities in the nature of the School Facilities;

(d) so that the Works do not cause an Education Functions Disruption, or damage the Site or Adjoining Property;

(e) so that the School Facilities and the Services are able to comply with or exceed the Output Specification;

(f) so that the School Facilities comply with all applicable Consents and Law;

(g) so that the School Facilities (as constructed) are, and will remain at all times, Fit for Intended Purpose; and

(h) in accordance with:

   (i) the Detailed Design;

   (ii) the Management Plans;

   (iii) the Quality Standards (Works) Plan;

   (iv) all applicable Law; and

   (v) without limiting the foregoing, the Building Code.

11.2 Works Program Amendments

(a) The Project Company must update the Works Program:

   (i) upon finalising the Detailed Design of each School Facility; and
for each School Facility, monthly to take account of changes to the program and delays, including delays for which relief has been given under this deed, provided that no alteration, addition or modification to a Works Program shall adjust a Target Completion Date, or a Target Full Service Commencement Date, unless such adjustment has been agreed or determined in accordance with clauses 20, 21 or 22.

(b) The Project Company must promptly submit the updated Works Program to the Project Director as it is further amended in accordance with this clause 11.2, and in the case of amendments made in accordance with clause 11.2(a)(ii), the updated Works Program must be submitted at least 7 Business Days prior to the end of each month.

(c) The Project Company must not make any alteration, addition or modification to the Works Program other than in accordance with this clause 11.2 and clause 22.

11.3 Commissioning Plan

(a) The Project Company must develop and complete a Commissioning Plan for each of the School Facilities:

(i) by the date set out in part E of schedule 12;

(ii) in accordance with the Quality Standards (Works) Plan and the other requirements set out in the Output Specification;

(iii) so that the School Facilities are in compliance with the Output Specification;

(iv) so that the School Facilities comply with all applicable Consents and Law; and

(v) so as to ensure that the School Facilities (as constructed) will be, and will remain at all times, Fit for Intended Purpose.

(b) The Project Company acknowledges and agrees that:

(i) each Commissioning Plan is intended to provide a detailed description of how the Project Company intends to comply with its obligation to ensure that the School Facilities comply with the Output Specification;

(ii) each Commissioning Plan will provide for training, demonstrations, testing education, support and familiarisation of and with relevant School Facilities for the benefit of relevant Education Staff, in accordance with the Output Specification;

(iii) each Commissioning Plan will require ongoing development, amendment and updating throughout the Construction Phase to take into account:

(A) Changes in Law;
(B) changes to the manner in which the relevant School Facility is to be used or the manner in which the Education Functions are to be provided;

(C) deficiencies in or omissions from the Commissioning Plan;

(D) changes in Good Industry Practice; and

(E) Contract Variations.

(c) The Project Company must:

(i) continue to develop and promptly amend or update each Commissioning Plan to take into account the occurrence of the events and circumstances referred to in clause 11.3(b); and

(ii) promptly submit each Commissioning Plan to the Project Director and Independent Certifier as it is further developed, amended or replaced for review in accordance with this clause 11.3.

(d) Without limiting any other rights the State may have, if the Project Director reasonably considers that:

(i) the Commissioning Plan has ceased to comply with the requirements of this deed;

(ii) the Commissioning Plan disrupts or will cause an Education Functions Disruption; or

(iii) the Project Company has not further developed, updated or amended the Commissioning Plan in accordance with the requirements of clause 11.3(c) above,

the Project Director may by written notice direct the Project Company to further develop, update or amend the Commissioning Plan specifying:

(iv) the reasons why such development, updating or amending is required; and

(v) such reasonable time within which such development, updating or amending must occur,

and the Project Company must:

(vi) further develop, update or amend the Commissioning Plan as directed by the Project Director; and

(vii) submit the further developed, updated or amended Commissioning Plan to the Project Director for review in accordance with this clause 11.3 within the time specified in the Project Director's notice.
(e) The Project Company must submit to the Project Director and the Independent Certifier for their review drafts of the Commissioning Plan in accordance with the Output Specification and this clause 11.3.

(f) The draft Commissioning Plan documentation submitted in accordance with this clause 11.3 must identify the School Facility or part of the School Facility to which it relates and contain all technical data in hard copy and in manipulable electronic format in respect of the Commissioning of the relevant School Facility.

(g) If required by the Project Director, the Project Company must make available such further information as the Project Director may reasonably request relating to the development of a Commissioning Plan, in such form as the Project Director may reasonably require.

(h) Subject to the draft Commissioning Plan documentation complying with clause 11.3(f), and the Project Company having complied with any reasonable requests of the Project Director under clause 11.3(g), within 10 Business Days after receiving the draft Commissioning Plan documentation, the Project Director may review the draft Commissioning Plan documentation and give the Project Company comments, recommendations and representations regarding the draft Commissioning Plan documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Commissioning Plan documentation with the requirements of this deed.

(i) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Commissioning Plan documentation, the Project Company must amend the draft Commissioning Plan documentation to reflect the Project Director's comments, recommendations or representations and the draft Commissioning Plan documentation must be re-submitted in accordance with this clause 11.3. Each relevant part of the draft Commissioning Plan documentation will not be considered final unless and until the Project Company has received no comments from the Project Director in accordance with clause 11.3(h) in respect of draft materials submitted to the Project Director and/or it has complied with its obligations under this clause 11.3(i).

(j) The Project Company acknowledges that any participation by the Project Director or any other representatives of the State or other stakeholders in the Commissioning Plan development process is solely for the benefit of the State, and the Project Director, any other representatives of the State and other stakeholders are not under any obligation to participate in the Commissioning Plan development process, and will not, in reviewing the draft Commissioning Plan documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

(k) The Project Company acknowledges that participation by the Project Director, or any other representatives of the State or other stakeholders in the Commissioning Plan development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 11.3 are solely for the purpose of monitoring the performance of the Project Company, and:
(i) the Project Company is solely responsible for ensuring that each School Facility is completed in compliance with the Output Specification and the Project Company's obligations under this deed, and no action or inaction of the Project Director, or any other representatives of the State or other stakeholders in the Commissioning Plan development process will be taken to constitute acceptance that the Commissioning Plan or compliance with it is in compliance with the Output Specification; and

(ii) no action or inaction of the Project Director or any other representatives of the State or other stakeholders in the Commissioning Plan development process under this clause 11.3 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.

(l) If the Project Company and the Project Director are unable to agree appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 11.3, such dispute will be dealt with in accordance with clause 4.7(h) and/or clause 40.

11.4 Construction reports

The Project Company must give the Project Director, no later than the fifth Business Day of each calendar month, during the Construction Phase for each School Facility, a report which includes:

(a) details of the progress of that School Facility, with a comparison to the progress projected in the Works Program for that School Facility;

(b) the revised Works Program prepared in accordance with clause 11.2;

(c) details of expenditure and significant items which may impact the Works Program, and any adjustment to the Project Company's progressive payment or drawdown schedules;

(d) a report on Subcontractor status, giving details of each Subcontractor package budget, contract value, works program, work performed, payments made, outstanding claims, progress against budget and program and any disputes with Subcontractors;

(e) any quality assurance audit report prepared in the preceding month in accordance with clause 11.8;

(f) details of test results in relation to any testing required to be carried out in accordance with the Output Specification;

(g) a report on any serious accident or dangerous occurrences during the preceding month; and

(h) a report on the progress of any work undertaken by a Relevant Authority for the purposes of extension, adjustment or relocation of Utilities in connection with the School Facility.
11.5 The Project Director's right to enter and inspect

(a) The Project Director and/or its representatives may enter a Site and inspect the Works on that Site, and any drawings, documents, test results, samples and specifications used in relation to such Works, at any reasonable time and upon reasonable notice, but must not cause unnecessary disruption to the Project Company, any Subcontractor or any other authorised user of a Site, and must comply with the reasonable safety and security requirements of the Project Company and the relevant Construction Contractor.

(b) The Project Company must procure that the Project Director and its representatives are afforded an opportunity to attend site meetings relating to the Works at least monthly and that agendas for such site meetings are sent to the Project Director at least five Business Days in advance of the meetings and (whether or not the Project Director or its representatives have attended) that a copy of the minutes of site meetings is promptly supplied to the Project Director.

11.6 The Project Director's right to comment

(a) Based on the information provided to the Project Director in accordance with clause 11.4 and/or any inspection carried out in accordance with clause 11.5, the Project Director may give the Project Company written comments, recommendations and representations regarding the Works, provided that such comments shall be limited to matters impacting upon the compliance of the Works with the requirements of this deed.

(b) If the Project Director gives the Project Company written comments, recommendations and representations regarding the Works, the Project Director and the Project Company must meet to discuss and establish the rectifications or changes required to the Works.

(c) If the Project Company and the Project Director are unable to agree appropriate rectifications or changes to reflect the written comments, recommendations or representations made to the Project Company by the Project Director in accordance with this deed, such dispute will be dealt with in accordance with clause 4.7(h) and/or clause 40.

(d) The Project Company acknowledges that the rights of review, inspection and comment granted to the Project Director in accordance with clause 11.4, clause 11.5 and this clause 11.6 are solely for the benefit of the State, and the Project Director is not under any obligation to review reports or inspect the Works or make comments, and will not, in reviewing reports or inspecting a Site or the Works, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

11.7 Failure to meet Milestones

(a) The Project Company must ensure that each Milestone under each Works Program occurs on or before the Target Completion Date relevant to that Milestone.
(b) If the Project Company fails to achieve a Milestone by the relevant Target Completion Date, it will, no later than 5 Business Days after such failure, produce a report in writing to the Project Director (the Construction Milestone Failure Report) setting out:

(i) the reasons that the Milestone was not achieved by the relevant Target Completion Date;

(ii) the date by which the Milestone will be achieved;

(iii) the impact, if any, of the delay on achieving Completion of the Works for a School Facility to which the Milestone relates, by the Target Completion Date for that School Facility; and

(iv) the impact, if any, of the delay on achieving Completion of the Works for all School Facilities by the Target Full Service Commencement Date.

(c) Without limiting the Project Director's rights under clause 11.6, if the Project Director does not believe the Project Company will achieve Completion of the Works for a School Facility by the Target Completion Date for that School Facility, and/or Completion of the Works for all School Facilities by the Target Full Service Commencement Date, the Project Director will give written notice to the Project Company requiring the Project Company to promptly prepare and submit within 10 Business Days of the notice to the Project Director for the Project Director's approval a draft plan (the Corrective Action Plan) describing in detail the current state of the Works and the actions and measures the Project Company will diligently pursue for remedying or curing of the failure to meet a Milestone, including acceleration of the Works.

(d) Within 10 Business Days after receipt of the draft Corrective Action Plan, the Project Director must either:

(i) approve the draft Corrective Action Plan by notifying the Project Company; or

(ii) reject the draft Corrective Action Plan by notifying the Project Company and providing reasons to the Project Company for its decision.

(e) If the Project Director approves a draft Corrective Action Plan the Project Company must comply with and diligently pursue the remedy or cure of the failure in accordance with the Corrective Action Plan and amend the Works Program accordingly. Nothing in this clause 11.7 limits the Project Director's rights under clause 11.2.

(f) If the Project Director rejects a draft Corrective Action Plan pursuant to clause 11.7(d)(ii), the Project Director and the Project Company must meet to discuss and establish a Corrective Action Plan.

(g) If the Project Company and the Project Director are unable to agree a Corrective Action Plan in accordance with this clause 11.7, such dispute will be dealt with in accordance with clause 4.7(h) and/or clause 40.
The Project Company will not be relieved of any obligation, liability or responsibility under this deed or otherwise arising under Law by virtue of any notice given under this clause 11.7 or the implementation of any Corrective Action Plan.

11.8 Quality Standards (Works) Plan

(a) The Project Company must develop and complete a Quality Standards (Works) Plan for each of the School Facilities:

(i) by the date set out in part C of schedule 12; and

(ii) in accordance with the Output Specification.

(b) The Project Company must:

(i) audit its own compliance with the Quality Standards (Works) Plan at intervals not exceeding 3 months and in accordance with the audit program which has been agreed to by the Project Director at the date of this deed;

(ii) have its compliance with the Quality Standards (Works) Plan audited at intervals not exceeding twelve months by an independent auditor acceptable to the Project Director;

(iii) permit the Project Director or his representative to be present during such audits; and

(iv) deliver to the Project Director an audit report, within a reasonable time of completion of each audit.

(c) The State has the right, at any time prior to the Full Service Commencement Date, to audit, at its own cost:

(i) the Project Company's compliance with the Quality Standards (Works) Plan; and

(ii) the compliance by the Subcontractors with their respective quality assurance plans which have been prepared to enable the Project Company to comply with its obligations under clause 11.8(a) and 11.1(h)(ii).

(d) If the audit performed by the State referred to in clause 11.8(c) reveals that:

(i) the Project Company is not complying with the Quality Standards (Works) Plan; and

(ii) any Subcontractor is not complying with their respective quality assurance plans referred to in clause 11.8(c)(ii),

the Project Company shall reimburse the State for the costs of carrying out such an audit.
(c) The Project Company shall not be relieved of any liability under this deed as a result of:

(i) compliance with the quality assurance requirements under this deed; or

(ii) anything which the State does or does not do with respect to the quality assurance requirements under this deed, including auditing the Project Company's or a Subcontractor's compliance with those requirements under clause 11.8(c).

11.9 State Provided Items

(a) The State must:

(i) ensure that the State Provided Items are:

(A) specified by the State; and

(B) where applicable, delivered and installed by relevant specialist contractors; and

(ii) give the Project Company at least 5 Business Days' notice of delivery and installation of State Provided Items.

(b) Without limiting the other provisions of this deed, the Project Company must:

(i) acknowledge in writing to the Project Director receipt of each State Provided Item, within 1 Business Day of delivery;

(ii) inspect and test each State Provided Item for physical damage and any defects or deficiencies which impact on, or are likely to impact on, School Use or the intended use or functionality of the State Department Item or the provision of any of the Services by the Project Company;

(iii) report in writing to the Project Director within 5 Business Days of delivery of the State Provided Item any defects or deficiencies in the State Provided Item; and

(iv) not install (or permit the specialist contractor referred to in paragraph (a) to install) or otherwise work with or use a State Provided Item that has been found on inspection to be damaged, defective or deficient.

(c) Except as expressly provided by this deed:

(i) no representation, warranty or advice of any kind has been or is given by or on behalf of the State regarding the State Provided Items;

(ii) the Project Company releases and indemnifies the State, the Department and their respective officers, agents and employees in respect of any Claims or Losses which the Project Company may suffer in connection with the State Provided Items unless such Claim or Loss is due to negligent or unlawful
acts or omissions or wilful misconduct of the State or a State Related Party; and

(iii) the Project Company will not be entitled to any relief from obligations, nor any compensation in respect of the location, condition, age or fitness for purpose of the State Provided Items or the impact State Provided Items may have on performance of the Services.

12. VARIATIONS

The Project Company must not make or implement any alteration, addition or modification to a Detailed Design or the Works other than in accordance with clause 20, clause 21 or clause 22.

13. COMPLETION AND COMMISSIONING

13.1 Due Dates

The Project Company must:

(a) achieve Completion of the Works for each School Facility by the Target Completion Date for that School Facility; and

(b) achieve Completion of the Works for all School Facilities by the Target Full Service Commencement Date.

13.2 School Facilities Completion

(a) Once the Project Company considers it has achieved Completion of the Works for a School Facility, the Project Company must serve on the Project Director and the Independent Certifier a Notice of Completion, provided that, for the avoidance of doubt, the Commencement Date in respect of a School Facility will not be deemed to have occurred until the date nominated by the Project Director in accordance with clause 13.4.

(b) Upon serving the Notice of Completion, the Project Company must:

(i) consult with the Independent Certifier about the tasks necessary to achieve Completion and allow the Independent Certifier and Project Director to attend the relevant Site and take input from appropriately qualified persons regards specialist activities necessary to achieve Completion;

(ii) provide sufficient information to the Independent Certifier to enable him or her to determine if Completion of the Works for that School Facility has been achieved in accordance with the requirements of this deed;

(iii) provide copies of any tests derived from the Commissioning Works and copies of test certificates to the Independent Certifier and Project Director;

(iv) provide entry on to the relevant Site by State Related Parties and other persons required for Education Purposes (in accordance with the Output Specification) and support aspects of Completion;
(v) permit entry on to the relevant Site by all specialist contractors and persons appointed by the Project Director to undertake installation of any State Provided Items; and

(vi) with the assistance of the State Related Parties, verify that all equipment other than State Provided Items have been Commissioned (if applicable) and that all training, education and support components of Completion and Commissioning have been completed.

