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Comparative analysis of key project issues in Australian PPPs

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Introduction

This paper compares the treatment of key issues under a number of recent project-financed concessions in Australia. This document incorporates a number of different social and economic concessions including roads and hospitals.

This paper is in the following three parts:

- Part 1 compares the treatment of key issues under a number of recent project-financed concessions in Australia. This document incorporates a number of different social and economic concessions including roads and hospitals
- Part 2 compares the treatment of key issues under the Australian National PPP Guidelines against the treatment under the UK PFI Guidance. This comparison is significant in light of the fact that the National PPP Guidelines were developed out of the UK PFI Guidance. Both of these documents are heavily consulted by government entities in the drafting and negotiation of Australian concessions to ensure value for money through the optimisation of risk allocation
- Part 3 summarises termination compensation regimes in a sample of eight benchmarked projects. None of these projects contemplate compensation payments in the event of termination before commencement under a conditions precedent regime.

1. *Key issues under recent Australian project-Financed concessions*

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
Extension Of Time (EOT)	There is an EOT regime entitling Project Co to extensions to the date for completion.	Project Co is entitled to an EOT to the completion date for a number of causes, including: • State breach of a project agreement • act or omission of the State • delay by utility provider in providing infrastructure works, or breach by utility provider of infrastructure works agreement • industry wide industrial action • State directed modification • suspension required by law or court order • latent ground conditions • contamination • change in policy or change in law • *force majeure* (see below) • failure by the Government to carry out works or provide services necessary for the	Project Co is entitled to an EOT to the completion date for the following events: • a *Force Majeure* Event (see below) • State breach of a project agreement • reckless, unlawful or malicious act or omission by the State • a Heritage or Native Title Claim • Project-specific industrial action • fire, flood or explosion (which is not caused by a *Force Majeure* Event, Project Co or any other Project Co Associate) • failure by a Governmental Agency (other than the State) to carry out works or provide services necessary for the implementation of the Project, unless that Governmental Agency, in failing to carry out the relevant works or services, is acting in accordance with or pursuant to its statutory powers, duties, discretions or	Project Co is entitled to an EOT to the completion date for the following events: • a *Force Majeure* Event (see below) • State breach of a project agreement • certain acts or omissions by the State • a Heritage or Native Title Claim • Project-specific industrial action • a Change in Mandatory Requirements • State Modification or Equipment Modification • legal proceedings challenging the validity of a state authorisation to the Project • fire, flood or explosion (which is not caused by a *Force Majeure* Event) • failure by a Governmental Agency (other than the State) to carry out works or provide services necessary for the implementation of the Project, unless	Project Co is entitled to an EOT for the completion date for a number of causes, including: • wrongful act or omission of the State • a Government-directed modification • *force majeure* (see below) • State breach of a project agreement • a discriminatory change in law (see below) • a relevant change in law (see below) • suspension due to discovery of artefacts or human remains • native title application or native title being found to exist • uninsurable *force majeure* event • a key approval event (essentially, legal action being taken in respect of a key approval or a	Project Co is generally entitled to an extension of the date for completion but must notify the State of any delay and comply with a corrective action plan.	There is an EOT regime entitling Project Co to extensions to the date for completion. A condition precedent to the EOT is that the delay was beyond the reasonable control of Project Co and its Associates.

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		Project • events, not caused by either party, which prevents access to the Site, other than third party access rights or industrial action	obligations • blockade or embargo that directly affects the Site; or • any event or occurrence outside the control of either party or their Associates, which causes lack of possession at, or access to, the Site, other than industrial action or an event or occurrence arising from third party rights to use or access the Site. Project Co's entitlement is subject to the following conditions precedent: • Project Co submitting a Change Notice • the cause of the delay being beyond the reasonable control of the Project Co • Project Co demonstrating to the Independent Reviewer's reasonable satisfaction that it has or will be delayed, and the critical path for the works delayed by an Extension Event • Project Co not being instructed to	that Governmental Agency, in failing to carry out the relevant works or services, is acting in accordance with or pursuant to its statutory powers, duties, discretions or obligations • blockade or embargo that directly affects the Site; or • any event or occurrence outside the control of either party which causes lack of possession at, or access to, the Site, other than industrial action or an event or occurrence arising from third party rights to use or access the Site. • Project Co's entitlement is subject to the following conditions precedent: • Project Co submitting a Change Notice • the cause of the delay being beyond the reasonable control of the Project Co • Project Co demonstrating to the Independent Reviewer's	key approval being changed or revoked, except to the extent caused or contributed to by Project Co) • a final court decision rendering it impossible for Project Co to undertake all, or substantially all, of the Project • termination or unenforceability of the statutory instrument authorising Project Co to enter and carry out works on the construction site.		

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			accelerate the works • Project Co otherwise complying with the Programming Requirements	reasonable satisfaction that it has or will be delayed, and the critical path for the works delayed by an Extension Event • Project Co not being instructed to accelerate the works • Project Co otherwise complying with the Programming Requirements			
Delay Liquidated Damages	Liquidated damages payable for late completion of Stage 1 and late completion of Stage 2	Liquidated damages are payable from each day after the original date for commercial acceptance until the date of commercial acceptance.	The Quarterly Service Payments may be abated pursuant to the Abatement Regime if the Project Co fails to provide the services in accordance with the Project deed for the Operating Term	The Quarterly Service Payments may be abated pursuant to the Abatement Regime if the Project Co fails to provide the services in accordance with the Project deed for the Operating Term	The State does not impose delay LDs.	The State does not impose delay LDs. The State does, though, have the right to terminate if Project Co fails to diligently and expeditiously progress construction. To the extent Project Co failed to do so, the State would have both a contractual right, and the benefit of an indemnity, to recover its loss. It is unclear on what basis delay LDs were not imposed under the agreement. The points above may have been a relevant consideration, as may have been difficulties in determining a genuine pre-estimate of loss likely to be suffered by the State for the delay (bearing in mind that amounts which are not a genuine pre-estimate of loss would constitute a penalty and be unenforceable).	The Quarterly Service Payments may be abated if Project Activities do not fully meet or exceed the KPIs or the freeway is not fully available.

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State-Proposed Variations	The State may at any time issue a Modification Price Request. Modification may also be required by the State in certain circumstances, including where there is a Change in Law or Change in Policy, a change to the type of utility services or medical gases, to remediate contamination or other reasons listed in clause. The modification regime is structured such that: • the State first notifies Project Co of its proposed modification and issues a price request • Project Co must provide a quote for preparing a proposal • the State may accept or reject this quote. If it is rejected, the State may suggest an alternative price, require Project Co to resubmit a quote, decide not to proceed or refer the issue to accelerated dispute resolution	The State may at any time issue a Modification Price Request. Modifications due to Changes in Mandatory Requirements are excluded from Modifications (see notes below). Project Co must propose a quote for the preparation of a Change Notice responding to the Modification Price Request. The State may: • agree to the proposal, in which case Project Co prepares a Change Notice • require Project Co to submit a further price • inform Project Co that it does not wish to proceed with the Modification; or • direct Project Co to proceed with the preparation of the proposal and either party may refer the determination of the price to an Independent	The State may at any time issue a Modification Price Request. Project Co must propose a quote for the preparation of a Change Notice responding to the Modification Price Request. The State may: • agree to the proposal, in which case Project Co prepares a Change Notice • require Project Co to submit a further price • inform Project Co that it does not wish to proceed with the Modification; or • direct Project Co to proceed with the preparation of the proposal and either party may refer the determination of the price to an Independent Expert. If Project Co submits a Change Notice, the State may issue a notice to Project Co to proceed with the Modification or inform Project Co that it does not wish to proceed.	The State may at any time issue a Modification Price Request. Project Co must propose a quote for the preparation of a Change Notice responding to the Modification Price Request. The State may: • agree to the proposal, in which case Project Co prepares a Change Notice • require Project Co to submit a further price • inform Project Co that it does not wish to proceed with the Modification; or • direct Project Co to proceed with the preparation of the proposal and either party may refer the determination of the price to an Independent Expert. If Project Co submits a Change Notice, the State may issue a notice to Project Co to proceed with the Modification or inform Project Co that it does not wish to proceed.	Broadly similar to North South Bypass Tunnel, but no qualification regarding effect of modification on facility use.	The State may require a modification to the D&C or O&M activities, provided it does not adversely affect the use, patronage or capacity of the toll road, or Project Co's ability to levy tolls. The modification regime is structured such that: • the State first notifies Project Co of its proposed modification • Project Co must provide a proposal setting out various details, including estimates of costs or savings, the basis on which it would be prepared to fund the cost, the impact on the D&C programme (if pre-completion) or the time within which it will be implemented (if after completion) and the effect on Project Co's ability to comply with its other contractual obligations • Project Co must price the proposed modification on an open book basis • the State may require a tender process for the modification where it is being carried	The State may issue a Modification Proposal. Project Co must provide a Modification Notice setting out its effect on the project (including cost, timing, funding etc). If accepted, Project Co must carry out the modification. Failing agreement, the terms for carrying out the modification will be determined by dispute resolution. If the State requests a modification after the construction is complete, the State may require Project Co to conduct a tender in relation to the modification requested.

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	• if the State has accepted or conditionally accepted Project Co's quote, Project Co must provide a detailed plan for carrying out the State-proposed modification. Where a modification is being imposed on Project Co, it is to be funded by the State (unless otherwise agreed). Project Co may also request modifications.	Expert. If Project Co submits a Change Notice, the State may issue a notice to Project Co to proceed with the Modification or inform Project Co that it does not wish to proceed.				out after completion • the State may accept Project Co's offer to carry out the modification, or it may withdraw the modification proposal, or it may reject Project Co's offer and have the disputed matters resolved through the dispute resolution process. The State may also direct a modification at any time, in which case it will make a determination of the cost etc (acting reasonably and subject to Project Co's right to refer issues for dispute resolution). Where a modification is being imposed on Project Co, it is to be funded by the State (unless otherwise agreed). Relevant modification costs which may be claimed comprise: • direct costs resulting from the modification (including increased construction, operating, maintenance and debt finance costs) • a reasonable amount on account of	

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						overheads and margin for the D&C or O&M Contractor • a reasonable equity return component where the modification is funded wholly or partly by new equity • the base case equity return for the period of any delay beyond the scheduled date for completion. If the terms of a modification are agreed, the State will pay the agreed modification costs as follows: • where funded by the State – progressively on a monthly basis • where funded by Project Co – as per Project Co's modification proposal. If the terms of a modification are not agreed, the State will pay the modification costs as it reasonably determines, pending determination by the dispute resolution process and subsequent adjustment. These payments will be made progressively on a monthly basis.	

