

New South Wales
New Schools Privately Financed Project

Summary of Contracts



May 2003

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I Introduction

This report summarises the main contracts, from a public sector perspective, for the New South Wales “New Schools” privately financed project.

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

In line with the *Guidelines*, this report:

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

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

1.1 The project

The “New Schools” project involves:

- Private sector financing, design and construction of nine new public schools, in new urban release areas in north-western and western Sydney, in the Illawarra and on the Central Coast, by January 2005, to standards that must meet or exceed current Department of Education and Training school design standards, and
- Private sector cleaning, maintenance, repair, security, safety, utility and related services for these schools’ buildings, furniture, fittings, equipment and grounds until 31 December 2032, when the buildings will be handed over to the public sector

in return for performance-based monthly payments by the Department of Education and Training during the operational phase of the project.

These tasks are to be carried out by Axiom Education Pty Limited, supported by ABN AMRO Bank, Hansen Yuncken, St Hilliers and Spotless.

The new schools will be:

- Rosebery Road primary school in Kellyville, initially for 400 students and later for up to 630 students, to be opened by 3 March 2004
- Poole Road School for Specific Purposes in Kellyville, for 85 “special needs” students, to be opened by 3 March 2004
- Horsley primary school in West Dapto, initially for 400 students and later for up to 630 students, to be opened by 14 March 2004
- Mungerie Park primary school, initially for 400 students and later for up to 630 students, to be opened by 14 March 2004
- Perfection Avenue primary school in Stanhope Gardens, initially for 400 students and later for up to 630 students, to be opened by 14 March 2004
- Shell Cove primary school in Shellharbour, initially for 400 students and later for up to 630 students, to be opened by 3 January 2005
- Mataram Road primary school in Woongarah (Warnervale), initially for 400 students and later for up to 630 students, to be opened by 3 January 2005
- Horningsea Park secondary school, for 1,000 students, to be opened by 3 January 2005, and
- Glenwood secondary school, for 1,000 students, to be opened by 3 January 2005.

These schools will be constructed some two years earlier, on average, than would have been possible had traditional public sector funding approaches been adopted, and the net present cost of the schools to the Government over the next 30 years will be reduced by approximately 7% (see *Table 1*).

In addition to the school facilities, at least eight of the nine schools are also likely to have child care centres. Axiom Education will pay the Government up-front fees for these centres, which will be financed, designed, built, operated, maintained and repaired by the private sector and then

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

	“Public sector comparator” (PSC) <i>(hypothetical, risk-adjusted estimate of the cost of the most efficient, likely and achievable form of public sector delivery)</i>			Private sector delivery <i>(adjusted to ensure discount rate calculated on a consistent basis with the PSC and to include an estimate of potential child care revenues)</i>
	“PSC best case” <i>(95% probability that PSC cost would be higher than this)</i>	“PSC most likely case” <i>(mean of PSC cost estimates)</i>	“PSC worst case” <i>(95% probability that PSC cost would be lower than this)</i>	
Estimated net present value of the financial cost of the project (over 30 years) to DET	\$134.3 m	\$141.8 m	\$152.6 m	\$131.4 m
Estimated saving achieved through private sector delivery	2.2%	7.3%	13.9%	

handed over to the Government or a substitute operator, along with the school facilities, on 31 December 2032.

1.2 Processes for selecting the private sector parties

1.2.1 Shortlisting of proponents

In March 2001 the Department of Education and Training (DET) decided to assess the feasibility of using “Privately Financed Project” (PFP) approaches to procure the financing, design, construction, maintenance and repair of nine new schools, including eight of the schools now to be developed under the contracts summarised in this report.

Following Government approval on 30 August 2001, DET advertised for *Registrations of Interest* from private sector parties on 13 and 17 October 2001, seeking information on their design, construction, facilities management, project finance and financial capabilities and broad proposals for project organisation and management, service delivery and innovation. Eleven *Registrations of Interest* were received by the closing date of 2 November 2001.

These *Registrations of Interest* were evaluated by a Project Evaluation Committee and specialist advisory committees, comprising staff from DET, NSW Treasury, NSW Treasury Corporation and the Department of Public Works and Services, with the assistance of PricewaterhouseCoopers (financial advice) and Page Kirkland Partnership and Milliken Berson Madden (technical advice).

The Project Evaluation Committee’s activities were overseen by a Project Steering Committee, comprising Mr John Burkhardt, DET’s General Manager of Properties, Mr Ken Dixon, DET’s General Manager of Finance, Mr Mark Ronsisvalle, NSW Treasury’s Executive Director, Mr Danny Graham, NSW Treasury’s Principal Adviser, Infrastructure, and Mr Ted Smithies, the Department of Public Works and Services’

Group General Manager, Strategic Procurement, and a Probity Auditor, Mr Rory O’Connor from Deloitte Touche Tohmatsu.

The *Registrations of Interest* were evaluated in terms of the applicants’

- Structure and allocations of responsibilities and risks
- Appreciation of key issues likely to affect the project and strategies to provide certainty of project delivery in accordance with the DET’s objectives
- Appreciation of the management requirements of the project and demonstrated management experience and expertise relevant to the delivery, ownership, operation and maintenance of the schools
- Appreciation of the design and construction requirements of the project and demonstrated experience, expertise, capacity and strategies to procure and manage the design and construction of the schools
- Appreciation of the operation, maintenance and handover requirements of the project and demonstrated experience, expertise, capacity and strategies to procure and manage these services
- Appreciation of the financial requirements of the project and demonstrated experience, expertise and strategies to provide certainty that these requirements would be met
- Financial capacity, and
- Preservation of effective competition and probity between and within the applicants.

Four of the registrants were shortlisted to submit detailed proposals for the project:

- The **Axiom Education** consortium (ABN Amro, Hansen Yuncken, St Hilliers and Honeywell, with Honeywell being replaced by Spotless before detailed proposals were submitted)

- The **Community Education Partnership** consortium (Bilfinger Berger, Baulderstone Hornibrook and Tempo Facility Services)
- **Living Schools** Ltd (John Holland, Jarvis and SG Australia), and
- The **Schools First** consortium (Thiess and Tempo Facility Services).

1.2.2 Selection of the preferred proponent

On 19 March 2002 DET issued a *Request for Detailed Proposals* to the four shortlisted registrants.

These proposals, received by DET on 21 May 2002, were evaluated by the Project Evaluation Committee and its advisory committees, now also assisted by Blake Dawson Waldron (legal advice) and again under the oversight of the Project Steering Committee and the Probity Auditor, in terms of the proponents' demonstrated capacities to meet:

- DET's educational objectives (15% weighting)
- The project's financial requirements, including the "value for money" of the proponents' prices and the proponents' financial strength (30%)
- The project's legal requirements, including compliance with the terms of a draft Concession Deed included with the *Request for Detailed Proposals* (15%)
- The project's technical requirements, including the deliverability of the proponents' technical proposals, design excellence, attention to quality and safety issues and compliance with all relevant policies, codes and standards (15%), and
- The project's facilities management requirements (25%).

None of the proposals submitted in response to the *Request for Detailed Proposals* was assessed as fully satisfying all the NSW Government requirements as spelt out in the *Request for Detailed Proposals*.

The proposals submitted by the Axiom Education consortium and the Community Education Partnership were assessed, however, as having the potential to offer value for money in comparison with the most efficient possible form of delivery using public sector funding.

Accordingly, in line with arrangements set out in the *Request for Detailed Proposals*, these two proponents were

requested, on 29 August 2002, to submit fully documented *Best and Final Offers*.

Each of these proponents was provided with a summary of issues requiring clarification, to assist them in improving their proposals, and was advised of processes under which they could submit draft revised proposals, for feedback on any remaining deficiencies, prior to the submission of their *Best and Final Offer*.

They were also asked to indicate their willingness to accept and execute revised drafts of the principal project contracts with the NSW Government—the Concession Deed, the Lenders Tripartite Agreement, the Construction Tripartite Agreement and the Operators Tripartite Agreement, as described later in this report—within seven days of being asked to do so by DET, should they be selected as the preferred proponent.

The two *Best and Final Offers* were received by DET on 5 November 2002. They were assessed by the committees described above against the same criteria, with the same weightings, as those applied in assessing the earlier responses to the *Request for Detailed Proposals*.

On 3 December 2002 the NSW Treasurer, Mr Michael Egan, announced the selection of Axiom Education as the preferred proponent.

All but one of the project contracts to which the Minister for Education and Training is a party were executed on 12 and 13 December 2002 and 7 March 2003, and took effect on 7 March 2003. The other, a contract appointing an independent certifier for the construction of the schools, was executed on 2 April 2003.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the "New Schools" privately financed project and explains the inter-relationships of the various agreements between the public and private sector parties.

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

2 Overview of the project's contracts

2.1 The participants in the project

The only public sector party to the “New Schools” project contracts is the **Minister for Education and Training**, representing the State of New South Wales (“the State”).

The private sector parties which have contracted with the Minister (*Figure 1*) are:

- **Axiom Education Pty Limited** (ACN 098 207 802) (“the **Contractor**”), which is wholly owned by Axiom Education Holdings Pty Limited (ACN 103 101 999), which in turn is ultimately wholly owned by ABN AMRO Bank NV (ABN 84 079 478 612), a public company listed on several stock exchanges, including the Amsterdam, London and New York stock exchanges
- **Hansen Yuncken Pty Limited** (ABN 38 063 384 056) (one of the project’s two “**Construction Contractors**”), which is privately owned
- **St Hilliers Contracting Pty Limited** (ACN 082 594 563) (the other “**Construction Contractor**”), which is wholly owned by St Hilliers Pty Limited (ABN 78 003 819 681), which in turn is owned by St Hilliers Holdings Pty Limited (ABN 71 069 565 331) (56%), St Hilliers Employees Share Plan Pty Limited (ABN 54 064 561 495) (25%) and A M Casey (19%)
- **St Hilliers Holdings Pty Limited** (ABN 71 069 565 331), which has provided parent company guarantees of St Hilliers’ Contracting’s performance of its design and construction obligations to the Contractor (the “**Construction Contractor Guarantor**”)
- **Colin Ging & Partners Pty Limited** (ABN 56 003 457 949) (“the **Independent Certifier**”), which will carry out specified certification, inspection and enforcement obligations during the construction and commissioning of the schools
- **Spotless Services Australia Limited** (ABN 19 005 309 320) (“the **Operator**”), an unlisted public company which is wholly owned by Spotless Services Limited (ACN 004 3911 502), which in turn is wholly owned by Spotless Group Limited (ABN 77 004 376 514), a public company listed on the Australian Stock Exchange

- **Spotless Group Limited** (ABN 77 004 376 514), which has provided parent company guarantees of the Operator’s performance of its operation, management, cleaning, maintenance and repair obligations to the Contractor (“the **Operator Guarantor**”), and
- **ABN AMRO Australia Limited** (ABN 78 000 862 797) (“the **Bond Manager**”) and **ABNED Nominees Pty Limited** (ACN 094 599 989) (“the **Security Trustee**”), as the manager and security trustee for the project’s senior debt underwriter, ABN AMRO Bank NV (ABN 84 079 478 612, trading as ABN AMRO Bank NV Australian Branch).

2.2 Contractual structure

The contractual structure of the project—inasmuch as the contracts affect or potentially affect public sector rights or obligations—is summarised in *Figure 1*.

The core contract is the NSW New Schools Project Concession Deed (“the **Concession Deed**”), dated 12 December 2002, between the Minister and the Contractor.

This agreement sets out the terms under which:

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

The Contractor will satisfy these obligations to the Minister through:

- The performance by the Construction Contractors of their obligations to the Contractor under two **NSW New Schools Project Construction Contracts**, one between the Contractor and Hansen Yuncken Pty Limited, the other between the Contractor and St Hilliers Contracting Pty Limited and both dated 13 December 2003 (“the **Construction Contracts**”), and
- The provision of debt finance to the Contractor through bonds underwritten by ABN AMRO Bank NV, Australian Branch, under private sector debt financing arrangements whose details are beyond the scope of this report.

The performance of St Hilliers Contracting Pty Limited under its Construction Contract has been guaranteed to the Contractor by St Hilliers’ parent

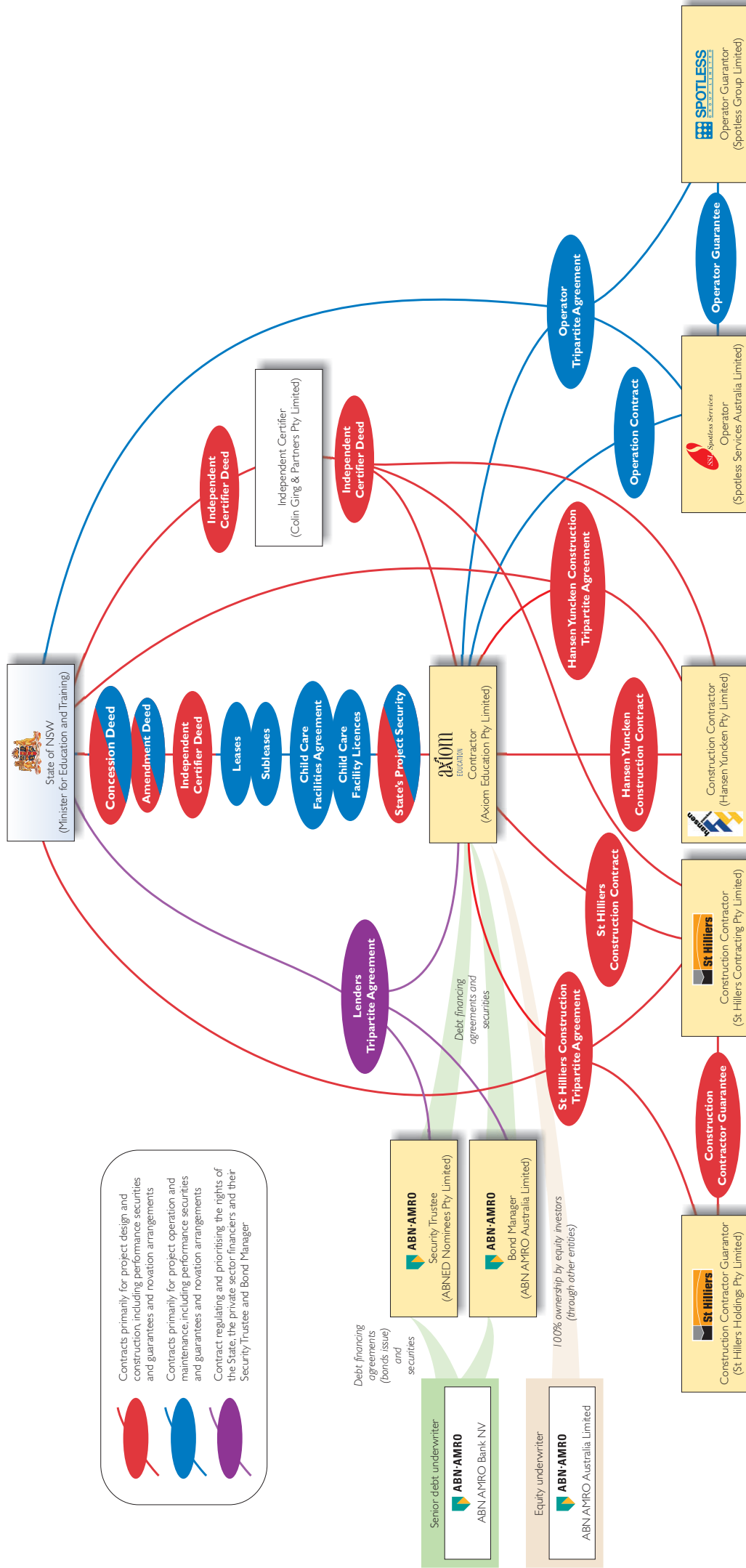


Figure 1. Overview of the structure of the 'New Schools' Privately Financed Project contracts from a public sector perspective.

company, the Construction Contractor Guarantor, under a **Parent Company Guarantee** dated 13 December 2002 (“the **Construction Contractor Guarantee**”).

The Independent Certifier, appointed under the **NSW New Schools Project Independent Certifier Deed** of 2 April 2003 between the Minister, the Contractor, the Construction Contractors and the Independent Certifier (“the **Independent Certifier Deed**”), will carry out specified certification, inspection and enforcement functions during the construction and commissioning of the school facilities under both the Concession Deed and the Construction Contracts.

- (b) The Contractor must **hold, operate, clean, maintain and repair** the school facilities from the completion and opening of each school until 31 December 2032 or until any earlier termination of the Concession Deed under arrangements described later in this report.

The Contractor will satisfy these obligations to the Minister through the performance by the Operator of its obligations to the Contractor under the **NSW New Schools Project Operation Contract** between the Contractor and the Operator (“the **Operation Contract**”), dated 13 December 2002.

The Operator’s performance of these obligations has been guaranteed to the Contractor by the Operator’s parent company, the Operator Guarantor, under a **Parent Company Guarantee** dated 13 December 2002 (“the **Operator Guarantee**”).

- (c) The State of NSW must pay the Contractor performance-based fees for providing the school facilities and associated services, with deductions if the Contractor does not satisfy specified standards.
- (d) The Minister must lease each school site to the Contractor from the completion and opening of each school until 1 January 2033 or until one day after any earlier termination of the Concession Deed, under a series of nine **Leases**, and the Contractor must lease each of these sites back to the State of NSW, under a series of nine **Subleases**, until 31 December 2032.
- (e) The Minister must grant the Contractor or an approved nominee of the Contractor **Child Care Facility Licences**, on terms indicatively set out in the **New Schools Project Child Care Facilities Agreement** of 7 March 2003 between the Minister and the Contractor (“the **Child Care Facilities Agreement**”) and *Child Care Facilities Licence Principles* set out in a

schedule to that agreement, to permit the construction, management and operation of child care centres on at least eight of the school sites (quite separately from the provision of school services under (b)).*

- (f) On 31 December 2032, or upon any earlier termination of the Concession Deed, the Contractor must hand over the school facilities to the State or to others as directed by the State.

Minor amendments to the Concession Deed were made on 7 March 2003 in a **NSW Schools Project Amendment Deed** between the Minister and the Contractor (“the **Amendment Deed**”).