(c) Any minor omissions or defects which, in aggregate, do not have an adverse effect on the occupation of the relevant School Facility and/or do not have an adverse effect on the ability of the State, the Department and the Education Staff to provide the Education Functions will be set out by the Project Company in a list attached to a Notice of Completion and must be completed or made good, as the case may be, to the reasonable satisfaction of the Independent Certifier as soon as practicable after Completion, and in any event in accordance with a minor defects rectification program, which must be agreed by the Independent Certifier, the Project Company and the Project Director prior to the Independent Certifier certifying Completion of the Works for the relevant School Facility in accordance with this clause 13.2.

(d) If, upon inspection of the Works for the relevant School Facility, the Independent Certifier is of the opinion that Completion of the Works for that School Facility has been achieved in accordance with the requirements of this deed, the Independent Certifier must issue a certificate to the Project Director and the Project Company certifying that Completion of the Works for that School Facility has been achieved.

(e) If, upon inspection of the Works for the relevant School Facility, the Independent Certifier is of the opinion that Completion of the Works for that School Facility has not been achieved in accordance with the requirements of this deed, the Independent Certifier must notify the Project Director and the Project Company, and the Project Company must rectify the deficiencies identified by the Independent Certifier and serve a new Notice of Completion upon the Project Director and the Independent Certifier, upon which the Independent Certifier will again be required to determine if Completion has been achieved in accordance with this clause 13.2.

(f) If upon inspection of the relevant School Facility the Independent Certifier is satisfied that Completion of the Works has been achieved for that School Facility, the Project Company will ensure that the Independent Certifier notifies the Project Director in writing that Completion has been achieved.

13.3 Commencement

(a) The Project Director must, within 2 Business Days of receiving certification from the Independent Certifier that the Project Company has demonstrated to the Independent Certifier that Completion of the Works for a School Facility has been achieved in accordance with the requirements of this deed, issue a Commencement Certificate to the Project Company in respect of that School Facility.

(b) The issue of a Commencement Certificate to the Project Company in respect of a School Facility will not constitute an approval by the State of the Project
Company's performance of its obligations under this deed or evidence that the relevant School Facility satisfies or is capable of satisfying the Output Specification.

13.4 Commencement Date

The Project Director must nominate, in the Commencement Certificate for a School Facility, a Commencement Date for that School Facility, which shall be the later of:

(a) the date of the Commencement Certificate; and

(b) the Target Completion Date for that School Facility.

13.5 Environmental Audit

(a) The Project Company must, prior to the issue of a Notice of Completion for a School Facility:

(i) undertake the Final Contamination Assessment. The Final Contamination Assessment must confirm:

(A) that the relevant Site does not present a risk of harm to the Environment and is suitable for the proposed use as a school; or

(B) that specified remediation work is required in order to confirm that the relevant Site does not present a risk of harm to the Environment and is suitable for the proposed use as a school, in which case the Project Company must undertake that remediation work before issuing the Notice of Completion; and

(ii) obtain the Final Site Audit Statement, which must confirm that the Site does not present a significant risk of harm to the Environment and is suitable for the proposed use as a school, with no material qualifications which restrict the use of the School Facility or require further monitoring or investigations.

(b) Copies of each of the Final Contamination Assessment and the Final Site Audit Statement must be provided to the Independent Certifier and the Project Director on or prior to the date on which the Notice of Completion is issued in accordance with clause 13.2.

13.6 Drawings and Survey

(a) No later than 60 days after the Commencement Date for a School Facility, the Project Company must give the Project Director a complete set of "work as executed" engineering drawings of that School Facility in hard copy and manipulable electronic format, which comply with the requirements of the field data capture specification, as detailed in the Output Specification.

(b) Within 180 days after the Commencement Date for a School Facility, the Project Company must provide the Project Director with a detailed survey from the State Surveyor which:

(i) will comply with State's required form of survey;
(ii) shows the location of the completed School Facility (not including Temporary Works) on the relevant Site (as the case maybe); and

(iii) certifies that the completed work is located in accordance with the Detailed Design.

14. INDEPENDENT CERTIFIER

14.1 Nominations and Qualifications

The Project Company acknowledges that:

(a) prior to the date of this deed, it nominated in writing at least three persons (each a Independent Certifier Candidate) to be the Independent Certifier for the purposes of the Project; and

(b) each Independent Certifier Candidate nominated by it:

(i) has the appropriate qualifications and experience to act as an independent certifier;

(ii) has no interest or duty which conflicts with its role as Independent Certifier in respect of the Project; and

(iii) is able and prepared to act in accordance with the terms of the Independent Certifier Deed.

14.2 Appointment

Prior to Financial Close, the Project Company and the Project Director will agree on the identity of the Independent Certifier and appoint the Independent Certifier in accordance with the terms of the Independent Certifier Deed. If the Project Director and the Project Company cannot agree, the parties will request that the President of the Royal Australian Institute of Architects (or its replacement or equivalent) nominate the Independent Certifier from the Independent Certifier Candidates nominated in accordance with clause 14.1 and such Independent Certifier will be appointed as soon as practicable in accordance with the Independent Certifier Deed.

14.3 Costs and Expenses of the Independent Certifier

The costs and expenses of the Independent Certifier (including the professional fees of the Independent Certifier) will be paid in the following proportions:

(a)  50% by the Project Company; and

(b)  50% by the State.

14.4 Replacement

(a) If the Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier for the purposes of this deed, the Project Company and the Project Director must, unless
otherwise agreed by the Project Company and the State, prior to termination or cessation, and in any case within 10 Business Days after the termination of the Independent Certifier Deed or cessation, whichever is applicable, appoint another person to act as Independent Certifier.

(b) The replacement Independent Certifier must meet the requirements set out in clause 14.1(b).

(c) If the Project Director and the Project Company cannot agree, the parties will request that the President of the Royal Australian Institute of Architects (or its replacement or equivalent) nominate an Independent Certifier who meets the requirements set out in clause 14.1(b) and such Independent Certifier will be appointed as soon as practicable in accordance with the Independent Certifier Deed.

14A CONSTRUCTION PAYMENT

14A.1 Payment

(a) In consideration of the execution of the Works, the State agrees to pay to the Project Company the Construction Payment on the Full Service Commencement Date.

(b) The State has no obligation to pay the Construction Payment unless and to the extent that it receives the corresponding Securitisation Payment from JEM under the Securitisation Agreement.

(c) The amount of the Construction Payment and the corresponding Securitisation Payment may only be adjusted:

(i) to reflect a Contract Variation prior to the Full Service Commencement Date agreed in accordance with clause 22 and calculated in accordance with schedule 19;

(ii) to reflect any other matters where the Estimated Cost Effect is agreed to apply prior to the Full Service Commencement Date and calculated in accordance with the schedule 19; and

(iii) otherwise by agreement in writing between the parties prior to the Full Service Commencement Date.

(d) No adjustment to the Construction Payment or the corresponding Securitisation Payment will affect the limitation referred to in clause 14A.1(b) above.

(e) The State may not set off any amount due and payable by the Project Company to the State under the Project Documents against the Construction Payment.

(f) The State must pay an additional amount on account of GST in relation to the Construction Payment in accordance with clause 42.3, but it is only obliged to make that payment when it has been provided with a tax invoice in respect of the Construction Payment and to the extent that it receives the benefit of an input tax credit in respect of that amount. The State must use reasonable endeavours to
receive the benefit of an input tax credit without delay having regard to when such amount becomes due and receivable from the Australian Taxation Office.

(g) In the event that a full input tax credit is subsequently denied by the Australian Tax Office, the amount of the Construction Payment is taken to be GST inclusive to that extent.

The State will provide such cooperation as is reasonable to the Project Company to discuss any such denial with the Australian Tax Office and will take reasonable steps to dispute such assessment (provided that the obligation to dispute is not a condition precedent for refunding the GST component if the input tax credit is denied and the Project Company indemnifies the State for any costs incurred in disputing such assessment).

(h) To the extent it has not already passed, all right, title and interest of the Project Company in each School Facility passes to the State on the Full Service Commencement Date on payment by the State under clause 14A.1(a).

(i) If the Construction Payment is adjusted in accordance with clause 14A.1(c), the State and the Project Company must amend the Master Rental Agreement so that the rent payable under the Master Rental Agreement in respect of the Leases is adjusted in accordance with paragraph 16(c)(iii) of schedule 19.

14A.2 Securitised Variation Payment

(a) If the State agrees to pay a Securitised Variation Payment pursuant to schedule 19 after the Full Service Commencement Date, the State must pay the Securitised Variation Payment to the Project Company in consideration of the execution of the Contract Variation or implementation of the works in relation to the Compensation Event, on the date of completion of the Contract Variation or the works in relation to the Compensation Event.

(b) The State has no obligation to pay the Securitised Variation Payment unless and to the extent that it receives the corresponding Securitisation Payment from JEM under the Securitisation Agreement in relation to that Contract Variation or Compensation Event.

(c) The State may not set off any amount due and payable by the Project Company to the State under the Project Documents against the Securitised Variation Payment.

(d) The State must pay an additional amount on account of GST in relation to the Securitised Variation Payment in accordance with clause 42.3, but it is only obliged to make that payment when it has been provided with a tax invoice in respect of the Securitised Variation Payment and to the extent that it receives the benefit of an input tax credit in respect of that amount. The State must use reasonable endeavours to receive the benefit of an input tax credit without delay having regard to when such amount becomes due and receivable from the Australian Tax Office.
(e) In the event that a full input tax credit is subsequently denied by the Australian Tax Office, the amount of the Securitised Variation Payment is taken to be GST inclusive to that extent.

The State will provide such cooperation as is reasonable to the Project Company to discuss any such denial with the Australian Tax Office and will take reasonable steps to dispute such assessment (provided that the obligation to dispute is not a condition precedent for refunding the GST component if the input tax credit is denied and the Project Company indemnifies the State for any costs incurred in disputing such assessment).

(f) To the extent it has not already passed, all right, title and interest of the Project Company in the relevant Securitised Variation Payment passes to the State on payment by the State under clause 14A.2(a).

PART D –OPERATION OBLIGATIONS

15. SERVICES

15.1 General

On and from the Commencement Date for a School Facility until the Termination Date, the Project Company must:

(a) provide the Services relevant to that School Facility at all times in accordance with, and duly and punctually perform its obligations arising in or under:

(i) the Output Specification;

(ii) the Operations Manual;

(iii) the Quality Standards (Services) Plan;

(iv) Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;

(v) all applicable Consents and Law;

(vi) the Detailed Designs;

(vii) the Works Program;

(viii) the Management Plans;

(ix) any other plans prepared pursuant to the Project Company's obligations under the Output Specification; and

(x) each other Project Document;

(b) allocate such resources and staff as is necessary to enable the due and proper performance of this deed;
(c) obtain and maintain all Consents which it is necessary to have for the provision of the Services;

(d) provide the Services such that each School Facility (as constructed) is and remains, at all times, Fit for Intended Purpose; and

(e) subject to the express terms of this deed (including the extent to which a Compensation Event or Relief Event applies) and during the Operations Phase, subject to any planned maintenance identified in a Programmed Maintenance Plan, ensure that each School Facility is available at all times to the State, the Department, Education Staff, students, and visitors of and to that School Facility for the purposes of provision of the Education Functions.

15.2 Operations Manual

(a) The Project Company must develop and complete the Operations Manual for each of the School Facilities:

(i) in accordance with the Project Company Proposals;

(ii) by the time set out in part F of Schedule 12;

(iii) in accordance with the Quality Standards (Services) Plan;

(iv) in accordance with the Output Specification;

(v) so that the School Facilities and the Services are in compliance with the Output Specification;

(vi) so that the School Facilities and the Services comply with all applicable Consents and Law; and

(vii) so that the School Facilities (as constructed) will be, and will remain at all times, Fit for Intended Purpose.

(b) The Project Company acknowledges and agrees that:

(i) each Operations Manual is intended to provide a detailed description of how the Project Company intends to comply with its obligations under this deed; and

(ii) Operations Manuals will require ongoing development, amendment and updating throughout the Term to take into account:

(A) Changes in Law, Consents and Policy;

(B) changes to the manner in which the relevant School Facility is being used or the manner in which the Education Functions are being provided;

(C) deficiencies in or omissions from an Operations Manual;
(D) changes in the requirements of Relevant Authorities or providers of Utilities;

(E) Contract Variations;

(F) changes in Good Industry Practice; and

(G) the requirements of the Output Specification.

(c) The Project Company must:

(i) continue to develop and promptly amend or update the Operations Manual:

(A) to take into account the occurrence of the events and circumstances referred to in clause 15.2(b) above;

(B) as required under the Output Specification; and

(C) in any event, update the Operations Manual at least every 12 months by no later than 31 January in each Contract Year; and

(ii) promptly submit each Operations Manual to the Project Director as it is further developed, amended or replaced for review in accordance with this clause 15.2.

(d) Without limiting any other rights the State may have, if the Project Director reasonably considers that:

(i) operation in compliance with any Operations Manual has ceased to comply with the requirements of this deed;

(ii) operation in compliance with any Operations Manual may cause an Education Functions Disruption; or

(iii) the Project Company has not further developed, updated or amended any Operations Manual in accordance with the requirements of paragraph (c) above,

the Project Director may by written notice direct the Project Company to further develop, update or amend the Operations Manual specifying:

(iv) the reasons why such development, updating or amending is required; and

(v) such reasonable time within which such development, updating or amending must occur,

and the Project Company must:

(vi) further develop, update or amend the relevant Operations Manual as directed by the Project Director; and
(vii) submit the further developed, updated or amended Operations Manual to the Project Director for review in accordance with this clause 15.2 within the time specified in the Project Director's notice.

(e) If so required in writing by the Project Director, the Project Company must, as part of the Operations Manual development process, meet and consult with relevant stakeholders in relation to successive iterations of the Operations Manual, and/or conduct Operations Manual development workshops, meetings, presentations and submissions for the Project Director, other representatives of the State, other stakeholders, and their respective consultants and advisers, at such times and places as the Project Director may require, and must ensure that any relevant comments or requirements of such parties are addressed and accommodated, to the extent they are consistent with the requirements of this deed.

(f) The Project Company must, submit to the Project Director for review by the Project Director the draft Operations Manual in accordance with the time set out in part F of schedule 12.

(g) The draft Operations Manual documentation submitted in accordance with clause 15.2(f) must contain all technical data in hard copy and in manipulable electronic format in respect of the operation of the relevant School Facility.

(h) If required by the Project Director, the Project Company must make available at the cost and expense of the Project Company, such further information as the Project Director may reasonably request relating to the development of the Operations Manual, in such form as the Project Director may reasonably request.

(i) Subject to the draft Operations Manual documentation complying with paragraph (g), and the Project Company having complied with any reasonable requests of the Project Director under paragraph (h), within 10 Business Days after receiving the draft Operations Manual documentation, the Project Director may review the draft Operations Manual documentation and give the Project Company comments, recommendations and representations regarding the draft Operations Manual documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Operations Manual documentation with the requirements of this deed.

(j) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Operations Manual documentation, the Project Director and the Project Company must meet to discuss and establish the amendments required to the draft Operations Manual documentation and, if any amendments are effected, the draft Operations Manual documentation must be re-submitted in accordance with this clause 15.2. Each relevant part of the draft Operations Manual documentation will not be considered final unless and until the Project Company has received no comments from the Project Director in accordance with clause 15.2(i) in respect of draft Operations Manual documentation submitted to the Project Director and/or it has complied with its obligations under this clause 15.2(j).

(k) The Project Company acknowledges that any participation by the Project Director or any other representatives of the State or other stakeholders in the Operations
Manual development process is solely for the benefit of the State, and the Project Director, any other representatives of the State and other stakeholders are not under any obligation to participate in the Operations Manual development process, and will not, in reviewing draft Operations Manual documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

(i) The Project Company acknowledges that participation by the Project Director or any other representatives of the State or other stakeholders in the Operations Manual development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 15.2 are solely for the purpose of monitoring the performance of the Project Company, and:

(i) the Project Company is solely responsible for the provision of the Services in compliance with the Output Specification and the Project Company's obligations under this deed, and no action or inaction of the Project Director or any other representatives of the State or other stakeholders in the Operations Manual development process will be taken to constitute acceptance that the Operations Manual or compliance with is in compliance with the Output Specification; and

(ii) no action or inaction of the Project Director or any other representatives of the State or other stakeholders in the Operations Manual development process under this clause 15.2 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.