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Force Majeure	**Events** A limited (exclusive) list of events: • lightning, hurricane, cyclone, earthquake, natural disaster, landslide, tsunami, high sea inundation, drought declared as a State of emergency or mudslide • act of a public enemy, war (declared or undeclared), riot, insurrection, civil commotion, civil rebellion, revolution, militarily usurped power or other like hostilities, terrorism or act of sabotage • fire, explosion or flood not caused or contributed to by Project Co and where all reasonable preventative measures were taken • ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination. The definition	**Events** A limited (exclusive) list of events which are beyond Project Co's control and comprising: • lightning, hurricane, cyclones, earthquakes, natural disasters, landslides, tsunamis or mudslides • civil riot, civil rebellion, revolution, terrorism, insurrections military usurped power, act of sabotage or act of public enemy and war (declared or undeclared) or other like hostilities • emergency declared as an emergency under the Emergency Management Act 2004 (SA) or public health emergency declared under the Public Environmental Health Act 1987 (SA) • ionising radiation or contamination by radioactivity,	**Events** A limited (exclusive) list of events which are beyond Project Co's control and comprising: • lightning, hurricane, cyclones, earthquakes, natural disasters, landslides, tsunamis or mudslides • civil riot, civil rebellion, revolution, terrorism, insurrections military usurped power, act of sabotage or act of public enemy and war (declared or undeclared) or other like hostilities • ionising radiation or contamination by radioactivity, nuclear, chemical or biological contamination not caused or contributed to by Project Co • fire, flood at or transgressing onto the Site (or in the immediate vicinity of the Site which prevents, delays or disrupts access to the Site) or explosion where caused by those events in the above first two dot points,	**Events** A limited (exclusive) list of events which are beyond Project Co's control and comprising: lightning, hurricane, cyclones, earthquakes, natural disasters, landslides, tsunamis or mudslides; • civil riot, civil rebellion, revolution, terrorism, insurrections military usurped power, act of sabotage or act of public enemy and war (declared or undeclared) or other like hostilities • ionising radiation or contamination by radioactivity, nuclear, chemical or biological contamination not caused or contributed to by Project Co • fire, flood at or transgressing onto the Site (or in the immediate vicinity of the Site which prevents, delays or disrupts access to the Site) or explosion where caused by those events in the above first two dot points,	**Events** A limited list of events which are beyond Project Co's control and comprising: • lightning, cyclones, earthquakes, natural disasters, landslides, tsunamis and mudslides • civil riots, rebellions, revolutions, terrorism, insurrections and military and usurped power, act of sabotage, act of public enemy and war (declared or undeclared) • fire, flood or explosion caused by the events above • ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination. **Relief** • Project Co's obligations are suspended to the extent	**Events** A limited (exclusive) list of events before completion which are beyond Project Co's reasonable control and comprising: • lightening, earthquakes, cyclone, natural disaster, landslide and mudslide • explosion, malicious damage, sabotage, riots or terrorist acts • once in 50 year floods • war, rebellion etc and confiscation by any authority • toxic chemical contamination • ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination. After completion, it includes any other material risk not otherwise specifically allocated in the agreement. **Relief** • Project Co's obligations are suspended to the extent affected by the *force majeure*. • No financial relief	**Events** A limited (exclusive) list of events beyond the reasonable control of Project Co or its associates: • earthquake, cyclone, natural disaster, landslide, seismic activity and mudslide • explosion, malicious damage, sabotage, riots or "terrorist act" • a flood expected to occur less frequently than once in every 100 years • war, invasion, act of a foreign enemy, hostilities between nations (whether war is declared or not), civil war, rebellion, revolution or military or usurped power, martial law or confiscation by order of any Authority • toxic, chemical or biological contamination • ionising radiation or contamination by radioactivity from any nuclear waste or from combustion of

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	specifically excludes all forms of industrial action and wet or inclement weather. **Relief** • The parties' obligations are suspended to the extent affected by the *force majeure* event. • If the services provided by Project Co are wholly or partially unavailable due to a *force majeure* event, the State will abate its payment to Project Co in relation to these services. • Termination for prolonged *force majeure* • Both parties have rights to terminate for prolonged *force majeure* (period exceeding 6 months).	nuclear, chemical or biological contamination not caused or contributed to by Project Co • fire, flood at or transgressing onto the Site or explosion at the Site caused by any of the above events, not caused or contributed to by Project Co and where all reasonable preventative measures were taken. **Relief** • Project Co's obligations are suspended to the extent affected by the FM. • Quarterly Services Payment and State Loan Payment payable by the State will be reduced. • Termination for prolonged *force majeure* • State can terminate where a *Force Majeure* event subsists for greater than 180 days.	and where the Project Co has taken preventative measures to ensure the works can withstand severe weather • during the Operating Term, Utility Interruption upstream from a Connection Point • epidemics or pandemics to the extent that Project Co cannot, in compliance with Law, enter such part of the Site necessary to perform the Works or the Services • an emergency declared as a disaster under the Disaster Management Act 2003 (Qld) or a public health emergency declared under the Public Health Act 2005 (Qld) that occurs during the Operating Term, but only to the extent performance of the Services is unlawful, which (either separately or together) directly causes the State or Project Co to be unable to perform all or a material part of its	and where the Project Co has taken preventative measures to ensure the works can withstand severe weather • Utility Interruption upstream from a Connection Point • epidemics or pandemics to the extent that Project Co cannot, in compliance with Law, enter such part of the Site necessary to perform the Works or the Services • an emergency declared as a disaster under the Emergency Management Act 1986 (Vic) or a public health emergency declared under the Public Health and Wellbeing Act 2008 (Vic) that occurs during the Operating Term, but only to the extent performance of the Services is unlawful, which (either separately or together) directly causes the State or Project Co to be unable to perform all or a material part of its obligations (other than	affected by the *force majeure*. • No financial relief provided by the State. However, there are minimum debt service protection provisions where an uninsurable *force majeure* event has occurred. **Termination for prolonged *force majeure*** Both parties have rights to terminate for prolonged *force majeure* (12 months). Project Co's right is qualified where it is able to recover under relevant insurance. **Uninsurable *force majeure*** The State may terminate for an uninsurable *force majeure* event.	provided by the State (including by way of extension of the concession period). **Termination for prolonged *force majeure*** None. Uninsurable *force majeure* The State (only) may terminate if an uninsurable *force majeure* event occurs.	nuclear fuel. **Relief** • Project Co's obligations are suspended to the extent affected by the *force majeure* event. • State will continue to pay the Quarterly Service Payment and an amount calculated in accordance with the Change Compensation Principles. • Termination Payment if agreement is terminated for prolonged *force majeure*. • Termination for prolonged *force majeure* • Both parties have rights to terminate for prolonged *force majeure* (period exceeding 6 months). • Project Co cannot terminate for prolonged *force majeure* events which are insured. • In limited circumstances, Project Co may be entitled to compensation for Project Debt for

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			obligations (other than an obligation to pay money), where the event or its consequences could not have been prevented or its consequences were not otherwise caused or contributed to by the failure by Project Co to comply with the Quality Standards or other obligations. **Relief** • Parties obligations are suspended to the extent affected by the FM. • Quarterly Services Payment will be abated in accordance with the Abatement regime, but any application of this regime will be ignored for the purpose of assessing an Event of Default so long as the Project Co complies with its obligations regarding actions to be taken in an FM event • Project Co may apply for payment under certain circumstances for minimum amounts necessary to pay scheduled principal repayments and interest on debt; and Quarterly Services	an obligation to pay money), where the event or its consequences could not have been prevented by the exercise of a standard of care and diligence consistent with that of a prudent person undertaking the obligations under this Agreement to comply with the Quality Standards or its other obligations. **Relief** • Parties obligations are suspended to the extent affected by the FM. • Quarterly Services Payment will be abated in accordance with the Abatement regime, but any application of this regime will be ignored for the purpose of assessing an Event of Default so long as the Project Co complies with its obligations regarding actions to be taken in an FM event. • Project Co may apply for payment under certain circumstances for minimum amounts necessary to pay scheduled principal repayments and			uninsurable *force majeure*.

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			Payments for unaffected services which the Project Co continues to deliver. • Termination for prolonged *force majeure* by either party	interest on debt, fixed costs incurred by the FM subContractor; Quarterly Services Payments for unaffected services; and costs incurred by Project Co in delivering an alternative method or work around • Termination for prolonged *force majeure* by either party			
Change In Law	Project Co entitled to compensation for a Change in Law or a Change in Policy determined by offsetting adverse financial effects (which increase the costs of Project Co) with the beneficial financial effects (which decrease the cost of Project Co). If a Change in Law or Policy specifically affects the project: • the State will compensate Project Co for 100% of the net adverse financial effect • the State will be entitled to 100% of the net beneficial financial effect. If a change in law or policy does NOT	Project Co is entitled to compensation of its net costs, and must pay to the State any net savings, for Changes in Law and Changes in Policy. A Change in Law is a change in an existing law, making of a new law or change in the way a law is applied or interpreted, which has a material effect on any of the works, services or other obligations of Project Co. A Change in Policy means a new health policy or quality standard or change in health policy or quality standard, which has a material effect on any of the works, services or	Project Co is entitled to compensation of its net costs, and must pay to the State any net savings, for a Change in Mandatory Requirements. It is a condition precedent to Project Co's entitlement to claim compensation that it has notified the State Delegate within 5 business days of becoming aware of any actual or impending change. A Change in Mandatory Requirement is defined to mean the following events: • **Change in Law:** change in or repeal of existing law; enactment or making of a new law; or change in the way	Project Co is entitled to compensation of its net costs, and must pay to the State any net savings, for a Change in Mandatory Requirements. It is a condition precedent to Project Co's entitlement to claim compensation that it has notified the State Delegate within 5 business days of becoming aware of any actual or impending change. A Change in Mandatory Requirement is defined to mean the following events: • **Change in Law:** change in or repeal of existing law; enactment or making of a new law; or change in	Project Co is entitled to compensation for discriminatory changes in State law and for 'Relevant Changes in Law'. A discriminatory change in law is a change in law which: • is Victorian law • specifically and only affects: – the project – the project together with other desalination plants in Victoria – Project Co, but only in its capacity as the entity contracting to	Generally, the State is liable for the consequences of, and has no claim against the Authority in respect of, changes in law. There is an exception for a discriminatory change in Queensland law ie a change that specifically and only affects the project or has a direct effect on the project together with other privately owned and operated toll roads in Queensland. In these circumstances, the material adverse effect regime applies – the parties must negotiate to agree on a method of redress (see below).	Project Co entitled to financial relief for a general change in law or a project specific change in law which increases the costs of performing the O&M Activities.

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	specifically affect the project: • the State will compensate Project Co for 95% of the net adverse financial effect • the State will be entitled to 95% of the net beneficial financial effect.	other obligations of Project Co.	a law is applied as a result of precedent • **Change in Policy:** generally, a new policy or quality standard with which the Project Co is legally obliged to comply and which has/would have a material effect on the works and performance of obligations of the Project Co **General Change in Law** A general change in law is • where there is a change in policy after the date of the project deed • where there is a change in law after the date of commercial acceptance of the first of the stages which results in capital costs or savings • where there is a change in law after the date of the deed which results in operational costs or savings The Project Co is entitled to compensation of its net costs and must pay the State any net saving, in accordance with	the way a law is applied as a result of precedent • **Change in Policy:** generally, a new policy or quality standard with which the Project Co is legally obliged to comply and which has/would have a material effect on the works and performance of obligations of the Project Co **General Change in Law** A general change in law is • where there is a change in policy after the date of the project deed • where there is a change in law after the date of commercial acceptance of the first of the stages which results in capital costs or savings • where there is a change in law after the date of the deed which results in operational costs or savings The Project Co is entitled to compensation of its net costs and must pay the	implement the project; or – the Project together with any other PPP projects in Victoria. The definition of a Relevant Change in Law is broader and incorporates any changes in State or Commonwealth law, other than certain specific exclusions and other than changes published in a gazette prior to contract signing in substantially the same form as the change is made after contract signing. The term includes changes resulting from a change in carbon emissions or renewable energy laws (other than by the implementation of a scheme substantially as contained in the Carbon Pollution Reduction Scheme Bills introduced into Parliament in July 2009). The State bears an undisclosed share of the cost of a discriminatory		

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			certain thresholds: 0% for aggregate capital amount of up to $750,000 and aggregate operating amount of up to $100,000; 50% where those amounts are between $750,000-$2 million and $100,000-$250,000 respectively; and 100% where those amounts are over $2 million and $250,000 respectively. **Project Specific Change in Law** A Project Specific Change in Law expressly and exclusively relates to the project, facility, works, site, or the Project Co in its capacity as the entity undertaking the works, and the Project Co and other entities undertaking projects under the Queensland Government's PPP and Value for Money Framework or the National PPP Guidelines The Project Co is entitled to compensation of 100% of its net costs and must pay the State 100% of the net savings arising, where both are as a consequence of the Project Specific Change in Law	State any net saving, in accordance with certain thresholds: 0% for aggregate capital amount of up to $200,000 and aggregate operating amount of up to $50,000; 50% where those amounts are between $200,000-$500,000 and $50,000-$100,000 respectively; and 100% where those amounts are over $500,000 and $100,000 respectively. **Project Specific Change in Law** A Project Specific Change in Law expressly and exclusively relates to the project, facility, works, site, or the Project Co in its capacity as the entity undertaking the works, and the Project Co and other entities undertaking projects under the Partnerships Victoria The Project Co is entitled to compensation of 100% of its net costs and must pay the State 100% of the net savings arising, where both are as a consequence of the Project Specific Change in Law	change in law. The State bears an undisclosed share of the cost of a relevant change in law.		