Should the Contractor default on its obligations under the Concession Deed or either of the Construction Contracts during the project’s design and construction phase, under the **NSW New Schools Project Construction Tripartite Agreement** of 13 December 2002 between the Minister, the Contractor and Hansen Yuncken Pty Limited and the **NSW New Schools Project Construction Tripartite Agreement** of 13 December 2002 between the Minister, the Minister, St Hilliers Contracting Pty Limited and the Construction Contractor Guarantor (“the **Construction Tripartite Agreements**”) the State will be able to “step in” or place a new contractor into the shoes of the Contractor under the Construction Contracts, so that design and construction work can continue.

Similarly, should the Contractor default on its obligations under the Concession Deed or the Operation Contract during the project’s operational phase, under the **NSW New Schools Project Operator Tripartite Agreement** of 13 December 2002 between the Minister, the Contractor, the Operator and the Operator Guarantor (“the **Operator Tripartite Agreement**”) the State will be able to “step in” or place a new contractor into the shoes of the Contractor under the Operation Contract, so that the operation, cleaning, maintenance and repair of the schools can continue.

Some of the rights and obligations of the Minister and the Contractor under the Concession Deed, the Construction Tripartite Agreements and the Operator Tripartite Agreement are subject to restrictions or additional process requirements under the **NSW New Schools Project Lenders Tripartite Agreement** of 7 March 2003, between the Minister, the Contractor, the Bond Manager and the Security Trustee (“the **Lenders Tripartite Agreement**”). In particular, this agreement requires the State to notify the Bond Manager and the Security Trustee before it terminates the Concession Deed and give them an opportunity to cure the Contractor’s defaults. It also sets limits on the Security Trustee’s enforce-

* These licences will be granted under a future **Child Care Centre Agreement** between the Minister and the Contractor or a child care operator nominated by the Contractor. The **Child Care Facilities Agreement** of 7 March 2003 should not be confused with this future **Child Care Centre Agreement**.

ment of the debt financier's securities, and in particular its power to transfer the Contractor's rights and obligations under the Concession Deed.

Under the **NSW New Schools Project Fixed and Floating Charge**, an agreement executed by the Minister and the Contractor on 12 December 2002 ("the **State's Project Security**"), the obligations of the Contractor to the Minister under the Concession Deed, site access licences granted under that deed, the Independent Certifier's Deed, the Leases, the Subleases, the Construction Tripartite Agreements, the Operator Tripartite Agreement and the Lenders Tripartite Agreement are secured by a fixed and floating charge over the Contractor's assets, undertakings and rights.

Priorities between this State security and securities held by the project's private sector debt financier(s) are governed by the **Lenders Tripartite Agreement**, which also:

- Records the Minister's consent to the private sector securities
- Records the consents of the Minister and the Security Trustee to each other's "step in" rights under the project contracts, and
- Regulates the exercising of these "step in" rights.

2.3 Conditions precedent

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

- The NSW Treasurer had consented to the contracts under section 20 of the Public Authorities (Financial Arrangements) Act. This condition precedent was satisfied on 27 February 2002.
- A specified series of formalities associated with the execution of the project's contracts, the authorisation of representatives of the Contractor, the registration of the State's Project Security, the payment of stamp duty and the

provision of evidence about the Contractor's corporate structure, ownership and subordinated debt arrangement had been completed. These conditions precedent were satisfied on or before 7 March 2003.

- An audited copy of the private sector participants' "base case financial model" for the project had been supplied to DET. This condition precedent was satisfied on 7 March 2003.
- DET had received binding rulings from the Australian Taxation Office on the tax aspects of the project. This condition precedent was satisfied on 7 March 2003.
- The Contractor had given DET a list of at least three potential Independent Certifiers. This condition precedent was satisfied on 6 February 2003.
- If necessary, DET had received a certified copy of an unconditional approval by the Commonwealth Treasurer stating that there is no objection under the Foreign Acquisitions and Takeovers Act (Cth) to the foreign ownership of the Contractor or its interests in the project. This condition precedent was satisfied on 21 January 2003.
- DET received evidence that the project's private sector debt financing arrangements had become unconditionally binding, or would do so as soon as the Concession Deed had become unconditionally binding. This condition precedent was satisfied on 7 March 2003.
- The State and the Contractor had agreed on the principles and/or form of the Child Case Facility Licence(s). This condition precedent was satisfied when the State and the Contractor agreed on the *Child Care Facilities Licence Principles*, as part of the Child Care Facilities Agreement, on 7 March 2003.

Accordingly, all the contracts to which the Minister is a party, apart from the Independent Certifier Deed executed on 2 April 2003, became binding on 7 March 2003.*

* The Concession Deed originally included another condition precedent, under which the Contractor had to take out specified insurance policies before the Concession Deed and the other project contracts would take effect. The Amendment Deed of 7 March 2003 changed these requirements by setting later dates by which the insurance policies must be effected and specifying action the State may take if these requirements are not met (see section 3.4.2).

3 The Concession Deed and associated certification, lease and novation arrangements

3.1 General obligations on and acceptance of risks by the Contractor

The main obligations on the Contractor under the Concession Deed are to:

- Design, construct and commission specified “school facilities”, at its own cost,
 - By dates specified in schedules to the Concession Deed and, in greater detail, in works programs to be developed by the Contractor, and
 - In accordance with detailed requirements specified by DET and annexed to the Concession Deed.

These “school facilities” are the nine schools listed in section 1.1 of this report and their associated facilities. They include all the schools’ buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, playgrounds, paths and gardens, except for:

- Items—other than demountable classrooms*—which the DET requirements stipulate will be provided by the State, and
- Any child care facilities constructed by the Contractor on the school sites.
- Provide operational, cleaning, security, safety, utility, maintenance and repair services, as detailed in the DET requirements annexed to the Concession Deed, for each “school facility” from the date on which DET formally accepts that it has been completed and commissioned as required by the Concession Deed, or a “target availability” date if this is later, until 31 December 2032.
- Hand the “school facilities” over to the State, or a new contractor nominated by the State, on 31 December 2032 or any earlier termination of the Concession Deed.

The State and the Contractor have undertaken to perform their obligations under the Concession Deed with these “project objectives” in mind, and to cooperate with each

other, in good faith, to facilitate the performance of all the project’s contracts.

The Contractor has expressly acknowledged in the Concession Deed that:

- The Contractor is solely responsible for its proposals on how to carry out these obligations, as annexed to the Concession Deed, and the State has not accepted that implementation of these proposals will necessarily satisfy DET’s requirements or other obligations on the Contractor under the Concession Deed
- The State will not be liable for any inaccuracy, omission or incompleteness in the information provided by it to the Contractor prior to the execution of the Concession Deed
- The Contractor has independently reviewed and evaluated the suitability and accuracy of information about the project, including the condition of the school sites, without any reliance on the Minister for Education and Training, DET or any of its agents, contractors or employees
- The State will have no liability for any loss or damage suffered by the Contractor as a result of incorrect or inaccurate assumptions by anyone concerning:
 - Taxation requirements
 - The availability of taxation rulings, or
 - Project revenues or project costs,*unless* this inaccuracy is caused by a “compensation event”, such as a serious breach of the Concession Deed by the State which makes it impossible for the Contractor to perform its obligations, as discussed in section 3.4.10 below, and
- To the extent permitted by applicable laws, the State, the Minister for Education and Training, DET and their delegates, employees, contractors and agents will have no liabilities to the Contractor or its subcontractors con-

* Special arrangements concerning the supply of demountable classrooms are described in section 3.3.9 below.

cerning contamination, pollution or waste disposal on or from the school sites, whatever the cause.

The Contractor must indemnify the State and its employees, agents and contractors, on demand, from and against any liability for death, injury, property damage, claims, losses, damages or expenses arising from the design, construction, operation or maintenance of the schools, the Contractor's performance (or otherwise) of its obligations under the project contracts or the Contractor's possession of or access to the school site or facilities, except for:

- Any injury, loss, damage, cost or expenses caused by
 - Negligent or unlawful acts or omissions or wilful misconduct by the State or its agents or employees, by teachers in the course of their employment, by students or visitors during school days or during periods of community use or by community users during these periods
 - Any breach by the State of its obligations under the Concession Deed, or
 - Any act or omission by the Contractor complying with an express direction by the State or DET's project director* in accordance with the Concession Deed
- Any loss or damage to the completed "school facilities" of \$300 or more caused by "specified perils" listed in the Concession Deed—including fire, theft, burglary, storms, hail and floods but not including electrical, electronic or mechanical breakdowns—apart from any loss or damage caused by negligent or unlawful acts or omissions or wilful misconduct by the Contractor or its employees, agents, contractors or a related body corporate (the \$300 threshold does not apply to damage to glazing), and
- Any claim above \$50 million (indexed to the CPI) or any other amount agreed between the State and the Contractor in writing.

3.2 Design and construction

3.2.1 Detailed design and intellectual property

The Contractor must develop and complete detailed design documentation for each of the nine "school facilities" by dates specified in a schedule to the Concession Deed.

The documentation required for development consent submissions had to be prepared by 23 January 2003, and all design documentation must be completed by 30 May 2003 for all the schools except Glenwood and Horningsea Park secondary schools, for which the deadline is 30 June 2003. Other deadlines are set for accommodation, furniture and

equipment, colour, commissioning and consent/approval schedules and the submission of "as constructed" drawings.

The Contractor's detailed designs must be developed with an "appropriate level of professional care", must comply with the Contractor's proposals for the project, as annexed to the Concession Deed, and must ensure the "school facilities" and the services to be provided by the Contractor will meet DET's requirements, also as annexed to the Concession Deed, and all applicable project approval and other legal requirements.

They must also ensure each "school facility" will be able to facilitate possible future expansion of the facility on the school site, under the arrangements described in sections 3.3.9 or 3.4.8 below.

The Contractor must provide DET's project director with hard copies and electronic copies of all design data and the detailed designs, so that DET may monitor the progress of the designs, but any DET reviews of the designs will not affect the Contractor's design obligations.

The Contractor has warranted that it owns or is entitled to use the project's design documentation and any other materials it will use for the project which is subject to any intellectual property or moral rights. It has granted the State an irrevocable, royalty-free, non-exclusive licence to use these materials for the purposes of the project or for any other project involving the "school facilities", and must indemnify the State and any sub-licensees against any intellectual property or moral rights liabilities arising out of these arrangements.

3.2.2 Planning and other project approvals

The Contractor must, at its own cost, apply for and obtain all the planning approvals required for the project under the Environmental Planning and Assessment Act, plus all other approvals and licences required for the project, including environmental protection licences and approvals under the Roads Act and the Water Management Act.

"Target dates" for the obtaining of each school's planning approval are set out in a schedule to the Project Deed. These targets are 28 March 2003 for Rosebery Road primary school and Poole Road School for Specific Purposes, 11 April 2003 for Horsley, Mungerie Park and Perfection Avenue primary schools, 30 June 2003 for Glenwood and Horningsea Park secondary schools and 30 December 2003 for Shell Cove and Mataram Road primary schools.

Copies of each school's development application must be provided to DET's project director, in a form and substance satisfactory to him or her, by no later than three months after

* DET's project director may delegate his or her powers, duties and discretions under the Concession Deed. References in this report to the project director should therefore be understood as references both to him or her and to any such delegates whose appointment has been notified to the Contractor.

these target dates. Copies of all approvals obtained for the project must also be provided to DET's project director.

The Contractor must comply with the requirements of all the project's approvals and licences.

If the Contractor does not obtain planning approval for a school by the date three months after its "target date" for this approval, or by a later date set by DET's project director in his or her absolute discretion, the Concession Deed and the other project contracts will terminate automatically from this date *unless*:

- The delay has not been caused, directly or indirectly, by any negligence, wilful misconduct or default by the Contractor, the Construction Contractors, the Operator or any other subcontractor of the Contractor, and
- The Contractor has applied for and been granted a reasonable extension of time under "relief event" provisions described in section 3.4.11 below.

If the Concession Deed and the other project contracts are terminated in this way,

- The Contractor must make all its development, design and construction work up to the termination date available to the State
- The Contractor may give DET's project director an itemised invoice for all its development, design and construction costs, up to the termination date, within one month of this date, and
- If it does so, the State must pay the invoice within one month of receiving it.

3.2.3 Site access, conditions and security

The State has been obliged since 7 March 2003 to give the Contractor, the Construction Contractors, the Operator, any other subcontractors of the Contractor and any of their agents or employees access to all of the school sites, as licensees, so that the Contractor can perform its obligations under the Concession Deed.

This access is subject to restrictions set out in a schedule to the Concession Deed.

The Contractor has accepted the sites "as is" and bears all the risks associated with ground conditions, including any land contamination.

During construction the Contractor is fully responsible for the security of the sites and must indemnify the State from and against any loss or claim arising from any breach of site security.

3.2.4 General construction obligations

The Contractor must use all reasonable endeavours to construct and commission each of the nine school facilities by a "target availability date" for each school, as specified in a schedule to the Concession Agreement or as extended under

arrangements described in sections 3.4.8, 3.4.10 and 3.4.11 below.

These "target availability dates" are currently 3 March 2004 for Rosebery Road primary school and Poole Road School for Specific Purposes, 14 March 2004 for Horsley, Mungerie Park and Perfection Avenue primary schools and 3 January 2005 for Glenwood and Horningsea Park secondary schools and Shell Cove and Mataram Road primary schools.

In carrying out its construction works the Contractor must:

- Use good workmanship and good quality, new and undamaged materials
- Comply with the project's approvals and licences—including construction certificates under the Environmental Planning and Assessment Act, which are express prerequisite for any construction by the Construction Contractors—and the Building Code
- Comply with DET's requirements, as annexed to the Concession Deed, and the Contractor's detailed designs
- Comply with a detailed *Works Program* for each school, to be developed by the Contractor and supplied to DET's project director at least two weeks before any construction work commences on the relevant site
- Use all reasonable endeavours to achieve "milestones" specified in each *Works Program* by dates specified in these programs or by later dates set under the arrangements described in sections 3.4.8, 3.4.10 and 3.4.11, and
- Comply with a series of *Management Plans* for each site, to be developed by the Contractor and supplied to DET's project director at least two weeks before any construction work commences on the relevant site.

The *Management Plans* required for each school site are an *Occupational Health and Safety Plan*, an *Environmental Management Plan*, a *Project Quality Plan*, a *Construction Management Plan* and a *Project Cost Plan*. All of them must satisfy criteria set out in the Concession Deed and a schedule to that deed.

The State must ensure that items which the DET requirements stipulate will be provided by the State are provided to the Contractor in a timely manner, so as not to disrupt or delay the works.

The Contractor has been appointed by the Minister for Education and Training as the "principal contractor" for the works under section 210 of the Occupational Health and Safety Regulation, with the power to exercise the Minister's authority as necessary to discharge its OH&S responsibilities.

DET's project director and his or her representatives may enter any school site and inspect the Contractor's works at

any reasonable time and upon reasonable notice. In doing so they must not cause unnecessary inconvenience and must comply with reasonable safety and security requirements by the Contractor and the relevant Construction Contractor.

DET's project director and his or her representatives may also attend site meetings at least once per month. The Concession Deed sets out procedures for the notification and minuting of these meetings.

At least once every four weeks, the Contractor must give DET's project director reports on the progress of the works at each school, quality assurance (as set out in each school's *Project Quality Plan*) and any works by other authorities to extend, adjust or relocate utilities for the school facilities.

At least every three months the Contractor must have its compliance with the quality standards in its *Project Quality Plans* independently audited by an auditor acceptable to DET's project director. The project director or his or her representative may be present during these audits and must be given copies of the audit reports.

3.2.5 Environmental obligations

In addition to providing the environmental release described in section 3.1 and accepting the risks the school sites might be contaminated as described in section 3.2.3, the Contractor has undertaken, both during construction and subsequently during the operational phase of the project, that it will:

- Exercise all due care and skill to protect the safety of people and the environment
- Comply with all environmental laws and environmental industry standards and codes of practice
- Keep each site in a good and safe condition, not posing any health, safety or environmental risks
- Not contaminate or pollute any of the sites or bring wastes onto a site
- Notify DET's project director immediately of any incidents potentially breaching environmental laws or any complaints about site contamination or pollution, and give him or her any information it holds or controls relating to site contamination or pollution
- Carry out any necessary remedial work
- Promptly comply with any environmental notices issued by any government agency, giving DET's project director copies of the notices and all other documents relating to its compliance with these notices.

Additional environmental obligations will apply towards the end of construction, as summarised in section 3.2.7 below.

3.2.6 Subcontracting of construction works

The Contractor may enter into subcontracts for its construction works, not limited to its current Construction Contracts with the Construction Contractors, provided:

- Each subcontractor is reputable and has (or has access to) sufficient experience and expertise to meet the standards required of the Contractor under the Concession Deed
- Any subcontracts for \$50,000 or more include:
 - Undertakings by the subcontractor to rectify defects, omissions and defaults at its own cost and provide to the Contractor any guarantees, warranties and maintenance and operating manuals it requires
 - Intellectual property and moral rights provisions consistent with the Contractor's obligations to the State on these matters, and
 - Provisions for the benefit of the subcontract to be assigned to the State, at the option of DET's project director, if the Concession Deed is terminated, and
- Each subcontractor (and any of its own subcontractors) gives DET's project director a collateral warranty, substantially in a form set out in a schedule to the Concession Deed, under which it:
 - Makes a series of promises to the State concerning the skills and care it will exercise, the quality of the goods and materials it will use, its insurance cover and its willingness to provide performance guarantees and information to the State, and
 - Undertakes to perform the subcontract for the State, or its nominee, if the State "steps in" under arrangements described in section 3.5.2 below.

The Contractor must give DET's project director a copy of each subcontract or proposed subcontract for \$50,000 or more, either by itself or in combination with other subcontracts with the same subcontractor or a related body corporate, and must notify the project director whenever any such subcontract is materially amended or terminated. Any amendment, termination or assignment of the Construction Contract(s) will not affect any of the State's rights against the Contractor or the Construction Contractors unless it has been approved by DET's project director (see also sections 3.4.3 and 3.4.4).