(m) If the Project Company and the Project Director are unable to agree appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 15.2, such dispute will be dealt with in accordance with clause 40.

(n) Without limiting clause 18.6, the Project Director will have the right at any time to audit the Project Company's compliance with the Operations Manual or any part of it. The Project Director must give the Project Company at least 20 Business Days' notice of its intention to exercise this right.

(o) The Project Company must procure that current copies of the Operations Manual for each School Facility are provided to the School Principal of that School Facility, and that relevant State Related Parties, including relevant Education Staff, are made aware of applicable provisions of the relevant Operations Manual and are given adequate training regarding the practices and procedures applicable to the Services provided by the Project Company, including operation of the Helpdesk.

(p) The Project Company acknowledges that, notwithstanding the preparation of maintenance programs and cleaning schedules in accordance with the Output Specification, at any time during the Operations Phase for a School Facility:

(i) the Project Director or the School Principal may direct rescheduling of maintenance or other Services set out in the monthly maintenance program
or cleaning schedules within the relevant month in which the Services were
to be provided;

(ii) it must amend any relevant maintenance program or cleaning schedule or
any other program, schedule or plan to reflect the directed rescheduling
under clause 15.2(p)(i) and re-submit the manual, program, schedule or plan
to the Project Director and the relevant School Principal; and

(iii) any such required amendment will not constitute a State Variation Request
and must be complied with by the Project Company.

15.3 Planned Maintenance

(a) Without limiting its other obligations under this deed, the Project Company must
implement the Programmed Maintenance Plan as reviewed or modified from time
to time pursuant to this deed.

(b) As part of the annual review of each Operations Manual, the Project Company must
review the Programmed Maintenance Plan for each School Facility, so as to plan
for works for the following 5 years (including any period after the expiry of the
Term to the extent that it may be relevant for the purposes of achieving the
Handover Condition for that School Facility) to ensure it will meet the Project
Company's obligations under this deed, and such review and any proposed
modifications to it (other than minor or immaterial modifications) shall be subject
to the review procedure set out in clause 15.2.

(c) In addition the Project Company must:

(i) no later than 31st January in each Contract Year provide to the Project
Director a draft of the Maintenance Program for that Contract Year for each
School Facility which must:

(A) include the commencement date, details and duration of planned
maintenance;

(B) be prepared on the basis that any disruption to the Education
Functions should be minimised;

(C) provide a breakdown of planned maintenance to show how the
Project Company will meet its obligations under this deed and how
planned maintenance will meet or otherwise relate to the
Programmed Maintenance Plan;

(ii) provide the State with the opportunity to comment on each annual
Maintenance Program consistent with the review procedure set out in clause
15.2;

(iii) not make any variations to any Maintenance Program (other than minor or
immaterial variations) unless they are approved in writing by the Project
Director.
(d) The Project Company must ensure that planned maintenance is carried out, so far as practicable, in a manner and at times which will facilitate the continued performance of the Services and the Education Functions.

15.4 Defects

(a) Except to the extent a Defect causes the Project Company to fail to meet a KPI, in which case, the rectification periods set out in Schedule 5 for that KPI will apply, but otherwise, without limiting its other obligations under this deed, the Project Company must remedy or make safe any other Defect as soon as is reasonable given the nature of the Defect and the impact of the Defect on the provision of the Services or the Education Functions, after such Defect is advised to the Project Company or the Project Company otherwise becomes aware of it.

15.5 Continuous Improvement

(a) The Project Company must use all reasonable endeavours, applying its professional skill, expertise and diligence, to effect continuous improvement, and increased cost efficiencies in the provision of the Services. In so doing the Project Company will consider all appropriate areas of Service delivery, including:

(i) the scope and standards applicable for each Service and the Services generally;

(ii) the performance of the Project Company;

(iii) risk management issues;

(iv) health and safety issues;

(v) applicable Law, including Beneficial Changes in Law;

(vi) Project Director, Education Staff and other stakeholder feedback;

(vii) Environmental issues;

(viii) means of optimising useful life of the School Facilities;

(ix) means of reducing whole of life costs or increasing cost efficiencies;

(x) means of improving functional and operational performance and Education Staff satisfaction; and

(xi) means of better monitoring and reporting performance.

(b) Without limiting its other obligations under this deed, the Project Company must develop proposed strategies, methodologies, and where necessary propose and effect changes in accordance with clause 15.2 and clause 22 to implement continuous improvement, and increased cost efficiencies in the delivery of the Services.
(c) The Project Company will submit with each updated Operations Manual, proposed continuous improvement strategies, methodologies, variations or amendments developed in accordance with this clause.

16. **ALTERATIONS, ADDITIONS AND MODIFICATIONS**

The Project Company must not make any alteration, addition or modification to an Operations Manual (except in accordance with clause 15.2), a School Facility or the Services, other than in accordance with clause 20, clause 21 or clause 22.

17. **USE OF SCHOOL FACILITIES**

17.1 **Priority**

The School Facilities must be made available for use in the following order of priority:

(a) School Use;

(b) Community Use; and

(c) Third Party Use.

17.2 **School Use**

(a) Each School Facility must be available for School Use for each School Day and at all other times (for the avoidance of doubt 24 hours per day, seven days per week) and from time to time as required by the Department or the relevant School Principal and notified to the Project Company.

(b) No later than December in each Contract Year during the Operation Phase for a School Facility, and at least one month prior to the Commencement Date for a School Facility, the Project Director must notify the Project Company of the dates for school terms for the Contract Year following that notice, including Critical Periods and Critical Areas. Critical Periods for each year for each School Facility shall not exceed 40 days.

(c) For the avoidance of doubt, the Project Company must ensure that the Operations Manual for each School Facility takes into account the information provided under paragraph (b) above, and will co-ordinate with the School Principal to ensure that, to the extent practicable, School Use availability in accordance with paragraph (a) above takes account of the requirements of the Operations Manual.

17.3 **Third Party Use**

The Project Company may enter into arrangements for Third Party Use of a School Facility or any part of a School Facility provided that:

(a) the Third Party Use is not, or does not involve, an Excluded Purpose;

(b) the Third Party Use cannot reasonably be expected to impair the ability of the Department to provide Educational Functions or to limit or hinder School Use or Community Use;
(c) prior to such Third Party Use the Project Company has submitted the proposed Third Party Use to the Project Director and the Project Director has given its prior written consent to the relevant Third Party Use; and

(d) the Project Company must notify the Project Director of any termination or suspension of any Third Party Use.

17.4 Use Prohibited

Notwithstanding any other provision of this deed, the Project Director may, by reasonable notice to the Project Company, prohibit the use of the School Facilities or any School Facility by any person or on any occasion, if the Project Director reasonably believes that such use:

(a) is not in accordance with relevant Policies;

(b) is not being provided in an appropriate manner;

(c) may cause the State loss or embarrassment or interfere with the Education Functions; or

(d) is incompatible with the use of the School Facilities or conflicts with a Community Use or School Use requirement as determined by the Project Director,

or the Third Party Use otherwise ceases to comply with clause 17.3.

17.5 Fees for Third Party Use

The Project Company is entitled to charge, and be paid a fee, in an amount determined by the Project Company, for the Third Party Use made of the School Facilities.

17.6 Income From Third Party Use

(a) All income received by the Project Company in connection with Third Party Use (Gross Income) after deducting the aggregate of the direct costs incurred by the Project Company, so far as they are additional to the costs which the Project Company would have incurred in connection with the provision of the Services, in making available any part of the School Facilities to such third party (Costs) is referred to below as the Net Income and will be divided between the State and the Project Company in equal shares.

(b) The Project Company must notify the Project Director in respect of the six months ending on each 30 June and 31 December, within one month of the end of each such period, of the Gross Income and the amount and nature of all Costs which the Project Company considers are eligible to be deducted from the Gross Income in accordance with this clause 17.6 (Income Notice).

(c) One half of the Net Income will be deemed to have been paid by the State on account of the Monthly Service Fee; and the Monthly Service Fee payable for the Payment Period following the final determination of the amount of Net Income in accordance with this clause 17.6 will be reduced accordingly and the Project
Company will be entitled to retain for itself the remaining half of the Net Income and the State will have no further entitlement to any part of it.

(d) If the date of such final determination is after the Termination Date, one half of the amount of such Net Income will be paid by the Project Company to the State.

(e) The Project Director is entitled to dispute the amount of the Gross Income and the Costs by written notice to the Project Company within 10 Business Days of the issue of the Income Notice (Dispute Notice). For the avoidance of doubt, income earned by related parties to the Project Company in connection with Third Party Use must be included in any calculation of Gross Income for the purposes of this clause. If the Project Director does not serve a Dispute Notice, the Income Notice will be conclusive evidence of the Gross Income and the Costs. If the Project Director does serve a Dispute Notice, the matter must be dealt with in accordance with clause 4.7(h) and/or clause 40.

(f) The provisions of this clause 17.6 do not apply to any use in accordance with clause 17.7.

17.7 Community Use

(a) The Project Company must make the School Facilities available for Community Use at all times (for the avoidance of doubt 24 hours per day, seven days per week) and from time to time as required by the Department or the relevant School Principal and notified to the Project Company.

(b) The Project Director or the School Principal will provide a copy of each Community Use Agreement to the Project Company and will notify the Project Company as soon as practicable of any suspension or termination of any Community Use.

(c) The Project Director or the School Principal will, to the extent reasonably practicable, facilitate the creation of a direct agreement (which may be included in a Community Use Agreement) between the Project Company and each Community User, which direct agreement must be consistent with the Community Use Policy.

(d) The State, or the School Principal on the State's behalf, will be entitled to retain all income received by, or on behalf of, the State in connection with Community Use. The Project Company has no entitlement to any such income or, subject to paragraph (e) below, any other fees or income in respect of such Community Use.

(e) Notwithstanding the provisions of paragraph (d) above, as between the State and the Project Company, the Eligible Community Use Costs will be borne by the State, and paid to the Project Company in accordance with clause 29, unless the relevant Community Use Agreement or the relevant direct agreement referred to in paragraph (c) above provides for direct payment by the School Principal or the Community User to the Project Company.

(f) For the avoidance of doubt, the Project Company must ensure that the Operations Manual for each School Facility takes into account any previously notified Community Use requirements, and the School Principal and the Project Company must, to the extent practicable ensure that all other Community Use availability in
accordance with paragraph (a) above takes account of the requirements of the

18. INFORMATION, MONITORING AND AUDIT

18.1 Notification of Safety Issues

The Project Company must:

(a) identify and enquire into:

(i) any activity performed in respect of the Services which may give rise to
health and safety risks for the Education Staff, the Project Company's
officers, employees, agents or consultants, any Subcontractor or any of their
respective officers, employees, agents or consultants; and

(ii) any accidents or other incidents involving any (or any risk of) loss, injury or
damage to persons (including death) or property of any kind, which occurs
on or about a Site or a School Facility as a result of or in connection with
the Project Company performing the Services;

(b) in the case of the matters referred to in sub-paragraph (a)(i), give the Project
Director written notice of each such matter as soon as reasonably practicable after it
is identified; and

(c) in the case of the matters referred to in sub-paragraph (a)(ii), give the Project
Director a detailed written report of such matters as soon as reasonably practicable
after such accident or incident occurs.

18.2 Notification of Industrial Issues

The Project Company must, during the Term for each School Facility:

(a) keep the Project Director regularly informed of any industrial action which may
affect the provision of the Works or the Services;

(b) promptly inform the Project Director of:

(i) any industrial action which causes the Project Company to suspend or cease
the provision of the Works or the Services; and

(ii) what action or measures (including settlement) the Project Company has
taken or proposes to take to overcome, or minimise the effects of, such
industrial action; and

(c) promptly inform the Project Director of any industrial action affecting the Project
Company or any Subcontractor or any employees of either of them which may
impede the provision of the Education Functions.

18.3 Notification of Emergencies

The Project Company must immediately inform the Project Director of:
(a) any event or circumstances reasonably likely to constitute or cause an Emergency;

(b) any other incident which causes the Project Company to suspend or cease carrying out all or any part of the Works or the Services or which may materially impede the provision of the Education Functions; and

(c) what action or measures the Project Company has taken or proposes to take to respond to, overcome, or minimise the effects of, such incident or Emergency.

18.4 Notification of damage or defect

(a) The Project Company must advise the Project Director promptly in writing of any material defects, damage or repairs sustained at or to the Works, a Site or a School Facility of which the Project Company is aware and the action the Project Company proposes to take to correct that material damage, defect or disrepair, and the estimated time that correction will require.

(b) For the purposes of this clause 18.4, material defects, damage or repairs mean any defects or damage the cost of repair of which is in excess of $3,000 (indexed by reference to the CPI).

18.5 Monitoring and Records

The Project Company must monitor its performance in the delivery of the Services and maintain the information programs, plans, procedures, standards, policies, systems, records and manuals required in accordance with the procedures set out in the Output Specification.

18.6 Plans, Procedures, Standards Audit

(a) Without limiting clause 18.5, the Project Company must, during the Operations Phase for each School Facility, have its compliance with the programs, plans, procedures, standards, policies, systems, records and manuals prepared and maintained in accordance with the Output Specification, audited as required by the Output Specification at intervals not exceeding twelve months by an independent auditor acceptable to the Project Director.

(b) The Project Company must permit the Project Director or his representative to be present during such audits and deliver to the Project Director an audit report, within a reasonable time of completion of each audit.

(c) The State may require additional audits of the programs, plans, procedures, standards, policies, systems, records and manuals prepared and maintained in accordance with the Output Specification, at its own cost, provided that if an additional audit performed by the State reveals that the Project Company or its Subcontractor is not complying with the requirements of the specifications with respect to programs, plans, procedures, standards, policies, systems, records and manuals the Project Company shall reimburse the State for the costs of carrying out such an audit, and any subsequent audit to confirm rectification of the non-compliance.
18.7 Helpdesk and Performance Reporting

Without limiting clause 18.6, the Project Company must:

(a) provide a Helpdesk, which must be available continuously during each Operations Phase to receive enquiries, complaints and notices from Education Staff, to receive and transmit requests for reactive maintenance and repair and to provide information to Education Staff; and

(b) within the first Quarter of the Operations Phase, and thereafter at intervals not exceeding twelve months, provide to the Project Director an audit, by an independent auditor acceptable to the Project Director, of the implementation and integrity of the Project Company's monitoring, reporting and Service Payment calculation mechanism.

(c) prepare and provide to the Project Director a system verification report and reconciliation between the Helpdesk and the Performance and Payment Report no less frequently than once every Quarter.

18.8 Customer Satisfaction Survey

(a) The Project Company must, at least once in each Contract Year undertake (or procure the undertaking of) a customer satisfaction survey (the Customer Satisfaction Survey) the purpose of which shall include:

(i) assessing the level of satisfaction among Education Staff and other users or stakeholders of the School Facilities with the Services (including the way in which the Services are provided, performed and delivered) and, in particular, with the quality, efficiency and effectiveness of the Services;

(ii) monitoring the compliance by the Project Company with the Output Specification; and

(iii) assisting the Project Company in complying with its continuous improvement obligations under clause 15.5.

(b) The Customer Satisfaction Survey must be undertaken by means of distributing to Education Staff and other users or stakeholders of the School Facilities a questionnaire or other survey method as agreed between the parties in a form to be agreed with the Project Director.

(c) The content of the questionnaire or other material to be used for any other survey method referred to in Clause 18.8(b) and the method of undertaking the Customer Satisfaction Survey shall comply with all applicable Law.

(d) The Project Director will provide reasonable assistance and information (subject to compliance with all Law) to the Project Company to enable the Project Company to undertake the Customer Satisfaction Survey.

(e) Within 30 Business Days of the date of each Customer Satisfaction Survey, the Project Company must prepare a summary of the results of the Customer Satisfaction Survey to the State in such form as the Project Director shall
reasonably require and promptly upon a written request from the Project Director provide such further details (including copies of all returned questionnaires and/or any other survey material used by the Project Company) as the Project Director shall reasonably require.

18.9 Financial Reporting

(a) The Project Company must keep proper books of account and all other financial and financial planning records that would be expected of a prudent and competent person undertaking similar obligations as the Project Company undertakes under the Project Documents.

(b) The Project Company must ensure that each Construction Contractor and Facilities Manager keep proper books of account and all other financial and financial planning records in relation to the Project that would be expected of a prudent and competent construction contractor, operator or maintenance contractor (as the case may be).

(c) The Project Company must have its, and must ensure that each Construction Contractor and Facilities Manager or their respective guarantors has its, financial statements audited annually.