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Material Adverse Effect (MAE) Regime	MAE defined to mean a material adverse effect on: • the ability of Project Co to perform and observe its obligations under any project document • the rights of the State under any Project Document or the ability or capacity of the State to exercise its rights or perform its obligations under a project document; or • the performance of, or the cost of delivering, the works. Project Co represents and warrants that there are no proceedings or agreements binding on Project Co or its assets which would have a MAE.	Project Co is entitled to compensation and performance relief for compensable intervening events, which include: • State breach • loss to Project Co caused by reckless acts of the State • suspension or variation required by Law or court order in respect of heritage or native title claim • project specific industrial action • industry wide industrial action • outage to the ICT Network for a minimum of 2 hours • 3 or more outages of the ICT Network of more than 5 minutes over a 24 hour period.	MAE is defined to mean events which a material adverse effect on: • the ability of Project Co to perform and observe its obligations under any Project Document • the rights of the State or any State Associate under any Project Document, or the ability or capacity of the State or a State Associate to exercise its rights or perform its obligations under a Project Document; or • the performance of, or the cost of undertaking, any Functions. Project Co represents and warrants that there are no proceedings or agreements binding on Project Co or its assets which would have a MAE	MAE is defined to mean events which a material adverse effect on: • the ability of a Project Entity to perform and observe its future obligations under any Project Document • the rights of the State or any State Associate under any Project Document, or the ability or capacity of the State or a State Associate to exercise its rights or perform its obligations under a Project Document; or • the performance of, or the cost of undertaking, any Functions. Project Co represents and warrants that there are no proceedings or agreements binding on Project Co or its assets which would have a MAE	Project Co is entitled to compensation and performance relief for intervening events, which include: • State breach • discriminatory change in law • relevant change in law • uninsurable *force majeure* events • key approval events (see above).	Events which have a material adverse effect on: • Project Co's ability to repay the Financiers substantially in accordance with the financing documents; or • the equity return which Project Co is expected to generate during the concession, entitle Project Co to enter negotiations with the State with a view to enabling Project Co to: • repay the Financiers interest and principal amortisation payments in accordance with the financing documents • give equity investors a return equal to the lower of the return they would have earned had the MAE event not occurred and the base case equity return. MAE events include: • the closure of principal road connections • a competing tunnel • the grant of the	MAE is not defined. However Project Co represents and warrants to the benefit of the State that there are no current, pending or threatened proceedings of any kind which would have a MAE on Project Co's business assets or financial condition. If: • Project Co fails to commence or expeditiously progress the construction of the project • this failure has a material adverse effect on Project Co's ability to achieve completion • Project Co fails to comply with the remedy program for this default, the State may terminate the agreement by giving a 20 day notice.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
						relevant leases (following completion) on terms materially different to those in the schedule • discriminatory changes in law • the issue of a court order for work to stop because of a native title claim or challenge to planning approval • uninsurable *force majeure* events. State contribution is a last resort. Methods to address the MAE event include varying the project agreement or concession period, varying financial contributions or varying the toll.	
Step Change In Technology	During the D&C phase, the State (acting reasonably) may an alternative item of plant or equipment if: • an alternative item would deliver a substantially lower Whole of Life Cost • an alternative item will substantially reduce the Operator's operating costs, the volume or energy consumption or	Project Co must delay the timing for the final selection of items marked as having 'high technical obsolescence risk' to a time as late as reasonably possible (without delaying Completion) to ensure that Project Co has procured the most technically up to date items. During the operational phase, if Project Co is required	During the Operating Term the Project Co must identify ways in which it can reduce costs as a result of, among other things, improved technology. If the Project Co seeks to implement improved technology, it must proposed a Project Co Modification to the State. The State may reject the Project Co Modification request, consent to the request and issue a	During the Operating Term the Project Co must identify ways in which it can reduce costs as a result of, among other things, improved technology. If the Project Co seeks to implement improved technology, it must proposed a Project Co Modification to the State. The State may reject the Project Co Modification request, consent to the request and issue a	The State may direct the implementation of technological improvements (ie advancements or improvements beyond those required pursuant to Project Co's obligation to comply with best O&M practice). Cost savings (including anticipated profit margins) resulting from certain types of technological	100% of cost savings are passed through to the State. During the D&C phase, the savings can be set-off against any modification costs payable by the State, or paid progressively on a monthly basis. During the O&M phase, the payment regime is as agreed or, failing agreement, as determined by arbitration or expert determination.	During the O&M phase, Project Co is required to promptly implement and respond to advancements in technology before infrastructure must be replaced.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	greenhouse gas emissions • the procurement and installation of the alternative item will not delay or adversely affect the project and the alternative item is fit for purpose. Project Co must install this item within 10 days of the request and cannot make any claim against the State for this change. Any cost savings will be shared between Project Co and the State.	to replace an item of equipment, it must use the same or higher level of quality which is as technically up to date as that which would be used in accordance the Best Operational Practices.	Modification Order, or request further information. If the State consents to a Project Co Modification the Project Co must carry out the works at its own cost and is not entitled to make any Claim in respect of that work.	Modification Order, or request further information. If the State consents to a Project Co Modification the Project Co must carry out the works at its own cost and is not entitled to make any Claim in respect of that work.	improvements are shared on a sliding scale.		
Liability And Indemnities	Project Co indemnifies the State from all claims and liabilities (excluding indirect and consequential loss) in respect of third party liability and breach of the Project Documents. Project Co will not be required to indemnify the State in relation to third party liability or breaches of the project agreement by Project Co if they result from: • a fraudulent, negligent, unlawful or wilful act or omission of the State • a breach of a Project Document	Project Co indemnifies the State against any claim, liability or loss from Project Co's breach of any project document. Project Co indemnifies the State against any claim, liability or loss arising from specific events, including: • contamination caused by Project Co • damage to external infrastructure; or • any personal death or injury or damage to third	Project Co indemnifies the State against any claim, liability or loss arising from: • Project Co's breach of any project document, or any negligent unlawful act or omission, or wilful misconduct of the Project Co or its affiliates • non-compliance with Work Health and Safety legislation • failure of the Project Co to satisfy the Conditions precedent • reliance by the Project Co on Information	Project Co indemnifies the State against any claim, liability or loss arising from: • Project Co's breach or unlawful repudiation of any project document • reliance by the Project Co on Information Documents • contamination caused by Project Co • loss, injury, damage suffered by any User after the Site Handover Date suffered in connection with contamination • damage to external	Project Co indemnifies the State against any liability or loss arising from Project Co breaching any project document (except to the extent that the breach is due to wilful default by the State). Project Co also indemnifies the State against any liability or loss arising from: • any property damage • any personal injury or death • third party	Project Co indemnifies the State against any liability or loss arising from: • breach of a project agreement • property damage • personal injury or death • third party economic loss (other than that arising from the State's decision to proceed with the project and the location or existence of the toll road) • third party intellectual property claims	Project Co indemnifies the State against any liability or loss arising from any breach of the project deed caused by Project Co. Project Co indemnifies the State against any claim or loss (including indirect and consequential loss) arising from: • damage, loss or destruction of property • personal injury, disease or death • third party's pure economic loss.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	by the State • a *force majeure* event, compensable extension event or intervening event • contamination for which Project Co is not responsible.	party property. Project Co's liability under the indemnities is excluded or reduced if the events were contributed to by fraud of the State, breach of any State Agreement by the State or direction by a State delegate.	Documents • claims by third parties in IP • contamination caused by Project Co • damage to external infrastructure • Project Co's failure to pay subContractors monies due and payable • any personal death or injury or damage to third party property. Project Co's liability under the indemnities is excluded or reduced if the events were contributed to by fraud of the State; *Force Majeure* Events; Extension Events; contamination not caused by Project Co; and breach of any State Agreement by the State or direction by a State delegate Except where the State elects to terminate as a result of a Default Termination Event, the Project Co's liability is capped at $40 million dollars	infrastructure • Project Co's failure to pay subContractors monies due and payable • any personal death or injury or damage to third party property. Project Co's liability under the indemnities is excluded or reduced if the events were contributed to by fraud of the State; *Force Majeure* Events; Extension Events; contamination which the Project Co is not required to remediate or not caused by Project Co; and breach of any State Agreement by the State or direction by a State delegate	economic loss • the provision or use of or reliance on information disclosed by the State • acts or omissions of Project Co's subContractors • the exercise of the State's step-in rights, except to the extent it acts in a reckless or grossly negligent way or in bad faith. Broadly, Project Co's liability under the indemnities will be reduced to the extent that the liability or loss is attributable to the State or compliance with the project documents. There is a reciprocal exclusion of liability for consequential loss, other than that arising from: • death or personal injury • criminal or fraudulent acts by Project Co • wilful misconduct by Project Co	• provision or use of or reliance on information disclosed by the State. Broadly, Project Co's liability under the indemnities will be reduced to the extent that the liability or loss is attributable to the State's wrongful acts or omissions. Project Co's liability for consequential loss is not limited or excluded.	