The Contractor has promised the State that it will:

- Enforce and comply with its existing Construction Contracts with the Construction Contractors, and not waive any claim against either Construction Contractor, in a way that might have a material adverse effect on the

State's interests, without the prior written consent of DET's project director, and

- Comply with its obligations under any other subcontract, and use its best endeavours to ensure the subcontractor(s) do likewise.

The Contractor must give DET's project director monthly certificates stating that it has paid its subcontractors all amounts owing and not genuinely in dispute and listing any formal disputes with its subcontractors.

3.2.7 Completion and commissioning

The Concession Deed sets out procedures for advance notifications of the completion of each of the schools, inspections by the Contractor with the Independent Certifier and DET's project director, responses by the Contractor to any representations by the Independent Certifier or the project director and the rectification of any defects identified (other than minor defects or omissions not having a material adverse effect on DET's ability to use the schools) prior to the issuing of a formal notice of completion.

Before a notice of completion may be issued the Contractor must also:

- Undertake a final assessment of contamination of the school's site, to confirm it presents no risks of harm and is suitable for use as a school
- Undertake any remediation work identified as necessary in this contamination assessment, and
- Obtain a final site audit report, from a site auditor accredited under the Contaminated Land Management Act and jointly appointed by DET and the Contractor, confirming that the site presents no risks of harm and is suitable for use as a school without any material qualifications restricting the use of the site or requiring further monitoring or investigations.

The contamination assessment and audit report must be given to DET's project director on or before the day the notice of completion is issued.

Within 20 business days of the notice of completion for a school the Contractor must:

- Correct the remaining minor defects at the school to the satisfaction of the Independent Certifier
- Carry out any installation, commissioning, testing or running in of plant, machinery or facilities required to meet DET's requirements for the school, in accordance with a commissioning plan forming part of its *Works Program*
- Consult with the Independent Certifier on the progress of these commissioning works, providing all necessary information, test results, etc to allow the Independent Certifier to certify the completion of commissioning, and

- With DET's assistance, verify that all items supplied by DET have been commissioned and tested.

DET's project director must issue a formal "acceptance certificate" within two business days of receiving certification from the Independent Certifier that the school facility has been completed and commissioned as required by the Concession Deed.

The Contractor must give DET's project director a complete set of "as constructed" drawings of the school facility within 60 days of this acceptance, or within 60 days of the school's "target availability date" if this is later (see section 3.2.4). Within 180 days of the acceptance, or within 180 days of the relevant "target availability date" if this is later, it must also give the project director a detailed survey of the school facility, by a surveyor nominated by DET and in accordance with DET's surveying requirements, which certifies the completed works are located in accordance with the contractor's detailed designs.

3.3 Operation, cleaning, maintenance and repair

3.3.1 The Contractor's general operational phase obligations

The Operator must provide operational, cleaning, security, safety, utility, maintenance and repair services for each of the nine "school facilities" from the school's "commencement date" until 31 December 2032.

For each school this "commencement date" is the *later* of:

- The date on which DET's project director issues the school's "acceptance certificate", after receiving advice that the school facility has been completed and commissioned as required by the Concession Deed (see section 3.2.7), and
- The school's "target availability date" (see section 3.2.4).

In providing its operational, cleaning, security, safety, utility, maintenance and repair services the Contractor must:

- Comply with DET's operational phase requirements, as annexed to the Concession Deed, including facility availability and performance requirements and minimum maintenance and performance standards
- Apply the skills, care, prudence, foresight and operating practices reasonably and ordinarily expected of a skilled and experienced operator in carrying out the same tasks in similar circumstances, and do this in "an appropriate, effective, efficient, dependable and cooperative manner"
- Maintain and comply with the project's approvals and licences (see section 3.2.2), including any additional approvals which must be obtained by the Contractor in order to operate each school facility

- Allocate competent and appropriate staff to ensure it will meet its operational phase obligations
- Comply with the Contractor's proposals for the operational phase of the project, as annexed to the Concession Deed, its detailed designs (see section 3.2.1), its *Works Program* for each school (see section 3.2.4) and its construction-phase *Management Plans*, including the quality standards set out in its *Project Quality Plan* (see section 3.2.4)
- Comply with the environmental obligations described in section 3.2.5, and
- Comply with a series of *Operation Manuals* to be developed by the Contractor for each school facility, the first versions of which must be provided to DET's project director one month before the school's "commencement date".

The *Operation Manuals* required for each school site are an *Asset Management Plan*, an *Operation Plan*, a *Maintenance Program*, an *Environmental Management Plan*, requirements for an *Operation, Maintenance and Repair Register* and a plan for a survey of asset conditions which must be conducted during 2029 (see section 3.3.12).

All of them must satisfy criteria set out in the Concession Deed and/or a schedule to that deed.

The manuals must, for example, cover monitoring, auditing and reporting procedures, quality standards, benchmarking data, staff vetting procedures, training plans, "help desks" and information management, document management, complaints and corrective action procedures, security provisions, security incident reporting systems, pest control, waste management, fire and emergency management, disaster plans, business continuity plans, staffing structures and responsibilities, costed life cycle and maintenance and replacement plans, costed maintenance programs, energy management, insurance provisions and procedures and "as built" and "as installed" drawings.

All the *Operation Manuals* must be amended and updated at least once each year, within two weeks of each anniversary of each school's "commencement date" and also whenever necessary at other times or whenever directed by DET's project director (see below), to take account of changes in law (see section 3.4.7), changes in the way the relevant school facility is being used, changes in the way educational services are being provided at the school, deficiencies in the *Operation Manuals* and changes in good industry practice.

Copies of the *Operation Manuals* must be provided by the Contractor to DET's project director within five days of any amendments. In turn, the project director must ensure complete copies are provided to the relevant school principals

and relevant excerpts are provided to teachers, other DET employees, agents and contractors, students and community organisations if this would assist the Contractor's performance of its obligations under the Concession Deed.

The Contractor must comply with any reasonable instructions it receives concerning any of the *Operation Manuals* from the school principals or DET's project director.

DET's project director may direct the Contractor to further develop, update or otherwise amend any of its *Operation Manuals* if he or she reasonably believes a manual no longer meets the requirements of the Concession Deed, is disrupting or might disrupt a school's educational services or has not been updated as required. If the project director issues such a direction, he or she must provide reasons and give the Contractor a reasonable time to comply.

The Contractor must promptly notify DET's project director, in writing, of any defects or damage at any school facility that will cost more than \$5,000 to repair, providing information on the corrective action the Contractor proposes to take and the estimated time required.

The project director, acting reasonably, may direct the Contractor to correct any material damage to or defect or disrepair in any school facility, and the Contractor must comply with any such direction within a reasonable time, giving the project director a written report on the steps it is taking to do so.

If requested by the Minister for Education and Training, the Contractor must give the Minister, each month, copies of its site-specific occupational health and safety management plans, its subcontractors' safe work method statements and all the other registers, records and documents which the Contractor must maintain as part of its obligations as a "principal contractor" under the Occupational Health and Safety Regulation.

Any operational phase changes to the services provided by the Contractor or the school facilities themselves must be addressed through a formal "change procedure" set out in the Concession Deed and summarised in section 3.4.8 below.

The only changes not subject to this formal "change procedure" are minor changes which are in accordance with the Contractor's *Operation Manuals* and/or directed by DET's project director, which will not entitle the Contractor to any relief from its other Concession Deed obligations, and whose estimated cost effects, calculated in accordance with a schedule to the Concession Deed, are no more than \$3,000 (indexed to the CPI). In these cases the Contractor will be entitled to be paid the actual costs it incurs, as detailed in a monthly report it must submit to the project director.

3.3.2 Uses of the school facilities

The Minister for Education and Training and the Contractor have expressly acknowledged the need to integrate the Contractor's services with DET's provision of educational services at the schools and community uses of the school facilities. They have agreed to consult from time to time on the best method of achieving this integration, and the resultant integration requirements must be implemented through the Contractor's *Operation Manuals*.

The school facilities for which the Contractor must provide operational services must be made available for:

- "School uses"—by the State, teachers, other DET employees and agents and students—as the first priority
- "Community uses"—by community groups—as the second priority, and
- Other ("third party") uses by users making arrangements with the Contractor, as a third priority.

Each school must be available for "school uses", 24 hours per day and seven days per week, both on regular school days and at any other times notified to the Contractor from time to time by DET or the school principal, who must take account of the requirements of the Contractor's relevant *Operation Manuals*.

DET's project director must notify the Contractor by November each year of the school term dates for the following year and, in particular, critical areas and periods for the uninterrupted delivery of the Contractor's services, such as halls during examination periods. These "critical periods" may not exceed 40 days per year. The Contractor must ensure these requirements are taken into account in its *Operation Manuals*.

Each school must also be available for "community uses", 24 hours per day and seven days per week, at any times notified to the Contractor from time to time by DET or the school principal, who again must take account of the requirements of the Contractor's relevant *Operation Manuals*.

DET's project director or the relevant school principal must give the Contractor copies of any agreements entered into by or on behalf of the State for community uses of the schools, and the Contractor must take these community use requirements into account in its *Operation Manuals*. DET's project director or the school principal must also, as much as is practicable, facilitate direct agreements between the Contractor and each community group using the facilities, and notify the contractor of any suspension or termination of a community use.

The community use agreements entered into by the schools and the Contractor may provide for direct payments by the community group users or the school principal to the Contractor to cover any additional costs to the Contractor from this use of the school facilities. If they do not, the State must pay these additional costs to the Contractor as part of its

regular monthly payments described in section 3.3.7 below. Apart from this liability, the State (or the school principal on its behalf) will be entitled to retain any income received from community groups for the use of the school facilities.

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

- These uses do not involve educational services other than those provided by DET, are consistent with the school's planning approval and other approvals and licences and are not expected to impair DET's educational services or "school" or "community" uses of the school facilities
- DET's project director has granted his or her prior written consent, and
- The Contractor notifies the project director of any suspension or termination of a third party use.

The Contractor may charge fees to third party users. Its net income from third party uses, after deducting its additional costs from these uses, must be shared 50:50 with the State, under procedural arrangements detailed in the Concession Deed.

Regardless of whether any use of the school facilities has been approved in the past, DET's project director may at any time, by issuing a notice to the Contractor, prohibit the use of any school facility by any person or on any occasion if he or she reasonably believes this use is incompatible with other uses of the facility as determined by the project director.

The State and the Contractor have already agreed, in the Child Care Facilities Agreement, that the State will consent to "third party" agreements between the Contractor and the operators of child care facilities at the schools (see section 3.3.10) for the school facilities to be used—during an initial period from the start of each Child Care Facility Licence (see section 3.3.10) to the end of that calendar year—for before-school, after-school and vacation care services for school-age children, provided:

- The general "third party use" requirements just described are satisfied, and
- Each child care facility operator notifies the State in writing, by 31 October each year, of the maximum number of before-school, after-school and vacation care service places it proposes to provide at the relevant school facility and its adjacent child care facility during the following calendar year.

The State's consent to these particular "third party" uses will be automatically renewed at the end of each calendar year, for a further year, unless the State expressly withholds its consent by 30 November.

The Concession Deed's general provisions for a 50:50 sharing of the net income from "third party" uses will not apply to these arrangements for before-school, after-school

and vacation care. Instead, the Contractor must pay the State \$350 per year (indexed to the CPI) for each of the maximum number of places to be provided, both in the school facilities and in the child care facilities, as notified by 31 October each year. These payments must be made by 31 January each year.

The Contractor must ensure the child care facility operators do not provide more before-school, after-school and vacation care places than the notified maxima. If a child care facility operator notifies the Contractor that it requires additional before-school, after-school or vacation care places, the Contractor must seek the consent of DET's project director and must pay the State \$350 per year (*pro rata*, and indexed to the CPI) for each additional place agreed to by the State.

Conversely, if the State withholds its consent for a continuation of these arrangements the next calendar year, or if it terminates the arrangement by exercising its general power to prohibit a "third party" use, the State must refund the Contractor, *pro rata*, for the payments advanced for the unexpired portion of the relevant calendar year. In the case of a withholding of the State's annual consent, this will be the only compensation payable by the State.

3.3.3 Subcontracting of operational services

The Contractor may enter into subcontracts for its operational services, not limited to its current Operation Contract with the Operator, provided:

- Each subcontractor is reputable and has (or has access to) sufficient experience and expertise to meet the standards required of the Contractor under the Concession Deed
- Any subcontracts for \$50,000 or more include:
 - Undertakings by the subcontractor to rectify defects, omissions and defaults at its own cost and give the Contractor any guarantees, warranties and maintenance and operating manuals it requires
 - An undertaking by the subcontractor to provide whatever consents and information are necessary for the Contractor to ensure the subcontractor's employees comply with the requirements of the Child Protection (Prohibited Employment) Act, the Child Protection (Offenders Registration) Act, the Commission for Children and Young People Act and the Education Act and have successfully completed a "working with children" check as required by the Concession Deed (see section 3.3.5 below)
 - Intellectual property and moral rights provisions consistent with the Contractor's obligations to the State on these matters, and
 - Provisions for the benefit of the subcontract to be assigned to the State, at the option of DET's pro-

ject director, if the Concession Deed is terminated, and

- Each subcontractor (and any of its own subcontractors) gives DET's project director a collateral warranty, substantially in a form set out in a schedule to the Concession Deed, under which it:
 - Makes a series of promises to the State concerning the skills and care it will exercise, the quality of the goods and materials it will use, its insurance cover and its willingness to provide performance guarantees and information to the State, and
 - Undertakes to perform the subcontract for the State, or its nominee, if the State "steps in" under the arrangements described in section 3.5.3 below.

The Contractor must give DET's project director a copy of each subcontract or proposed subcontract for \$50,000 or more, either by itself or in combination with other subcontracts with the same subcontractor or a related body corporate, and must notify the project director whenever any such subcontract is materially amended or terminated. Any amendment, termination or assignment of the Operation Contract will not affect any of the State's rights against the Contractor or the Operator unless it has been approved by DET's project director (see also sections 3.4.3 and 3.4.4).

The Contractor has promised the State that it will:

- Enforce and comply with its existing Operation Contract with the Operator, and not waive any claim against the Operator, in a way that might have a material adverse effect on the State's interests, without the prior written consent of DET's project director, and
- Comply with its obligations under any other subcontract, and use its best endeavours to ensure the subcontractor(s) do likewise.

The Contractor must give DET's project director monthly certificates stating that it has paid its subcontractors all amounts owing and not genuinely in dispute and listing any formal disputes with its subcontractors.

3.3.4 Leases and subleases

On or before each school's "commencement date" (see section 3.3.1),

- The Minister for Education and Training must grant a lease of the relevant school site to the Contractor, in the form of a draft lease set out in a schedule to the Concession Deed, from the commencement date until 1 January 2033, any earlier termination of the Concession Deed or the day after any termination of the sublease referred to below, and
- The Contractor must grant a sublease of this site back to the Minister, in the form of a draft sublease set out in another schedule to the Concession Deed, from the

commencement date until 31 December 2032, any earlier termination of the Concession Deed or any assignment of the sublease contrary to the project's contracts (see section 3.4.3).

The rents under each of these leases and subleases will be \$1 per year. The Concession Deed sets out procedures for the preparation, completion, execution and registration of these documents.

If a lease granted to the Contractor expires or terminates while the Concession Deed is still in force, the Minister for Education and Training may, in his or her absolute discretion, grant the Contractor a licence to use the site so it can continue to perform its obligations under the Concession Deed. This access must be subject to restrictions set out in a schedule to the Concession Deed.

All chattels and non-fixtures forming part of the school facilities, other than items supplied by DET, will remain the Contractor's property, unless and until they are transferred to the State or a replacement contractor at the end of the operating period, under arrangements described in section 3.3.13 below.

3.3.5 Employees

The Contractor must ensure that any person providing its operational services at a school facility from the date on which students first attend the school, including the employees of the Operator and any other subcontractors, comply with the requirements of the Child Protection (Prohibited Employment) Act, the Child Protection (Offenders Registration) Act, the Commission for Children and Young People Act and the Education Act and have successfully completed a "working with children" check as required by the Concession Deed.

The Contractor must undertake all necessary searches and checks to ensure this compliance and has acknowledged the right of the Minister for Education and Training to do likewise, provided he or she has the Contractor's consent, which may not be unreasonably withheld or delayed. The Contractor must also procure the consent of each prospective employee to these searches etc. DET's project director has the right to carry out additional police checks to supplement the Contractor's checking of prospective employees.

The Contractor must comply with any reasonable requirements by DET concerning the conduct of its staff at the school facilities, and must ensure its employees, agents and subcontractors do likewise. It must take disciplinary action against anyone who transgresses these requirements.

The Contractor will otherwise be entirely responsible for the employment and conditions of service of its own employees, and must ensure its subcontractors are similarly responsible for their own employees.

DET's project director may refuse to admit any person employed by the Contractor or its subcontractors to any of the school sites if he or she considers their admission would be undesirable. Any decision to do this will be final and conclusive, and reasons need not be given.

Similarly, the project director may direct the Contractor to remove any employee from any of the school sites or facilities, on security or any other grounds, and need not disclose his or her reasons for doing so. Any person removed in this way may be employed again on the project or enter the school site(s) again only with the project director's written consent.

3.3.6 Performance monitoring and audits

The Contractor must monitor and report to the DET project director on its performance in delivering its operational services in accordance with detailed monitoring procedures, record-keeping requirements, notification requirements, "help desk" requirements and routine monthly reporting requirements set out in a schedule to the Concession Deed.

At least every 12 months the Contractor must have its compliance with the quality standards in its *Operation Manuals* independently audited by an auditor reasonably acceptable to DET's project director. The project director or his or her representative may be present during these audits and must be given copies of the audit reports.

In addition to the monitoring to be carried out by the Contractor, the State or State-nominated subcontractors may, at the State's expense, monitor the Contractor's performance of its services and the Contractor's own monitoring and quality assurance procedures. This may include joint monitoring by the State and the Contractor of the Contractor's performance.

If the Contractor believes the delivery and monitoring of its services would be enhanced if DET's project director attended and jointly monitored any aspect of these services, it may request this of DET's project director, giving reasonable notice, and the project director must then attend and jointly monitor the relevant aspects of the Contractor's services, at the Contractor's cost.