(d) No later than the date which is three months prior to the commencement of each Contract Year during the Operations Phase for each School Facility, the Project Company must provide to the Project Director its and its Facilities Manager's annual business plan and budget in relation to the Project for the following Contract Year which shall be in such detail and provide such information as the Project Director may reasonably request.

(e) Within 20 Business Days after each six month period during a financial year, the Project Company must provide to the Project Director its unaudited management accounts, together with details of any financial indebtedness and an explanation of any material variations between actual results and budget year to date.

(f) No later than four months after the end of each financial year, the Project Company must provide to the Project Director its audited financial statements for that financial year and the audited financial statements of each Construction Contractor or its guarantor during the Construction Phase and the audited financial statements of the Facilities Manager or its guarantor during the Operations Phase.

(g) The Project Company will promptly provide to the Project Director copies of all documents, reports, plans, materials, certificates, notices, materials (including but not limited to any updated financial models or reports) which the Project Company provides to the Financiers.

(h) Each of the documents to be provided to the Project Director in accordance with this clause 18.9 must be accompanied by a certificate signed by two authorised officers of the relevant entity certifying that the information provided complies with the requirements of this clause 18.9 and is accurate, complete and correct in all respects.
18.10 State Inspection

(a) The Project Director and/or its representatives may carry out or procure the carrying out of an inspection of the relevant Site or School Facility or any part of it and any programs, plans, procedures, standards, policies, systems, records (including financial records) and manuals relating to the Project, a School Facility or a Site to assess whether the Project Company is complying with its obligations under this deed. Provided clause 18.10(c) does not apply and no Project Company Termination Event has occurred and is continuing, this right may not be exercised in relation to each individual School Facility more often than twice in each calendar year.

(b) The Project Director must notify the Project Company in writing a minimum of 5 Business Days in advance of the date it wishes to carry out the inspection. The Project Director must consider any reasonable requests by the Project Company for the inspection to be carried out on a different date if such request is made at least 2 Business Days prior to the notified date and the Project Company is able to demonstrate that carrying out the inspection on the notified date would materially prejudice the Project Company’s ability to provide the Services.

(c) When carrying out any inspection, the Project Director and its representatives must cause the minimum disruption reasonably practicable to the provision of the Services by the Project Company, and must comply with the reasonable Site safety and Site security requirements of the Project Company. The Project Company must provide reasonable assistance to the Project Director in carrying out the inspection, including providing access to any systems, registers, manuals, records (including financial records), plans and programs maintained in relation to the School Facility or Site or in accordance with the relevant Operations Manual.

(d) The cost of any inspection carried out in accordance with this clause 18.10, except where clause 18.10(c) applies or a Project Company Termination Event has occurred and is continuing, will be borne by the State. The Project Company must give the Project Director any reasonable assistance required by the Project Director from time to time during the carrying out of any inspection.

(e) If an inspection shows that the Project Company has not complied or is not complying with its obligations under this deed, the Project Director:

(i) must notify the Project Company of the details of the non-compliance;

(ii) must specify a reasonable period within which the Project Company must carry out appropriate rectification and/or remedy activities; and

(iii) will be entitled to be reimbursed by the Project Company for the cost of the inspection and any reasonable administrative costs incurred by the State in relation to the inspection.

(f) The Project Company must at its own cost carry out such rectification and/or remedy activities within the period specified by the Project Director, and the Project Director may carry out or procure the carrying out of an additional inspection to
assess compliance with the requirement to carry out such rectification and/or remedy activities.

18.11 **State Financial Audit**

(a) At any time up to 6 months after the Termination Date, and the Project Director may give notice to the Project Company (**a Financial Audit Notice**) requiring an independent audit of any annual financial statements of the Project Company or other financial information of the Project Company provided pursuant to clause 18.9 to be undertaken for the purpose of reviewing any such financial statements or other financial information and verifying their accuracy, correctness and completeness.

(b) If the Project Director gives a Financial Audit Notice under this clause 18.9:

(i) the Project Director will appoint, and notify the Project Company of, an appropriately trained and qualified person to carry out and complete the audit (**the Financial Auditor**), at the State's cost and expense of the State, on terms and conditions of appointment determined by the Project Director; and

(ii) the Project Company must, within a reasonable period, make its financial statements, other financial reports and accounts and all source information, documentation and data required for the preparation of such annual financial statements or other financial reports, available for audit by the Financial Auditor.

(c) Upon request by the Financial Auditor, the Project Company must make available to the Financial Auditor an appropriately trained and qualified member of the Project Company's staff (or staff of a Subcontractor) to extract any relevant information from the Project Company's accounting system for the purposes of the audit.

(d) If the written report of the Financial Auditor (**the Financial Auditor's Report**) states that any annual financial accounts, or any other financial reports, or any part of them is not accurate, complete and correct, then:

(i) the Project Company must:

(A) fix the inaccuracy, incorrectness or incompleteness in the affected accounts or data and re-issue the affected accounts or data to the Project Director; and

(B) as applicable, promptly take steps to remedy the inaccuracy, incorrectness or incompleteness in its monitoring, measuring and reporting systems;

(ii) if the inaccuracy, incorrectness or incompleteness has affected the amount of any Monthly Service Payment or any other account, that has been paid to the Project Company, the Project Director will determine, and notify the Project Company of, the amount of the appropriate adjustment to the affected amounts and that amount will be added to or deducted from (as the
case may be) the next Monthly Invoice scheduled after the date of the Project Director's notice; and

(iii) the Project Company will reimburse the State the costs of the Financial Auditor in carrying out the audit pursuant to this clause 18.11.

18.12 Asset Condition Survey

The Project Company must carry out an asset condition survey of each School Facility every twelve months during the Operations Phase, in order to identify and determine the requirement for future planned maintenance and repair and shall provide to the Project Director a copy of such survey.

PART E – ADVERSE EVENTS AND CHANGE

19. EMERGENCIES AND STATE STEP IN

19.1 Project Director may instruct

If an Emergency occurs, the Project Director may instruct the Project Company to immediately suspend performance of the Services, perform any Services in respect of which the Project Company is in breach and/or to procure that such additional or alternative services are undertaken by the Project Company as and when required by the Project Director, in each case to ensure that the Emergency is dealt with and normal operation of the relevant School Facility and Site resumes as soon as is reasonably practicable.

19.2 Payment for additional or alternative services

(a) Subject to paragraph (b) below, any additional third party costs incurred by the Project Company or its Subcontractor in providing the additional or alternative services under clause 19.1 will be borne by the State and paid in accordance with clause 29.

(b) The Project Company will bear the cost of any additional or alternative services provided by the Project Company where the relevant Emergency arose (directly or indirectly) as a result of any negligence, wilful misconduct, breach or default of the Project Company or Project Company Related Party.

19.3 State Step-In

If:

(a) the Project Company fails to promptly remedy a breach which has given rise to an Emergency and the Project Director reasonably believes that action must be taken in respect of the Emergency; or

(b) the Project Company is unable or unwilling to provide additional or alternative services requested under clause 19.1, and the Project Director reasonably believes that action must be taken in respect of the Emergency; or
(c) the Project Director reasonably believes that the Project Company must suspend provision of the Services and/or the State must take step in action to discharge a legislative, public or constitutional duty,

the State may exercise the Step In Rights in accordance with the procedure set out in schedule 15.

20. COMPENSATION EVENTS

If and to the extent that a Compensation Event:

(a) is or is likely to be the cause of a delay in:

   (i) obtaining a Development Approval by 30 Business Days after the relevant Target DA Approval Date;

   (ii) achieving Completion of a Milestone or Completion of the Works for a School Facility by the relevant Target Completion Date for that Milestone or School Facility;

   (iii) achieving Completion of the Works for a School Facility by the Longstop Date for that School Facility; or

   (iv) achieving the Full Service Commencement Date by the Target Full Service Commencement Date; and/or

(b) affects the ability of the Project Company to comply with any of its other obligations under this deed; and/or

(c) causes the Project Company to incur additional or increased costs or causes the Project Company to lose revenue in respect of the Project,

then the Project Company is entitled to apply for relief from its obligations and/or claim compensation under this deed in accordance with the provisions of schedule 17.

21. RELIEF EVENTS

If and to the extent that a Relief Event:

(a) is or is likely to be the cause of a delay in:

   (i) obtaining a Development Approval by 30 Business Days after the relevant Target DA Approval Date;

   (ii) achieving Completion of a Milestone or Completion of the Works for a School Facility by the relevant Target Completion Date for that Milestone or School Facility;

   (iii) achieving Completion of the Works for a School Facility by the Longstop Date for that School Facility; or
achieving the Full Service Commencement Date by the Target Full Service Commencement Date; and/or

(a) affects the ability of the Project Company to perform any of its other obligations under this deed,

then the Project Company is entitled to apply for relief from its obligations in accordance with the provisions of schedule 18, but, for the avoidance of doubt, shall not be entitled to any compensation for additional or increased costs or lost revenue in respect of such Relief Event.

22. CHANGE PROCEDURE

22.1 Proposal of Changes in Services

Either party may propose a Contract Variation in accordance with the Change Procedure.

22.2 Project Company Changes

Where a request for a Contract Variation is made by the Project Company pursuant to clause 22.1, the Project Company will not be entitled to any extension of time, nor relief from any other obligation, nor any compensation in respect of the implementation of any Contract Variation which it requests unless such Contract Variation is deemed pursuant to clause 22.4 to be the State Variation Request.

22.3 State Change

Where a request for a Contract Variation is made by the Project Director or there is deemed to be the State Variation Request pursuant to clause 22.4, the Change Procedure will apply in respect of any extension of time, relief from any other obligation, and/or any compensation payable in respect of the implementation of that Contract Variation.

22.4 Deemed State Variation Requests

Any Contract Variation proposed by the Project Company:

(a) as a direct result of a Compensation Event; or

(b) under clause 23.9;

(c) under paragraph 8 of schedule 16; or

(d) under clause 6.4(c),

will be deemed to be a State Variation Request, provided that the Project Company must, at the time it issues the relevant request for Contract Variation, notify the Project Director that it considers that such request is being made as a direct result of a Compensation Event, under clause 23.9, under paragraph 8 of schedule 16 or under clause 6.4(c) and is therefore a deemed State Variation Request.
22.5 **No Other Change**

Without limiting the other provisions of this deed, but subject to clause 22.7 and clause 22.8, the Project Company must not implement any Contract Variation except in accordance with this clause 22.

22.6 **Additional Work**

(a) Where the State Variation Request involving Additional Work occurs during the Operations Phase for a School Facility, and the Project Company and the Project Director, having invoked the Change Procedure, are unable to agree on the terms of the relevant Contract Variation, the State may undertake, or appoint an Additional Work Contractor to undertake, the Additional Work.

(b) The Project Company must not hinder, prevent or delay the State or any Additional Work Contractor from undertaking the Additional Work and the State may request that the Project Company and the Additional Work Contractor enter into a co-ordination and interface agreement with respect to all or any of the design, construction, completion, commissioning, hand over and facilities management of the Additional Work. The Project Company will comply with all such requests.

(c) Unless otherwise determined by the Project Director, the Project Company will be responsible for all aspects of the Services as they relate to such Additional Work, after completion or installation of the Additional Work. The resultant changes to the Services and the Service Payment will be determined in accordance with schedule 16 and the Project Company releases the Minister, the State, the Department, their respective delegates, employees, contractors and agents from any liability, duty or obligation to the Project Company (or any person claiming through or on behalf of the Project Company, including any Subcontractor) in respect of Claim or Loss connected with such Additional Work, except for any rights of the Project Company arising from a Compensation Event.

22.7 **Minor Changes**

Notwithstanding the other provisions of this deed, the Project Company may implement Minor Changes in accordance with the directions of the Project Director without reference to the Change Procedure, provided that the Project Company will not be entitled to any extension of time or other relief from the performance of its obligations in accordance with this deed in respect of Minor Changes, and the Project Company must comply with and will only be compensated in accordance with schedule 19 in respect of any Minor Changes.

22.8 **Additional Learning Spaces**

(a) Where the Project Director notifies the Project Company that a School Facility requires additional learning spaces which fall within the Output Specification, which notice must be given no later than three months before such additional learning spaces are required, the Project Company must:

(i) provide the additional learning spaces in accordance with the Output Specification;
(ii) ensure that the relevant additional learning spaces are fully complete, installed, commissioned and functional by the date specified in the notice from the Project Director that such additional learning spaces are required;

(iii) provide written notice to the Project Director no later than two weeks after the Project Director's notice regarding the additional learning spaces if the Project Company proposes to use the Department Relocatable Units; and

(iv) ensure that all aspects of the Services, as they apply to the additional learning spaces, comply in all respects with this deed, the Output Specification and the Project Company Proposals.

(b) The State will determine if it wishes to use Department Demountable Units or Modular Design Ranges and must source, locate, transport and deliver to the relevant School Facility such Department Demountable Units or Modular Design Ranges requested by the Project Company in accordance with paragraph (a) of this clause 22.8 no later than two weeks prior to the date on which the additional learning spaces are required in accordance with the notice given by the Project Director under clause 22.8 (a).

(c) Without limiting the other provisions of this deed:

(i) the Project Company acknowledges and agrees that each School Facility, nominated by the Output Specification to be provided on a "core plus basis" must be designed, constructed and operated so as to accommodate and incorporate Department Relocatable Units;

(ii) the Project Company must acknowledge in writing to the Project Director receipt of each Department Relocatable Unit provided by the State, within 10 Business Days of delivery;

(iii) the Project Company must:

(A) inspect and test each Department Relocatable Unit for physical damage and any defects or deficiencies which impact on, or are likely to impact on, the intended use or functionality of the Department Relocatable Unit or the provision of any Services required to be provided in connection with the Department Relocatable Unit; and

(B) report in writing within 10 Business Days of delivery any defects or deficiencies to the Project Director;

(iv) the Project Company must not install or otherwise work with or use a Department Relocatable Unit that has been found on inspection to be damaged, defective or deficient, and must issue a Project Company Variation Proposal in respect of any works required to repair any damage, defects or deficiencies to a Department Relocatable Unit, to ensure it meets the standards required by this deed;
(v) the Project Company must incorporate the Department Relocatable Unit into the relevant School Facility, with a high degree of professional skill and care and in accordance with the requirements of this deed;

(vi) upon installation, each Department Relocatable Unit or other additional learning space provided in accordance with this clause shall become part of the relevant School Facility;

(vii) subject to the State's obligations in clause 22.8(e), the Project Company will be responsible for loss or destruction of, damage to or defects or deficiencies in, each Department Relocatable Unit, which occur after it is delivered to the Project Company in accordance with this clause until the Department Relocatable Unit is removed from the Site by the Project Company; and

(viii) the Project Company will be responsible for installation, commissioning, removal (including making good of the Site) and the provision of all aspects of the Services as they relate to such Department Relocatable Units in accordance with the Output Specification, and the Project Company releases the Minister, the State, the Department, their respective delegates, employees, contractors and agents from any liability, duty or obligation to the Project Company (or any person claiming through or on behalf of the Project Company, including any Subcontractor) in respect of Claim or Loss connected with such Department Relocatable Units, except for any rights of the Project Company arising from a Compensation Event.

(d) The Project Company will be paid for the installation, removal and provision of all Services in connection with the Department Relocatable Units in accordance with schedule 5, and, subject to the express provisions of this clause, will not have any other claim, via the Change Procedure or otherwise, in respect of the performance of its obligations under this clause 22.8.

(e) The State will ensure that Department Relocatable Units meet the Output Specification applicable to such Department Relocatable Units as at the date they are delivered to the relevant School Facility by the State in accordance with this clause 22.8.

23. **FORCE MAJEURE**

23.1 **Ability to make Deductions**

Nothing in this clause 23 will affect any entitlement of the State to make Deductions under schedule 5 in the period during which the Force Majeure Event is subsisting.

23.2 **Notify**

On the occurrence of a Force Majeure Event, the Project Company must notify the Project Director as soon as practicable. The notification will include all updated details required to be provided in accordance with schedule 18 in relation to the Relief Event which has become a Force Majeure Event.
23.3 Consultation and Relief

(a) As soon as practicable following notification in accordance with clause 23.2, the parties must consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this deed.

23.4 Relief

(a) If the Project Company believes that a Force Majeure Event has occurred and adversely impacts the ability of the Project Company to comply with any of its obligations under this deed and the Project Company provides evidence to the Project Director that:

(i) the Force Majeure has occurred and caused an inability to comply with the Project Company's obligations;

(ii) the impact of the force majeure could not reasonably have been mitigated or recovered by the Project Company acting in accordance with Good Industry Practice, without incurring material expenditure; and

(iii) the Project Company is using best endeavours to perform its obligations under this deed,

without limiting the other provisions of this clause 23, the State may grant such relief as is appropriate, taking into account the likely effect of delay.