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
					• third party claims in respect of water quality • matters which cannot be excluded by law. Project Co provides the State with a broad release of liability.		
Security	Project Co must provide a $5 million Conditions Precedent Bond (**CPB**) on the date of the Agreement. If Financial Close occurs on or before the Conditions Precedent Deadline, the State will return the CPB on Financial Close, subject to any entitlement to make a demand under the CPB, eg if Project Co breaches a condition of the Agreement which takes immediate effect or seeks to make an amendment to the Project Documents where were not specifically identified in writing and agreed to by the State by the date of the Agreement, or fails to satisfy its Conditions Precedent by the deadline.	Project Co must provide a: • construction bond for the period commencing no later than Financial Close and in place until at least 3 months after the original date for commercial acceptance • post completion bond for the period expiring no earlier than 12 months after the date of commercial acceptance. The Construction Bond must be returned once Project Co has procured the post completion bond, and the post completion bond must be returned 12 months after the Date of Commercial	Project Co must provide a: • construction bond of not less than 5% of the Contract Price for each Stage, commencing no later than Financial Close and in place until at least 3 months after the original date for commercial acceptance of that Stage • defects liability bond of not less than 2.5% of the Contract Price for the period expiring no earlier than 12 months after the date of commercial acceptance. The Construction Bond must be returned once Project Co has procured the defects liability bond	Project Co must provide a construction bond for the following amounts at the following stages: • prior to Commercial Acceptance, up to an amount no greater than 5% of the Stage 1 Construction Contract Price or the Stage 2 Construction Contract Price • for the 12 month period commencing on the Date of Stage 1 Commercial Acceptance, up to an amount no greater than 2.5% of the Stage 1 Construction Contract Price • for the 12 month period commencing on the Date of Stage 2 Commercial Acceptance, up to an amount no greater than 2.5% of the Stage 2 Construction Contract Price.	Project Co may provide bonds to secure its obligations with respect to handover and final abatement payments (as an alternative to instead setting aside amounts covering those obligations). Project Co does not provide direct D&C or O&M bonds to the State. The State, however, may require direct agreements with the counterparties to material contracts (eg the D&C and O&M Contractors).	Project Co must provide a $5m bond for the D&C phase of the project. The State may require performance bonds of up to $20m if Project Co does not satisfactorily operate the tunnel. In respect to handover of the toll road, Project Co may either provide a handover bond (to be returned within 12 months after handover) having a face value equal to the estimated cost of the works, or progressively deposit into an escrow account revenue (after expenses) from the last 3 years of the concession period until the amount deposited equals the estimated cost of the works. The State may make a demand under a bond at any time, and use the proceeds to reimburse it for any loss, and in payment of any other moneys owing by	Project Co must provide to the State: • a condition precedent bond before financial close • a handover bond which is equal to the total estimate of the works. **Condition precedent bond (CPB)** The State will return the CPB to Project Co within 20 days of financial close, subject to the State's right to make a demand if Project Co fails to satisfy a condition precedent or seeks to make an amendment to the project deed which is not agreed to by the State.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		Acceptance or if the defects liability period has been extended, 3 months after the extended defects liability period expires.				Project Co.	
Change Of Control And Assignment	**Assignment/ Transfer** Project Co must obtain the prior approval of the State before it can assign or transfer any of its rights, title or interest under the project documents. The State cannot unreasonably withhold its consent and Project Co cannot assign parts of its rights, title or interest. Prior approval of Project Co is required to any dealing by the State with its interest unless the assignee is an agent of the Crown in the right of Victoria. **Change in control** The State's prior consent is required to any change in control of Project Co. However, the State must not unreasonably withhold its consent. The State may withhold its consent if: • the change in control occurs within 2 years of	**Assignment/ Transfer** Project Co may not assign or transfer any rights or interest under any Project Document without the prior written consent of the State. The State cannot unreasonably withhold its consent if Project Co demonstrates certain criteria, including: • the assignee or transferee has the financial and technical capacity • the assignment or transfer is not against the public interest, • the assignment or transfer will not have material adverse effect on the rights of the State • the assignment adversely affect the State's rights under the Project Documents.	**Assignment/ Transfer** The State may assign or transfer or otherwise dispose of any of its rights, title or interest in or under any Project Document without the consent of Project Co. Project Co may not assign or transfer any rights or interest under any Project Document without the prior written consent of the State. The State cannot unreasonably withhold its consent if Project Co demonstrates certain criteria, including: • the assignee or transferee has the financial and technical capacity • the assignment or transfer is not against the public interest, • the assignment or transfer will not have material adverse effect on the rights of the State • the assignment adversely affect the	**Assignment/ Transfer** Project Co may not assign or transfer any rights or interest under any Project Document without the prior written consent of the State. The State cannot unreasonably withhold its consent if Project Co demonstrates certain criteria, including: • the assignee is solvent and reputable and will not be appointed prior to the second anniversary of the Operational Commencement Date • the Change in Control is to take effect prior to the second anniversary of the Operational Commencement date • there is no conflict between the State's and the assignee's interests • the assignee or transferee has the financial and	**Assignment/ Transfer** As for the National PPP Guidelines where Project Co wishes to deal with its rights or interest. Prior approval of Project Co is required to any dealing by the State, except for any assignment of rights to receive revenue. **Change in control** There is a prohibition on changes in control of Project Co and upstream parties without the State's prior consent, with carve-outs for certain matters.	**Assignment/ Transfer** Except as provided in the financier's direct agreement and State deed of charge, the State's prior approval is required to any dealing by Project Co with its interest or obligations under the project agreement. State approval must not be unreasonably withheld. Prior approval of Project Co is required to any dealing by the State with its interest, except for any assignment of rights to receive revenue. **Change in control** A change in control of Project Co (or any holding company) is deemed to be an assignment. There is a limited carve-out where the change in control results from a stock exchange listing.	**Assignment/ Transfer** Except as provided in the financier's direct agreement and State deed of charge, the State's prior approval is required to any dealing by Project Co with its interest or obligations, including change in control. However, the State may only withhold its consent if the acquirer is not solvent or reputable, has a conflict of interest with the State or the change would be contrary to public interest or have adverse impacts. Prior approval of Project Co is required to any dealing by the State with its interest.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	the commencement date • the acquirer is not solvent or reputable • the acquirer has a conflict of interest with the State • the change would increase the level of risk or liabilities to the State; or • the change would be contrary to public interest or have adverse impacts.	**Change in control** The State's consent is required for a change of control, and may only be withheld if: • the State has not been provided all required information • the State is of the reasonable opinion that the transferee is not of sufficient financial standing • the State does not consider it appropriate to enter into commercial relations with the transferee • it will create a conflict of interest • the proposed change is against public interest • the transferee does not have sufficient financial, managerial and technical capacity • it will lead to a material adverse effect; or • it will increase the level of risk or liabilities of	State's rights under the Project Documents. **Change in control** The State's consent is required for a change of control, but it will only be reasonable for the State to withhold consent if the State has not been provided all required information, and the State is of the reasonable opinion that: • the controller is not solvent or reputable • the Change in Control is to take effect prior to the second anniversary of the Operational Commencement date • there is a conflict between the State's and the Controller's interests • the Controller does not have the level of financial, managerial and technical capacity of the person or Entity it is replacing or from whom it is taking Control or otherwise to deliver the Project; or • the proposed change is against public interest, could lead to the occurrence of a Probity Event,	technical capacity • the assignment or transfer is not against the public interest, • the proposed assignment could not lead to the occurrence of a Probity Event, or would have a Material Adverse Effect or would increase the level of risk or liabilities of the State • the assignment or transfer will not have material adverse effect on the rights of the State • the assignment adversely affect the State's rights under the Project Documents. Change in control The State's consent is required for a change of control, but it will only be reasonable for the State to withhold consent if the State has not been provided all required information, and the State is of the reasonable opinion that: • the controller is not solvent or reputable • the Change in Control is to take effect prior to the second anniversary			

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		the State.	would have a Material Adverse Effect or would increase the level of risk or liabilities of the State	of the Operational Commencement date • there is a conflict between the State's and the Controller's interests • the Controller does not have the level of financial, managerial and technical capacity of the person or Entity it is replacing or from whom it is taking Control or otherwise to deliver the Project; or • the proposed change is against public interest, could lead to the occurrence of a Probity Event, would have a Material Adverse Effect or would increase the level of risk or liabilities of the State			
Refinancing	State consent is required for a refinancing, not to be unreasonably withheld where certain conditions are satisfied, such as the refinancing does not adversely affect the State position or it is not in accordance with market practice.	State consent is required for refinancing. The State may only withhold consent where the refinancing increases or adversely changes the liabilities or risk profile of the State, or the refinancing as a whole is materially more onerous or disadvantageous to	State consent is required for refinancing. The State may only withhold consent where the refinancing increases or adversely changes the liabilities or risk profile of the State, or the refinancing as a whole is materially more onerous or disadvantageous to Project Co. The State is entitled to 50% of any gains from	State consent is required for refinancing. The State may only withhold consent where the refinancing increases or adversely changes the liabilities or risk profile of the State, or the refinancing as a whole is materially more onerous or disadvantageous to Project Co. The State is entitled to 50% of any gains from	Similar to National PPP Guidelines. The State is entitled to an undisclosed share of any refinancing gain.	State consent is required for a refinancing, not to be unreasonably withheld where it does not adversely affect the State's position). The State and Project Co will use reasonable endeavours to agree the 'refinancing gain' and manner and timing of paying Council's share. If the parties fail to agree, the matter may be	State consent is required for refinancing. Approval not to be unreasonably withheld, including where the refinancing does not adversely affect the State position or it is on arm's length commercial terms in accordance with market practice. The State and Project

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		Project Co. The State is entitled to an undisclosed percentage of any gains from refinancing.	refinancing.	refinancing.		submitted for dispute resolution under the project deed. The parties must require any expert or arbitrator to make his or her determination on the basis that the State is to receive 50% of any refinancing gain. The State is not entitled to share in any refinancing gains in respect of 'assumed refinancing' (refinancing that is specifically taken into account in the base case financial model and which complies with the 'refinancing assumptions').	Co will share any refinancing gains and must negotiate in good faith to agree on the basis and method of calculating the refinancing gains as well as the manner and timing of paying State's share. If no agreement is reached, either party may refer the matter to expert determination.
Events Of Default And Termination	Project Co events of default include: • breach by Project Co of its obligations under the project agreement • abandonment or intention to abandon the project • assignment or change in control without State's prior consent • failure to achieve completion of the project • insolvency; or • determination of Project Co which is a unit trust and	Project Co events of Major Default include: • insolvency or change in control of related company other than Project Co • fraudulent financial audit report of Project Co • untrue representations or warranties by Project Co • failure to commence construction within 3 months of the specified commencement	Project Co events of Major Default include: • insolvency or change in control of related company other than Project Co • fraudulent financial audit report discloses fraudulent or negligent reporting of Project Co • untrue representations or warranties by Project Co • technical completion and commercial acceptance are not achieved by the required dates • breach or vitiation of	Project Co events of Major Default include: • insolvency or change in control of related company other than Project Co • fraudulent financial audit report discloses fraudulent or negligent reporting of Project Co • untrue representations or warranties by Project Co • technical completion and commercial acceptance are not achieved by the	Broadly similar to the National PPP Guidelines. **State's other termination rights** The State can terminate for prolonged *force majeure* and an uninsurable *force majeure* event. The State also has the right to terminate for convenience.	Project Co events of default and termination regime are similar to the National PPP Guidelines. Termination rights are subject to the Financiers' direct agreement. **State's other termination rights** The State can also terminate for uninsurable *force majeure* or where Project Co is prevented from carrying out the project for more than 6 months by law or State direction in relation to a native title application or claim. No termination for	Project Co events of default include: • failure to commence or expeditiously and diligently progress the works • abandonment or intention to abandon the project • failure to operate or maintain, repair or insure the facility in a material respect • fraud, collusion, misleading or deceptive conduct or representation • assignment or change in control

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	loss of the right of full indemnity against the assets of the trust. Projects Co events of default also includes unremedied major defaults such as: • insolvency of a subContractor • fraud, collusion, misleading or deceptive conduct or representation • cessation or threat to cease providing services • failure to comply with obligations in relation to change in control, assignment, insurance, refinancing. There is a regime for Project Co to provide a remedy program and comply with that remedy plan for defaults capable of being remedied. The State may agree to extend the remedy period where Project Co is complying and continues to comply with the remedy program and an extension of time is required. **State's other termination rights**	date • technical completion and commercial acceptance are not achieved by the required dates • vitiation of Project Documents • breach of insurance obligations by Project Co • any defaults that have not been cured by Project Co within the cure period. Project Co Default Termination Events of Project Co include: • insolvency of Project Co • change in control or assignment of Project Co without consent of the State • abandonment of works or services by Project Co • uncured Major Default • commercial acceptance is not achieved by the Sunset Date; or • damage and destruction to the Facility that is	Project Documents • there is a Services Failure and the Project Co accumulates certain Failure Abatements • any defaults that have not been cured by Project Co within the cure period. Default Termination Events of Project Co include: • insolvency of Project Co • change in control or assignment of Project Co without consent of the State • abandonment of works or services by Project Co • three Major Default Service Failures in any rolling three year period • late completion • Major Default that is incapable of cure • damage and destruction to the Facility that is deemed a Default Termination Event. There is a regime for Project Co to provide a remedy program and comply with that remedy program for defaults capable of being remedied. The State may agree to extend the	required dates • a material breach by the Project Co of its insurance obligations or repair or rebuilding obligations • an event that restricts or cancels a Project Entity's ability to obtain or continue to have all available funding under the finance documents • a failure by the Project Co to obtain prior consent before refinancing • any default which has not been cured within 20 business days of receipt of a default notice • a breach of any project document other than the project deed which as a material adverse effect • five or more defaults in any 12 month period or a persistent or repeated failure to comply with obligations in the opinion of the State • there is a Services Failure and the Project Co accumulates certain Failure Abatements;		convenience right.	without State's prior consent • material default • failure to achieve completion of the project • insolvency (including of material subContractors); or • cancellation of finance or draw down rights. There is a regime for Project Co to provide a remedy program and comply with that remedy program for defaults capable of being remedied. The State may agree to extend the remedy period where Project Co is complying with the remedy program and as long as the remedy period does not exceed 9 months. **State's other termination rights** The State can also terminate for convenience and prolonged *force majeure*.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	The State can also terminate for convenience and prolonged *force majeure*.	deemed a Default Termination Event. There is a regime for Project Co to provide a remedy program and comply with that remedy program for defaults capable of being remedied. The State may agree to extend the remedy period where Project is complying with the remedy program and an extension of time is required. **State's other termination rights** State may terminate for convenience and prolonged *Force Majeure*.	remedy period where Project is complying with the remedy program and an extension of time is required. **State's other termination rights** State may terminate for convenience and prolonged *Force Majeure*.	or • vitiation of Project Documents Default Termination Events of Project Co include: • insolvency of Project Co • change in control or assignment of Project Co without consent of the State • abandonment of works or services by Project Co • three Major Default Service Failures in any rolling three year period • late completion • Probity failures • damage and destruction to the Facility that is deemed a Default Termination Event. There is a regime for Project Co to provide a remedy program and comply with that remedy program for defaults capable of being remedied. The State may agree to extend the remedy period where Project is complying with the remedy program and an extension of time is required. **State's other**			