DET's project director may also:

- Carry out or procure his or her own audits of any school facility, but not more than twice in a calendar year for any individual school facility, to assess whether it is being operated and maintained in accordance with the standards and other requirements listed at the start of section 3.3.1 above, and
- Audit the Contractor's compliance with the *Operation Manuals* at any time, giving the Contractor at least 20 business days' notice of his or her intention to do so.

In the former case, the project director must give the Contractor at least five business days' written notice of the date on which he or she wishes to carry out the audit, but must consider any reasonable request by the Contractor for the audit to be carried out on a different date in order to avoid material prejudice to its ability to provide its services, provided this request is made at least two business days before the originally notified date.

The Contractor must provide reasonable assistance to the project director during these audits, including access to its records and registers.

The costs of these audits will be borne by the State, except for any audit which shows the Contractor has failed or is failing to comply with its obligations.

If an audit shows such a breach of the Contractor's obligations, the project director must advise the Contractor of the standards to be met and specify a reasonable period for rectification and/or maintenance works, and the Contractor must:

- Carry out these works, at its own cost, within the specified period, and
- Reimburse the State for the cost of the audit and any reasonable associated costs incurred by the State.

3.3.7 Monthly payments to the Contractor

The State must make payments to the Contractor for the period between the "commencement date" of the first of the schools to be opened until the end of that calendar month, and then for each successive calendar month until 31 December 2032 or any earlier termination of the Concession Deed.

These monthly payments will comprise:

- A performance-based "monthly net fee" for each payment period, calculated in accordance with a schedule to the Concession Deed, and
- Upward and downward adjustments to reflect any amounts owing by the State and the Contractor to each other under other provisions of the Concession Deed and any GST.

The starting bases for calculating each month's "monthly net fee" are "monthly services fees" for each school, as set out in a schedule to the Concession Deed, which will be payable if the Contractor fully complies with all of DET's specifications and other requirements for the operational services, as set out in an annexure to the deed.

These "monthly services fees" currently add up to \$9,492,000 per year at 1 March 2003 prices. They will be:

- Adjusted each quarter in line with the CPI, less an "efficiency" reduction of 0.0625% per quarter, and
- Adjusted up or down every five years to reflect the results of "benchmarking" and "market testing" exercises

described in section 3.3.8 below, but only if this benchmarking or market testing shows the Contractor's costs for any of the particular services in question are more than 5% above or below the market costs of providing the same services.

Each of the Contractor's "monthly net fees" will be calculated by:

- Making deductions from the "monthly services fee", for all the payment periods except the first, for:
 - Any failure by the Contractor, for any defined functional part or parts of any of the school facilities, to comply with availability standards set out in DET requirements annexed to the Concession Deed, other than in specified circumstances such as failures caused by a breach of the Concession Deed by the State
 - Any other failures by the Contractor to provide its operational services to standards set out in the DET requirements annexed to the Concession Deed, again other than in specified circumstances
 - Any repetition of an availability or performance failure leading to three or more occurrences in any three-month period, and
 - Any failure by the Contractor, in a previous monthly report to DET's project director on its performance, to disclose an event which would otherwise have led to a deduction
- Making an adjustment up or down, for each January payment period, if the number of demountable classrooms *added* to the nine schools that January exceeds or falls short of "base case" numbers of additions as set out in a schedule to the Concession Deed
- Making another adjustment up or down if the *total* number of demountable classrooms in the nine schools during the payment period exceeds or falls short of "base case" totals set out in a schedule to the Concession Deed, and
- Subtracting a "non usage rebate" if any of the defined functional parts of any of the school facilities has been designated by DET's project director, prior to the payment period, as surplus and not to be used.

Detailed and complex provisions for the calculation of these deductions and adjustments are set out in a schedule to the Concession Deed. The formulae used to calculate the unavailability and performance deductions involve weightings, so that (for example) a performance failure giving rise to an immediate health and safety or security risk attracts a much greater deduction than a lesser performance failure.

The bases for the deductions and adjustments, if any, must be presented in a monthly *Performance and Payment Report* which the Contractor must submit to DET's project director,

together with a statutory declaration of its accuracy, before the eighth day of the following monthly payment period.

The Contractor must then invoice the State on or around the fifteenth day of the following payment period, and the State must pay the Contractor within 20 business days of this invoice. If DET's project director disputes any amount set out in an invoice, the State may withhold payment of this amount while the issue is resolved under the dispute resolution procedures described in section 3.4.9 below, but will be liable to pay the Contractor interest (at 4% pa above the BBSY bank bill rate) if it is determined that the Contractor was entitled to this amount. Conversely, if it is determined that the Contractor has been overpaid, the Contractor must pay interest at this rate on the overpaid amount, on top of its repayment to the State.

3.3.8 Benchmarking and market testing of operational costs

The Contractor must conduct a "benchmarking" exercise every five years—on 31 December in 2007, 2012, 2017, 2022 and 2027—to determine the relative quality and competitiveness of its cleaning, security, grounds maintenance, pest control, insurance and utilities services and any other "soft" facilities management services nominated by DET's project manager.

The Contractor's costs of providing these services must be compared by the Contractor, in good faith, with the costs of comparable school services provided by reputable organisations with "an appropriate degree of skill, resources, reputation and financial standing".

The procedures to be followed before, during and after these benchmarking exercises are set out in a schedule to the Concession Deed.

The differences (if any) between the Contractor's costs for each of the benchmarked services and the "market" costs for these services are to be agreed between DET's project director and the Contractor in accordance with these procedures. If the parties cannot agree, the project director may require the relevant services to be subjected to competitive market testing, as described below. If he or she does not do so within 15 days of receiving the Contractor's report on the results of the benchmarking exercise, either party may refer the matter for determination under the dispute resolution procedures summarised in section 3.4.9 below.

Competitive market testing will also be required if the cost difference for any service disclosed by the benchmarking exercise is greater than 15%, or if there is a determination under the dispute resolution procedures that market testing of any of the benchmarked services is required.

Timeframes and procedures for any market testing—including the "grouping" of services to be tendered, the iden-

tification and selection of tenderers and the awarding of contract(s) to the tenderer(s) identified by the Contractor as providing the best value for money—are set out in a schedule to the Concession Deed. The successful tender(s) will replace the Contractor's previous subcontractor(s) in providing the relevant services.

If a benchmarking exercise (or any subsequent market testing exercise) shows the Contractor's costs for any of the particular services in question have been more than 5% above or below the market costs of providing the same services, the "monthly services fee" used in calculating the State's monthly payments to the Contractor (see section 3.3.7) must be adjusted to reflect this difference, using procedures set out in the schedule to the Concession Deed. If the difference is 5% or less, no adjustment will be made.

3.3.9 Additional 'learning spaces' and demountable classrooms

DET's requirements for the project, annexed to the Concession Deed, envisage the provision of additional "learning spaces"—classrooms and other rooms used by students—during the operational phases of the school facilities, to cater for future growth in the schools' enrolments.

If additional learning spaces are required at a school facility, DET's project director must give the Contractor at least three months' notice of this, specifying the date by which the new spaces are required. The Contractor must then:

- Provide the additional learning spaces in accordance with the DET requirements annexed to the Concession Deed, ensuring they are fully functional by the date specified in the project director's notice, and
- Ensure its operational services for the additional spaces fully comply with the Concession Deed.

If the Contractor proposes to use DET demountable units to provide some or all of the additional learning spaces, it must notify the project director of this within two weeks of receiving his or her notice, and the State must deliver the requested units, in a condition satisfying DET's requirements for its demountable units at the time, at least two weeks before the deadline for providing the extra learning spaces.*

The Contractor will be fully responsible for installing, commissioning and providing operational services for any

* The "base case" total numbers of demountable units in the nine schools, as set out in a schedule to the Concession Deed, are none in 2004, five in 2005, ten in 2006, 17 in 2007, 25 in 2008, 34 in 2009, 42 in 2010, 46 in 2011, 50 in 2012, 53 in 2013 and 54 from 2014 to 2032. As already indicated in section 3.3.7, the State's monthly payments to the Contractor during the operational phase of the project will be adjusted up or down to reflect any differences (compared to the "base case") in the actual numbers of demountable units in the schools.

demountable classrooms, and has released the State, the Minister for Education and Training, DET and their delegates, employees, contractors and agents from any liability for any claim, loss, injury or damage associated with DET's demountable units, apart from any liabilities arising from "compensation events" discussed in section 3.4.10 below.

The Contractor will be paid for its provision of the additional learning spaces and associated services through the normal monthly payment arrangements described in section 3.3.7.

The provision of extra learning spaces in accordance with the DET requirements annexed to the Concession Deed will not amount to a variation under the arrangements described in section 3.4.8, and the Contractor will not be able to make a claim under the "change procedure" described in that section.

3.3.10 Child care facilities

The Minister for Education and Training must grant the Contractor or its approved nominee(s) licences to use specified parts of at least eight of the nine school sites for the purpose of constructing, managing and operating child care facilities, each providing at least 59 long day care places for pre-school children, until 31 December 2032. (It is not yet clear whether development approval will be able to be gained for a child care centre at Horsley Public School.)

These Child Care Facility Licences—which may, but need not take, the form of registered leases—must be in accordance with:

- The Contractor's proposals for the project, annexed to the Concession Deed (as amended, in the case of the child care facility at the Poole Road School for Specific Purposes, by the Child Care Facilities Agreement), and
- *Child Care Facilities Licence Principles* agreed between the State and the Contractor on 7 March 2003, as set out in a schedule to the Child Care Facilities Agreement.

The construction, management and operation of the child care centres will be quite separate from, and *not* part of, the operational services which the Contractor must provide to the State under the Concession Deed, and any child care facility sublicences granted by the Contractor will *not* be "subcontracts" under the arrangements summarised in section 3.3.3.

The Contractor must give the State (or procure the provision of) detailed plans for the proposed child care facilities before development applications are lodged for these facilities. The State's right to approve or disapprove these detailed proposals will be limited to any effects on the construction, operation, security or appearance of the adjacent school facilities, and the State's objections must not be inconsistent

with any requirements of the Department of Community Services or the relevant local councils.

If the Contractor wishes the State to grant a licence to an approved nominee, it must give the State details on the relevant experience of the nominee and its subcontractors. The State may not unreasonably withhold its consent to a proposed nominee.

The Contractor will make one-off payments to the State of \$250,000 for each of the licences for the eight or nine child care facilities. Each of these payments, other than that for the Horsley Public School child care centre, must be made within three business days of the granting of planning approval for the adjacent school facility, or on the date three months after the "target date" for obtaining the school's planning approval, as set out in section 3.2.2, if this approval has not been obtained beforehand. If the Horsley Public School child care facility proceeds, the payment for this facility's licence must be made within three business days of the granting of planning approval for the child care facility itself.

In addition to these arrangements concerning the *child care* facilities, the child care facility operators may be able to use the adjacent *school* facilities for before-school, after-school and vacation care services for school-age children, under the "third party use" arrangements already described in section 3.3.2.

3.3.11 Emergencies and 'public duty' action

If there is an emergency at any school facility which (in the opinion of DET's project director) threatens or is causing material damage or disruption to health, safety, the environment or property, and this emergency cannot be dealt with by the Contractor's performance of its normal services, the project director may direct the Contractor to:

- Immediately perform any services in respect of which the Contractor is in breach, or
- Undertake additional or alternative services, as and when required by the project director,

so that normal operation of the school facility resumes as soon as reasonably practicable.

The cost of any additional or alternative services will be borne by the State *unless* the emergency was caused, directly or indirectly, by any negligence, wilful misconduct or breach of contract by the Contractor, the Operator or any other subcontractor.

If:

- The Contractor fails to promptly remedy a breach that has led to an emergency, and DET's project director reasonably believes action must be taken, or
- The Contractor is unable or unwilling to provide additional or alternative services as directed in response to

an emergency, and the project director reasonably believes action must be taken, or

- The project director reasonably believes—even if there has been no emergency—that action must be taken to discharge a public duty, including the duty to make school places available for school-age children,

the project director may exercise “step in” rights set out in a schedule to the Concession Deed.

If DET’s project director wishes to do so, he or she must notify the Contractor, in writing, of the action the State wishes to take, the reasons for this action, the timing of the proposed action and, to the extent reasonably practicable, the effect on the Contractor and its services obligations.

The Contractor must give all reasonable assistance to the project director while the State is taking the notified action and any consequential additional action which the project director reasonably believes to be necessary.

If action taken by the State prevents the Contractor from providing any part of its operational services, the Contractor will be relieved from its obligation to provide these particular services, but its monthly payments will not be reduced to reflect this reduction in its services.

The Contractor’s monthly payments will be reduced, however, by the operational costs incurred by the State in taking the notified and consequential action if this action is taken because of a breach of the Concession Deed by the Contractor.

The State must reasonably endeavour to complete its action promptly after the emergency (if any) has ended, except in the case of action taken because of a breach by the Contractor.

DET’s project director must give the Contractor five business days’ notice of the State’s intention to complete its action, and the Contractor must resume its full services as soon as the State’s action has been completed.

These State “step in” rights and procedures following an emergency or in response to a perceived need to take action to discharge a public duty are in addition to broader-ranging and more generally applicable rights for the State to remedy breaches of the Concession Deed by the Contractor, discussed in section 3.5.1, and other, more specific “step in” rights discussed in section 3.5.3.

3.3.12 Special arrangements for the last three years of operations

At any time between 31 December 2028 and 31 December 2029 DET’s project director may procure an independent survey of the school facilities to:

- Assess whether the facilities have been and are being maintained as required under the Concession Deed, and

- Determine the amount of money that will need to be spent or reserved, during the rest of the Contractor’s operating term up to 31 December 2032, to:

- Ensure there will be no life cycle failure or expiry, during the six years following the end of the operating term (i.e. to 31 December 2038), of any parts of the schools’ buildings and equipment with a normal life cycle of 15 years or more, and
- Rectify any breaches of the Contractor’s obligation to comply with DET’s requirements, as annexed to the Concession Deed.

The project director must give the Contractor at least 10 business days’ notice, in writing, of the date on which it wishes this survey to be conducted, but must consider any reasonable request by the Contractor for the survey to be carried out on a different date in order to avoid material prejudice to its ability to provide its services, provided this request is made at least five business days before the originally notified date.

The independent surveyor is to be appointed by agreement between the State and the Contractor or, if they cannot agree within two business days of a nomination by the State, the President of the Australian Institute of Quantity Surveyors. The survey must be funded “up front” by the State, but the State may later be entitled to recover these costs from the Contractor, in circumstances described below.

During last the 36 months of the Contractor’s operating term (i.e. from 1 January 2030 to 31 December 2032),

- The State will deduct 10% of the monthly payments which would otherwise be paid to the Contractor under the arrangements described in section 3.3.7, and place these amounts into an interest-bearing “retention fund account”, or
- The State may accept a security proposed by the Contractor, if this is satisfactory to the State, in lieu of this funding of the “retention fund account” (the State will be entitled to refuse to do so if the security is not in the form of cash or an equivalent).

If the amount of money required for the prevention of life cycle failures/expirations and the rectification of breaches, as determined by the independent surveyor, is higher than the amount of money reasonably expected to be placed into the “retention fund account” under this “10% retention” arrangement,

- The State will be entitled, in its sole discretion, to
 - Retain *additional* mounts from each monthly payment to the Contractor, starting from the first payment after the surveyor’s determination, and pay these additional amounts into the “retention fund account”, or

- ◻ Accept a security proposed by the Contractor, if this is satisfactory to the State, in lieu of this additional funding of the “retention fund account”
- DET’s project director must notify the Contractor of the required rectification works (including repairs and/or replacements) and/or maintenance works, specifying a reasonable period for these works to be carried out
- The State may recover the cost of the survey from the Contractor, either through a withdrawal from the “retention fund account” or through a deduction from the next monthly payment to the Contractor
- The Contractor must carry out the required rectification and/or maintenance works within the specified period
- The State must reimburse the Contractor for its costs in carrying out the rectification and/or maintenance works from the “retention fund account”, if and when this account has funds available for this to occur, and
- The State may carry out the rectification and/or maintenance works itself if the Contractor fails to do so, at the Contractor’s cost (through withdrawals by the State from the “retention fund account”, deductions from monthly payments to the Contractor or other means).

Once all the rectification and maintenance works identified by DET’s project director or the independent surveyor have been carried out and paid for by the Contractor, the State must pay the Contractor any amounts remaining in the “retention fund account”, either on 31 December 2032 or on the date by which the rectification works were required to be completed, if this is later.

3.3.13 Handover to the State or another contractor in 2032

The Contractor must use all reasonable endeavours to facilitate a smooth transfer of its operational services to the State or a new contractor on 31 December 2032 and must take no action, at any time, with the intention of prejudicing, frustrating this transfer or making it more difficult.

Among other things, it must ensure the Operator provides all reasonable assistance to the State or the new contractor until 31 March 2033.

More specifically, during the final three months of the Contractor’s operating term and the following three months—i.e. between 1 October 2032 and 31 March 2033—the Contractor must fully cooperate with the transfer of any or all of its operational services to the State or a new contractor, and in particular it must:

- Transfer all of its title, interests and rights in the school facilities, free of any security interests, to the State or the new contractor
- Liaise with and provide advice and assistance to DET’s project director and/or the new contractor

- Give any new contractor access to the school facilities at reasonable times and on reasonable notice, and
- Give DET’s project director and/or the new contractor all the information required for an efficient transfer of the services to occur.

The same obligations apply if there is an earlier termination of the Concession Deed, as discussed in sections 3.5.6, 3.5.7, 3.5.8 and 3.5.9 below.

3.4 Miscellaneous general provisions of the Concession Deed

3.4.1 Utilities, rates, land tax and stamp duty

The Contractor must pay all water, electricity, gas, telephone, electronic communication and similar utility charges for the school sites, but from each school’s “commencement date” (see section 3.3.1) the State must reimburse it for half of these charges, other than telephone usage charges, and all of the telephone usage charges, except those incurred by the Contractor, its subcontractors and their employees, contractors and agents.

The State must pay all rates on the school sites until each school’s “commencement date”, after which the Contractor will take over this responsibility.