(b) The Project Company must notify the Project Director if at any time it receives or becomes aware of any further information relating to the Force Majeure Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading, and the relief given in accordance with this clause 23.4 will be amended accordingly.

(c) If the Project Director disagrees that a Force Majeure Event has occurred or that the Project Company is entitled to any relief under this clause 23.4, the parties will seek to resolve the matter in accordance with clause 4.7(h) and clause 40.

23.5 Unable to Agree

If the parties are unable to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this deed, on or before the date falling 180 days after the date of the commencement of the relevant Relief Event and such Relief Event is continuing or its consequence remains such that the affected party has been or is unable to comply with its obligations under this deed during that 180 day period then, subject to clause 23.6, either party may terminate this deed by giving 20 Business Days’ written notice to the other party.

23.6 Notice to Continue

If the Project Company during the subsistence of a Force Majeure Event gives notice to the Project Director under clause 23.5 that it wishes to terminate this deed, then the Project Director has the option either to accept such notice or to respond in writing on or before the
date falling 10 Business Days after the date of its receipt stating that it requires this deed to continue in whole. If the Project Director gives the Project Company such notice, then:

(a) the State must pay to the Project Company the Monthly Service Payment from the day after the date this deed would have terminated in whole under clause 23.5 (or in the case of a Force Majeure Event occurring during the Construction Phase for a School Facility, from the Target Completion Date for that School Facility except that any extension of time to the Target Completion Date for that School Facility granted by the Project Director as a result of the occurrence of the Relief Event giving rise to the Force Majeure Event will be limited to 180 days unless otherwise agreed in accordance with clause 23.3) as if the Services then required to be provided under this deed were being fully provided (less costs not incurred as a result of non-provision of Services); and

(b) this deed will not terminate until expiry of written notice (of at least 30 Business Days) from the State to the Project Company that they wish this deed to terminate.

23.7 Mitigation

The parties must at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Project Company will at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

23.8 Event Ceases

The affected party must notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the affected party to be unable to comply with its obligations under this deed. Following such notification this deed will continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

23.9 Not all School Facilities affected

Where a Force Majeure Event prevents the Project Company from carrying out its obligations under this deed in respect of some but not all of the Sites or School Facilities, as the case may be, either party may after 180 days after the occurrence of the relevant Relief Event propose a Contract Variation in accordance with the relevant provisions of clause 22, under which the affected Site or School Facility, as the case may be, ceases to be subject to this deed.

24. CHANGE IN LAW

24.1 Requirement to comply

(a) Without limiting clause 2.6, the Project Company acknowledges that it must, in performing the Project, comply, and procure that all Subcontractors comply, with all applicable Law, and it is not entitled to any compensation or extension of time or relief from performance of its obligations under this deed as a result of any Change in Law, unless and to the extent, such Change in Law constitutes or gives rise to a Compensation Event.
24.2 Implementation Relief

Notwithstanding clause 24.1 to the extent it is able to do so, the State will use all reasonable endeavours to avail the Project Company of any relief, implementation arrangements or programs which are extended to the Department, for Department operated schools generally, in respect of compliance with any Change in Law.

24.3 Beneficial Change in Law

Where a Beneficial Change in Law occurs, the Service Payment will be adjusted in accordance with schedule 19 as if the Beneficial Change in Law resulted in a Contract Variation and the Variation Saving arose due to a State Variation Request.

PART F – LOSS, DAMAGE AND INSURANCE

25. LOSS AND DAMAGE

25.1 Risk of loss or damage

(a) From the date of this deed until the Commencement Date for a School Facility, the Project Company bears the risk of loss or damage to Works relating to that School Facility and the Site in or on which the relevant Works are carried out.

(b) From the Commencement Date for a School Facility, the Project Company bears the risk of loss or damage to that School Facility, including the Site on or in which that School Facility is located, until the end of the Term.

(c) The Project Company must, in accordance with clause 27, promptly make good any loss or damage to the Works, the Sites or the School Facilities (as applicable) caused during the period it bears the risk of loss or damage.

25.2 Project Company’s Indemnity

The Project Company must, subject to clause 25.3, be responsible for, and must release and indemnify the State, the Department and their respective officers, employees and agents on demand from and against each of:

(a) any Claim or Loss in respect of:

   (i) death or personal injury;

   (ii) loss of or damage to property (including property belonging to the State or the Department or for which it is responsible); and

   (iii) third party suits, claims, actions, demands, proceedings, penalty, costs, charges or expenses (excluding, for the avoidance of doubt, any Claim or Loss in respect of a suit, claim, action or proceeding initiated by a State Related Party),

which may arise out of, or in consequence of, the design, construction, operation or maintenance activities of the Project Company or the performance or non-performance by the Project Company of its obligations under this deed or any
Project Document or the presence on or possession of or access to the Sites, the Works or the School Facilities by the Project Company or any Project Company Related Party, including any Contamination of or Pollution occurring on or from any Site; and

(b) any Claim or Loss suffered by or incurred in connection with any:

(i) breach or failure to comply with the terms of any Project Document by the Project Company or any Project Company Related Party; or

(ii) negligent, or unlawful acts or omissions or wilful misconduct by the Project Company or any Project Company Related Party.

25.3 Project Company not obliged to indemnify and limitation on liability

(a) The Project Company will not be obliged to indemnify the State under clause 25.2 for any Claim or Loss to the extent only that the Claim or Loss is caused by:

(i) negligent or unlawful acts or omissions or wilful misconduct of a State Related Party, where such Claim or Loss did not occur as a result of a failure by the Project Company to provide the Services;

(ii) a breach of the State of its express obligations under a Project Document; or

(iii) the Project Company following the express directions of the State or the Project Director with respect to its obligations under this deed, where such directions are given in accordance with this deed, and give rise to an action or claim or against the State by a third party.

(b) The liability of the Project Company under this deed in respect of a Claim or Loss will be capped at the higher of the Insured Sum or $50,000,000 (indexed by reference to the CPI).

For the purposes of this clause 25.3(b), the "Insured Sum" means the amount recoverable in respect of the relevant Claim or Loss under any insurance policy effected or caused to be effected by the Project Company in compliance with Schedule 14 or which would have been recoverable under such insurance but for this clause and had the Project Company or the relevant insured complied with the requirements of Schedule 14 and the terms of the insurance policy, had diligently pursued payment of the insured claim and the insurer had met its liability under the insurance policy.

25.4 Damage by State or State Related Parties

Loss of or damage to a School Facility or a Site or any part of a School Facility or a Site by the State or the State Related Party will not (subject to paragraph (a) of the definition of Compensation Event) be a Compensation Event. The State will have no obligation to indemnify the Project Company or any Project Company Related Party in respect of such damage.
25.5 **Responsibility for Related Parties**

The Project Company will be responsible, as against the State, for the acts or omissions of the Project Company Related Parties as if they were the acts or omission of the Project Company and, subject to clause 25.4, the State will be responsible, as against the Project Company, for the acts or omissions of the State Related Parties as if they were the acts or omissions of the State.

25.6 **Claims Procedure**

(a) Where the State wishes to make an indemnity demand under this deed on the Project Company in respect of a Claim, the State must give notice of the relevant Claim as soon as reasonably practicable, setting out full particulars of the Claim, (provided that failure to give such notice must not affect Project Company's indemnity obligations under this deed, except to the extent the Project Company is precluded or prejudiced by such failure).

(b) The State must exercise all rights and remedies reasonably available to it in respect of such Claim to mitigate such Claim and shall advise the Project Company, at the Project Company's request, of the status of any such action.

(c) Subject to the rights of insurers under policies of insurance maintained pursuant to clause 26, the Project Company may investigate, and, upon acknowledging its obligation to indemnify under this deed, may defend or compromise in good faith in a commercially reasonable manner any Claim for which indemnification is sought under this deed, and the State must cooperate with all reasonable requests of the Project Company in connection with such action, provided, that no Claim shall be compromised without the prior written consent of the State.

25.7 **Costs of claims**

The Project Company must, if it wishes to have conduct of any Claim, give reasonable security to the State for any cost or liability arising out of the conduct of the Claim by the Project Company.

26. **INSURANCE**

26.1 **Project Company's Requirement to Maintain**

The Project Company must take out and maintain or procure the taking out and maintenance of the insurances specified in schedule 14, at the times, in the manner and in the form specified in schedule 14, and any other insurances as may be required by applicable Law.

26.2 **Limit of Liability**

Neither failure to comply, nor full compliance by the Project Company with the insurance provisions of this deed, will limit or relieve the Project Company of its liabilities and obligations under this deed.
26.3 **Insurance proceeds**

The Project Company must pay to the State the net amount it recovers under any insurance policy in connection with any event which results in the State making a payment to the Project Company pursuant to Part B or Part C of schedule 21, which are not used to repair, reinstate or replace part or parts of Works, the Sites or the School Facilities.

27. **REINSTATEMENT**

27.1 **Project Company's Obligation to Reinstate**

(a) If any loss or damage occurs to any part of the Works, or a School Facility or a Site, the Project Company must (without limiting its other obligations under this deed) promptly repair or replace that part of the Works or the School Facility that has been lost or damaged so that, to the greatest extent possible, the Project Company continues to comply with its obligations under the Project Documents.

(b) In carrying out repair and replacement activities, the Project Company must minimise the impact on the Works, the Sites, the School Facilities, the Education Functions and keep the Project Director fully informed of the progress of the repair and replacement activities.

27.2 **Application of Proceeds**

All insurance proceeds, and amounts paid to the Project Company under clause 28.3, in each case received in respect of loss or damage to any part of the Works, the Sites or School Facilities, must be applied by the Project Company to repair, reinstate, and replace each part or parts of Works, the Sites or the School Facilities in respect of which the amounts were received.

28. **UNINSURABLE RISKS**

28.1 **Obligation**

Nothing in clause 26 will oblige the Project Company to take out or maintain insurance in respect of a risk which is or becomes Uninsurable.

28.2 **Risks Become Uninsurable**

To the extent that any risk required to be insured against under the policies to be effected in accordance with clause 26 becomes Uninsurable then:

(a) the Project Company must notify the Project Director within 5 Business Days of the risk becoming Uninsurable; and

(b) if both parties agree, or it is determined in accordance with clause 40, that the risk is Uninsurable and that the risk being Uninsurable is not caused by the actions of the Project Company or a Project Company Related Party,

then the parties must meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either party).
28.3 **Consequences**

(a) If the requirements of clause 28.2 are satisfied with respect to a Material Risk, but the parties cannot agree as to how to manage the Material Risk, then this deed will continue but with the Quarterly Service Payment being adjusted to deduct an amount agreed by the Project Company and the Project Director to be equal to the premium that was payable for insurance for such Material Risk immediately prior to it becoming Uninsurable. If the parties are unable to agree the amount equal to the premium that was payable in respect of insurance for the relevant Material Risk immediately prior to it becoming Uninsurable, the matter must be referred for determination in accordance with clause 40.

(b) If this clause 28.3 applies, on the occurrence of the Material Risk the Project Director must (at the Project Director's option) either:

(i) pay to the Project Company an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available and clause 27.2 will apply; or

(ii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if some, but not all of the Sites or School Facilities are affected, make the State Variation Request pursuant to the relevant provisions of the Change Procedure, under which the affected Site or School Facility, as the case may be, ceases to be subject to this deed; or

(iii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if all Sites or School Facilities are affected, pay to the Project Company an amount equal to the amount set out in part C of schedule 21 and this deed will terminate.

**PART G – PAYMENT PROVISIONS**

29. **PAYMENT PROVISIONS**

29.1 **Service Payment**

The State must pay the Project Company an amount in respect of each Operating Month, calculated in accordance with schedule 5, and otherwise increased or decreased in accordance with the provisions of this deed.

29.2 **Invoices**

On or about the fifteenth day of each Operating Month and on or about the date that is fifteen days following the Termination Date, the Project Company must submit to the Project Director an invoice (**Monthly Invoice**) in the form of the Pro Forma Invoice.

29.3 **Payment of Invoices**

(a) Subject to clause 29.5, the State will pay the amount of the Monthly Invoice (excluding the relevant Monthly Lifecycle Payment) submitted to it under clause 29.2 within 20 Business Days of its submission of the Monthly Invoice and the Performance and Payment Report in accordance with clause 29.7.
(b) Where a Monthly Invoice shows a net amount owed by the Project Company to the State, the Project Company will pay that amount to the State within 20 Business Days of the Monthly Invoice or, other than in the case of the Monthly Invoice submitted after the Termination Date, at the option of the Project Director, carry forward that amount to the next Monthly Invoice in reduction of accounts which would otherwise have been owed by the State to the Project Company.

29.4 Disputed Amounts

If the Project Director disputes, in good faith, any amount set out in a Monthly Invoice, the State will be entitled to withhold payment of the amount so disputed (the Disputed Amount). Disputed Amounts will be resolved in accordance with clause 40. Until the dispute is resolved in accordance with clause 40, and subject to the outcome of that dispute, the Disputed Amount will be taken not to be due and payable for the duration of the dispute.

29.5 Determination of Dispute

If the determination of any dispute referred to in clause 29.4 shows that:

(a) the State has withheld any amount which the Project Company was entitled to be paid;

(b) the Project Company has withheld any amount which the State was entitled to be paid; or

(c) the Project Company has claimed and received any amount which it was not entitled to be paid,

the State will pay such amount to the Project Company or the Project Company will repay such amount to the State, as the case may be, with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by the State) or from the date on which over payment was made (in the case of excessive claims by the Project Company) until all relevant monies have been paid in full and whether before or after judgement.

29.6 Monthly Reconciliations

(a) Before the eighth day of each Operating Month, and on or before the date that is eight days following the Termination Date, the Project Company must provide to the Project Director a performance and payment report for the preceding Operating Month accompanied by information clearly setting out the derivation and calculation of the Deductions in accordance with the requirements of the Output Specification in respect of each School Facility (each a Performance and Payment Report).

(b) Each Performance and Payment Report must be accompanied by a statutory declaration, signed by an authorised officer of the Project Company, confirming, to the best of the relevant authorised officer's knowledge and belief, the accuracy of the Performance and Payment Report, compliance with the provisions of this deed, payment to all Subcontractors of all amounts which fell due for payment in the Operating Month preceding the Operating Month to which the relevant
Performance and Payment Report relates, compliance with the Consents and applicable Law and certifying that no Project Company Termination Event has occurred and is continuing.

29.7 **Late Payments**

If any payment due under this deed remains unpaid after its due date, such payment will bear interest calculated at the Prescribed Rate from the day after the date on which the payment was due to (and including) the date of payment. The right of a party to receive interest in respect of the late payment of any sum due will be without prejudice to any other rights that party may have under this deed.

29.8 **Rights of Set-Off**

The Project Company will not be entitled to retain or set off any amount due to the State by it, but the State may (subject to clauses 14A.1(e) and 14A.2(c) and schedule 21) retain or set off any amount due and payable to them or either of them by the Project Company under any Project Document.

29.9 **Set-Off and Disputed Amounts**

If the payment or deduction of any amount referred to in clause 29.8 above is disputed then any undisputed element of that amount must be paid and the disputed element will be dealt with in accordance with clause 29.5.

29.10 **Base Case and Service Payment Adjustments**

(a) As soon as reasonably practicable following any adjustment to the Service Payment in accordance with schedule 19, or where this deed provides for a revised Base Case to be submitted to the State, the Project Company must submit to the Project Director for approval:

(i) one certified hard copy and one electronic copy of the revised schedule 5, using the same methodology to produce the indicative schedule 5, but based on the Target Completion Dates as at the date of this deed, actual date of Financial Close and the actual cost of funding to the Project Company, determined as at the actual date of Financial Close;

(ii) a proposed revised base case (Proposed Base Case) and all supporting formulae and data;

(iii) an instruction manual outlining how to use the Proposed Base Case, which is acceptable to the Project Director, acting reasonably; and

(iv) a certificate from an auditor acceptable to the Project Director confirming that an independent audit of the Proposed Base Case has been completed and that:

(A) calculations in the Proposed Base Case have been checked and are in all material respects internally consistent and mathematically correct;
(B) the Proposed Base Case allows changes in assumptions to correctly flow through to the results;

(C) any macros in the Proposed Base Case that govern the calculation of the Proposed Base Case are correct;

(D) the input data used in the Proposed Base Case is consistent with all relevant supporting project documentation, formulae or constants;

(E) the calculations of any relevant ratios and financial covenants in the Proposed Base Case have been checked and that the Proposed Base Case correctly reflects the definitions contained in the Financing Agreements;

(F) the Proposed Base Case correctly incorporates the relevant structural features in the Financiers' term sheets such as reserve accounts, lock up provisions, default provisions and amortisation;

(G) the accounting assumptions and outputs from the Proposed Base Case are in accordance with the generally accepted accounting principles in Australia; and

(H) the income taxation assumptions and outputs from the Proposed Base Case are in accordance with the relevant income tax legislation.