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				termination rights State may terminate for convenience and prolonged *Force Majeure*.			
State Step-In Rights	The State may step in and assume management and control where: • there is a serious risk to the structure of the facility, public or users or a serious risk of material damage to property • Project Co abandons the project or becomes insolvent. • an assignment by or a change in control of Project Co has occurred without State's prior consent • Project Co has breached its obligations under the project agreement and has failed to remedy its breaches (if they are capable of being remedied) • Project Co ceases to be a unit trust and ceases to be indemnified against the assets of the trust	The State may step in and assume total or partial management and control after the occurrence of either a Major Default or Default Termination Event, except if: • Project Co is remedying the Major Default; or • the Major Default is incapable of being remedied.	The State may step in and assume total or partial management and control after the occurrence of either a Major Default or Default Termination Event (see above), except if: • Project Co is remedying the Major Default; or • the Major Default is incapable of being remedied. The State may also step in to any Subcontract in the event of an Emergency	The State may step in and assume total or partial management and control after the occurrence of either a Major Default or Default Termination Event (see above), except if: • Project Co is remedying the Major Default; or • the Major Default is incapable of being remedied. The State may also step in to any Subcontract in the event of an Emergency	The State may step in and assume total or partial management and control where: • Project Co is in breach and the State reasonably believes there is a material risk to health and safety, the environment or the works • the D&C or O&M Contractor has issued a State cure notice to the State advising that the Contractor has the right to terminate under the D&C or O&M contract (as the case may be). The State's liability in exercising its step-in rights appears similar to the position under the National PPP Guidelines.	The State may step in where Project Co is in breach of the project agreement and has not remedied the breach within a reasonable time. The State will have no liability to Project Co in connection with the exercise of its step-in rights.	The State may step in and assume total or partial management and control where: • there is a serious risk to the structure of the facility, public or users or a serious risk of material damage to property • it is necessary to discharge a statutory duty • suspension of activities due to *force majeure*; or • Project Co abandons the project or becomes insolvent. The State is only liable for exercising its step-in rights if it has been fraudulent, has acted in bad faith or has been grossly negligent (only in limited circumstances). If State steps in as a result of prolonged *force majeure* or Project Co's insolvency, Project Co will be relieved from its obligations but must

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	• Project Co fails to achieve completion of the project. If the State exercises its step-in rights, the rights and obligations of Project Co are suspended and Project Co must pay all costs and expenses reasonably incurred by the State to the extent of the State's step in.						pay all costs and expenses reasonably incurred by the State to the extent of the State's step in.
Termination Payments	**Project Co Default** If Project Co complies with its handover obligations, it will be entitled to receive a 'default termination payment'. The details of the calculation of this payment are not disclosed.	**Project Co Default** If the State elects to conduct a Tender, the State must pay Project Co the highest compliance tender price, *plus:* • any amounts owing by the State to Project Co, less: • the tender costs • any amounts owing by Project Co to the State • any additional costs reasonably incurred by the State • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of	**Project Co Default** If the State elects to conduct a Tender, the State must pay Project Co the highest compliance tender price, *plus:* • any amounts owing by the State to Project Co, *less:* • the tender costs • any amounts owing by Project Co to the State • any additional costs reasonably incurred by the State • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of termination • insurance proceeds • the aggregate of the	**Project Co Default** If the State elects to conduct a Tender, the State must pay Project Co the highest compliance tender price, *plus:* • any amounts owing by the State to Project Co, less: • the tender costs • any amounts owing by Project Co to the State • any additional costs reasonably incurred by the State • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of termination • insurance proceeds	**Project Co Default** No termination payment where Project Co default consists of abandonment of the project. In the event of termination for other Project Co defaults, the State will pay the default termination amount determined as follows: *If the contract is re-tendered by the State:* Highest compliant tender price *less:* • tender costs • amounts owing to State • State's direct termination costs	**Project Co Default** No termination payment.	**Project Co Default** State can recover from Project Co any loss (including indirect and consequential loss) suffered as a result of termination. This amount is calculated as follows: Project debt *plus:* • amounts owing to Project Co by the State, *less* various other amounts such as: • highest compliant tender price • tender costs • amounts owing to the State by Project Co • various costs incurred by the State arising from the early termination • gains resulting

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		termination • insurance proceeds • the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement. If the State does not elects to conduct a Tender, the State must pay Project Co the estimated fair value of the project, *plus:* • any amounts owing by the State to Project Co, less*:* • costs incurred in electing not to tender • any amounts owing by Project Co to the State • any additional costs reasonably incurred by the State • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of termination • insurance	receivables refund payment and outstanding moneys under the State Loan Agreement. If the State does not elects to conduct a Tender, the State must pay Project Co the estimated fair value of the project, *plus*: • any amounts owing by the State to Project Co, *less*: • costs incurred in electing not to tender • any amounts owing by Project Co to the State • any additional costs reasonably incurred by the State • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of termination • insurance proceeds • the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement.	• the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement. If the State does not elects to conduct a Tender, the State must pay Project Co the estimated fair value of the project, *plus*: • any amounts owing by the State to Project Co, *less*: • costs incurred in electing not to tender • any amounts owing by Project Co to the State • any reasonable forecast internal and external tendering costs • value of all post termination service amounts • any net gains that have accrued to Project Co as a result of termination • insurance proceeds • an amount equal to the outstanding amount of the Receivables Refund Payment.	• gains and insurance proceeds to Project Co • monthly service payments post-termination, *plus* any other amounts owing to Project Co. *If the contract is not re-tendered:* Fair market value of the project assuming full concession period, as determined by the independent expert, and with similar additions and deductions as for a re-tender (above).		from termination of finance or project documents • post termination service amounts • insurance proceeds.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		proceeds • the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement.					
	State Default Project Co does not have the right to terminate for State default and, accordingly, there is no termination payment for such an event.	**State Default** Project Co does not have the right to terminate for State default and, accordingly, there is no termination payment for such an event.	**State Default** Project Co does not have the right to terminate for State default and, accordingly, there is no termination payment for such an event.	**State Default** Project Co does not have the right to terminate for State default and, accordingly, there is no termination payment for such an event.	**State Default** Project Co does not have the right to terminate for Authority default and, accordingly, there is no termination payment for such an event. Note that State default under the UK PFI and National PPP Guidelines is treated in the same manner as termination for convenience. The termination for convenience payment under the desalination project includes debt plus forecast return for the balance of the concession (see below).	**State Default** Project debt *plus* projected nominal after tax IRR over the concession period based on: • the distributions in the base case financial model – if the projection is being made in the first 5 years of tolling • a reasonable forecast of distributions based on historical performance and current projected growth – if the projection is being made after the first 5 years of tolling. The equity return amount must take into account: • amounts received by or paid to Project Co • amounts which Project Co must pay as a consequence of termination • distributions made or accrued.	**State Default** Project Co does not have the right to terminate for State default and, accordingly, there is no termination payment for such an event.

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
	Termination for Convenience If Project Co complies with its handover obligations, it will be entitled to receive a 'termination for convenience payment'. The details of the calculation of the termination for convenience payment are not disclosed.	**Termination for Convenience** State must pay Project Co the Project debt, *plus:* • costs arising from terminating or reversing the derivative position under finance documents • fair market value of the equity as assessed by an independent expert • any redundancy payments for employees of Project Co • amounts incurred by Project Co payable to builders and subContractors • costs incurred (or less gains realised) by Project Co as a direct result of terminating the finance documents • amounts owing by the State to Project Co *less:* • amounts owing by Project Co to the State	**Termination for Convenience** State must pay Project Co the higher of: (A) project debt *plus:* • fair market value of the equity as assessed by an independent expert • any redundancy payments for employees of Project Co • amounts incurred by Project Co payable to builders and subContractors • costs incurred (or less gains realised) by Project Co as a direct result of terminating the finance documents • amounts owing by the State to Project Co *less:* • amounts owing by Project Co to the State • credit balances held for the benefit of Project Co • sums due and payable to Project Co from the Financiers • any insurance proceeds • the aggregate of the receivables refund	**Termination for Convenience** State must pay Project Co the higher of: (A) project debt *plus:* • fair market value of the equity as assessed by an independent expert • any redundancy payments for employees of Project Co • amounts incurred by Project Co payable to builders and subContractors • costs incurred (or less gains realised) by Project Co as a direct result of terminating the finance documents • amounts owing by the State to Project Co *less:* • amounts owing by Project Co to the State • credit balances held for the benefit of Project Co • sums due and payable to Project Co from the Financiers • any insurance proceeds • the aggregate of the	**Termination for Convenience** The higher of: (A) project debt *plus:* • NPV of forecast equity cash flows from termination date to end of concession period [27 years] determined using the discount rate equal to the lower of the prevailing market rate of return to equity for projects with similar risk profile and equity returns assumed in the base case financial model • various costs arising from the early termination, including employee redundancy payments, D&C or O&M termination costs and finance break costs • amounts owing by the State,	**Termination for Convenience** Not applicable, as the State does not have the right to terminate for convenience.	**Termination for Convenience** If Project Co complies with its handover obligations, it will be entitled to receive a 'termination for convenience payment'. This amount is calculated as follows: Project debt *plus:* • an amount which gives an equity return calculated for the period between the termination date and the expiry date being the greater of: – the Blended Equity Return – the fair market value of the equity as reasonably assessed by the Independent Expert • various costs arising from the early termination, including employee redundancy payments, D&C or O&M termination costs and finance break costs • amounts owing to Project Co by the State,

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		• credit balances held for the benefit of Project Co • sums due and payable to Project Co from the Financiers • any insurance proceeds • the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement.	payment and outstanding moneys under the State Loan Agreement.	receivables refund payment and outstanding moneys under the State Loan Agreement.	*less* various other amounts such as: • gains resulting from termination of finance or project documents • amounts owing to the State • insurance proceeds; and (B) project debt *plus*: • finance break costs • amounts owing by the State.		*less* various other amounts such as: • amounts owing to the State by Project Co • gains resulting from termination of finance or project documents • insurance proceeds • all sums due and payable to Project Co by Financiers as a result of pre-payment of debt • security refund repayment.
	Prolonged *Force Majeure*/Uninsurable *Force Majeure* Event If Project Co complies with its handover obligations, it will be entitled to receive a '*force majeure* termination payment'. The details of the calculation of the termination for convenience payment are not disclosed.	**Prolonged *Force Majeure*** State must pay Project Co the Project debt, *plus* • amounts owing by the State to Project Co, less*:* • gains realised (or add costs incurred) from terminating or reversing derivative position under finance documents • any amounts owing by Project Co to the State • insurance	**Prolonged *Force Majeure*** If the State or Project Co terminates due to a *Force Majeure* Event, the Termination Payment is the greater of a Default Termination Payment was due (as calculated above where the state elects not to re-tender) and the following calculation: Project debt, *plus* • amounts owing by the State to Project Co, *less:* • gains realised (or add costs incurred) from terminating or reversing derivative position under	**Prolonged *Force Majeure*** If the State or Project Co terminates due to a *Force Majeure* Event, the Termination Payment is the greater of a Default Termination Payment was due (as calculated above where the state elects not to re-tender) and the following calculation: Project debt, *plus* • amounts owing by the State to Project Co, *less:* • gains realised (or add costs incurred) from terminating or reversing derivative position under	**Prolonged *Force Majeure*/Uninsurable *Force Majeure* Event** The higher of the amount payable on termination for Project Co default (as above) and the following: Project debt *plus:* • costs arising from terminating or reversing derivative position under finance documents • amounts owing by the State • various costs arising from	**Uninsurable *Force Majeure* Event** As for State Default above.	**Prolonged *Force Majeure*/Uninsurable *Force Majeure* Event** If Project Co complies with its handover obligations, it will be entitled to receive a 'general termination payment'. This amount is calculated as follows: Project debt *plus*: • various costs arising from the early termination, including employee redundancy payments, D&C/O&M termination costs and finance break