The State must pay all land taxes on the school sites, other than any penalties associated with any failure by the Contractor to submit accurate land tax returns or any other breach of the law by the Contractor. If the Contractor successfully contests any land tax assessment, it must pay the State any refund it receives, plus or minus any tax benefit or detriment realised by the Contractor as a result of the refund.

The Contractor must pay stamp duty on the project contracts to which the Minister for Education and Training is a party, and must do likewise for the leases and subleases (see section 3.3.4), but is entitled to be reimbursed by the State, except for any penalties for late lodgment etc.

3.4.2 Insurance and loss or damage

Required insurance policies

The Contractor must maintain the following insurance policies, as specified in a schedule to the Concession Deed:

- Contract works insurance for each site, for the full reinstatement value of the construction works and equipment, until the completion of all construction on the site
- Public liability and third party property damage insurance, for at least \$50 million per occurrence except in the case of third party motor vehicle insurance, until 31 December 2032 or any earlier termination of the Concession Deed

- Workers' compensation insurance
- Professional indemnity insurance, for at least \$10 million per claim and \$10 million in total during any 12-month period, until seven years after all the schools have opened or until seven years after the relevant professional services are provided, if this is later
- Startup delay and business interruption insurance until 31 December 2032 or any earlier termination of the Concession Deed, and
- Any other insurance required by law.

All these insurance policies must be with insurers and on terms approved by the State. The State may review the \$50 million minimum coverage requirement for public liability and third property damage insurance at any time, but not more than once every five years, and may determine a new minimum in its absolute discretion. The contracts works and property damage insurance policies must name the State and the Contractor's subcontractors as insured parties, as well as the Contractor itself.

If the Contractor fails to maintain any of the required insurance policies, the State may pay the premiums or procure the insurance itself and recover the amounts it has paid from the Contractor on demand.

Insurance claims and application of insurance proceeds

The Contractor must:

- Inform DET's project director, within 20 business days, of any incident or circumstance which might give rise to an insurance claim, and provide full details if asked to do so by the project director, and
- Inform the State immediately if it becomes aware of any actual or threatened claim which might materially reduce the Contractor's insurance cover.

The Contractor must apply any insurance proceeds it receives under its contracts works insurance policies to repair, reinstate and replace the damaged works.

Physical loss or damage during the operational phase

The Concession Deed does not require the Contractor to take out insurance for physical loss or damage to the school facilities during the operational phase of the project. Instead, if any part or all of a school facility is lost, damaged or destroyed during its operational phase as a result of a "specified peril" listed in the Concession Deed, the State must indemnify the Contractor—subject to requirements set out in a schedule to the Concession Deed—for any amount by which its insurance proceeds (if any) fall short of the full costs of reinstatement. These "specified perils" include fire, theft, burglary, storms, hail and floods but do not include electrical, electronic or mechanical breakdowns.

Under the relevant schedule to the Concession Deed, the Contractor must:

- Take all reasonable steps to avoid, mitigate, eliminate or prevent loss or damage from any of the "specified perils"
- Notify DET's project director as soon as practicable, and in any event within five business days, of any actual, threatened or likely loss or damage from a "specified peril", and
- In the case of malicious damage or theft, advise the police as soon as practicable and promptly advise the State of any impending prosecution or inquiry.

If the total reinstatement costs resulting from a "specified peril" exceed the Contractor's insurance proceeds (if any) by more than \$3,000 (indexed to the CPI),

- The Contractor must—as soon as practicable, and in any event within 20 business days of any actual loss or damage from the "specified peril"—give DET's project director a detailed *Claim Statement* on the incident or events, the items lost, damaged or destroyed, any reports made to the police, the steps taken to mitigate, eliminate or prevent the loss or damage, any insurance proceeds to which the Contractor may be entitled, the estimated reinstatement costs (including competitive quotes for costs of \$10,000 or more, and calculated in accordance with requirements set out in the schedule to the Concession Deed) and a proposed *Reinstatement Plan*.
- Within 20 business days the State must either accept the Contractor's reinstatement costs and *Reinstatement Plan* or request further information and/or revisions.

If it does the latter,

- The State must notify its acceptance of the Contractor's reinstatement costs and *Reinstatement Plan*, as supplemented and/or revised, within 20 business days of receiving the requested information, and
 - Any disputes on these matters must be referred for determination under the dispute resolution procedures described in section 3.4.9 below.
- Once the State has accepted the Contractor's reinstatement costs and *Reinstatement Plan*, or a determination has been made under the dispute resolution procedures that they are acceptable, the Contractor must implement the *Reinstatement Plan*.
- If the total reinstatement costs (*less* any insurance proceeds to which the Contractor is entitled) are less than or equal to \$10,000 (indexed to the CPI), the State must pay the Contractor's shortfall directly to the Contractor within 20 business days of its providing evidence to DET's project director that it has entered into contracts for the reinstatement works, and the Contractor must apply these funds to the reinstatement works.
- If the total reinstatement costs (*less* any insurance proceeds) are more than \$10,000 (indexed to the CPI),

the State must pay an amount equal to the Contractor's shortfall into an account jointly held by the State, the Contractor and the debt financier's Security Trustee. DET's project director and the Security Trustee must permit the Contractor to withdraw this amount, plus any interest accrued, once the project director is reasonably satisfied the *Reinstatement Plan* or an agreed component of this plan has been fully implemented. The Contractor must use these funds to pay for the reinstatement works.

- Provided the Contractor is complying with these procedures and requirements, the State may not exercise any right it might otherwise have had, under the arrangements described in sections 3.5.6 and 3.5.9 below, to terminate the Concession Deed because of the loss or damage incurred.

Simpler procedures apply to "small claims" for which the total reinstatement costs resulting from a "specified peril", less the Contractor's insurance proceeds (if any), are less than or equal to \$3,000 (indexed to the CPI).

In these cases,

- A detailed *Claims Statement* is not required
- The contractor must carry out reinstatement works as soon as practicable
- Full details on all "small claim" incident or events, the items lost, damaged or destroyed and the reinstatement costs incurred, including receipts, must be presented in a monthly *Small Claims Report* to DET's project director, and
- All such "small claims" which the project director is reasonably satisfied have been substantiated must be paid to the Contractor as part of the State's regular monthly payments to the Contractor (see section 3.3.7).

If the Contractor is not able to obtain business interruption insurance for business interruptions caused by "specified perils", and it demonstrates to the State that this is solely because the Contractor has not taken out insurance for physical losses or damage to the school facilities during the operational phase, the Contractor may require the State to propose a variation, under the "change procedure" described in section 3.4.8 below, to amend the Concession Deed procedures described above. Such a variation might, for example, replace the Concession Deed procedures with commercial insurance for "specified perils", taken out by either the State or the Contractor.

Uninsurable risks

If a risk is or becomes uninsurable—either totally or because the associated premiums become so high that the risk is not generally being insured against by prudent, competent and experienced service providers—the Contractor must notify

DET's project director within five business days. Provided the "uninsurability" has not been caused by the Contractor, its subcontractors or their employees, subcontractors or agents, the State and the Contractor must then meet to discuss how the risk should be managed, through self-insurance or otherwise.

If they cannot agree, and the uninsurable risk is one that was covered by the contracts works insurance or public liability and third party property damage insurance policies before it became uninsurable, the State's monthly payments to the Contractor must be reduced by an amount equal to the premium(s) previously payable for the risk.

If an uninsurable risk occurs, of a type that was covered by the Contractor's contracts works insurance or public liability and third party property damage insurance policies before it became uninsurable, DET's project director must, at his or her option, either:

- Pay the Contractor an amount equal to the insurance proceeds that would previously been available, in which case the Contractor must apply this amount to the repair, reinstatement or replacement of the lost or damaged items, or
- Propose a *force majeure* contract variation, under the procedures described in sections 3.4.8 and 3.4.12 below, to take the affected school site or school facility outside the ambit of the Concession Deed, or
- If *all* the school sites or facilities have been affected, terminate the Concession Deed for *force majeure*, under the arrangements described in section 3.5.9 below, and pay the Contractor compensation as described in that section.

3.4.3 Restrictions on assignments, encumbrances, refinancing and changes of ownership

The State and the Contractor may not deal separately with their interests under the Concession Deed, the leases and the subleases, and any dealings with their interests under these documents must occur at the same time, on substantially the same terms and with the same parties.

The State and the Contractor may not assign, novate or otherwise deal with their interests in and obligations under the main project contracts, other than through the enforcement of a security under the private sector debt financing agreements or as expressly permitted in the Concession Deed's provisions summarised in sections 3.5.2 to 3.5.5, without the other's prior written consent and also, where relevant, the consent of other parties to the contracts.

Similarly,

- The Construction Contractors may not deal with or encumber their interests under the Construction Contracts, the Construction Contractor Guarantee, the Construc-

tion Tripartite Agreements or securities in favour of the Contractor for their performance under the Construction Contracts, other than in accordance with the State's Project Security or securities under the private sector debt financing agreements, without the prior written consent of DET's project director

- The Construction Contractor Guarantor may not deal with or encumber its interests under the Construction Contractor Guarantee or the St Hilliers Construction Tripartite Agreement without the consent of the State
- The Operator may not deal with or encumber its interests under the Operation Contract, the Operator Guarantee, the Operator Tripartite Agreement or securities in favour of the Contractor for its performance under the Operation Contract, other than in accordance with the State's Project Security or securities under the private sector debt financing agreements, without the prior written consent of DET's project director
- The Operator Guarantor may not deal with or encumber its interests under the Operator Guarantee or the Operator Tripartite Agreement without the consent of the State
- The Contractor may not enter into any new debt financing arrangements, or materially amend or waive any provision of the project's existing debt financing agreements, without the prior written consent of DET's project director
- The debt financier's Security Trustee may deal with any interests over which it holds securities under the project's debt financing agreements only in accordance with the Lenders Tripartite Agreement, and
- The Security Trustee may deal with its interests under the debt financing agreements only if the assignee is reasonably acceptable to DET's project director and has entered into a tripartite agreement that is substantially the same as the Lenders Tripartite Agreement.

Ownership of the Contractor may not be transferred, other than to a related body corporate or through changes in the ownership of shares listed on a stock exchange, without the prior written consent of DET's project director.

If any refinancing of the project (as approved by the project director) might increase or accelerate distributions to the Contractor's shareholders or related bodies corporate or change the State's liabilities under any of the project contracts, the State and the Contractor will each be entitled to receive 50% of the resultant financial gain, after deducting the direct costs to both parties of the execution of the refinancing, in the same manner and within equivalent timeframes.

If such a refinancing is proposed,

- The Contractor must promptly give DET's project director full details, including any changes to the project's "base case" financial model
- The project director may not unreasonably withhold or delay his or her consent if the refinancing would not increase the State's liabilities, if adequate compensation were to be provided to the State, if the senior debt would not be increased by more than 10% or if the primary purpose of the refinancing is to cure a potential or actual default under the original debt financing agreements
- The Contractor and the project director must negotiate in good faith to agree on how to calculate the financial gain and how and when the State will receive its 50% share of this gain, and
- Within five business days of the refinancing, the Contractor must give the project director certified copies of the new financing agreements and a certificate, on terms acceptable to the project director, from the auditors of the amended "base case" financial model.

3.4.4 Restrictions on amendment of the project's contracts

The State may not amend any of the project contracts to which it is a party without the prior written consent of the Security Trustee, which may not unreasonably withhold or delay this consent.

Similarly, the Contractor may not amend or waive any of the provisions of the project contracts to which it is a party without the Security Trustee's consent.

Any amendment or termination of the Construction Contracts or the Operation Contract will not affect the State's rights against the Contractor, the Construction Contractors or the Operator under the Concession Deed, the Construction Tripartite Agreements or the Operator Tripartite Agreement, unless the amendment or termination has been approved by DET's project director.

Under the Construction Tripartite Agreements, the Construction Contractors have undertaken, more generally, that they will not:

- Amend or waive any of the terms of the Construction Contracts, the Construction Contractor Guarantee, the Construction Tripartite Agreements, securities in favour of the Contractor for their performance under the Construction Contracts
- Amend any of the works, or
- Enter into any other arrangements with the other parties to the construction-related contracts

without the prior written consent of DET's project director, *except* in the case of changes to or extensions of the Construction Contract(s) which are required to facilitate the Contractor's compliance with the Concession Deed, including, in particular, changes or extensions permitted under the arrangements described in sections 3.4.8, 3.4.10 and 3.4.11 below.

An analogous commitment has been made by the Operator under the Operator Tripartite Agreement.

The Contractor must ensure that any new or replacement construction contractor or operation contractor executes an equivalent of the Construction Tripartite Agreements or the Operator Tripartite Agreement.

3.4.5 Confidentiality

The Concession Deed and the four Tripartite Agreements are subject to confidentiality restrictions. Specified exemptions to these restrictions include disclosures required by law, disclosures by DET's project director to other State Government departments and agencies, disclosures to prospective investors or shareholders and the publication of this *Summary of Contracts*.

3.4.6 Late payments and setting off

Any late payments by the State or the Contractor under the Concession Deed will attract interest, at a rate 4% pa above the BBSY bank bill rate at the time, from the day after the due date until the overdue payment and the accrued interest are paid.

Except in the case of termination payments (see sections 3.5.6 to 3.5.9), the State may retain or set off any amount the Contractor owes it against any amount it owes the Contractor, but the Contractor may not do likewise. If there is a dispute about any set-off payment or deduction, the undisputed portion must be paid immediately and the disputed portion must be determined under the dispute resolution procedures summarised in section 3.4.9.

3.4.7 Changes in law

The Contractor will generally not be entitled to compensation, an extension of time or any other relief from its obligations under the Concession Deed as a result of any change in the law, either through legislation (including subordinate legislation) or through a court decision which changes a binding legal precedent.

It may, however, be entitled to compensation, an extension of time and/or other relief, under the arrangements described in sections 3.4.10 and 3.4.11 below, if:

- There is a change in law, as a result of NSW legislation or a decision of a NSW court, which specifically refers or applies to services similar to those to be provided by the Contractor during the operational phase or to shareholdings in companies whose main business is to provide these services, *or* there is a change in NSW or Commonwealth tax law, *and* this change is discriminatory in that it applies to:
 - This project but not to similar projects procured by DET
 - The Contractor but not to others
 - This project's school sites or facilities, and not to others in their vicinities, *or*
 - Privately financed projects and not to others, *or*
- There is a change in law, coming into effect during the operational phase of the project, which forces the Contractor to spend more than \$20,000 on capital works for the school facilities, *or*
- There is a change of law which gives rise to any of the other "compensation events" listed in section 3.4.10 or any of the "relief events" listed in section 3.4.11.

The procedures to be followed in these circumstances are described in section 3.4.10 and 3.4.11.

Regardless of whether any of these exceptions applies to a change in the law, the State must use all reasonable endeavours to give the Contractor access to any relief, implementation arrangements or programs which are made available to State-operated schools generally concerning compliance with the change in the law.

3.4.8 Variations

Any variations to DET's requirements (as annexed to the Concession Deed), the Contractor's proposals for the project (also as annexed to the Concession Deed), the Contractor's detailed designs, the construction works, the Contractor's *Works Program*, the Contractor's *Operation Manuals*, any of the school facilities or any of the Contractor's operational services must be made in accordance with a detailed, formal "change procedure" set out in the Concession Deed and one of its schedules.*

The only variations not subject to this formal "change procedure" are minor changes during the project's operational phase which are in accordance with the Contractor's *Operation Manuals* and/or directed by DET's project director, which will not entitle the Contractor to any relief from its

* As already indicated in section 3.3.9, the provision of additional "learning spaces" at the schools, as envisaged by and in accordance with the DET requirements annexed to the Concession Deed, will not amount to a variation under these arrangements.

other Concession Deed obligations under the arrangements described in section 3.4.11 below, and whose estimated cost effects, calculated in accordance with another schedule to the Concession Deed, are no more than \$3,000 (indexed to the CPI). In these cases the Contractor will be entitled to be paid the actual costs it incurs, as detailed in a monthly report it must submit to the project director.

Variations which are subject to the formal “change procedure” may be proposed by the State and by the Contractor.

Copies of any State proposals for variations must be given to the debt financier’s Bond Manager and Security Trustee within two business days.

If the State proposes a variation, or if the Contractor proposes a variation because of the occurrence of a “compensation event”, as listed in section 3.4.10 below, the State and the Contractor may agree—following the preparation by the Contractor of a *Variation Impact Report*, and under arrangements detailed in the “change procedure”—on changes that may include extension(s) of time and the payment by the State of compensation for the estimated cost effects, as calculated and agreed in accordance with a schedule to the Concession Deed. This compensation must cover any additional construction, operational, financing or other costs or losses of revenue borne by the Contractor, less any insurance proceeds or other compensation received by the Contractor, any cost savings to the Contractor, any other amounts received or receivable by the Contractor as a result of the variation and any element of its additional costs resulting merely from the impact of indexation (with appropriate adjustments to eliminate any double counting).

If the Contractor proposes a variation in any other circumstances, the Contractor will not be entitled to any extensions of time or compensation for the variation’s estimated cost effects.

Any agreement reached between the parties on a variation will be binding once subsequent procedures have been complied with, but until the Contractor starts implementing the variation the State may still decide not to proceed, or not to agree to a proposed method of implementation, on any reasonable ground, expressly including an opinion by DET’s project director that the variation or implementation method would not be of benefit to the State or DET as a whole. If the State decides not to proceed with a variation originally proposed by the State or a variation proposed by the Contractor because of a “compensation event”, the State must meet all of the Contractor’s reasonable costs directly associated with the proposed variation, up to the time the State decided not to proceed.

If the State and the Contractor cannot agree on the terms of a State-proposed variation for additional capital works at a school site or facility during the school’s operational phase, or the terms of a variation of this type proposed by the

Contractor because of a “compensation event”, the State may:

- Undertake these additional works itself, or appoint another contractor to carry out these works, and
- Ask the Contractor and the “additional works” contractor to enter into a coordination and interface agreement for any or all aspects of the additional works. The Contractor must comply with all such reasonable requests.

The State may also propose a variation requiring the Contractor to provide operational services for the additional works once they are completed.