(b) The Project Company must:

(i) allow the Project Director 15 Business Days to approve the Proposed Base Case and/or the revised schedule 5 or submit proposed amendments to the Proposed Base Case and/or the revised schedule 5; and

(ii) if required by the Project Director, make available, at the cost and expense of the Project Company, the appropriate personnel to explain the Proposed Base Case and/or the revised schedule 5 or provide information in relation to the Proposed Base Case and/or the revised schedule 5 in such form as the Project Director reasonably requests.

(c) The Project Director must approve the Proposed Base Case and/or the revised schedule 5 or submit proposed amendments within 15 Business Days of receipt of the Proposed Base Case and/or the revised schedule 5 pursuant to clause 29.10(a). If the Project Director approves the Proposed Base Case and/or the revised schedule 5 submitted by the Project Company in accordance with clause 29.10(a), then the Proposed Base Case will be the Base Case for the purposes of this deed and/or schedule 5 will be replaced with the schedule 5 submitted in accordance with clause 29.10(a).

(d) If the Project Director submits amendments to the Proposed Base Case and/or the revised schedule 5 in accordance with clause 29.10(c), then:

(i) the Project Company and the Project Director must consult in good faith with respect to, and use their reasonable endeavours to establish, the
amendments required to the Proposed Base Case and/or the revised schedule 5; and

(ii) if, and to the extent that, those amendments are agreed, the revised Proposed Base Case and/or the revised schedule 5 (as applicable) agreed by the Project Director and the Project Company will be the Base Case or schedule 5 (as applicable) for the purposes of this deed.

(e) If the Project Director and the Project Company do not agree on the amendments required to be made to the Proposed Base Case and/or the revised schedule 5 within 10 Business Days after the commencement of the consultation pursuant to clause 29.10(d) or if no consultation is held, within 12 Business Days after date when the Project Director submitted amendments to the Proposed Base Case and/or the revised schedule 5 in accordance with clause 29.10(c), then:

(i) the Project Director and the Project Company must refer the dispute for resolution by an independent expert in accordance with clause 40.2; and

(ii) the base case and/or the new schedule 5, as determined by the independent expert under clause 40.2, will be the Base Case and/or the schedule 5 for the purposes of this deed.

(f) The Project Company acknowledges and agrees that the Project Director's review of, comment on, rejection of, or direction in respect of the Base Case, schedule 5, the Proposed Base Case and/or the revised schedule 5 is solely for the benefit of the State for the purpose of monitoring the performance of the Project Company, and the State does not assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed, and no action or inaction on the part of the Project Director will entitle the Project Company to make any claim or in any way relieve, alter, limit or change the Project Company's obligations and liabilities to the State under the Project Documents.

(g) The parties acknowledge and agree that the Base Case and schedule 5 have been prepared on an indicative basis and must be adjusted and/or completed at Financial Close in accordance with the Financial Close Protocol. The adjusted Base Case and adjusted and/or completed schedule 5, together with the documents required under clause 29.10(a), must be delivered to the Project Director at Financial Close. The adjusted Base Case and adjusted and/or completed schedule 5 which otherwise comply with the requirements set out in this clause 29.10 will be initialled by the Minister and the Project Company at Financial Close and such documents will then become the agreed form Base Case and schedule 5 for the purposes of this deed.

29.11 Lifecycle sinking fund

(a) The State must prior to the first Commencement Date open an interest paying bank account in the name of the State (Sinking Fund Account). The State will be liable for any tax payable in relation to the Sinking Fund Account.

(b) The State must in each month during the Operations Phase for a School Facility pay an amount equivalent to the Monthly Lifecycle Payment excluding GST (calculated in accordance with schedule 5) for that month into the Sinking Fund Account. To
the extent that the State has the right under this deed to reduce the amount of the Monthly Service Payment payable in any month, the State must first apply such right against the part of the Monthly Service Payment other than the Monthly Lifecycle Payment before reducing the Monthly Lifecycle Payment in any month.

(c) Interest accruing on the balance of the Sinking Fund Account will be retained in the Sinking Fund Account until withdrawn in accordance with clauses 29.11(c) or (g).

(d) The Project Company is entitled to withdraw funds from the Sinking Fund Account at any time, but not more than once in any calendar month. When it wishes to withdraw funds, the Project Company will provide to the State an invoice for the amount to be released (the Sinking Fund Invoice).

(e) On presentation of the Sinking Fund Invoice, the State must, subject only to clause 29.11(f), release from the Sinking Fund Account the GST exclusive amount of the invoice within 7 days and make payment of the GST amount of the invoice from funds other than those in the Sinking Fund Account.

(f) The State's obligation to release the funds to the Project Company under clause 29.11(e) will be limited to the extent that there are moneys in the Sinking Fund Account. The State may not refuse to release funds on any other basis.

(g) Notwithstanding any other provisions of this deed, prior to the expiry of the Term, the State must not withdraw from, set-off against, or otherwise apply or use in any manner, the balance of the Sinking Fund Account other than as provided in this clause 29.11. Any amount in the Sinking Fund Account at the expiry of the Term will remain the property of the State.

30. BENCHMARKING

30.1 Benchmarking Exercise

If either the Project Company or the Project Director requires, by giving written notice to the other party no less than 20 Business Days before a Benchmark Date, the Project Company must undertake a benchmarking exercise (the Benchmarking Exercise) at the times and in respect of the Services specified in the relevant notice, in accordance with the procedure set out in schedule 20.

30.2 Purpose of Benchmarking

The parties acknowledge that the Benchmarking Exercise will be undertaken to ascertain the relative quality and competitiveness of the relevant Services. The Project Company must undertake the Benchmarking Exercise in good faith and on the basis of an objective and like for like comparison by comparing the standards and prices (including rates, where prices are calculated by reference to rates per hour, volume or quantity) of the relevant Services and the costs of providing them (taking into consideration the obligations assumed by the provider of the relevant Benchmarked Services), with the standards and prices of equivalent services and the costs of providing those equivalent services where they are provided by reputable organisations possessing an appropriate degree of skill, resources, reputation and financial standing (Comparable Services).
30.3 **Market Testing**

The Project Company must carry out any market testing exercise in the circumstances, at the times and in accordance with the procedure set out in schedule 20.

30.4 **Benchmarked Service Rates**

Prior to Financial Close, the Project Company must provide to the Project Director, in respect of the Services which are subject to the Benchmarking Exercise, the rates for key inputs to those Services, (where prices are calculated by reference to rates per hour, volume or quantity) and a reconciliation to the total cost for each of those Services upon which the relevant aggregated operating costs in the Base Case are calculated.

30.5 **Benchmarking of Insurance Component of Service Payment**

(a) Three months prior to each Insurance Benchmark Date, the Project Company must obtain separate quotations from three reputable insurance companies in the commercial insurance market at that time, for annual premium costs (on the basis that premiums are paid quarterly) of obtaining the Benchmarked Insurances.

(b) On each Insurance Benchmark Date, if the annual insurance premiums for the Benchmarked Insurances is greater or less than the insurance premiums (indexed by reference to the CPI) for the Benchmarked Insurances at the first Commencement Date or the last Insurance Benchmark Date on which an adjustment Insurance Component of the Service Payment to the occurred under this clause, the Insurance Component of the Service Payment will be adjusted by the amount by which the insurance premium for the Benchmarked Insurance:

(i) exceeds the Insurance Component; or

(ii) is less than the Insurance Component,

provided that any increase or decrease in the cost of obtaining the Benchmarked Insurance which is attributable to the Project Company’s or a Subcontractor’s performance under the Project Documents or the insurance history of (or other relevant acts or omissions of) the Project Company or a Subcontractor under or in relation to any existing or previous insurance policy will be disregarded.

30.6 **Benchmarking of Energy Component of Service Payment**

(a) Three months prior to each Energy Benchmark Date, the Project Company must obtain no less than three separate quotations from appropriate energy providers or retailers, for a price per unit of gas, electricity and water.

(b) On each Energy Benchmark Date, if the price per unit of gas, electricity or water was at least 10% greater or less than the price per unit of gas, electricity or water set out in schedule 5 as the Energy Component of the Monthly Service Payment, as adjusted in accordance with this provision, the Energy Component of the Monthly Service Payment would be adjusted by the amount by which the price per unit of gas, electricity or water multiplied by the volume assumed to calculate the Energy Component:
(i) exceeds 110% of the Energy Component; or

(ii) is less than 90% below the Energy Component.

PART H –TERMINATION

31. FINANCIERS TRIPARTITE DEED

The provisions set out in this part H of this deed are subject to the Financiers Tripartite Deed.

32. NON-PERFORMANCE OF OBLIGATIONS

(a) Without prejudice to any other rights or remedies of the State under this deed or the other Project Documents, if the Project Company fails to perform or comply with any of its obligations or agreements contained in this deed or the other Project Documents, the Project Director may (but shall be under no obligation to) perform or comply (or procure performance or compliance) with such obligations or agreements, and the amount of any costs or expenses incurred in such performance or compliance will be a debt, due and payable on demand, from the Project Company to the State.

(b) The Project Director shall give to the Project Company as much notice as is practicable of its intent to take any action under this clause 32 and, if notice in advance is not practicable, will advise the Project Company promptly after the taking of such action.

33. PROJECT DEFAULT AND PERSISTENT BREACH

33.1 Project Default

(a) If, at any time:

(i) during the Term, a representation or warranty given by the Project Company in a Project Document proves to be untrue; or

(ii) during the Term, there is fraud, collusive, misleading or deceptive conduct on the part of the Project Company or a Subcontractor in the performance of the Project or any part of it;

(iii) during the Term, the Project Company commits a material breach of any of its obligations under this deed or any other Project Document, other than a failure to Complete a Milestone by the Target Completion Date for that Milestone, or a breach specifically referred to in clause 34.1;

(iv) during the Construction Phase, the Project Company fails to comply with the terms of a Corrective Action Plan produced under clause 11.7; or

(v) during the Term, an obligation to provide funding under the Financing Facilities is terminated, withdrawn or cancelled,
(each a **Breach** the Project Director may give the Project Company notice (a **Breach Notice**) in writing specifying that a Breach has occurred and giving reasonable details of the Breach.

(b) Upon receipt of the Breach Notice, the Project Company must:

(i) if the Breach is remediable, remedy the Breach or diligently pursue a remedy of the Breach within 5 Business Days of receipt of the Breach Notice; or

(ii) if the Breach is capable of being remedied but cannot reasonably be, or is not, remedied within such 5 Business Day period despite the Project Company diligently pursuing a remedy of the Breach, within 7 Business Days of receipt of the Breach Notice, submit a plan in form and substance acceptable to the Project Director (the **Cure Plan**), which Cure Plan must contain full details of all steps which the Project Company is taking, or proposes to take, in order to remedy or mitigate the effect of such Breach, and the Project Company must comply with, pursue and diligently implement the Cure Plan in accordance with its terms; or

(iii) if the Breach is not capable of being remedied, within 5 Business Days of receipt of the Breach Notice, submit a plan, in form and substance acceptable to the Project Director (the **Prevention Plan**), which Prevention Plan must contain full details of all steps which the Project Company is taking, or proposes to take, in order to prevent the recurrence of such Breach, and the Project Company must comply with, pursue and diligently implement the Prevention Plan in accordance with its terms.

(c) If, following service of a Breach Notice under paragraph (a), the Project Company:

(i) if the Breach is remediable within 5 Business Days of receipt of the Breach Notice, fails to remedy the Breach in accordance with paragraph (b)(i);

(ii) if the Breach is capable of being remedied but cannot reasonably be remedied within 5 Business Days of receipt of the Breach Notice, fails to provide or implement a Cure Plan in accordance with paragraph (b)(ii); and

(iii) if the Breach is not capable of being remedied, fails to provide or implement a Prevention Plan in accordance with paragraph (b)(iii),

it will be deemed to be a **Project Default**.

### 33.2 Persistent Breach

(a) Where there have been breaches of the Project Company's obligations (or any obligation) under a Project Document, other than breaches specified in clause 33.1, (whether or not remedied and whether or not in respect of the same School Facility), which are, in aggregate, material to the Education Functions, the administration of the Project, or the performance or implementation of the Project, then the Project Director may serve a notice on the Project Company (a **Warning Notice**):

(i) specifying that the notice is a formal Warning Notice;
(ii) giving reasonable details of the relevant breaches; and

(iii) stating that if one or more of the relevant breaches recur or continue, it may result in a termination of this deed.

(b) If, following service of a Warning Notice under clause 33.2(a), a relevant breach or breaches specified in the Warning Notice has or have continued or recurred after the date falling 30 days after the date of service of the relevant Warning Notice, then the Project Director may serve another notice (a Final Notice) on the Project Company:

(i) specifying that it is a Final Notice;

(ii) stating that the relevant breach or breaches specified has or have been the subject of a Warning Notice served within the twelve month period prior to the date of service of the Final Notice; and

(iii) stating that if the relevant breach or breaches continues or continue or recurs or recur four times within the six month period after the date of service of the Final Notice, it will be deemed to be a Persistent Breach.

(c) If, within the period of six months following service of a Final Notice under clause 33.2(b), relevant breaches continue or recur four times, then it will be deemed to be a Persistent Breach and this deed may be terminated in accordance with clause 34.

34. **TERMINATION OF THIS DEED**

34.1 **Project Company Default Termination**

The State will be entitled to terminate this deed by notice in writing to the Project Company (subject to clause 34.2) if:

(a) Completion of the Works for a School Facility has not occurred, or the State reasonably forms the view that Completion of the Works for a School Facility will not occur, in each case, by the Longstop Date for that School Facility;

(b) the Project Company Abandons the Project;

(c) an Insolvency Event occurs in respect of the Project Company;

(d) an Insolvency Event occurs in relation to the Construction Contractor, the Facilities Manager, the Construction Contractor Guarantor or the Facilities Manager Guarantor (in each case whether or not the Project Company is in breach of this deed) and the Construction Contractor, Facilities Manager, Construction Contractor Guarantor or Facilities Manager Guarantor is not replaced within 90 days by a party which:

(i) is reputable, solvent and has the resources and experience to perform its obligations under the Construction Contract or the Facilities Management Contract (or in the case of the Construction Contractor Guarantor or the Facilities Manager Guarantor, the obligations under the relevant guarantee); and
(ii) complies with clause 7;

e) an Illegality Event occurs;

(f) a breach by the Project Company of its obligations under clause 39 occurs;

(g) an Unavailability Termination Event occurs;

(h) a Persistent Breach occurs; or

(i) a Project Default occurs.

34.2 **Termination by the State**

(a) At any time while a Project Company Termination Event is subsisting the State may terminate this deed by notice (Termination Notice) to the Project Company stating:

(i) the Project Company Termination Event in respect of which the notice is given;

(ii) that the State is terminating this deed under this clause 34.2; and

(iii) that this deed will terminate on the date falling 20 Business Days after the date of receipt of the notice.

(b) Subject to the provisions of the Financiers Tripartite Deed, this deed will terminate on the date falling 20 Business Days after the date of receipt by the Project Company of a Termination Notice.

34.3 **Project Company Notice of Project Company Termination Event**

Without limiting the State's rights or the Project Company's other obligations under this deed, the Project Company must notify the Project Director immediately upon becoming aware of a Project Company Termination Event or an event or occurrence which, with the giving of notice, or lapse of time, would, or is likely to, become a Project Company Termination Event.

34.4 **State Action Following Project Company Termination Event**

Without limiting the State's other rights and remedies under this deed, where a Project Company Termination Event has occurred and is subsisting, the State may take any action it considers appropriate or necessary to overcome the effects of the Project Company Termination Event or preserve the Project, which may include the State's representatives entering and remaining on or in a Site or a School Facility, and the amount of any costs or expenses incurred in taking such action shall be payable upon demand by the Project Company to the State.
34.5 **State Default Termination**

If a State Default is subsisting and:

(a) the Project Company has served a written notice of its intention to terminate this deed (the *Project Company Termination Notice*) on the Project Director within 20 Business Days of becoming aware of the State Default; and

(b) the Project Company Termination Notice specifies the State Default in respect of which the Project Company Termination Notice is given,

this deed will terminate on the day falling 120 days after the date the Project Director receives the Project Company Termination Notice, unless the State rectifies or overcomes the effect of the State Default in that 120 day period.