Issue	Hospital Project A	Hospital Project B	Hospital Project C	Hospital Project D	Desalination Project	Tunnel Project	Toll Road Project D
		proceeds • all sums due to Project Co from the Financiers • credit balances held for the benefit of Project Co • the aggregate of the receivables refund payment and outstanding moneys under the State Loan Agreement,	finance documents • any amounts owing by Project Co to the State • insurance proceeds • all sums due to Project Co from the Financiers • credit balances held for the benefit of Project Co • an amount equal to the outstanding amount of the Receivables Refund Payment.	finance documents • any amounts owing by Project Co to the State • insurance proceeds • all sums due to Project Co from the Financiers • credit balances held for the benefit of Project Co • an amount equal to the outstanding amount of the Receivables Refund Payment.	termination, including D&C and O&M termination costs, • equity invested (without return) (this payment obligation continues only while the State provides financial support and for a maximum of 7 years from financial close), *less* various other amounts such as: • amounts owing to the State • gains from terminating or reversing derivative position under finance documents • insurance proceeds.		costs • amounts owing to Project Co by the State, *less* various other amounts such as: • amounts owing to the State by Project Co • gains resulting from termination of finance or project documents • insurance proceeds • all sums due and payable to Project Co by Financiers as a result of pre-payment of debt • security refund repayment.

Project frameworks and guidance

National PPP Guidelines – Commercial Principles For Economic Infrastructure

Infrastructure Australia, a national government body, was formed to develop the standardisation of the tender processes and contract documentation between the Australian Commonwealth and State jurisdictions for PPP and other relevant procurement options. In February 2011, it produced the *Commercial Principles for Economic Infrastructure*.

UK SOPF2 – Standardisation of PF2 Contracts (Draft version to replace UK SOPC4 – Standardisation of PFI Contracts, Version 4)

These comprise guidelines issued by the UK Treasury in March 2007 for standardisation of project financed initiatives (PFIs).

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
Extension Of Time (EOT)	The principles do not consider EOTs because delay liquidated damages (LDs) are not usually imposed because of value for money reasons. Where the Government elects to impose delay LDs, then an EOT may be appropriate. See discussion on delay LDs below.	The date for commencement of project services can be extended for delays but not indefinitely ie there should be a long-stop date after which the Government can terminate the contract. Extensions should be permitted for delays caused by compensation events, relief events and *force majeure*).
Delay Liquidated Damages	Government will consider delay LDs where they represent value for money. Considerations include the potential for higher project costs, other remedies available to the Government (such as indemnities) and erosion of the operating term. The reduction in the revenue-earning period due to completion delay may be sufficient commercial incentive to ensure that Project Co achieves timely completion. Where payable, LDs will represent the Government's sole and exclusive remedy for delay. However, they do not limit the Government's rights in relation to aspects or consequences of an event other than delay costs. Where payable, the Government generally requires Project Co to provide security for delay LDs through bonds or guarantees	The contract must protect the Government against late delivery in a way which provides value for money. Delay LDs may be appropriate, but are not typically imposed by the Government. However, they may prove value for money where the costs which the Government incurs as a result of the delay are so great as to justify the increased project expense. Delay LDs for delayed service commencement should be an ascertained payment representing a genuine pre-estimate of the losses or damage the Government will suffer if Project Co fails to fulfil its obligation to commence Service delivery on time. If the Government will not suffer any losses in excess of the payment of the unitary charge, liquidated damages are not appropriate or recoverable. Service commencement should not generally be allowed to be delayed indefinitely due to Project Co default. The Government may impose a long stop date, after which the contract can be terminated by the Government if the service has not yet

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	issued either by the private party or its subContractors.	been commenced. The long stop date should be extended to the extent of any delay caused by any compensation event, relief event or *force majeure* event.
State-Proposed Variations	The Government generally has the right to request modifications (ie variations to the works, facility or project activities) at any time and will compensate Project Co for the cost of carrying out the modifications. In some jurisdictions, the Government may not request a modification that adversely affects the use, patronage or capacity of the facility or Project Co's ability to earn revenue. However, the Government may request a modification resulting from public policy decisions where such modification does impact on the use or patronage of the facility or Project Co's ability to earn revenue. The Government's modification should not, however, result in Project Co being in a worse (or better) position than prior to the policy change. The Government may require Project Co to conduct a tender where the modification is being carried out after construction is complete. The Principles broadly provide for Project Co to provide a response to the Government's modification request, setting out details of the effect of the modification in terms of cost, timing, funding etc. Disputed matters are resolved through the dispute resolution process under the contract. Compensation will include agreed margins and on-costs that Project Co or its major subContractors may apply to the cost of the modification, as well as an equity return component where the modification is funded wholly or partly by new equity. It also includes direct costs and associated on-site overheads. Where the modification delays completion beyond the date for completion, compensation will also include an amount to provide equity investors with a return equal to their base case equity return for the period of delay. In calculating the compensation, any cost savings are to be	The State should generally have an unfettered right to require changes during the O&M phase but a more restricted right during the D&C phase. Project Co should generally be given limited rights to refuse or object to a change, such as where it would imperil the project economics or make it impossible for Project Co to meet its contractual obligations or adversely affect its risk profile. The Government should generally be liable for the cost of changes which it proposes or requires. It should generally be assumed that payment for capital costs works will be made by milestone payments or on completion through a lump sum payment and that payment for service changes will be made through an adjustment to the service charges. Project Co should be obliged to use reasonable endeavours to seek necessary additional finance, if required.

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	deducted. The Government may pay for the modification progressively after the relevant work is undertaken or as agreed, depending on which party is funding the work. Where Project Co is required to fund an amount upfront above a certain threshold, it must use commercial endeavours to obtain competitive financing. If it is unable to obtain financing acceptable to the Government (or the funding has a material adverse effect on Project Co), the Government may choose to pay the costs by way of a lump sum payment.	
Force Majeure	**Events** A limited list of events of exceptional severity beyond either party's control and where neither is in a better position to manage the consequences including: • lightning, cyclones, earthquakes, natural disasters, landslides, tsunamis and mudslides • civil riots, rebellions, revolutions, terrorism, insurrections and military and usurped power, act of sabotage, act of public enemy and war (declared or undeclared) • ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination unless caused by Project Co or sub-Contractors (and excluding the risk of pollution and contamination otherwise allocated to Project Co in the contract) • fire, flood or explosion caused by events referred to in the first two paragraphs above. **Relief** Project Co's obligations are suspended to the extent affected by the FM. No financial relief provided by the Government (including by way of extension of the concession period).	**Events** A limited (exclusive) list of events including: war, civil war, armed conflict or terrorism; or nuclear, chemical or biological contamination (unless the source or cause of the contamination is the result of the actions of or breach by Project Co or its subContractors); or pressure waves caused by devices travelling at supersonic speeds, which directly cause either party to be unable to comply with all or a material part of its obligations under the contract. **Relief** Project Co's obligations are suspended to the extent affected by the *force majeure*. Termination for prolonged *force majeure* Both parties have rights to terminate for prolonged *force majeure* (typically 6 months). Financial relief is provided through the termination mechanism where the agreement is terminated for prolonged *force majeure*. **Uninsurable *force majeure*** The Government may terminate on the occurrence of an uninsurable *force majeure* event. Note also that SOPF2 has a separate regime for "relief events" which allow

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	Termination for prolonged *force majeure* The Government (only) has the right to terminate for prolonged *force majeure* (relevant threshold period to be agreed). **Uninsurable *force majeure*** The Government (only) may terminate if an uninsurable *force majeure* event occurs.	performance and time relief (but not compensation). Relief events include fire, explosions, lightening, storms, flood, earthquakes, riots, failure or shortage of power, transport or fuel, embargo and strikes generally affecting the industry or a significant sector of it.
Change In Law	Compensation only for project specific changes in law. A project specific change in law is a change in law by the relevant jurisdiction which specifically and only affects the project or has a direct effect on the project together with other similar privately owned and operated facilities. It does not include a change which, as at the signing date, was published or notified publically or which an experienced and competent Contractor carrying out similar works to Project Co would have reasonably foreseen. A change in law will not be project specific: • solely on the basis that its effect on Project Co is greater than its effect on other entities • if it is a change in taxes (including GST). If the project specific change in law has a material adverse effect on the ability of Project Co to pay the debt Financiers the amounts due in accordance with the financing agreements or pay the equity investors their projected equity return, it will be entitled to relief. The parties must negotiate in good faith to agree on a method of redress that achieves the objective of enabling Project Co to repay the debt Financiers the appropriate interest and principal payments owing when due and to pay the equity investors a return (eg lower of base case and the return they would have earned had the event not occurred). This may occur by varying the project agreements, varying the contract term, varying the financial or other contributions of the parties (a last resort), requesting the debt Financiers to restructure the financing agreements or varying the revenue calculation	Discriminatory change in law risks should be allocated to the Government. A discriminatory change in law means a change in law, the terms of which apply expressly to: • the Project and not to similar projects procured under the PFI • Project Co and not to other persons; or • PFI Contractors and not to other persons. Specific change in law risks should be allocated to the Government. A specific change in law means any change in law which specifically refers to the provision of services the same as or similar to the service or to the holding of shares in companies whose main business is providing services the same as or similar to the service. General changes in law will generally be at Project Co's risk but it may be appropriate to share them where they: • require capital expenditure • take effect during the O&M phase • were not reasonably foreseeable on contract signing. Risk sharing in this case could be by a sliding scale, with the Government taking the risk where the capital costs exceed a certain threshold. Project Co's general liability should be capped at between 2-5% of the initial capital cost of the project.

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	schedule. In addition, if the project specific change in law adversely affects the ability of Project Co to perform any of its project obligations and causes Project Co to incur additional costs (including delay costs if Project Co is prevented from achieving on time completion), it will be entitled to claim its reasonable incremental costs and expenses as a direct result of the change.	
Material Adverse Effect (Mae) Regime	The guidelines provide a regime for "possible key risk events" and a forum for negotiations to redress the occurrence of key risk events. Project Co will be entitled to relief for possible key risk events that have a material adverse effect on the ability of Project Co to either: • pay the debt Financiers the amounts due in accordance with the financing agreements; or • pay the equity investors their projected equity return. Events (non-exclusive and optional) include: • a project specific change in law • Project Co is ordered by a court to cease (or change the method of) carrying out the D&C activities due to a challenge to the Government obtained planning approval (other than for Project Co breach) • Project Co is directed or required to cease or change its O&M activities because of a native title application or claim • an uninsurable *force majeure* event • an identical directly competing facility is opened during the concession period. No relief will be provided where the event is caused by or is otherwise within the control of Project Co or any sub-Contractor or related party. Methods to consider include: • varying the project contracts	SOPF2 provides for compensation events which are at the Government's risk and which result in a delay to the O&M commencement or increased costs to Project Co. Compensation can be extended to the O&M phase). Events included: • breach by the Government of an obligation (including third party breaches for which the Government is responsible) • modifications by the Government • discriminatory or specific changes in law. If the event requires capital expenditure (whether before or during the O&M phase) in most cases it will be more practicable to deal with the cost by way of lump sum reimbursement (with a possibility of staged payments). If the event requires a change in operating costs, an alteration in the service charge is the appropriate means of payment.