3.4.9 Dispute resolution

The Concession Deed sets out procedures which may—and in some specified circumstances, such as disputed monthly payments, must—be followed whenever there is a dispute between the State and the Contractor, other than:

- Disputes concerning the Independent Certifier, which must be settled under different dispute resolution procedures set out in the Independent Certifier Deed
- Disputes about the appointment of an independent surveyor under the arrangements described in section 3.3.12, which must be resolved through the appointment of a surveyor chosen by the President of the Australian Institute of Quantity Surveyors, and
- Disputes under the Leases and the Subleases.

Under the Concession Deed’s dispute resolution procedures,

- Either party may refer a dispute for resolution by a committee comprising a representative of DET’s project director and a representative of the Contractor, by issuing a referral notice which must specify the nature of the dispute in reasonable detail.
- This committee may determine its own procedures. Its decisions must be unanimous, and will bind the parties.
- If the committee fails to resolve the dispute within five business days of the referral notice, it must, within the next two business days, refer the dispute to binding expert determination or arbitration, the procedures for which are set out in the Concession Deed, or another form of dispute resolution.
- If the committee fails to meet, fails to make a referral, cannot agree on whether to make such a referral or cannot agree on the expert or arbitrator to be appointed, the DET project director or the Contractor may ask the President of the Institute of Arbitrators and Mediators Australia to choose a process for resolving the dispute and nominate a panel of at least three experts or arbitrators. The Contractor will then have three business days to nominate one member of this panel as the expert or arbitrator to be used for expert determination of or arbi-

tration on the dispute. If it fails to make this selection, the project director may make the selection.

- If the dispute has been referred for independent expert determination, the procedures adopted must be as set out in the Concession Deed. Among other things, the parties must present their submissions to the expert within five business days of his or her appointment, unless they agree otherwise, and the expert must make his or her determination, including a determination on the awarding of costs, within 20 business days of their presentations. Each party must pay 50% of the expert's fees and expenses.
- If the dispute has been referred to arbitration the arbitrator must be appointed within ten business days and the procedures adopted must again be as set out in the Concession Deed. The parties must ask the arbitrator must make his or her determination, including a determination on the awarding of costs, within 20 business days of their presentations.
- While the dispute is being resolved the parties must continue to perform their obligations under the concession Deed.

If a dispute between the Contractor and one of its subcontractors under the Construction Contracts, the Operation Contract or any other subcontract concerns the rights and obligations of the State and the Contractor under the Concession Deed, the Contractor must immediately inform the State and, if the State consents, may join the subcontractor in the dispute resolution procedures under the Concession Deed.

The Concession Deed's dispute resolution procedures do not limit the rights or remedies of the State or the Contractor at law or in equity. In particular, they acknowledge the right of either party to bring court proceedings if an arbitration does not satisfactorily resolve a dispute.

Under the Independent Certifier Deed's dispute resolution procedures, disputes about the appointment, performance, independence, payment or termination of the Independent Certifier must be referred for resolution by the chief executive officers of the parties in dispute. The CEOs must then meet and use reasonable endeavours, in good faith, to resolve the dispute within seven business days or by a later date as agreed. Their joint decision, if any, must be made in writing and will be binding. The parties may refer the dispute to litigation only if they have exhausted this procedure, and the Independent Certifier must continue to perform its obligations while the dispute is being resolved.

3.4.10 'Compensation events'

"Compensation events" are defined in the Concession Deed as:

- Any breach by the State of its obligations under the Concession Deed which substantially frustrates or renders

impossible the Contractor's performance of its own obligations under the deed

- Any expropriation or requisition of a material part of the Contractor's assets and/or shares by a NSW court or a local, State or Commonwealth government, minister, department or authority in NSW
- Any failure by the State to pay the Contractor any undisputed amount specified in its monthly invoices—or any other undisputed amount of money, totalling more than \$50,000 (indexed to the CPI), which is due to the Contractor—within 20 business days of a formal written demand by the Contractor
- Any discriminatory change in law, as described in section 3.4.7
- Any change in law, coming into effect during the operational phase of the project, which forces the Contractor to spend more than \$20,000 on capital works for the school facilities
- Any emergency or "public duty" "stepping in" by the State, as described in sections 3.3.11, other than in response to a breach by the Contractor of its obligations under the Concession Deed
- Any implementation of additional capital works at a school site or facility during the school's operational phase by the State itself or by another contractor appointed by the State to carry out these works, following a failure by the State and the Contractor to agree on the terms of a variation for these works (see section 3.4.8)
- Any use of a school facility for a "school use" or a "community use" which conflicts with an existing "third party" use (see section 3.3.3), and
- Any delivery by DET, under the arrangements described in section 3.3.9, of demountable classrooms which are not in a condition satisfying DET's requirements for its demountable units at the time they are delivered.

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

- Causes, or is likely to cause,
 - A delay in the Contractor's obtaining planning approval for any school beyond the date three months after its planning approval "target date" (see section 3.2.2), or
 - A delay in the achievement of any construction "milestone" by the date set in the Contractor's relevant *Works Program*, or
 - A delay in the "commencement date" for any school (see section 3.3.1) beyond the school's "target availability date" (see section 3.2.4) or what is termed its "longstop date" for opening (currently 3 June 2004 for Rosebery Road primary school and Poole Road School for Specific Purposes, 14 June 2004

for Horsley, Mungerie Park and Perfection Avenue primary schools, 1 April 2005 for Glenwood and Horningsea Park secondary schools and Shell Cove primary school and 13 April 2005 for Mimosa Drive primary school), or

- A delay in the last of the “commencement dates” for the schools beyond the last of the “target availability dates” (currently 3 January 2005), and/or
- Adversely affects the Contractor’s ability to comply with its obligations under the Concession Deed, and/or
- Causes an increase in the Contractor’s costs or a decrease in its revenue from the project,

the Contractor may:

- Apply for relief from its contractual obligations, and/or
- Claim compensation from the State

in accordance with rights and procedures set out in a schedule to the Concession Deed.

Any claim for an extension of time, other relief or compensation under these circumstances must be lodged by the Contractor as soon as practicable, and by no later than 15 business days after it becomes aware of the effect or likely effect of the “compensation event”. Full details must be provided to DET’s project director within ten business days of this claim, or within ten business days of the end of the “compensation event” if it continued.

Provided these notification requirements have been satisfied,

- DET’s project director must grant reasonable extension(s) of time and give the Contractor other reasonable relief from its obligations, and
- The State must pay compensation to the Contractor for its increased costs and/or reduced revenues, calculated in accordance with another schedule to the Concession Deed.

This compensation will be any additional construction, operational, financing or other costs or losses of revenue borne by the Contractor (*plus*, in the case of a discriminatory change in law, any loss of net profits), *less* any insurance proceeds or other compensation received by the Contractor, any cost savings to the Contractor, any other amounts received or receivable by the Contractor as a result of the “compensation event” and any element of its additional costs resulting merely from the impact of indexation (with appropriate adjustments to eliminate any double counting).

If the Contractor is more than five business days late in notifying the project director of the “compensation event” and providing full details, it will not be entitled to any extension of time, relief or compensation in respect of the period of this delay in providing the information.

If the parties disagree about whether a “compensation event” has occurred, its consequences or the Contractor’s entitlements to an extension of time, other relief or compensation, the dispute must be referred for determination under the dispute resolution procedures summarised in section 3.4.9.

3.4.11 ‘Relief events’

In addition to the possibility of relief under the “compensation event” provisions just described, the Contractor may be entitled to more limited forms of contractual relief following a “relief event”, as described below.

“Relief events” are defined in the Concession Deed as any:

- Fires, explosions, floods, earthquakes, riots, civil commotions and protests
- Lightning or storms, but *not* “normal adverse weather conditions”
- Ionising radiation short of force majeure (see section 3.4.12)
- Failures by a statutory authority or local authority to carry out works or provide services
- Events causing loss or damage to a school facility (see section 3.4.2)
- Failures or shortages of power, fuel or transport
- Blockades or embargoes short of *force majeure* (see section 3.4.12)
- Industrial actions affecting the construction or school services industries generally, or a significant part of these industries, but *not* any industrial actions affecting only one or more of the project’s school sites or facilities
- Events causing a loss of access to or possession of a school site, beyond the control of either party, or
- Failures to obtain—or revocations, suspensions or material modifications of—any planning approvals or other project approvals or licences properly applied for, pursued and acted on by the Contractor,

which are *not* caused, directly or indirectly, by any negligence, wilful misconduct or default by the Contractor, the Construction Contractors, the Operator or any other subcontractor of the Contractor.

If any of these “relief events” occurs, and it:

- Causes, or is likely to cause,
 - A delay in the Contractor’s obtaining planning approval for any school beyond the date three months after its planning approval “target date” (see section 3.2.2), or
 - A delay in the “commencement date” for any school (see section 3.3.1) beyond the school’s “target availability date” (see section 3.2.4) or “longstop date” (see section 3.4.10), or

- ◻ A delay in the achievement of any construction “milestone” by the date set in the Contractor’s relevant *Works Program*, and/or
- Adversely affects the Contractor’s ability to comply with its obligations under the Concession Deed,

the Contractor may:

- Apply for extension(s) of time, and/or
- Apply for relief from any right the State may have to terminate the Concession Deed in these circumstances (see section 3.5.6 below)

in accordance with rights and procedures set out in a schedule to the Concession Deed.

Any claim for an extension of time or other relief under these circumstances must be lodged by the Contractor as soon as practicable, and by no later than ten business days after it becomes aware of the effect or likely effect of the “relief event”. Full details must be provided to DET’s project director within five business days of this claim, or within five business days of the end of the “relief event” if it continued.

To obtain the relief sought, the Contractor must demonstrate that:

- It and its subcontractor(s) could not reasonably have foreseen and avoided the event or its consequences by taking reasonable steps that would not have involved material expenditure
- In the case of an application for extension(s) of time, the “relief event” *directly* caused the delay or likely delay
- The lost time could not reasonably have been recovered and/or the other relief required could not reasonably have been mitigated by the Contractor, in accordance with good industry practices, without incurring material expenditure, *and*
- The Contractor is reasonably endeavouring to perform its obligations under the Concession Deed.

Provided these notification and other requirements have been satisfied,

- Reasonable extension(s) of time must be granted
- The State may not terminate the Concession Deed, and
- The State must give the Contractor any other relief the Contractor has requested, but this will *not* affect the deductions the State is entitled to make from the Contractor’s monthly payments as described in section 3.3.7, including “unavailability”, “performance” and “repeated failure” deductions.

If the Contractor is more than five business days late in notifying the project director of the “relief event” and providing full details, it will not be entitled to any extension of time or other relief in respect of the period of this delay in providing the information.

If the parties disagree about whether a “relief event” has occurred, its consequences or the Contractor’s entitlements to an extension of time or other relief, the dispute must be referred to the dispute resolution procedures summarised in section 3.4.9.

3.4.12 Force majeure

General force majeure provisions

Force majeure events are defined in the Concession Deed as any:

- War, armed conflict, terrorism, supersonic shockwave or contamination (other than contamination caused by the Contractor), or
- “Relief event” (see section 3.4.11) continuing for more than 180 days

that directly causes either the State or the Contractor to be unable to comply with all, or a material part of, its obligations under the Concession Deed.

During any *force majeure* event neither party may bring any claim for a breach by the other party of any of its Concession Deed obligations rendered impossible by the *force majeure* event, or terminate the deed for such a breach.

The occurrence of a *force majeure* event will *not*, however, affect the deductions the State is entitled to make from the Contractor’s monthly payments as described in section 3.3.7, including “unavailability”, “performance” and “repeated failure” deductions.

If a *force majeure* event occurs, the affected party must immediately notify the other party, providing details on the event, evidence of its effects and details on any proposed mitigation action.

The parties must then consult with each other, in good faith, as soon as practicable, using all reasonable endeavours to agree on how to mitigate the *force majeure* event and facilitate continued performance of the Concession Deed.

In particular, reasonable extension(s) of time must be granted if the Contractor believes a *force majeure* event has caused, or is likely to cause,

- A delay in the “commencement date” for any school (see section 3.3.1) beyond the school’s “target availability date” (see section 3.2.4) or “longstop date” (see section 3.4.10), or
- A delay in the achievement of any construction “milestone” by the date set in the Contractor’s relevant *Works Program*

and the Contractor provides evidence to DET’s project manager that:

- The *force majeure* event caused the delay or likely delay
- The lost time could not reasonably have been recovered or mitigated by the Contractor, in accordance with good

industry practices, without incurring material expenditure, and

- The Contractor is reasonably endeavouring to perform its obligations under the Concession Deed.

If the State and the Contractor disagree about whether a *force majeure* event has occurred or the Contractor's entitlements to an extension of time, the dispute must be referred to the dispute resolution procedures summarised in section 3.4.9.

While a *force majeure* event continues the Contractor must take all steps according with good industry practice to overcome or minimise its consequences, and the State and the Contractor must both use all reasonable endeavours to prevent or mitigate the effects of any delay.

The Contractor must notify DET's project director, in detail, if it becomes aware of any further information about the *force majeure* event, including information rendering any previously submitted information inaccurate or misleading.

If a *force majeure* event ends or no longer prevents the affected party from performing its obligations under the Concession Deed, the affected party must notify the other party as soon as practicable and the Concession Deed must be performed on the same terms as immediately before the *force majeure* event.

Force majeure contract variations

If a *force majeure* event prevents the Contractor from performing its obligations at one or some but not all of the schools, and this continues to be the situation 150 days after the start of the event (or, in the case of a "relief event" that has become a *force majeure* event, 210 days of the start of the "relief event"), either party may propose a *force majeure* contract variation, to take the affected school site(s) or school facilities outside the ambit of the Concession Deed. Copies of any such variation proposal must be given to the debt financier's Bond Manager and Security Trustee within two business days.

The procedures adopted following the notification of any proposal for such a *force majeure* contract variation must generally follow the "change procedure" described in section 3.4.8, including sections of this "change procedure" which are specific to *force majeure* variations.*

However, DET's project director may not decide not to proceed with a *force majeure* variation proposal by the Contractor—as he or she may do for other variations, at several stages of the "change procedure"—unless this proposal arises from a *force majeure* event during the operational phase of

the project and the project director's rejection is notified to the Contractor within ten business days after the project director receives the variation proposal.

If the project director gives the Contractor such a notice, specifying that the Concession Deed must continue to apply, in full, to all the school facilities,

- Copies of this notice must be given to the Bond Manager and Security Trustee within two business days
- The State's monthly payments to the Contractor, after the date from which the Contractor had proposed to sever the affected school facilities from the Concession Deed, must be calculated as if all the Contractor's services were being fully provided, and
- The Concession Deed will otherwise continue to apply to all the school facilities, unless:
 - The State terminates the entire Concession Deed, after giving the Contractor at least 30 business days' written notice of its intention to do so, with copies of this notice being given to the Bond Manager and Security Trustee within two business days (see section 3.5.9), or
 - The State notifies the Contractor that the sections of the "change procedure" which are specific to *force majeure* variations are now to be followed.

If the State proposes a *force majeure* contract variation following a failure to obtain planning approval for a school facility, and

- This leads under the "change procedure" to the adoption of an alternative site for the affected school facility and its adjacent child care facility, and
- The new site area for the child care facility and the demographic profile and population density of the applicable "catchment" are reasonably comparable to those of the originally proposed child care site,

the Contractor must pay the State \$250,000 for the relevant child care facility within three business days of the granting of planning approval for the new school facility, and the State must grant a Child Care Facility Licence, as described in section 3.3.10, for the new child care site.

Termination for force majeure

For any type of *force majeure* event, if:

- The State and the Contractor cannot agree on how to mitigate the *force majeure* event and facilitate continued performance of the Concession Deed within 120 days of the start of the event—or, in the case of a "relief

* These sections of the "change procedure" specific to *force majeure* variations also apply if an uninsurable risk has occurred, of a type that was covered by the Contractor's contracts works insurance or public liability and third party property damage insurance policies before it became uninsurable, and DET's project director has elected to propose a *force majeure* contract variation to take the affected school site or school facility outside the ambit of the Concession Deed, as described in section 3.4.2.

event” that has become a *force majeure* event, within 180 days of the start of the “relief event”—and

- The *force majeure* event and/or its effects are still continuing, and have prevented the affected party from complying with its Concession Deed obligations for more than 180 days,

either party may give the other 30 days’ notice that it intends to terminate the Concession Deed for *force majeure*. If this occurs, the arrangements described in section 3.5.9 will apply.

3.5 Defaults and termination of the Concession Deed

3.5.1 General right of the State to remedy any contractual breach by the Contractor

If the Contractor fails to perform *any* of its obligations under the Concession Deed, the Construction Tripartite Agreements, the Operator Tripartite Agreement, the Independent Certifier Deed, the Lenders Tripartite Agreement, the State’s Project Security, the Construction Contracts, the Operation Contract, any of its other subcontracts or any of its site access licences, leases or subleases, the State may—but need not—perform these obligations itself or procure their performance by others.

If the State does so, the costs it incurs in performing the obligations must be paid by the Contractor upon demand.

DET’s project director must give the Contractor as much notice as practicable of its intention to remedy a breach, and must give the debt financier’s Bond Manager and Security Trustee a copy of any notice it issues within two business days. If advance notice is not practicable, the State must advise the Contractor promptly after it has acted to remedy the breach.

This general right of the State to remedy the Contractor’s breaches is in addition to its more specific remedy and “step in” rights following:

- An emergency or a perceived need to take action to discharge a public duty during the project’s operational phase (see section 3.3.11)
- Breaches by the Contractor of its construction-phase obligations under the Concession Deed and/or the either of the Construction Contracts (see section 3.5.2)
- Breaches by the Contractor of its operational phase obligations under the Concession Deed and/or the Operation Contract (see section 3.5.3), and
- More narrowly defined “Contractor events of default” potentially leading to termination of the Concession Deed and other contracts (see section 3.5.4).