34.6 **Voluntary Termination**

(a) The State may elect, at any time during the Term, to terminate this deed by notice (*Voluntary Termination Notice*) to the Project Company stating:

   (i) that the State is terminating this deed under this clause 34.6; and

   (ii) that this deed will terminate on the date falling 120 days after the date of receipt of the Voluntary Termination Notice or such later date as specified in the Voluntary Termination Notice.

(b) If the State issues a Voluntary Termination Notice, this deed will terminate on the date falling 120 days after the date of receipt by the Project Company of a Voluntary Termination Notice or such later date as specified in the Voluntary Termination Notice.

35. **CONSEQUENCES OF TERMINATION**

35.1 **Consequences of Termination**

If this deed is terminated under clause 34, clause 23 or clause 28:

(a) compensation will be calculated in accordance with schedule 21 and be payable by the State in accordance with clause 35.2;

(b) the Project Director may require the Project Company, at no cost to the State (except for the compensation under paragraph (a)), to transfer its title, interest and rights in and to any School Facilities and/or Works and novate the Construction Contract and/or the Facilities Management Contract to the State or to a replacement contractor; and

(c) the Project Company must comply with the provisions of clause 37.
35.2 Compensation Provisions

If this deed is terminated pursuant to:

(a) clause 34.2, the provisions of Part A of schedule 21 will apply (provided however, that if this deed is terminated due to an event of the type described in clause 34.1(b), then the Project Company will receive no payment);

(b) clause 34.5, the provisions of Part B of schedule 21 will apply;

(c) clause 34.6, the provisions of Part B of schedule 21 will apply; and

(d) clause 23.5 or clause 28.3, the provisions of Part C of schedule 21 will apply,

provided always that all compensation received by the Project Company as a result of a Compensation Event will reduce the Project Company’s entitlement under paragraphs (a)-(d) by that amount of compensation received to that extent that to do otherwise would amount to the State being required to pay the same amount twice.

35.3 Accrued Rights

The termination of this deed is without prejudice to the rights, duties and liabilities of either party accrued prior to termination, including any rights, duties and liabilities accrued by either party as a result of the termination of this deed. The clauses of this deed which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

36. AUDIT ON EXPIRY AND HANOVER SECURITY

36.1 Handover Audit

(a) Without prejudice to any other provision of this deed, approximately:

(i) 3 years; and

(ii) 1 year,

prior to the Expiration Date, the Project Director will be entitled to procure the carrying out of a project audit by an independent expert appointed by agreement between the parties (or in default of agreement within two Business Days of a nomination made in writing by the State, appointed by the President of the Australian Institute of Quantity Surveyors) (the Handover Audit) of the School Facilities and the Sites to assess whether they have been and are being maintained by the Project Company in accordance with its obligations under this deed and to determine the aggregate of the amount (if any) required to be expended or reserved against during or for the balance of the period up until the Expiration Date to ensure that the School Facilities and the Sites are in the Handover Condition on the Expiration Date (less any amounts which will be paid by the Project Company during that period for any scheduled maintenance or lifecycle replacements to be performed during the period) and the amount (if any) for making good or rectifying any breaches by the Project Company of the Output Specification (the aggregate
amount as updated by each subsequent Handover Audit less the amount calculated in accordance with clause 36.7 - is the Relevant Amount).

(b) The cost of each Handover Audit will be shared equally by the State and the Project Company.

36.2 Security

(a) Within 20 Business Days of the Project Director notifying the Project Company of the results of the Handover Audit, the Project Company must provide the Project Director a bank guarantee which:

(i) must be substantially in the form of schedule 26;

(ii) must have a face value of the Relevant Amount;

(iii) expires no earlier than the date which is 12 months after the Expiration Date;

(iv) is in favour of the State; and

(v) is given by a bank licensed in Australia and is satisfactory to the Project Director with a credit rating of not less than A-(S&P) / A3 (Moody’s)/A-(Fitch) with an address for service in Sydney.

(b) If any bank guarantee produced under clause 36.2(a) fails to comply with the requirements of clause 36.2(a)(i) to 36.2(a)(v) then the Project Company must promptly provide the State with a replacement guarantee which complies with clause 36.2(a)(i) to 36.2(a)(v) and upon receipt of such guarantee, the State will return to the Project Company the bank guarantee being replaced.

(c) If clause 36.2(b) applies in respect of any bank guarantee which complies with clause 36.2(a) within 10 Business Days of the Project Company’s obligations under clause 36.2(b) coming into effect, then irrespective of anything contained in, and without limiting the State’s right under, this deed, the State may make demand under the bank guarantee and hold the proceeds as security for the performance of the Project Company’s obligations under this deed.

36.3 Notification of Handover Audit

(a) The Project Director must notify the Project Company in writing a minimum of 10 Business Days in advance of the date it wishes to procure the carrying out of the Handover Audit.

(b) The Project Director must consider in good faith any reasonable request by the Project Company for the Handover Audit to be carried out on a different date if such request is made at least 5 Business Days prior to the notified date and the Project Company (acting reasonably) is able to demonstrate that carrying out the Handover Audit on the notified date would materially prejudice the Project Company’s ability to provide the Services.
36.4 Minimise Disruption

(a) The Project Director must use its reasonable endeavours to procure that the person carrying out the Handover Audit minimises any disruption caused to the provision of the Services by the Project Company.

(b) The Project Company must afford any person carrying out the Handover Audit (free of charge) any reasonable assistance required by that person during the carrying out of the final survey.

(c) The Project Director will provide a copy of the Handover Audit to the Project Company promptly after receiving it.

36.5 Results of Handover Audit

If the Handover Audit reveals work required to rectify breaches of the Project Company's obligations under this deed or to ensure the School Facilities are in the Handover Condition on the Expiration Date (taking into account any scheduled maintenance or lifecycle replacement to be performed during the period), the Project Director:

(a) must notify the Project Company of the required rectification (which, for the purposes of this clause 36 includes repair and/or replacement) and/or other work; and

(b) must specify a reasonable period within which the Project Company must carry out such work.

36.6 Rectification Work

The Project Company must carry out the required rectification and/or maintenance work notified pursuant to clause 36.5 within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work will be at its own expense subject to clause 36.7.

36.7 Reduction of the Relevant Amount

If and to the extent that the Project Company carries out the required rectification and/or maintenance within the specified period as notified pursuant to clause 36.5(b), the Relevant Amount will be reduced by the costs estimated in the Handover Audit for undertaking the relevant work.

36.8 Failure to Carry Out Work

If and to the extent that the Project Company fails to carry out the necessary rectification and/or maintenance work to the appropriate level of professional care and in accordance with Good Industry Practice, and within the specified period as notified pursuant to clause 36.5(b), the Project Director will be entitled to carry out itself, or procure, such rectification and/or maintenance work, and the cost of such rectification and/or maintenance work will be a debt due and payable against the Project Company to the State.

The State may deduct or set off that amount against any amount otherwise payable by the State to the Project Company, or may take any other enforcement action available to it.
including under the security provided under clause 36.2(a), in respect of an unpaid debt owed to it.

37. **TRANSITION TO STATE OR ANOTHER PROJECT COMPANY**

37.1 **Duty to Co–operate**

During the final three months prior to the Expiration Date or during the period after any notice of termination has been given under clauses 34.2 or 34.6, and in either case for a period of twelve months thereafter, the Project Company must co–operate fully with the transfer of responsibility for the Services (or any of the Services) to the State or any new contractor of such services the same or similar to the Services (**New Project Company**), including:

(a) transfer of all the Project Company's title, interest and rights in and to the Project, the School Facilities, the Sites, and/or the Works to the New Project Company:

   (i) free from any Security Interests;

   (ii) in a state and condition which complies with this deed; and

   (iii) which will, without further action by any party, immediately vest in and become the absolute property of the State or the New Project Company;

(b) liaising with the Project Director and/or any New Project Company, and providing reasonable assistance and advice concerning the Services and their transfer to the State or to such New Project Company; and

(c) allowing any such New Project Company access (at reasonable times and on reasonable notice) to each School Facility or Site, but not so as to interfere with or impede the provision of the Services.

37.2 **Handover of documents on Termination Date**

On or before the Termination Date, the Project Company must provide to the Project Director and/or to any New Project Company all and any documents and information concerning the Sites, the Works, the School Facilities and the Services which is required for the efficient transfer of responsibility for their performance including the following:

(a) a complete Operations Manual (in electronic and hard copy format) which is up to date as at the Termination Date;

(b) all data recorded for the provision of the Services during the Term;

(c) all valid and unexpired warranties, guarantees and similar documentation (in hard copy) obtained for materials and workmanship for each of the School Facilities; and

(d) a licence to use a copy of all software applications necessary to perform the Services to meet the requirements of this deed.
37.3 **Transfer of Responsibility**

The Project Company must facilitate the smooth transfer of responsibility for the Services to a New Project Company or to the State, as the case may be, and the Project Company must take no action at any time during the Term or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

**PART I – ADMINISTRATION OF PROJECT**

38. **INFORMATION AND CONFIDENTIALITY**

38.1 **Keep Confidential**

The parties must keep confidential all matters relating to this deed and the Project Documents and must use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this deed.

38.2 **Permitted Disclosure**

Clause 38.1 will not apply to:

(a) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party to this deed, including without limitation, the provision of a copy of this deed to each Construction Contractor, the Facilities Manager and any guarantors of the obligations of such parties;

(b) any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of breach of clause 38.1;

(c) any disclosure which is required by any Law (including any order of a court of competent jurisdiction) or in accordance with clause 40;

(d) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

(e) any provision of information to the Financiers or the Financiers' professional advisers or insurance advisers or rating agencies or, where it is proposed that a person should or may provide funds (whether directly or indirectly, on initial issue or secondary sale, and whether by loan, equity participation or otherwise) to the Project Company or JEM to enable the Project Company to carry out its obligations under this deed, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

(f) any disclosure of information to any prospective permitted assigns or prospective investors in or shareholders of the Project Company, in each case to the extent reasonably necessary to enable a decision to be taken on the proposal;

(g) any disclosure by the Project Director, of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:
(i) any proposed new contractor, its advisers and lenders should the State decide to re-tender this deed pursuant to the terms of this deed;

(ii) any person in connection with Benchmarking;

(h) any registration or recording of the Consents, the Licences, the Leases and the Subleases;

(i) any disclosure of information by the Project Director to any department, office or agency of the government of the State;

(j) any disclosure by the Project Director of any document relating to this deed to which it is a party and which the Project Company (acting reasonably) has agreed with the Project Director contains no Commercially Sensitive Information; and

(k) any disclosure of information that is reasonably required by a person in order to exercise, or to enjoy the rights under the licence of Proprietary Materials granted under clause 10.5(b).

38.3 **Obligations Preserved**

Where disclosure is permitted under clause 38.2, other than paragraphs (h), (c), (g), (h) or (i), the party providing the disclosure must ensure that the recipient of the information will be subject to the same obligation of confidentiality as that contained in this deed.

38.4 **Auditor-General**

Notwithstanding the other provisions of this clause 38, the parties acknowledge that the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983*, and the Project Documents and any related documents and information may be tabled in Parliament by or on behalf of the State and will be published in accordance with the Guidelines, and the State and the Project Director may make the Project Documents (other than the Subcontracts) or any of them available to any party, subject to the deletion of Commercially Sensitive Information.

38.5 **Exploitation of Information**

The Project Company must not make use of this deed or any information issued or provided by or on behalf of the State in connection with this deed otherwise than for the purposes of this deed, except with the written consent of the Project Director.

38.6 **Expiry**

On or before the Termination Date, the Project Company must ensure that all documents or computer records in its possession, custody or control which contain information relating to any student or Education Staff at or of any School Facility, including any documents in the possession, custody or control of any Subcontractor are delivered up to the Project Director.
39. ASSIGNMENT OR CHANGE OF CONTROL

39.1 Project Documents

(a) The State and the Project Company acknowledge and agree that in the documentation structure adopted for the Project:

(i) the majority of the Project Company's substantive obligations requiring the Project Company to design and construct the School Facilities and operate, maintain and repair the School Facilities are included in this deed, including obligations which would normally appear in the lease documentation; and

(ii) the Leases and the Subleases are essentially documents of title.

(b) As a result of this documentation structure, the State and the Project Company acknowledge and agree that they:

(i) will not deal with their interests under this deed and the Leases or the Subleases separately; and

(ii) must ensure that any dealings with their interests in this deed and the Lease and the Sublease occur:

(A) at the same time;

(B) on substantially the same terms; and

(C) with the same parties.

(c) The State and the Project Company acknowledge and agree that upon termination of this deed, the Leases and Subleases shall terminate with effect from the date of such termination.

(d) The State and the Project Company acknowledge and agree that, upon termination of any Sublease, the Lease relating to the Site or building in respect of which the Sublease has terminated will also terminate with effect from the day after the date of such Sublease termination.

39.2 Assignment

(a) Subject to any express provision of this deed, neither party may, without the prior written consent of the other, assign, grant a Security Interest over, or otherwise dispose of all or any benefit, right or interest under the Project Documents, provided always that an assignment by the State of its interest to any other governmental body, agency or department (in each case constituting the State or guaranteed by the State) will not require the Project Company's prior written consent.

(b) The provisions of clause 39.2(a) do not apply to the granting of Security Interests in accordance with the Financing Agreements.
39.3 **Change of Ownership**

(a) The Project Company undertakes to the State that the legal and beneficial ownership of each member of the Project Company Group and the Project Company Group structure will remain as set out in part B of schedule 2 until the Commencement Date for the School Facility which is Completed first.

(b) Subject to clause 39.3(c), the Project Company must not permit any change to the legal and beneficial ownership of any member of the Project Company Group or any change to the Project Company Group structure without the prior written consent of the State.

(c) For the purposes of clauses 39.3(a) and 39.3(b):

(i) any change in beneficial or legal ownership of any equity interests (including shares or units) that are listed on a prescribed financial market; and

(ii) any transfer of equity interests by a person to its related body corporate, will be disregarded.

(d) If equity interests (including shares or units) in an entity with ultimate control of any member of the Project Company Group are listed on a prescribed financial market and a Change in Control occurs due to the transfer of such shares or interests on that market:

(i) promptly after the Project Company becomes aware of the Change in Control, the Project Company must notify the Project Director, providing:

(A) full details of the Change in Control including the acquisition of voting power, the change in equity interests or any other event which has caused or constituted the Change in Control;

(B) all other information necessary for the State to determine whether to consent, or not to consent, to the Change in Control of the Project Company;

(ii) the Project Director must notify the Project Company with 20 Business Days of receipt of the Project Company’s notice under paragraph (i) whether the State accept the Change in Control or reject the Change in Control; and

(iii) if the State rejects the Change in Control, the Project Company (without causing there to be any other Change in Control as a result, other than one in relation to which the Project Company has obtained the State’s prior written consent) will procure that the relevant person or persons cease to have the voting power or control or to hold the share capital or other equity interests which gave rise to that Change in Control within 90 days after the date on which the State gives notice of their refusal to give consent to the Change in Control.
39.4 Change in Ownership of Material Subcontractors

(a) If a Change in Control of a Material Subcontractor has occurred, the Project Company must promptly notify the Project Director.

(b) The Project Company will provide to the Project Director in its notification under this clause 39.4:

(i) full details of the Change in Control, including the acquisition of voting power, the change in equity interests or any other event which has caused or constituted the Change in Control; and

(ii) all other information necessary for the State to determine whether to exercise its rights under clause 39.4(c), in relation to the Change in Control of the Material Subcontractor.

(c) If the State determines that it does not approve of the Change in Control, because:

(i) the person or entity which now exercises Control of the relevant Material Subcontractor is not a reputable entity or person to properly carry out the obligations of the relevant Material Subcontractor under the relevant Project Documents; or

(ii) as a result of the Change in Control, the relevant Material Subcontractor no longer:

(A) has sufficient expertise and ability; or

(B) is of sufficiently high financial and commercial standing,


 to properly carry out the obligations of the relevant Material Subcontractor under the relevant Project Documents; or

(iii) the person or entity which now exercises Control of the relevant Material Subcontractor is an unsuitable entity or person, having regard to the activities or business of that entity or person, and their compatibility with the obligations of the relevant Material Subcontractor under the Project Documents,

the Project Company must at its own cost, terminate any Material Subcontract with that Material Subcontractor and re-tender those Works or Services being provided by that Material Subcontractor, in accordance with Part B of schedule 20, within 60 days.