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	• varying the contract term • varying the financial or other contributions of the parties • requesting the debt Financiers restructure the financing agreements • varying the service charges. Contribution by the Government is a last resort. *Compensation events* There is a separate regime providing compensation for costs incurred as a direct result of certain events. Events (non-exclusive and optional) include: • a breach by the Government of any project contracts • modification, withdrawal, revocation or replacement of the Government obtained planning approval (other than where it is caused by Project Co) • Project Co is ordered by a court to cease (or change the method of) carrying out the D&C activities due to a challenge to the Government obtained planning approval (other than for Project Co breach) • the Government makes a direction in relation to artefacts (other than for Project Co breach). Compensation will only be given for events which: • adversely affect the ability of Project Co to perform any of its obligations under the project agreement • cause Project Co to incur additional costs (including delay costs to the extent that Project Co is or will be prevented from achieving Completion by the completion date). Compensation will be assessed as Project Co's reasonable incremental costs and expenses incurred as a direct result of the event, as reasonably determined by the Government.	

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
Step Change In Technology	No specific provisions. Where the project agreement requires modifications in order to incorporate technological advancements, cost savings will be shared with the Government under an agreed mechanism.	No specific provisions. Typically dealt with on a case by case basis.
Liability And Indemnities	Project Co indemnifies the Government for any liability or loss arising from: • design, construction, operation or maintenance of the facility • the provision or use of or reliance on information disclosed by the Government • acts or omissions of Project Co and its subContractors • breach of any project agreement • negligence • unlawful acts or omissions • wilful misconduct • breach of warranty. In some cases, the indemnity may be limited to liability or loss arising from death or personal injury, property damage and third party claims. The Government will not generally cap Project Co's liability under the indemnity but may do so (where it provides value for money) in respect of third party claims (other than death or personal injury), damage to Government property and Government economic loss. Project Co will not be liable under the indemnity to the extent the liability or loss arises from the Government's fraudulent or wrongful acts or omissions or breach of any project agreement. Project Co releases the Government from any liability or claim arising from the matters the subject of the indemnity. Project Co's liability for consequential loss is not limited or excluded.	Broadly, there are four heads of liability that the Government will be concerned to be indemnified against if the liability arises as a result of Project Co's operations: • (a) death and personal injury • (b) property damage • (c) breach of statutory duty (d) third party claims. Liability caps are not generally appropriate but can be considered on a value for money basis.

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
Security	The Government will typically require a performance bond for the D&C phase for 5% to 10% of the construction cost to cover late or inadequate completion. The Government may accept the provision of this bond from Project Co's D&C Contractor (issued in favour of Project Co). The Government may require a direct bond from Project Co for the O&M phase. It may accept: • a bond being provided by the O&M Contractor to Project Co • a smaller initial amount with an ability to increase this if there is a repeated or severe breach • no bond, with an ability to require one if there is a repeated or severe breach. The Government may seek parent company guarantees from Project Co's ultimate holding company or from material subContractors, where this represents value for money.	It is not normally appropriate in PFI agreements for the Government to expect to obtain parent company guarantees from the parent companies and/or sub-Contractors to support Project Co's obligation to deliver the service. It is normal for there to be parent company guarantees of the sub-Contractor's obligations to Project Co and sometimes of its payment obligations to the Lenders, but these are not an issue for the Government. Performance bonds are not required under the standard form between the Government and Project Co. More generally, standard practice assumes that the Government should be satisfied with direct agreements from the immediate sub-Contractors to Project Co and collateral warranties from consultants and sub-subContractors. The sub-subContractors giving collateral warranties to the Government are usually limited to construction sub-subContractors.
Change Of Control And Assignment	**Assignment/Transfers etc** Subject to the financier's direct agreement and agreed security interests, Project Co must not dispose of any rights or interest under the project agreement without the Government's prior consent. Government approval may be provided in its discretion. **Change in control** With the exception of transfers to related parties and of listed shares, Project Co must obtain the Government's prior consent to a change in control (not to be unreasonably withheld). Consent may be withheld in certain circumstances eg the change occurs within 2 years of completion construction or the proposed transferee does not have the financial or technical capability. The Government may also require certain shareholders of Project Co to maintain their equity for a minimum period (eg 2 years from completion).	**Assignment/Transfers etc** The agreement should not allow Project Co to assign, novate or transfer its rights except as part of its senior Lenders' security package. A PFI agreement should generally not allow the Government to assign or transfer its rights or obligations under the agreement without the consent of Project Co, except where such transfer either takes place under statute or is required to facilitate a public sector reorganisation. It should also be permitted where the new authority has a similar financial standing to the outgoing authority or the outgoing authority provides a guarantee. **Change in control** As a general rule, it should not be necessary for the agreement to contain restrictions on the transferability of equity, other than a need to inform the Government, except where the Government would object to a particular class of shareholder being involved in the project for particular reasons. In practice, the Government will generally only have a discretion over the change of control of Project Co for a fixed period, usually up to the end of the defect

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
		liability period, after which time the authority will not be able to prevent occurrence of a change of control.
Refinancing	Essentially, all refinancing other than those contemplated at financial close will require Government consent. Under normal market conditions, refinancing gains are shared 50:50 provided the equity return at the time of refinancing is above that reflected in the original base case financial model. In difficult market conditions, the Government may require different gain sharing proportions.	The Government should be entitled to a 50% share of any refinancing gain only where the projected performance of the project is above that included in the original financial close base case financial model.
Events Of Default And Termination	Project Co events of default include: • failure to commence or expeditiously and diligently progress the works • abandonment or intention to abandon the project • failure to operate or maintain, repair or insure the facility in a material respect • material default • insolvency (including of material subContractors) • cancellation of finance or draw down rights. There is a regime for Project Co to provide a cure plan and comply with that plan for defaults capable of cure. The Government may agree to extend the cure period where Project Co is complying with the plan and can satisfy the Government that it will cure the default within the extended period. Where Project Co fails to provide a cure plan, comply with the cure plan or cure the default within the agreed period, the Government may exercise its step in rights or terminate. Where the default is not capable of cure, the Government may require a prevention plan to overcome the consequences of the default and compensate the Government or may terminate (without any cure period).	Project Co events of default include: • breach which materially and adversely affects performance of the services • a persistent breach (a breach for which a final warning notice has been issued, which has continued for more than a specified number of days or recurs a specified number of times within a six month period after the day on which the warning notice is served • insolvency events • a breach of any obligations under the agreement requiring the Government to approve any subContractors or replacement subContractors • a breach of any restrictions under the agreement on the engagement of employees to work on the Project • assignment, novation or transfer of rights under the Contract without the consent of the Government (other than as part of the Senior Lenders' security package) • change of Ownership without the consent of the Government • abandonment • failure to achieve service by a long-stop date • accumulation of more than a certain number of performance deduction points in a given period • failure to take and maintain required insurance. **Government's other termination rights**

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	Government's other termination rights The Government can also terminate for prolonged *force majeure*, uninsurable *force majeure* and where Project Co is prevented from carrying out the project for a specified period by law in relation to a native title application or claim. The Government may also terminate for convenience.	The Government can terminate for prolonged *force majeure*. The Government should have the right to terminate for convenience, provided Project Co is compensated in full ie it is left in the position it would have been had the contract run its full course. The Government also has the specific right to terminate for fraud or corrupt acts by Project Co, or where Project Co breaches the refinancing provisions. These terminate events have their own specific termination payments.
Government Step-In Rights	The Government may step in and assume all or some of service delivery obligations where: • there is an emergency, serious risk to the structure of the facility, the environment, public or users or a serious risk of material damage to property • it is necessary to discharge a statutory duty; or • (in some jurisdictions) a Project Co event of default occurs. The Government has no liability in exercising the step-in rights except where it is grossly negligent (in relation to emergency step-in only), fraudulent or has acted in bad faith.	The focus of the right is a serious short-term problem that can or must be solved quickly, where the Government is in a better position to do this than Project Co. The Government may step in where it reasonably believes that action needs to be taken: • because a serious risk exists to health and safety, property or the environment; or • to discharge a statutory duty. The Government should act in accordance with good industry practice in exercising its step-in rights where there has been no Project Co breach and indemnify Project Co for any effects.
Termination Payments	**Project Co Default** No termination payment.	A marked approach is taken which facilitates the Senior Lenders rights to step-in, manage and rescue or sell the Project if Project Co defaults. If they fail to do so, compensation is paid on termination based on the market value of the unexpired term of the Contract, less any post termination service amounts already paid to the Contractor, the tender costs incurred in obtaining a new Contractor and amounts the Government are entitled to set off or deduct. In addition, the Government will pay an amount equal to the aggregate of all credit balances on any bank accounts held by or on behalf of Project Co on the date the highest priced compliant tender is received, any additional insurance proceeds and other amounts owing to Project Co and any additional post termination service amounts to the extent they have not been directly taken into account in the compliant tender or have not otherwise been received already by the Government.

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
Government Default	**Government Default** (Note: there is no separate concept of Government default events. However, Project Co does have the right to terminate for Government failure to provide its agreed project contribution.) Compensation payable is Senior debt *plus* finance break costs *plus* projected nominal after tax IRR for the concession period based on: • equity return shown in the base case financial model (if termination occurs within a pre-agreed period from commencement of tolling eg 3 or 5 years); or • a reasonable forecast of distributions likely to be made to equity investors based on the historical performance and current projected growth (if termination occurs after that period) *less:* • all credit balances on any bank accounts held by or on behalf of Project Co on the termination date • any amounts owing by Project Co to the Authority as at the termination date • any insurance proceeds paid or payable to Project Co at any time between the termination date and the date of the termination payment • all sums due and payable to Project Co from the Financiers as a result of any prepayment of senior debt and any third party amounts paid to Project Co at any time during the period between the termination date and the date of payment. The equity return amount must take into account: • distributions and amounts received or paid by the shareholders up to the termination date	**Government Default** The objective is to fully compensate Project Co and the Financiers so that they are no worse off than if the contract had continued. Compensation can be determined by any of the following: • base case IRR for entire concession period (ie does not take account of actual performance) • estimated fair market value • base case for remainder of contract duration (ie future return originally provided for in base case).

Issue	Infrastructure Australia – National ppp guidelines for economic infrastructure	UK PFI guidance (SOPF2)
	• amounts Project Co must pay as a consequence of the termination (including demobilisation costs and third party costs but not including amounts between parties not engaged on arm's length commercial terms).	
	Termination for Convenience As for Government Default above.	**Termination for Convenience** As for Government default above.
	Prolonged *Force Majeure*/Uninsurable *Force Majeure* Event As for Government Default above.	**Prolonged *Force Majeure*** Senior debt plus share capital (less dividends paid) redundancy payments and subContractor breakage costs.

Termination compensation benchmarking

Sole remedy, FM and Fair Market Value

Generally, the benchmarked projects include the following terms:

- the termination payments are Project Co's sole remedy for termination by the State (Desalination Project, Road Project, Hospital Project and Car Park Project), common law termination rights are expressly excluded (Desalination Project and Road Project) and the State's general law remedies are expressly preserved (Desalination Project, Hospital Project and Road Project) or are not excluded (Desalination Project and Car Park Project) and Project Co waives rights to claims for restitution, including unjust enrichment and quantum meruit (Desalination Project and Road Project)

- Project Co can terminate for extended *Force Majeure* if it is unable to recover under specified insurances (Hospital Project, Desalination Project, Tunnel Project and Car Park Project)

- The assessment of Fair Market Value (if applicable) assumes the Project continues for the remainder of the original term (Hospital Project, Car Park Project, Desalination Project).

Negative payments

Certain projects provide as follows in relation to negative Termination Payments:

- Termination Payment cannot be a negative number (Desalination Project, Car Park Project)

- Project Co must pay the State any negative Termination Payment (Hospital Project)

- If a re-tender option is chosen, the Termination Payment is paid once the Termination Payment is determined upon conclusion of the re-tendering process (Car Park Project).