3.5.2 The State’s remedy, ‘step in’ and novation rights during the construction phase

Notification of Contractor defaults

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

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

State remedying of Contractor defaults, short of ‘stepping in’

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

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

- An agreement with the State is not reached within the 60-day period, and
- The State has not “stepped in” and taken over all the rights of the Contractor under the Construction Contract and the Construction Contractor Guarantee, under provisions described below, or exercised its powers under the State’s Project Security (see section 4.1)—subject to priorities set out in the Lenders Tripartite Agreement (see section 4.2)—to appoint an agent, manager, receiver, receiver/manager or administrator to do likewise.

State ‘stepping in’

Under the Construction Tripartite Agreements the State or an agent, manager, receiver, receiver/manager or administrator appointed under the State’s Project Security may, but need not, “step in” and assume the rights of the Contractor under the Construction Contract(s)—and, if relevant, the Construction Contractor Guarantee—if:

- The Contractor is in continuing breach of its obligations under the Concession Deed, *or*

- A Construction Contractor has notified the State of a breach by the Contractor of either of the Construction Contracts and the 60-day period following this notice has not expired

and the Security Trustee has not exercised its own “step in” rights under the Lenders Tripartite Agreement (see sections 3.5.4 and 3.5.5).

If the State decides to take this action, it must give the Construction Contractor and the Construction Contractor Guarantor at least two days’ written notice, including details of any relevant breach of the Concession Deed.

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

- The relevant Construction Contractor must continue to perform all its obligations under the Construction Contract
- The State may enforce any of the Contractor’s rights under these contract(s), and
- The Construction Contractor may terminate the relevant Construction Contract only if:
 - Before the “step in”, it had not been paid any amount owing to it under the Construction Contract at the time it originally notified the State of the Contractor’s breach (as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc)
 - It is not paid any amount falling due to it under the Construction Contract during the 60 days after it originally notified the State of the Contractor’s breach, or any other previously unknown amount which becomes payable to it after this original notification, within 30 days of notifying the State of this liability (again as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc), or
 - Grounds for termination of the Construction Contract arise after the “step in”.

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

Novation of the Construction Contract(s)

During any “step in” by the State or any State agent/manager/receiver etc, or more generally during any continuing breach of the Concession Deed even if the State has not exercised any of its powers described above, the State may require the novation of the Contractor’s rights and responsibilities under the Construction Contract(s)—and, if relevant, the Construction Contractor Guarantee—to a substitute contractor

nominated by DET’s project director and approved by the relevant Construction Contractor.

The State must give each relevant Construction Contractor 30 days’ written notice of any such novation, providing all the information it reasonably needs to decide whether the proposed substitute contractor is suitable and acceptable. The Construction Contractor must make its decision on this within the 30 days, and may not unreasonably withhold or delay its decision.

Once the Construction Contract(s) and the Construction Contractor Guarantee (if relevant) have been novated, with the substitute contractor effectively stepping into the Contractor’s shoes under these contracts,

- Any existing grounds for termination of these contracts will cease to have any effect, and
- The State, the substitute contractor and the Construction Contractor must enter into a tripartite agreement on substantially the same terms as the relevant Construction Tripartite Agreement.

Contractor’s indemnity

The Contractor must indemnify the State against all losses, liabilities, expenses and taxes incurred by the State in exercising any of these rights under the Construction Tripartite Agreements, and must pay the State any of these amounts on demand.

3.5.3 The State’s remedy, ‘step in’ and novation rights during the operational phase

The State’s rights to remedy operational phase breaches by the Contractor—other than the State’s general rights to remedy breaches, as described in section 3.5.1, and its rights to “step in” following an operational phase *emergency* or in response to a perceived need to take action to discharge a public duty, as described in section 3.3.11—are precisely analogous to those described in section 3.5.2 for breaches during the construction phase of the project.

Notification of Contractor defaults

Under the Operator Tripartite Agreement, if the Contractor breaches the Operation Contract, the Operator may not terminate the Operation Contract, or give the Contractor a notice of termination under the terms of the Operation Contract, without giving the State at least 60 days’ written notice of its intention to do so, providing details of the grounds for termination, the proposed termination date and any amounts owed or expected to be owed by the Contractor.

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

State remedying of Contractor defaults, short of ‘stepping in’

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

If the State makes this election, it must give the Operator reasonable notice, and the Operator must then use its best endeavours to reach an agreement with the State on these arrangements. The Operator may not terminate the Operation Contract, or exercise any of its other powers under the Operation Contract concerning the Contractor’s breach, unless:

- An agreement with the State is not reached within the 60-day period, and
- The State has not “stepped in” and taken over all the rights of the Contractor under the Operation Contract and the Operator Guarantee, under provisions described below, or exercised its powers under the State’s Project Security (see section 4.1)—subject to priorities set out in the Lenders Tripartite Agreement (see section 4.2)—to appoint an agent, manager, receiver, receiver/manager or administrator to do likewise.

State ‘stepping in’

Under the Operator Tripartite Agreement the State or an agent, manager, receiver, receiver/manager or administrator appointed under the State’s Project Security may—but need not—“step in” and assume the rights of the Contractor under the Operation Contract and the Operator Guarantee—if:

- The Contractor is in continuing breach of its obligations under the Concession Deed, *or*
- The Operator has notified the State of a breach by the Contractor of the Operation Contract and the 60-day period following this notice has not expired

and the Security Trustee has not exercised its own “step in” rights under the Lenders Tripartite Agreement (see sections 3.5.4 and 3.5.5).

If the State decides to take this action, it must give the Operator and the Operator Guarantor at least two days’ written notice, including details of any relevant breach of the Concession Deed.

During any “step in” by the State or its agent, manager, receiver, etc under the Operation Contract and the Operator Guarantee,

- The Operator must continue to perform all its obligations under the Operation Contract
- The State may enforce any of the Contractor’s rights under these contracts, and

- The Operator may terminate the Operation Contract only if:
 - Before the “step in”, it had not been paid any amount owing to it under the Operation Contract at the time it originally notified the State of the Contractor’s breach (as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc)
 - It is not paid any amount falling due to it under the Operation Contract during the 60 days after it originally notified the State of the Contractor’s breach, or any other previously unknown amount which becomes payable to it after this original notification, within 30 days of notifying the State of this liability (again as independently certified to the reasonable satisfaction of the State and any State agent/manager/receiver etc), or
 - Grounds for termination of the Operation Contract arise after the “step in”.

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

Novation of the Operation Contract and Operator Guarantee

During any “step in” by the State or any State agent/manager/receiver etc, or more generally during any continuing breach of the Concession Deed even if the State has not exercised any of its powers described above, the State may require the novation of the Contractor’s rights and responsibilities under the Operation Contract and the Operator Guarantee to a substitute contractor nominated by DET’s project director and approved by the Operator.

The State must give the Operator 30 days’ written notice of any such novation, providing all the information it reasonably needs to decide whether the proposed substitute contractor is suitable and acceptable. The Operator must make its decision on this within the 30 days, and may not unreasonably withhold or delay its decision.

Once the Operation Contract and the Operator Guarantee have been novated, with the substitute contractor effectively stepping into the Contractor’s shoes under these contracts,

- Any existing grounds for termination of these contracts will cease to have any effect, and
- The State, the substitute contractor and the Operator must enter into a tripartite agreement on substantially the same terms as the Operator Tripartite Agreement.

Contractor’s indemnity

The Contractor must indemnify the State against all losses, liabilities, expenses and taxes incurred by the State in exercising any of these rights under the Operator Tripartite

Agreement, and must pay the State any of these amounts on demand.

3.5.4 The Security Trustee's 'step in' and novation rights following 'Contractor events of default'

"Contractor events of default" are defined in the Concession Deed as:

- Any failure by the Contractor to commence its site development and construction works by 28 February 2003 or a later date determined by the State
 - Any failure by the Contractor to carry out works contemplated by its *Works Programs* for 20 consecutive business days or during any 60 business days in any six-month period, unless this is permitted under the terms of the Concession Deed
 - Any failure by the Contractor to provide substantially all of its operational services for 15 consecutive business days, again unless this is permitted under the terms of the Concession Deed
 - Any failure to open a school by its "longstop date" (see section 3.4.10)
 - Any "insolvency event" concerning the Contractor, as defined in the Concession Deed
 - Any breach of the law by the Contractor, a Construction Contractor, the Operator or any of the Contractor's other subcontractors, including any failure to continue to hold all approvals and licences required for the project, which DET's project director believes is material to the Contractor's performance of its obligations under the Concession Deed and which is not remedied within 30 days
 - Any revocation, repudiation, termination, invalidation or lack of enforceability of the Concession Deed, the Construction Tripartite Agreements, the Operator Tripartite Agreement, the State's Project Security or the leases or subleases, except as contemplated by the project contracts
 - Any entitlement by the State to reduce any of the Contractor's monthly performance-based payments by more than 15% because of "unavailability", "performance", "repeated failure" and/or "reporting" deductions (see section 3.3.7)
 - Any unavailability of any particular school facility for a total of ten days or more in any three-month period
 - Any unavailability of a "critical area" (such as an examination hall) during any particular "critical period" (such as an examination period), as notified to the Contractor by DET's project director by November each year (see section 3.3.2), for two or more days in total, if a suitable alternative area is not available at the school
- Any "persistent breach" of the Concession Deed by the Contractor, which under the definitions in that deed may arise under either of the following situations:
 - The occurrence of a particular *type or class* of breach of the Concession Deed more than once, not necessarily at the same school, *followed by* the service of a formal warning notice by the State (with copies being sent to the debt financier's Bond Manager and the Security Trustee within two business days), *followed by* a continuation or recurrence of the same type or class of breach 30 days or more after this notice, *followed by* a final warning notice by the State (again with copies being sent to the Bond Manager and the Security Trustee within two business days), *followed by* a continuation or four or more recurrences of the same type or class of breach within the next six months, or
 - The *frequent* occurrence of breaches of the Concession Deed, not necessarily of the same type or class, which taken together substantially frustrate the project, significantly impair the State's ability to provide educational services or make any of the school facilities available for community use, otherwise have a material adverse effect on the State's interests or indicate the Contractor does not regard itself as being bound by the Concession Deed, *followed by* the service of a formal warning notice by the State (with copies being sent to the Bond Manager and the Security Trustee within two business days), *followed by* continued frequent breaches during any period of three months or more starting 30 days or more after this notice, *followed by* a final warning notice by the State (again with copies being sent to the Bond Manager and the Security Trustee within two business days), *followed by* further frequent breaches within the next six months, and
 - Any breach by the Contractor of its obligations under the Concession Deed, the Construction Tripartite Agreements, the Operator Tripartite Agreement, the Independent Certifier Deed, the Lenders Tripartite Agreement, the State's Project Security, the Construction Contracts, the Operation Contract, any of its other subcontracts or any of its site access licences, leases or subleases, if this breach:
 - Has a material adverse effect on the project's works, the performance of the operational services or the interests of the State, and
 - Is not remedied—if it can be remedied—within five business days of a notice to do so by the State, with a copy of this notice being sent to the Bond

Manager and Security Trustee within two business days,

but *not* including:

- Any breach which can be remedied, but not reasonably within five business days, *provided*:
 - The Contractor has submitted a detailed *Cure Plan*, within five business days of the State’s notice, setting out the steps the Contractor will take to remedy the breach and mitigate its effects
 - This *Cure Plan* is reasonably acceptable to DET’s project director
 - The Contractor is implementing the *Cure Plan*, and
 - The cure period nominated in the *Cure Plan* has not expired prior to remedying of the breach, *or*
- Any breach which cannot be remedied but for which:
 - The Contractor has submitted a detailed *Prevention Plan*, within five business days of the State’s notice, setting out the steps the Contractor will take to prevent any recurrence of the breach
 - This *Prevention Plan* is acceptable to DET’s project director in his or her absolute discretion
 - The Contractor is implementing the *Prevention Plan*, and
 - The breach has not recurred.

The Contractor must immediately notify the State if it becomes aware of such a “Contractor event of default” or any event which might become a “Contractor event of default”, and must give the Bond Manager and Security Trustee copies of this notification within two business days.

Under the Concession Deed the State is entitled to terminate the Concession Deed for any subsisting “Contractor event of default” simply by giving the Contractor 180 days’ written notice (see section 3.5.6).

Under the Lenders Tripartite Agreement, however, the State has agreed that it will not issue such a termination notice under the Concession Deed without first giving the Bond Manager and the Security Trustee at least 30 business days’ written notice of its intention to do so, specifying the proposed date for the termination notice and providing details of the “Contractor event of default”.

At any time at least 20 business days after receiving this notice but no later than one business day before the proposed date for the State’s termination notice, the Security Trustee may—but need not—notify the State that it intends to exercise its rights under the Lenders Tripartite Agreement to “step in” itself, or have an agent, manager, receiver, receiver/manager or administrator appointed under the financing

securities “step in”, from a specified date within the next 20 business days.

If the Security Trustee decides not to “step in”, and the “Contractor event of default” is still subsisting, the State may issue a termination notice under the Concession Deed.

However, if the Security Trustee does issue a notice that it intends to “step in”, the State may not terminate the Concession Deed prior to the proposed “step in” date, and the State and the Security Trustee must consult with each other, within five business days of the Security Trustee’s notice, to:

- Make any necessary transitional arrangements
- Determine the content of a *Step-In Report* which they must jointly produce within 20 business days of the Security Trustee’s notice, at the Contractor’s cost, setting out:
 - The Contractor’s outstanding obligations to the State under the Concession Deed
 - Any sums owing under the Concession Deed
 - A program to remedy any breaches of the Concession Deed and/or prevent the recurrence of breaches not able to be remedied
 - Details of the proposed agent/receiver/manager
 - Details of proposed insurance arrangements, and
 - The financing required, and
- Make any necessary arrangements if the State chooses to have an auditor and/or technical adviser verify any of the information in the *Step-In Report*.

Within ten business days of the Security Trustee’s notice the Security Trustee must give the State a proposed remediation/prevention program and details of its proposed agent/receiver/manager or other representative.

The State may veto the Security Trustee’s proposed representative at any time prior to the proposed “step in” date. Its prior consent is also required before the Security Trustee or its representative may appoint a substitute Construction Contractor or Operator or novate the Construction Contract(s) or the Operation Contract to new construction contractor(s) or a new operator.

The Security Trustee’s representative, or the Security Trustee if it is “stepping in” itself, must give the State a formal *Step-In Undertaking* prior to the “step in” date, under which it must agree to procure the performance by the Contractor of its outstanding and future obligations under the Concession Deed, including any obligations to make payments to the State.

The Security Trustee’s appointed representative must then take all necessary steps to remedy the Contractor’s breach or breaches of the Concession Deed, within ten business days in the case of payment obligations and otherwise

within a reasonable period, consistent with good industry practice, as specified in the *Step-In Report*.

In doing so it must ensure it does not restrict or interfere with the provision of educational services and minimises any disruption to the Contractor's operational services. In particular, it may interfere with the Operator's performance of its obligations under the Operation Contract only with the prior written consent of DET's project director, who may not unreasonably withhold his or her consent.

During the "step in" period the State may terminate the Concession Deed, by written notice to the Contractor and the Security Trustee's representative, only if the representative fails to procure the performance of the Contractor's obligations under the Concession Deed or remedy any continuing breach of the Concession Deed.

The Security Trustee's representative may at any time terminate the "step in" by giving the State 30 days' written notice. It may also seek an extension of the "step in" period from its initial limit of 180 days, giving DET's project director a detailed plan of the steps being taken and proposed by the Security Trustee. The project director may grant or reject an extension in his or her absolute discretion.

At any time during the "step in" period the Security Trustee may require the novation of the Contractor's rights and responsibilities under the Concession Deed to a substitute contractor nominated by the Security Trustee and approved by the State.

The Security Trustee must give the State at least 60 days' written notice of any such novation, providing all the information the State reasonably needs to decide whether the proposed substitute contractor is suitable and acceptable.

The State will nominally have 30 days to make its decision on this after receiving this information, but it may withhold or delay its decision on the suitability and acceptability of a proposed substitute contractor on any basis. In particular, the State may withhold or delay its decision if it is not reasonably satisfied the proposed substitute contractor has the necessary legal capacity, power or authority, technical competence, financial standing or resources, if it is not reasonably satisfied the proposed contractor is a suitable or appropriate organisation to have an interest in NSW schools or if the State believes the proposed contractor has or has had a direct or indirect association with the Contractor which might affect its ability to perform its obligations.

Once the Concession Deed has been novated, with the substitute contractor approved by the State effectively stepping into the Contractor's shoes under this contract,

- Any existing grounds for termination of the Concession Deed will cease to have any effect, provided the new contractor remedies any continuing breaches of the Concession Deed within a reasonable period, and

- The State, the new contractor and the Security Trustee must enter into a tripartite agreement on substantially the same terms as the Lenders Tripartite Agreement.

3.5.5 The Security Trustee's 'step in' and novation rights following a finance default

The Security Trustee has "step in" and novation rights following a default under the project's private sector debt financing agreements which are closely analogous to its rights following a "Contractor event of default", described above.

The Bond Manager and the Security Trustee must notify the State within two business days if they become aware of any finance default, providing reasonable details and indicating whether, when and how they intend to exercise their rights under the financing agreements.

At any time at least 20 business days after receiving this notice but no later than one business day before the proposed date for exercising its rights under the financing agreements, the Security Trustee may—but need not—notify the State that it intends to exercise its rights under the Lenders Tripartite Agreement to "step in" itself, or have an agent, manager, receiver, receiver/manager or administrator appointed under the financing securities "step in", from a specified date within the next 20 business days.

If the Security Trustee does issue a notice that it intends to "step in", the State may not terminate the Concession Deed prior to the proposed "step in" date, and the State and the Security Trustee must consult with each other, within five business days of the Security Trustee's notice, to:

- Make any necessary transitional arrangements
- Determine the content of a *Step-In Report* which they must jointly produce within 20 business days of the Security Trustee's notice, at the Contractor's cost, setting out:
 - The Contractor's outstanding obligations to the State under the Concession Deed
 - Any sums owing under the Concession Deed
 - A program to remedy the finance default(s)
 - Details of the proposed agent/receiver/manager
 - Details of proposed insurance arrangements, and
 - The financing required, and
- Make any necessary arrangements if the State chooses to have an auditor and/or technical adviser verify any of the information in the *Step-In Report*.

Within ten business days of the Security Trustee's notice the Security Trustee must give the State details of its proposed agent/receiver/manager or other representative.