(d) If the State determines that it does not approve of the Change in Control for a reason other than that specified in clause 39.4(c)(i) or (ii) then:

(i) the Project Company must at its own cost, terminate any Material Subcontract with that Material Subcontractor and re-tender those Works or Services being provided by the Material Subcontractor, in accordance with Part B of schedule 20, within 60 days; and
(ii) the State will pay to the Project Company:

(A) any costs associated with terminating any relevant Project Documents reasonably incurred by the Project Company as a direct result of the termination. Such costs shall include redundancy payments for employees of the Material Subcontractor and any demobilisation costs that have been incurred as a result of termination; and

(B) any costs reasonably incurred and directly associated with the entry into the Project Documents with a replacement Material Subcontractor and any increased costs to the Project Company in performing those Project Documents with the relevant Material Subcontractor; and

(iii) the Service Payment will be adjusted in accordance with schedule 20.

(c) The exercise of the State's rights under clause 39.4(c) or (d) will not relieve the Project Company of any of its obligations under this deed including the provision of the Works and Services in accordance with this deed.

40. DISPUTE RESOLUTION

40.1 Dispute Resolution Procedure

(a) If any dispute arises between the State and the Project Company, which has been referred to but has not been resolved by the Project Co-ordination Group in accordance with clauses 4.7(h) to 4.7(j), any party to the dispute may by notice (Referral Notice) to the other party refer the dispute to the Director General of the Department and the Chief Executive Officer of the Project Company (or their delegates with authority to bind the State or the Project Company (as relevant)) (the Representatives) for resolution. The Referral Notice must specify in reasonable detail the nature of the dispute.

(b) The joint decisions of the Representatives in respect of matters referred to them under this clause 40.1 will be reduced to writing and will be contractually binding on the parties.

(c) If a dispute is referred to the Representatives, the Representatives and their delegates will meet to resolve the dispute.

(d) If the Representatives do not resolve the dispute within the Resolution Period, the Project Co-ordination Group will:

(i) refer the dispute to expert determination under clause 40.2; or

(ii) refer the dispute to arbitration under clause 40.3; or

(iii) refer the dispute to resolution by some other dispute resolution procedure, within 2 Business Days after the expiration of the Resolution Period.
(e) If:

(i) the Project Co-ordination Group cannot agree within the 2 Business Days period referred to in clause 40.1(d) on:

(A) whether the dispute should be referred to expert determination, arbitration or some other dispute resolution procedure; or

(B) the expert or arbitrator to be appointed for the dispute resolution process; or

(ii) the Representatives do not:

(A) meet before the expiry of the relevant Resolution Period; or

(B) on the expiration of the Resolution Period refer the dispute for resolution in accordance with clause 40.1(d),

then the Project Co-ordination Group or the Representatives (as the case may be) may request the President of the Institute of Arbitrators and Mediators Australia (President) to:

(iii) select the process for resolution of the dispute; and

(iv) nominate a committee of not less than 3 experts or arbitrators (as the case may be) (Selected Committee).

(f) If the President has nominated a Selected Committee the Project Director must within 3 Business Days of being notified of the members of the Selected Committee advise the Project Company of the expert or arbitrator for the purposes of clause 40.2 or clause 40.3 as the case may be, chosen from the Selected Committee. If the Project Director fails to select a member of the Selected Committee as the expert or arbitrator within that period of 3 Business Days then the Project Company will be entitled to select the expert or arbitrator for the purposes of clause 40.2 or clause 40.3 respectively.

(g) This clause 40.1 has no application to the appointment of an independent expert under clause 36.1.

40.2 Expert Determination

(a) If a dispute is referred to expert determination under this deed then the Project Director will appoint, upon the referral in accordance with clause 40.1(d) as expert, in relation to that dispute, a qualified person considered appropriate by the Representatives, or if the Representatives do not select an expert in accordance with this clause 40.2(a), an expert will be selected in accordance with clauses 40.1(e) and 40.1(f). The Project Director must engage the selected expert by way of letter setting out:

(i) the details of the dispute;

(ii) the expert's fees; and
(iii) any other matter which is relevant to the engagement.

(b) The expert must be engaged on terms which require the expert to:

(i) initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and

(ii) determine and inform the parties to the dispute of a time for presentation to the expert by the parties of their respective positions. Unless the Representatives otherwise agree the presentation must be no later than 5 Business Days after the appointment of the expert. The expert may ignore any submission or response not made within this stipulated time-frame, unless the parties otherwise agree.

(c) The expert may request further information from either party. The request must be in writing with a time-limit for the response. The expert must send a copy of the response to the other party and give the other party a reasonable opportunity to comment.

(d) The expert must make its determination or finding in respect of the dispute within 20 Business Days after the presentation referred to in clause 40.2(b). Any determination of a dispute by the expert will include a determination as to the award of costs. The expert must not tax the costs of a party. The fees and expenses of the expert will be borne by the parties equally.

(e) Any determination made by the expert will be binding on all parties unless referred to arbitration or legal proceedings within 10 Business Days after the relevant decision.

(f) The expert must act as an expert and not an arbitrator. The expert must have no interest or duty which conflicts with its role as an independent expert.

(g) The expert must keep confidential all materials and information made available to that expert in respect of the dispute.

(h) The expert is released by the parties to this deed from liability (other than for fraud, negligence or wilful misconduct) in acting as an expert.

40.3 Arbitration

(a) If under clause 40.1 a dispute is referred to arbitration the following provisions will apply:

(i) The Representatives will select a qualified person considered appropriate by the Representatives, or if the Representatives do not select an arbitrator in accordance with this clause 40.3(a)(i), an arbitrator will be selected in accordance with clauses 40.1(e) and 40.1(f), and the Project Director must appoint the selected arbitrator within 10 Business Days of the Representatives' selection or the selection in accordance with clauses 40.1(e) and 40.1(f).
(ii) The arbitration must be conducted in accordance with and subject to the Arbitration Law.

(iii) The arbitrator must:

(A) initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and

(B) determine and inform the parties of a time for presentation to the arbitrator by the parties of their respective positions in relation to the dispute.

(iv) In any arbitration each party to the dispute will be permitted to be represented by a legal practitioner, call witnesses and present evidence.

(v) The parties to the dispute and the arbitrator will not be bound by the rules of evidence.

(vi) The Representatives will request the arbitrator to make its determination within 20 Business Days after completion of presentations.

(vii) Any determination made by the arbitrator to this clause 40.3 will include a determination relating to costs. The arbitrator may not tax the costs of a party.

(viii) Any determination made by the arbitrator will be binding on all parties.

40.4 Continued Performance of Obligations Pending Resolution of Dispute

Notwithstanding the existence of a dispute the parties must continue to perform their respective obligations under this deed.

40.5 Related disputes

The parties acknowledge and agree that a dispute or difference arising under a Subcontract may concern the respective rights and obligations of the State and the Project Company under this deed. The Project Company must inform the Project Director immediately of any formal disputes and differences and the consequences (if any) on the operation of this deed. In such circumstances and if the State consents, the Project Company may join the Subcontractor in the dispute resolution process under this deed, provided that the relevant Subcontractor agrees to be bound by decisions made in accordance with the dispute resolution process under this deed to the same extent as the State and the Project Company.

40.6 Dispute under Independent Certifier Deed

The parties acknowledge and agree that:

(a) the provisions of this clause 40 will not apply to any dispute between the parties which is to be resolved under the provisions of the Independent Certifier Deed; and

(b) the parties shall be bound by the terms of any resolution of any dispute between the parties which is resolved under the provisions of the Independent Certifier Deed.
41. **NOTICES**

41.1 **How to give a notice**

A notice, consent or other communication under this deed is only effective if it is:

(a) in writing, signed by or on behalf of the person giving it;
(b) addressed to the person to whom it is to be given; and
(c) either:
   (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
   (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

41.2 **When a notice is given**

A notice, consent or other communication that complies with this clause 41 is regarded as given and received:

(a) if it is delivered or sent by fax:
   (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
   (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day; and

(b) if it is sent by mail:
   (i) within Australia – 2 Business Days after posting; or
   (ii) to or from a place outside Australia – 5 Business Days after posting.

41.3 **Address for notices**

A person's address and fax number are those set out below, or as the person notifies the sender:

**The State**
Address: Level 33, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Fax number: (02) 9228 5366
Attention: The Minister for Education and Training

with a copy to:

Address: Level 4, 35 Bridge Street
Sydney NSW 2000
Fax number: (02) 9561 8949
Attention: Project Director, New Schools 2 Privately Financed Project

The Project Company
Address: Level 5, ABN AMRO Tower
        88 Philip Street
        Sydney NSW 2000
Fax number: (02) 8259 5425
Attention: Simon Hunter and Greg Bowyer

with a copy to:

Address: Level 39, The Chifley Tower
        2 Chifley Square
        Sydney 2000
Fax number: (02) 9231 5619
Attention: Adam Chittendon

42. GENERAL

42.1 Governing Law and Submission to Jurisdiction

(a) This deed is governed by the Law in force in New South Wales.

(b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts, for any proceedings in connection with any Project Document, and waives any right it might have to claim that those courts are an inconvenient forum.

42.2 Liability for Taxes

(a) Subject to clause 42.2(b) and clause 42.3, the Project Company must indemnify the State against, and must pay the State on demand the amount of, all Taxes (excluding Rates and Land Tax) incurred in connection with:

(i) the negotiation, preparation, execution, stamping and registration of this deed or any Project Document;

(ii) the transactions that this deed or any Project Document contemplates; and

(iii) any amendment to, or any consent, approval, waiver, release or discharge of or under, this deed or any Project Document.

(b) The State will pay and indemnify the Project Company against all stamp duty in respect of this deed, the Securitisation Agreement, the Leases, Licences and Subleases which is payable to the State of New South Wales, provided that the State will not pay or indemnify the Project Company in respect of any fine, penalty or additional liability resulting from any failure or any delay in paying or submitting any Relevant Document or any other breach of applicable Law.

(c) Any amount payable by the State under paragraph (b) will be paid by the State within 20 Business Days of submission by the Project Company to the Project Director of a stamp duty invoice, together with copies of receipts or other evidence,
satisfactory in all respects to the Project Director, of payment of the stamp duty in respect of the Relevant Documents.

(d) If the State notifies the Project Company within 14 days after execution of this deed, a Lease, a Licence or Sublease that it will attend to lodgement and stamping of the relevant document, the Project Company must promptly deliver all executed copies of the documents in its possession to the State to enable it to arrange lodgement and must co-operate with the State to arrange stamping, payment of any assessment and to dispute an assessment (at the State’s cost) in accordance with the State’s directions.

42.3 GST gross up and GST on claims

(a) Words defined in A New Tax System (Goods and Services Tax) Act 1999 (Cth) have the same meaning in this clause.

(b) If a party makes a supply to another party under or in connection with this deed, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply is exclusive of GST, and in addition to paying or providing that consideration the recipient must:

(i) pay to the supplier an amount equal to any GST for which the supplier is liable on that supply, without deduction or set-off of any other amount; and

(ii) make that payment as and when the consideration or part of it must be paid or provided, except that the recipient need not pay unless the supplier has issued to the recipient a tax invoice (or an adjustment note) for that supply.

(c) The supplier must refund to the recipient any overpayment by the recipient for GST, but the supplier need not refund to the recipient any amount for GST paid to the Commissioner of Taxation unless the supplier is entitled to a refund or credit of that amount.

(d) If a party provides a payment for or in satisfaction of a Claim or a right to make a Claim under or in connection with this deed that gives rise to a liability for GST, the provider must pay, and indemnify the recipient on demand against, the amount of that GST.

(e) If any party is required under this deed to reimburse, indemnify or pay to another party an amount paid or incurred by that party, the amount of the reimbursement, indemnity or payment will be reduced by the amount of any input tax credits or reduced input tax credits to which that party is entitled in respect of any acquisition relating to that cost, expense or other amount.

(f) If a party has a Claim under or in connection with this deed whose amount depends on actual or estimated revenue or which is for a loss of revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).

(g) Any reference in this clause to GST payable by a party includes any GST payable by the representative member of any GST group of which that party is a member.
Any reference to input tax credits to which a party is entitled includes input tax credits to which the representative member of the party's GST group is entitled.

(h) If the GST law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the period to which that part of the supply will be attributable, such part of the supply will be treated as a separate supply for the purposes of this clause.

42.4 Liability for Expenses

(a) Subject to clause 42.2 and paragraph (b) below, each party must pay its own expenses incurred in the negotiation, preparation and execution of this deed or any Project Document.

(b) Subject to clause 22, a party which requests any consent, waiver, amendment, supplement, replacement, novation or assignment under the Project Documents shall pay all costs associated with such consent, waiver, amendment, supplement, replacement, novation or assignment.

(c) Without limiting clauses 32 and 34.4, the Project Company shall pay all expenses associated with a breach of this deed or any Project Document by it.

42.5 Cost of Obligations

A party to this deed which has an obligation to do anything under this deed must perform that obligation at its cost, unless this deed expressly provides otherwise.

42.6 Giving effect to this deed

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this deed.

42.7 Operation of this deed

(a) Subject to paragraph (b) below, this deed contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this deed and has no further effect.

(b) If a provision of this deed is inconsistent with a provision of the Financiers Tripartite Deed, the provision of the Financiers Tripartite Deed prevails.

(c) Any right that a person may have under this deed is in addition to, and does not replace or limit, any other right that the person may have.

42.8 Severance

If at any time any provision of this deed or any other Project Document is or becomes illegal, invalid or unenforceable in any respect under applicable Law, that provision is to be severed to the extent necessary to make this deed enforceable, and it will not affect or
impair the legality, validity or enforceability of any other provision of the relevant Project Document.

42.9 Priority of Interpretation

(a) Subject to paragraph (b) below, in the event of any ambiguity, discrepancy or inconsistency between the documents forming this deed and other documents defining or identifying the State's requirements or the Project Company's obligations in respect of the Project, the following order of precedence in decreasing priority, will apply:

(i) compliance with applicable Law and Policies;

(ii) the provisions of this deed (other than schedule 4 and schedule 27) and each document provided or agreed in accordance with this deed;

(iii) the Output Specification; and

(iv) the Project Company Proposals.

(b) To the extent that the Project Company Proposals impose greater or more onerous obligations and liabilities on the Project Company than the other provisions of this deed, the Project Company must satisfy and meet the obligations and liabilities in the Project Company Proposals.

42.10 Amendment and waivers in writing

(a) This deed may only be amended, supplemented, replaced or novated by a document signed by or on behalf of each party to this deed.

(b) The non-exercise of or a delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. Any waiver or consent given by a party will only be effective if given or confirmed in writing.

(c) Nothing in paragraph (b) prevents the partial waiver of a power or right, but paragraph (b) applies equally to such partial waiver.

42.11 Operation of indemnities

(a) No indemnity in this deed limits the effect or operation of any other indemnity in this deed.

(b) Unless expressly provided otherwise, each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties.

(c) Each indemnity in this deed survives the expiry or termination of this deed.

(d) A party may recover a payment under an indemnity in this deed before it makes the payment in respect of which the indemnity is given.
42.12 Exercise of Remedies

(a) If the Project Company breaches any of its obligations under this deed or any other Project Document, the State or the Project Director may exercise any or all of the rights and powers and pursue any or all of the remedies available to the State under the Project Documents and/or enforce any other legal or equitable remedy available under applicable Law.

(b) Each and every right, power and remedy of the State shall be cumulative and in addition to any other right, power and remedy, whether under a Project Document or applicable Law, which may be exercised by the State and the exercise of a right, power or remedy shall not be construed to be a waiver of the right to exercise any other right, power or remedy.

(c) No delay or omission by the State or the Project Director in the exercise of any right, power or remedy shall impair such right, power or remedy or constitute a waiver of the relevant breach.

42.13 Counterparts

This deed may be executed in counterparts.

42.14 Attorneys

Each person who executes this deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.
EXECUTED as a deed.

SIGNED, SEALED and DELIVERED by
THE HONOURABLE CARMEL
TEBBUTT MINISTER FOR
EDUCATION AND TRAINING, FOR
AND ON BEHALF OF THE CROWN
IN RIGHT OF THE STATE OF NEW
SOUTH WALES in the presence of:

[Signature]
Signature of witness

[Name]
Name

SIGNED, SEALED and DELIVERED for
AXIOM EDUCATION NSW NO. 2 PTY
LIMITED under power of attorney in the
presence of:

[Signature]
Signature of witness

AMELIA MONTAGUE
Name

[Signature]
Signature of attorney

[Name]
Name

[Date]
Date of power of attorney