Concepts such as 'Actual Debt', 'Project Debt', 'Fair Market Value' and 'Equity Return' (or similar terms) used in the following tables are generally the same across projects, however, the specific definitions differ.

Table 1: Summary of benchmarked termination compensation regimes

Termination event	Desalination project	Tunnel project	Road project	Toll road project	Toll road project	Hospital project	Car park project
Project Co default	*Alternative options:* **Highest tender price** **OR** **Fair value** (each adjusted for costs, cash and gains)				*Alternative options:* **Highest tender price** **OR** **Fair value** (each adjusted for costs, cash and gains)	*Alternative options:* **Highest tender price** **OR** **Fair value** (each adjusted for costs, cash and gains)	*Alternative options:* **Highest tender price** **OR** **Fair value** (each adjusted for costs, cash and gains)
State default		**Project debt + equity return** (with adjustments)	**Project debt + equity return** (with adjustments)	**Project debt + Equity Return** (with adjustments)			
Prolonged *force majeure*	**Project debt** (adjusted for costs, cash and gains)				*Higher of:* **Fair value** **and** **Project debt** (each adjusted for costs, cash and gains)	*Higher of:* **Fair value** **and** **Project debt** (each adjusted for costs, cash and gains)	*Lower of:* **Actual debt** **and** **Forecast debt** (and adjusted for costs, cash and gains)

Table 2: Project Co Default

Desalination project	Toll road project	Hospital project	Car park project
Project Co is entitled to receive a Default Termination Amount (except where Project Co default consists of failure to cure breach). *A. If State re-tenders:* Payment equals Highest Compliant Tender Price: • plus any outstanding amounts owed by the State • plus Electricity Asset Price • less State's tender costs • less amounts owing to State • less State's direct termination costs • less gains to Project Co directly from termination • less insurance proceeds • less credit balances for Project Co • less Post Termination Service Amounts payable by the State. *B. If no re-tendering:* Payment is same as for re-tendering option with: • 'Highest Compliant Tender Price' replaced with 'estimated Fair Market Value'; and • State's tender costs replaced with State's independent expert costs. **Estimated Fair Market Value** 'Fair Market Value' defined as being the amount at which an asset or liability could be exchanged in an arm's length transaction	Project Co is entitled to receive a 'Default Termination Payment'. *A. If State re-tenders:* Payment equals Highest Compliant Tender Price *plus* any outstanding amounts owed by the State *less*: • State's tender costs • amounts owing to State • State's direct termination costs • Project Co's gains and insurance proceeds • post termination service amounts. *B. If no re-tendering:* Payment equals Fair Market Value of the Project (assuming continuation for full term), *less* same adjustments as listed above for a re-tender process (except State's tender costs replaced with State's independent expert costs). Fair Market Value to be determined by the independent expert.	Project Co is entitled to receive a 'Default Termination Payment'. *A. If State re-tenders:* Payment equals Highest Compliant Tender Price *plus* any outstanding amounts owed by the State *less*: • State's tender costs • amounts owing to the State • State's direct termination costs • Project Co's net gains (non-negative only) • Project Co's insurance proceeds • credit balances and other amounts owed to Project Co not already accounted for • net amounts under loan arrangements between the State and Finance Co. Post-termination service amounts are also payable. *B. If no re-tendering:* Payment equals Fair Market Value of the Project (assuming continuation for full term), *less* same adjustments as listed above for a re-tender process (except State's tender costs replaced with State's independent expert costs). Fair Market Value to be determined	Project Co is entitled to receive a 'Default Termination Payment'. *A. If State re-tenders:* Payment equals Highest Compliant Tender Price *plus* any outstanding amounts owed by the State, *plus* Management Agreement termination costs *less*: • State's tender costs • amounts owing to the State • State's direct termination costs • Project Co's net gains (non-negative only) • Project Co's insurance proceeds • credit balances and other amounts owed to Project Co not already accounted for • Sub-Sublease Refund Payment. Post-termination service amounts are also payable. *B. If no re-tendering:* Payment equals Fair Market Value of the Project (assuming continuation for full term), *less* same adjustments as listed above for a re-tender process (except State's tender costs replaced with State's independent expert costs). Fair Market Value to be determined by the independent expert.

Desalination project	Toll road project	Hospital project	Car park project
between informed and willing parties, other than in a forced or liquidation sale. To be determined by the independent expert and assumes continuation for life of Project. Expert must use net present value of cashflows and accounting for various factors eg willing buyer bidding in public tender, costs to new Contractor, reinstatement costs incurred etc and using blended discount rate.		by the independent expert. Definition of 'Fair Value' – same as for Desalination Project. NPV formula specified for cashflow projections.	Definition of 'Fair Value' – same as for Desalination Project. NPV formula specified for cashflow projections.

Table 3: State Default

Tunnel project	Road project	Toll road project
Payment equals: • Project Debt • *plus/less* interest rate hedge payments/gains • *plus* an amount sufficient to give a nominal after tax IRR equal to the Equity Return. 'Equity Return' is the nominal after tax (on project cashflows) IRR per annum projected to be earned during concession period (assuming no early termination or extension) based on: • distributions in the BCFM (if projection made within first 5 years of tolling) • a reasonable forecast based on historical performance and current projected growth (if projection made after first 5 years of tolling). Calculation of Equity Return must take into account: • amounts received by or paid to investors and amounts which Project Co and State must pay as a consequence of termination • amounts actually distributed or accrued prior to the relevant time.	Early Termination Payment equals: • Project Debt • plus/less interest rate hedge payments/gains • plus an amount sufficient to give a nominal after tax IRR equal to the Equity Return. 'Equity Return' is the nominal after tax (on project cashflows) IRR per annum projected to be earned during concession period (assuming no early termination or extension) based on: • distributions in the BCFM (if projection made within first 5 years of tolling) • a reasonable forecast based on historical performance and current projected growth (if projection made after first 5 years of tolling). Calculation of Equity Return must take into account: • amounts received by or paid to investors and amounts which Project Co and State must pay as a consequence of termination • amounts actually distributed or accrued prior to the relevant time.	Project Debt *plus*: • Other amounts payable to the Financiers as a result of termination • Demobilization and other reasonable costs incurred as a result of termination • Subject to some limitations, third party costs reasonably incurred as a result of termination • Prevailing pre-tax IRR at the date of termination (or the base case equity return if termination occurs prior to or within the first 3 years of tolling) *less* various other amounts such as: • any amount owing to the State • amounts received by or paid to Project Co.

Table 4: Prolonged *Force Majeure*

Desalination project	Road project/tunnel project	Toll road project	Hospital project	Car park project
'*Force Majeure* Termination Amount' payment is Project Debt: • plus subcontract and other contract break costs • plus outstanding amounts owed by the State • plus Electricity Asset Price • plus costs OR less gains, arising for Project Co due to termination of Finance Documents • less amounts owing to the State • less amounts due to Project Co from Financiers for prepayments of debt and interest and amounts received from third parties • less debt to be converted to equity (if terminated before date for conversion) • less insurance proceeds • less Receivables Refund Payment.	No termination right for Prolonged *Force Majeure*. **Note**: Early Termination Payment payable under Road Project if State terminated due to Uninsurable *Force Majeure* Event. Payment is the same as for State Default (see Table 3 above).	'*Force Majeure* Termination Payment' is the *higher* of: • 'no tendering' Default Termination Payment • *Force Majeure* Termination Payment (below). *Force Majeure Termination Payment* Payment equals Project debt *plus* outstanding amounts owed by the State: *less* various other amounts such as: • amounts owing to the State by Project Co • gains resulting from termination of finance or project documents • insurance proceeds and credit balances • all sums due and payable to Project Co by Financiers as a result of pre-payment of debt • securitisation refund payment.	'*Force Majeure* Termination Payment' is the *higher* of: • 'no tendering' Default Termination Payment • *Force Majeure* Termination Payment (below). *Force Majeure Termination Payment* Payment equals Project debt *plus* outstanding amounts owed by the State: • plus costs OR less gains, arising for Project Co/Fin Co due to termination of Finance Documents • less amounts owing to the State • less Project Co's insurance proceeds • less amounts due to Project Co or Finance Co from Financiers for prepayments of debt and interest and amounts received from third parties • less amounts in Financial Model intended to be refinanced as equity (or debt treated as equity) • less credit balances owed to Project Co not already accounted for • less net amounts under loan arrangements between the State and Finance Co.	'*Force Majeure* Termination Amount' payment equals: • the lower of Actual Debt and the amount forecast in the Financial Model as owing to the Financiers at the Termination Date (plus interest from Termination Date until the date of payment) • plus costs OR less gains, arising for Project Co/Fin Co due to termination of Finance Documents • less amounts owing to the State • less Project Co's insurance proceeds • less amounts due to Project Co or Finance Co from Financiers for prepayments of debt and interest and amounts received from third parties • less amounts in Financial Model intended to be refinanced as equity (or debt treated as equity) • less credit balances owed to Project Co not already accounted for • less Sub-Sublease Refund Payment.

Table 5: Termination for Convenience

Desalination project	Toll road project D	Hospital project B	QEII car park
Payment equals the higher of: **(A) Project Debt:** • plus NPV of forecast equity cashflows to end of term (using the discount rate equal to lower of: (i) prevailing market rate of return to equity for projects with similar risk profile; and (ii) equity returns assumed in BCFM) • plus Project Co employee redundancy payments and subcontract and other contract break costs • plus outstanding amounts owed by the State and Electricity Asset Price • plus costs or less gains, arising for Fin Co due to termination of Finance Documents • less amounts owing to the State • less gains to Project Co directly from termination and insurance proceeds • less amounts due to Project Co from Financiers for prepayments of debt and interest and amounts received from third parties • less Receivables Refund Payment. **AND** **(B) Project Debt:** • plus costs or less gains, arising for Fin Co due to termination of Finance Documents • plus outstanding amounts owed by the State and Electricity Asset Price.	Project debt plus: • an amount which gives an equity return calculated for the period between the termination date and the end of the concession being the greater of: • (i) the Blended Equity Return (pre-tax IRR in Base Case Financial Model) • (ii) the fair market value of the equity as reasonably assessed by the Independent Expert, having regard to projects with similar risk profiles • various costs arising from the early termination, including employee redundancy payments, D&C or O&M termination costs and finance break costs • amounts owing to Project Co by the State less various other amounts such as: • amounts owing to the State by Project Co • gains resulting from termination of finance or project documents • insurance proceeds and credit balances • all sums due and payable to Project Co by Financiers as a result of pre-payment of debt • security refund repayment.	Project Co is entitled to receive a 'Termination Payment' where termination is for convenience. Payment equals Debt: • plus Fair Market Value of equity (as assessed by expert and assuming continuation for full term) • plus Project Co employee redundancy payments • plus subcontract break costs • plus costs OR less gains, arising for Project Co/Fin Co due to termination of Finance Documents • less amounts owing to the State • less Project Co's insurance proceeds • less credit balances and other amounts owed to Project Co not already accounted for • less amounts due to Project Co or Finance Co from Financiers for prepayments of debt and interest and amounts received from third parties • less net amounts under loan arrangements between the State and Finance Co, with a *minimum* payment of Debt (*plus* Project Co costs or *less* Project Co gains, from terminating Finance Documents).	Project Co is entitled to receive a 'Voluntary Termination Amount' where termination is for convenience. Payment equals Actual Debt: • plus return on equity (assuming continuation for full term) • plus Project Co employee redundancy payments • plus subcontract break costs • plus costs or less gains, arising for Project Co/Fin Co due to termination of Finance Documents • less amounts owing to the State • less Project Co's insurance proceeds • less credit balances and other amounts owed to Project Co not already accounted for • less amounts due to Project Co or Finance Co from Financiers for prepayments of debt and interest and amounts received from third parties • less the Sub-Sublease Refund Payment.

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