The State may veto the Security Trustee's proposed representative at any time prior to the proposed "step in" date. Its prior consent is also required before the Security Trustee or

its representative may appoint a substitute Construction Contractor or Operator or novate the Construction Contract(s) or the Operation Contract to new construction contractor(s) or a new operator.

The Security Trustee's representative, or the Security Trustee if it is "stepping in" itself, must give the State a formal *Step-In Undertaking* prior to the "step in" date, under which it must agree to procure the performance by the Contractor of its outstanding and future obligations under the Concession Deed, including any obligations to make payments to the State.

The Security Trustee's appointed representative must ensure it does not restrict or interfere with the provision of educational services and minimises any disruption to the Contractor's operational services. In particular, it may interfere with the Operator's performance of its obligations under the Operation Contract only with the prior written consent of DET's project director, who may not unreasonably withhold his or her consent.

During the "step in" period the State may terminate the Concession Deed, by written notice to the Contractor and the Security Trustee's representative, only if the representative fails to procure the performance of the Contractor's obligations under the Concession Deed or remedy any continuing breach of the Concession Deed.

The Security Trustee's representative may at any time terminate the "step in" by giving the State 30 days' written notice. It may also seek an extension of the "step in" period from its initial limit of 180 days, giving DET's project director a detailed plan of the steps being taken and proposed by the Security Trustee. The project director may grant or reject an extension in his or her absolute discretion.

At any time during the "step in" period the Security Trustee may require the novation of the Contractor's rights and responsibilities under the Concession Deed to a substitute contractor nominated by the Security Trustee and approved by the State. The arrangements applying if it does so are identical to those summarised in section 3.5.4.

3.5.6 Termination of the Concession Deed by the State for a 'Contractor event of default'

As already indicated in section 3.5.4, the State may terminate the Concession Deed for a "Contractor event of default"—subject to the rights of the Security Trustee to "step in" in these circumstances, as also described in section 3.5.4—by giving the Contractor 180 days' written notice.

If the State does so, it may elect to:

- Call new tenders for the provision of the project's operational services, subject to conditions and procedures set out in a schedule to the Concession Deed and summarised below, or

- Require an expert determination of the compensation payable to the Contractor, if any, as set out in the same schedule and again as summarised below

unless

- The Security Trustee has "stepped in" under the Lenders Tripartite Agreement, under the arrangements described in sections 3.5.4 and 3.5.5, has sought to transfer the Contractor's rights and obligations to a substitute contractor but has been unable to do so, and
- The Contractor or the senior debt financier(s) have demonstrated to DET's project director that the reason for this failure was the absence of a "liquid" market with sufficient willing bidders for contracts similar to the Concession Deed at the price likely to be achieved, and
- The Project director agrees that no "liquid" market exists, or such a determination is made under the dispute resolution procedures summarised in section 3.4.9,

in which case the State may not call new tenders and must rely on expert determination of the compensation (if any) to be paid to the Contractor.

The State must notify the Contractor of its election (if an election is available) by no later than 20 business days after the termination of the Concession Deed and give copies of this notice to the Bond Manager and the Security Trustee within the next two business days.

Procedures and compensation if new tenders are called

If the State elects to call new tenders,

- DET's project director and the Contractor must follow procedures set out in the schedule to the Concession Deed
- Between the termination of the Concession Deed and the commencement of a new contract with the successful tenderer, the State must make monthly payments to the Contractor, calculated in accordance with the schedule to the Concession Deed, based on:
 - The maximum monthly fees that would have been payable to the Contractor had the Concession Deed not been terminated and no "unavailability", "performance", "repeated failure" and/or "reporting" deductions been made (see section 3.3.7)
 - *less* the total deductions made in the fee payment period immediately before the termination of the Concession Deed, other than any "unavailability" deduction for services which have subsequently become available, and
 - *less* the State's reasonable costs in performing (or procuring the performance of) the operational services during the month for which the payment is being made.

If this is a negative amount, it must be carried forward and set off against any future monthly amounts payable to the Contractor.

- Within 20 business days of the State's entering into the new contract, the State must pay the Contractor an amount, calculated in accordance with the schedule to the Concession Deed, based on:
 - The highest capital sum offered by any tenderer complying with the tender's qualification criteria
 - *plus* any bank balances and insurance proceeds held by the Contractor and received by the State, and any negative monthly payment amounts that have not yet been set off as described above, but only to the extent that these amounts have not been taken into account in the successful tender
 - *less* the total of the monthly payments made to the Contractor after the termination of the Concession Deed
 - *less* the reasonable costs of the tender process to the State, and
 - *less* any amounts the State is entitled to set off or deduct under the Concession Deed, including its reasonable costs associated with the "Contractor event of default" and (if necessary to avoid double payment) any compensation already paid to the Contractor following a "compensation event" (see section 3.4.10).

This payment will fully and finally discharge all the State's liabilities to the Contractor under the Concession Deed, other than any liabilities accrued before the termination of the Concession Deed but not taken into account in calculating the final payment amount.

If this final payment amount is zero or negative, the State and the Contractor need not make any final payments to each other.

If the State and the Contractor cannot agree on the final payment amount, it must be determined under the dispute resolution procedures described in section 3.4.9 and paid within 20 business days of this determination.

Procedures and compensation if new tenders are not called

If the State elects to require expert determination, or has no option but to use expert determination,

- The Contractor will not be entitled to receive any monthly payments after the termination of the Concession Deed, *unless* the State initially elects to call new tenders and then decides to require expert determination, in which case the monthly payments described above must continue until the final payment amount described below has been agreed or determined.

- The State and the Contractor must follow procedures and comply with principles detailed in the schedule to the Concession Deed to calculate and agree on an "estimated fair value" of a contract on the same terms as the Concession Deed, apart from specified exceptions. Among other things, they must take account of forecast monthly fee payments and forecasts of specified costs that will be incurred by the State as a result of the termination of the Concession Deed.
- If the State and the Contractor cannot agree on this "estimated fair value" within 20 business days of the State's requiring expert determination, the State must pay the Contractor the lowest of the proposed "estimated fair values" by no later than 30 business days after the date on which the State required expert determination, and the disputed element must be determined under the dispute resolution procedures summarised in section 3.4.9.
- Within 20 business days of an agreement or determination on the "estimated fair value", the State must pay the Contractor an amount, calculated in accordance with the schedule to the Concession Deed, based on:
 - The "estimated fair value"
 - *plus* any bank balances and insurance proceeds held by the Contractor and received by the State, and any negative monthly payment amounts that have not yet been set off as described above, but only to the extent that these amounts have not been taken into account in calculating the "estimated fair value"
 - *less* the total of any monthly payments made to the Contractor after the termination of the Concession Deed
 - *less* the reasonable costs of any abandoned tender process to the State
 - *less* any amounts the State is entitled to set off or deduct under the Concession Deed, including its reasonable costs associated with the "Contractor event of default", any portion of a disputed "estimated fair value" already paid to the Contractor and (if necessary to avoid double payment) any compensation already paid to the Contractor following a "compensation event" (see section 3.4.10).

This payment will fully and finally discharge all the State's liabilities to the Contractor under the Concession Deed, other than any liabilities accrued before the termination of the Concession Deed but not taken into account in calculating the final payment amount.

If this final payment amount is zero or negative, the State and the Contractor need not make any final payments to each other.

Other termination arrangements

In addition to these compensation and payment arrangements, and regardless of whether the State has elected to call new tenders,

- DET's project director may require the Contractor, at no cost to the State, to transfer its title, interests and rights in any school facilities to the State or a replacement contractor.
- The Contractor must use all reasonable endeavours to facilitate a smooth transfer of its operational services to the State or a new contractor, and must take no action, at any time, with the intention of prejudicing, frustrating this transfer or making it more difficult. Among other things, it must ensure the Operator provides all reasonable assistance to the State or the new contractor until three months after the termination of the Concession Deed.
- More specifically, during the 180-day notice period and the following three months the Contractor must fully cooperate with the transfer of any or all of its operational services to the State or a new contractor, and in particular it must:
 - Transfer all of its title, interests and rights in the school facilities, free of any security interests, to the State or the new contractor
 - Liaise with and provide advice and assistance to DET's project director and/or the new contractor
 - Give any new contractor access to the school facilities at reasonable times and on reasonable notice, and
 - Give DET's project director and/or the new contractor all the information required for an efficient transfer of the services to occur.
- The leases and subleases will automatically terminate upon the termination of the Concession Deed.

Several of these arrangements are identical or analogous to those applying at the end of the "normal" full operational term in 2032, summarised in section 3.3.13.

3.5.7 'Voluntary' termination of the Concession Deed by the State

At any time after all the schools have opened the State may terminate the Concession Deed—even if there has been no default by the Contractor, *force majeure* event or other event leading to a specific right to terminate under the provisions summarised in sections 3.5.6 and 3.5.8—by giving the Contractor 180 days' written notice.

Copies of any such "voluntary" termination notice must be given to the debt financier's Bond Manager and Security Trustee within two business days.

If the State exercises this right to "voluntarily" terminate the Concession Deed, the State must—upon termination of the deed and within one month of agreement on the sums involved—pay the Contractor:

- An amount sufficient to pay out the outstanding debt under the project's debt financing agreements, calculated in accordance with a schedule to the Concession Deed
- The costs incurred and likely to be incurred by the Contractor and its subcontractors in making redundancy payments to employees rendered redundant by the termination of the Concession Deed, and
- An amount which, in conjunction with distributions paid by the Contractor to its shareholders, will give the project's equity investors the same real rate of return as they would have received, as notional investors, under the private sector parties' "base case" financial model less (if this is necessary to avoid double payment) any compensation already paid to the Contractor following a "compensation event" (see section 3.4.10).

The arrangements described in section 3.5.6 requiring the Contractor to facilitate the transfer of the school facilities to the State or a replacement contractor will also apply, and the leases and subleases will automatically terminate upon the termination of the Concession Deed.

3.5.8 Termination of the Concession Deed by the Contractor for a 'State default'

If:

- Any breach by the State of its obligations under the Concession Deed substantially frustrates or renders impossible the Contractor's performance of its own obligations under the deed for a continuous period of two months or more
- There is an expropriation or requisition of a material part of the Contractor's assets and/or shares by a NSW court or a local, State or Commonwealth government, minister, department or authority in NSW, or
- The State fails to pay the Contractor any undisputed amount specified in its monthly invoices—or any other undisputed amount of money, totalling more than \$50,000 (indexed to the CPI), which is due to the Contractor—within 20 business days of a formal written demand by the Contractor

the Contractor may serve a notice on DET's project director, within ten business days of the Contractor's becoming aware of the default, notifying the State that the Contractor intends to terminate the Concession Deed for the default, as specified in the notice.

If the State fails to rectify this default within ten business days of the project director's receipt of the termination

notice, the Concession Deed will terminate 45 days after his or her receipt of the notice.

If the Concession Deed is terminated in this way,

- The State must—upon termination of the deed and within one month of agreement on the sums involved—pay the Contractor the same amounts that would be payable if the State had “voluntarily” terminated the deed, as described in section 3.5.7
- The arrangements described in section 3.5.6 requiring the Contractor to facilitate the transfer of the school facilities to the State or a replacement contractor will also apply, and
- The leases and subleases will automatically terminate upon the termination of the Concession Deed.

3.5.9 Termination of the Concession Deed for *force majeure* or following specified ‘uninsurable’ events

As already indicated in section 3.4.12, if

- The State and the Contractor cannot agree on how to mitigate the *force majeure* event and facilitate continued performance of the Concession Deed within 120 days of the start of the event—or, in the case of a “relief event” that has become a *force majeure* event, within 180 days of the start of the “relief event”—and
- The *force majeure* event and/or its effects are still continuing, and have prevented the affected party from complying with its Concession Deed obligations for more than 180 days,

either party may give the other 30 days’ notice that it intends to terminate the Concession Deed. Copies of this notice must be given to the Bond Manager and Security Trustee within two business days.

If such a notice of termination is issued by the Contractor during the operational phase of the project, DET’s project director may either:

- Accept this notice or
- Issue a notice to the Contractor, within ten business days after receiving the termination notice, specifying that the Concession Deed must continue to apply, in full, to all the school facilities.

If he or she issues such a notice rejecting the Contractor’s notice of termination for *force majeure*,

- Copies of the project director’s notice must be given to the Bond Manager and Security Trustee within two business days
- The State’s monthly payments to the Contractor, after the date from which the Contractor had proposed to

terminate the Concession Deed, must be calculated as if all the Contractor’s services were being fully provided, and

- The Concession Deed will otherwise continue to apply to all the school facilities, unless:
 - The State terminates the Concession Deed for *force majeure* itself, after giving the Contractor at least 30 business days’ written notice of its intention to do so, with copies of this notice being given to the Bond Manager and Security Trustee within two business days, or
 - The State proposes a *force majeure* contract variation under the arrangements described in section 3.4.11, again with copies of its proposal being given to the Bond Manager and Security Trustee within two business days.

In addition, as already indicated in section 3.4.2, the State may terminate the Concession Deed if an uninsurable risk, of a type that was covered by the Contractor’s contracts works insurance or public liability and third party property damage insurance policies before it became uninsurable, affects *all* the school sites or facilities.

If the Concession Deed is terminated for *force majeure* or an uninsurable risk event under any of these arrangements, the State must—upon termination of the deed and within one month of agreement on the sums involved—pay the Contractor:

- An amount sufficient to pay out the outstanding debt under the project’s debt financing agreements, calculated in accordance with a schedule to the Concession Deed
- The costs incurred and likely to be incurred by the Contractor and its subcontractors in making redundancy payments to employees rendered redundant by the termination of the Concession Deed, and
- An amount equal to all amounts paid to the Contractor by its shareholders, through share subscriptions or shareholder subordinated loans, *less* dividends, interest and other distributions paid to the shareholders by the contractor

less (if this is necessary to avoid double payment) any compensation already paid to the Contractor following a “compensation event” (see section 3.4.10).

The arrangements described in section 3.5.6 requiring the Contractor to facilitate the transfer of the school facilities to the State or a replacement contractor will also apply, and the leases and subleases will automatically terminate upon the termination of the Concession Deed.

4 The State’s Project Security and interactions between State and private sector securities

4.1 The State’s Project Security

Under the NSW New Schools Project Fixed and Floating Charge (“the State’s Project Security”) the Contractor has granted the State a fixed and floating charge over all its present and future real and personal property interests—including its interests in the Construction Contracts and the Operation Contract—as security for:

- The prompt payment by the Contractor of all amounts owing to the State under the Concession Deed or other project contracts, and
- The performance by the Contractor of all its other obligations to the State under the Concession Deed and the other project contracts.

The Construction Contractors, the Construction Contractor Guarantor, the Operator and the Operator Guarantor have also expressly acknowledged and consented to the creation of the charge.

The Contractor has warranted that there are and will be no encumbrances over the charged property other than those created under the project’s private sector debt financing securities and other project contracts, liens arising in the ordinary course of business and any encumbrances specifically approved by the State.

It has also promised not to dispose of, permit the creation of an interest in or part with possession of any of its property subject to the fixed charge, other than as agreed to by the State.

The relative priorities of the charge created by the State’s Project Security and the debt financier’s securities are governed by the Lenders Tripartite Deed, as discussed in section 4.2 below. The charge created by the State’s Project Security ranks behind the debt financier’s securities but ahead of all other securities affecting the Contractor’s property.*

* To ensure the State’s charge will have priority over any subsequently registered charges—unless the State agrees otherwise, as it has under the Lenders Tripartite Agreement—the maximum prospective liability secured by the State’s charge has been set, for the purpose of determining priorities between the charges under Part 2K.3 of the Corporations Act 2001 and *only* for this purpose, at \$250 million, a figure much higher than the value of all the Contractor’s interests in the New Schools project.

Subject to the priorities between securities and enforcement rights under the Lenders Tripartite Deed, the charges created by the State’s Project Security may be immediately enforced by the State, without notice, if a “Contractor event of default” occurs (see section 3.5.4).

In these circumstances, and again subject to the Lenders Tripartite Agreement, the State may appoint receiver(s) and/or receiver(s)/manager(s) of the charged property, exercising powers set out in the State’s Project Security, and the State and its authorised representatives may exercise specified powers of attorney granted by the Contractor.

4.2 Consents to and priorities between the State and debt financier’s securities

The Lenders Tripartite Agreement formally records:

- The State’s consent to the debt financier’s securities under the project’s private sector debt financing agreements
- The State’s acknowledgement of the rights of the Security Trustee under tripartite agreements between the Security Trustee, the Bond Manager, the Construction Contractors, the Operator and the Contractor, subject to a requirement for the State’s written consent to be obtained before the Security Trustee appoints an agent/receiver/manager or other representative, appoints a substitute Construction Contractor or Operator or novates the Construction Contract(s) or the Operation Contract to new construction contractor(s) or a new operator.
- Acknowledgements by the Security Trustee and the Bond Manager of the State’s rights under the Construction Tripartite Agreements and the Operator Tripartite Agreement (see sections 3.5.2 and 3.5.3), subject to the deferral of these rights if the Security Trustee exercises its own “step in” rights under the Lenders Tripartite Agreement (see sections 3.5.4 and 3.5.5).

Each of the debt financier’s securities has priority over any State security, up to the aggregate of the project’s senior debt, all interest on this senior debt and all financing agreement enforcement costs. Beyond this limit, the financier’s securities and the State’s security have equal priority.



This *Summary of Contracts* was written, edited, designed and produced for the New South Wales Department of Education and Training (DET) by Catalyst Communications, Suite 101A, 75 Archer Street, Chatswood, NSW 2067 (phone (02) 9413 1497, fax (02) 9415 1027, www.catalyst.com.au). The assistance of Blake Dawson Waldron, Axiom Education, NSW Treasury and DET New Schools Project staff is gratefully acknowledged.

In accordance with the NSW Government *Working with Government: Guidelines for Privately Financed Projects*, this report:

- Presents only introductory summaries of, and *not* complete reports on, the New Schools Project contracts of greatest relevance to the public sector, and
- Does not cover matters which might disclose the private sector parties' cost structures, profit margins or intellectual property or otherwise place them at a disadvantage with their competitors.

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